

1-1-2001

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Recommended Citation

Kevin C. Kennedy, Foreign Direct Investment and Competition Policy at the World Trade Organization, 33 *Geo. Wash. Int'l L. Rev.* 585 (2000-2001).

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FOREIGN DIRECT INVESTMENT AND COMPETITION POLICY AT THE WORLD TRADE ORGANIZATION

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Although international trade, foreign direct investment, and competition policy converge at several points, their overarching theme is to increase world wealth by opening markets to foreign goods, services, and capital.¹ These three policies can be mutually reinforcing when pursued with the common goal of encouraging cross-border competition. For example, a liberal trade policy has as its goal the elimination or lowering of barriers to trade in goods, opening foreign markets to goods from abroad, and bringing competition to bear on domestic producers. A liberal trade policy thus can have a significant impact on competition and on markets. To the extent trade liberalization reduces entry barriers to foreign markets, it gives domestic firms less ability to engage in anti-competitive behavior. Similarly, to the extent that domestic firms tie up channels of distribution in local markets and thereby block market access to imports, a liberal investment policy can eliminate such anti-competitive practices by permitting foreign firms to own distribution networks in the local market. In theory, then, trade, investment, and competition policies ought to work in harmony. Their shared goals and objectives suggest teaming rules against private anti-competitive behavior with rules on the elimination of government barriers to international trade and investment.

This paper examines whether the mutually-reinforcing roles that international trade, foreign investment, and competition policy play in opening markets to foreign goods, services, and capital

* Professor of Law, Michigan State University-Detroit College of Law. This paper is drawn in part from two books, KEVIN KENNEDY, *COMPETITION LAW AND THE WORLD TRADE ORGANISATION: THE LIMITS OF MULTILATERALISM* (2001), and *COMPLETING THE UNFINISHED AGENDA: TRADE AND FOREIGN DIRECT INVESTMENT AT THE WORLD TRADE ORGANIZATION*, to be published by Carolina Academic Press in Fall 2002.

1. See OECD, *TRADE AND COMPETITION POLICIES: EXPLORING THE WAYS FORWARD* (1999) (describing the interface between trade and competition policies and the impetus for a multilateral approach); WTO Secretariat, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, WT/WGTCP/W/80 (Sept. 18, 1998) [hereinafter *Synthesis Paper on the Relationship of Trade and Competition Policy*]; Michael J. Trebilcock, *Competition Policy and Trade Policy, Mediating the Interface*, 30 *J. WORLD TRADE* 71, 71 (1996).

should be integrated into the General Agreement on Tariffs and Trade-World Trade Organization (GATT-WTO) system through WTO multilateral agreements on investment and competition policy. The primary focus is on WTO agreement on competition policy. The reasons for this focus are fourfold: (1) overall, the issues facing negotiators are far more formidable with regard to a competition policy agreement than with regard to an investment agreement; (2) developing countries have a long-standing objection that they will not consider a multilateral investment agreement without a parallel agreement on competition policy; (3) the Organization for Economic Cooperation Development (OECD) has broken the trail for negotiations on a multilateral investment agreement with the culmination in 1998 of its work on the aborted Multilateral Agreement on Investment; and (4) the WTO's follow-on negotiations on trade in services, which will include market access through a physical presence of foreign services providers, will be a telltale for the prospects of a WTO investment agreement.

Part I examines the trade and competition policy relationship. Part II reviews the investment and competition policy relationship. Part III addresses the wisdom of negotiating multilateral agreements on competition policy and investment under WTO auspices. Part IV argues that multilateralism is no panacea for resolving every cross-border issue that may arise between trading countries. Parts V and VI conclude that existing WTO agreements are adequate to resolve at least some competition policy disputes.

I. THE TRADE AND COMPETITION POLICY RELATIONSHIP

Although nowhere explicitly stated in any WTO agreement, the guiding economic premise that underlies the entire GATT-WTO system is open or liberal trade.² Why did open trade become the WTO's desideratum? The answer is short but compelling: by exploiting the law of comparative advantage, liberal trade policies permit the unrestricted cross-border flow of the best goods and services at the lowest prices, thereby increasing total world wealth. Under the law of comparative advantage, resources are allocated efficiently across and within industries in response to competitive pressures from imports. Both of these phenomena lead to product specialization and increased firm size that in turn lowers the unit cost of goods and services.

2. See Martin Wolf, *Why Trade Liberalization is a Good Idea*, in *THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS* 14 (J. Michael Finger & Andrzej Olechowski eds., 1987).

The role that multilateral trade rules play in fostering liberal trade manifests itself in two important ways. First, specialization and economies of scale become possible because of secure access to a barrier-free international market. Second, increased international competition leads to product and process innovation, further reducing costs and expanding consumer choices.³

Until a few years ago, antitrust law was purely a domestic issue that arose in advanced economy countries. Today, it has a new name—competition policy, signifying a set of issues broader than the prescriptive rules of antitrust law—and has become a priority topic on policymakers' agendas. This change was triggered by several factors, such as the simultaneous trends toward globalization and regional integration, the rebirth of capitalism in Eastern Europe, the Latin American economic reforms, the creation of the WTO, the new legal instruments for dealing with regulatory reform in open economies, and the growing number of competition cases involving more than one country.⁴

What is the relationship between trade policy and competition policy?⁵ As GATT-WTO agreements have progressively removed or lowered government barriers to trade, attention has shifted to private barriers to market access that could undermine the progress of the GATT-WTO system. The best method for removing these private barriers to market access, some argue, is through aggressive enforcement of competition laws.⁶ Consequently, competition law directed at private conduct is a natural complement to a set of international rules regulating government barriers to market access. Like the goal of a liberal trade policy, the goal of competition policy is in general to promote the efficient allocation of resources by ensuring that markets are open and competitive. The nine multilateral trade negotiation rounds sponsored by the GATT since 1947 have resulted in the progressive reduction of tariffs and non-tariff barriers to trade in goods and services, and with it technological innovation, investment, lower prices for goods and ser-

3. See *The Miracle of Trade*, *ECONOMIST*, Jan. 27, 1996, at 61-62. See generally RAJ BHALA, *INTERNATIONAL TRADE LAW* 5-78 (1996) (presenting both classical and contemporary arguments in support of free trade and protectionism).

4. See UNCTAD, *Competition Cases Involving More Than One Country*, TD/B/COM.2/CLP/9 (1999).

5. See OECD, Joint Group on Trade and Competition, *Complementarities Between Trade and Competition Policies*, COM/TD/DAFFE/CLP(98)98/FINAL at 4 (Jan. 29, 1999); *Synthesis Paper on the Relationship of Trade and Competition Policy*, *supra* note 1, at 11.

6. See, e.g., JOHN O. HALEY & HIROSHI IYORI, *ANTITRUST: A NEW TRADE REMEDY?* (1995) (arguing that the most efficient method for removing private trade barriers to market access is an active antitrust policy).

vices, and growth in world gross domestic product.⁷ By reducing tariffs and non-tariff barriers to trade, the liberal trade policy embodied in the GATT and WTO agreements creates export opportunities and spurs international competition among businesses.

Clearly, the objectives of a liberal trade policy seem to closely match and complement those of competition policy. The reduction of government barriers to trade that is the objective of a liberal trade policy complements competition policy's goal of shielding consumers from private firms that either unilaterally or collectively set prices higher than those that would prevail under competitive market conditions. Firms are able to charge higher than competitive prices when they have market power, but firms are unlikely to have such power when barriers to market entry are low. By reducing or eliminating government-imposed barriers to market entry in the form of tariffs and non-tariff barriers, markets can be made more competitive through lower-cost imports, thus making it more difficult for domestic firms to successfully charge abnormally high prices to consumers.

Trade liberalization, however, can fully succeed only if anti-competitive practices of private firms are checked through effective competition laws. Competition law can ensure that the reduction or elimination of government barriers to trade are not negated by the anti-competitive behavior of a private firm through the abuse of market power or by a number of private firms through collusive behavior. Like a liberal trade policy that removes government barriers to competition at the border, competition policy removes private barriers to competition behind the border.⁸ The two policies strive to eliminate or reduce market distortions and barriers to market entry. They share the common objectives of promoting economic efficiency and welfare through non-discriminatory, transparent, rules-based regimes. In the absence of an effective competition law, the gains from liberalized trade may be undermined because of private restraints that deter or prevent access to foreign goods and services. Conversely, the absence of trade and investment liberalization deters or prevents access to pro-competitive foreign goods

7. See generally *The WTO in Brief: The Multilateral Trading System – Past, Present and Future*, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited May 17, 2000) (summarizing the history of negotiation rounds over the past fifty years).

8. This distinction should not be overdrawn, however. One of the pillars of the GATT-WTO system is the national treatment obligation that addresses behind-the-border discrimination against imported products vis-a-vis the like domestic product.

and producers, hampering the ability of competition law to promote the contestability of markets.

The economics of competition policy and trade liberalization are also quite similar. The overarching concern of competition policy is with static and dynamic economic efficiency.⁹ Static efficiency refers to the optimum utilization of resources to meet consumer demand (allocative efficiency) at the lowest possible cost (productive efficiency). Dynamic efficiency refers to the process of innovation in technology, products, and processes to meet changing consumer tastes.¹⁰ A liberal trade policy also seeks to remove barriers to trade in order to achieve allocative, productive, and dynamic efficiencies. But it has as other objectives as well, including raising revenue, protecting producers, and protecting competitors.

In sum, trade and competition policies share the common economic objective of removing barriers—governmental with trade policy, private with competition policy—to the competitive process, thereby ensuring that international markets are open to all entrants. The two policies are thus mutually reinforcing.

Despite their close interrelationship and common economic objective of wealth maximization, these policies also have points of divergence and contradiction as well. It must be remembered that trade policy has two facets: trade promotion and trade protection. Trade remedy laws (e.g., antidumping and countervailing duty laws) have as their ostensible goal correcting market disequilibrium introduced by unfair and injurious import pricing practices, whether in the form of dumping or unlawful subsidization. These trade remedy laws can also serve a protectionist purpose, however, by raising barriers to market entry by foreign competitors. Two areas of concern in this connection are, first, the extent to which domestic producers abuse unfair trade remedy laws by bringing actions that force foreign exporters to raise their prices or exclude them altogether from the domestic market; and, second,

9. See OECD, Joint Group on Trade and Competition, *Consistencies and Inconsistencies Between Trade and Competition Policies*, COM/TD/DAFFE/CLP(98)25/FINAL, at 6 (Feb. 25, 1999).

10. Economists speak of two kinds of efficiencies that are promoted by competition, static and dynamic efficiency. Static efficiency is subdivided into productive efficiency (operating efficiencies, together with transaction cost savings) and allocative efficiency (the allocation of products through the price system in the optimum manner to satisfy consumer demand). Dynamic efficiency refers to optimal introduction of new products, more efficient production processes, and superior organizational structures over time. See UNCTAD, Report by the UNCTAD Secretariat, *Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in Order to Attain Greater Efficiency in International Trade and Development* 6-11, TD/B/COM.2/EM/10/Rev.1 (May 25, 1998).

the extent to which unfair trade remedy laws take into account the effects on competition of unfair trade law proceedings.

Thus, trade remedy laws and competition law can work at cross-purposes. Take, for example, the auto parts negotiations between the United States and Japan in the mid-1990's to open the Japanese market for U.S.-manufactured auto parts. The United States, through the U.S. Trade Representative, complained that market access was virtually foreclosed because of the vertical relationships (*keiretsu*) between Japanese final assemblers and their suppliers.¹¹ These relationships are long term in nature and cemented through cross-ownership of stock.¹² Although the conduct blocking market access is private in nature, the United States nevertheless pressed its attack under Article XXIII of GATT, arguing that this was a market condition tolerated by the Japanese antitrust authorities that nullified or impaired trade benefits accruing to the United States under GATT.¹³ No one on the U.S. side stopped to question (at least publicly) whether this non-tariff barrier to U.S. auto parts trade was sheltering inefficient Japanese parts suppliers. Only unless the exclusion from the Japanese auto parts market is inefficient does a misallocation of resources result. The unspoken assumption of U.S. trade negotiators apparently was that because *keiretsu* are exclusionary, they are *ipso facto* inefficient. In other words, market foreclosure was synonymous with market inefficiency. U.S. negotiators either conveniently ignored or were oblivious to Supreme Court jurisprudence that expressly recognizes that long-term vertical relationships can have efficiency benefits.¹⁴

This episode puts in dramatic relief the disconnect between U.S. antitrust enforcement authorities (the Justice Department and the Federal Trade Commission) and U.S. trade authorities. It also fuels the fire of those who advocate a more coherent and integrated approach to the formulation of trade and competition policies.¹⁵ The advocates of integrating trade and competition policies argue

11. See generally Kinya Kubo, *Distribution Keiretsu and Competition Policy in Japan*, in INTERNATIONAL HARMONIZATION OF COMPETITION LAWS 75 (Chia-Jui Cheng, Lawrence S. Liu & Chih-Kang Wang eds., 1995); Jiro Samura, *Foreign Firm Access to Japanese Distribution Systems: Trends in Japanese Antitrust Enforcement*, in ANTITRUST: A NEW TRADE REMEDY? 267 (John O. Haley & Hiroshi Iyori eds., 1995) (both discussing the nature of keiretsu in Japan).

12. See *id.*

13. See *id.*

14. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-58 (1977); *United States v. General Dynamics Corp.*, 415 U.S. 486, 499-500 (1974).

15. See, e.g., OECD, Geza Feketekuty, *The Scope, Implication and Economic Rationale of a Competition-Oriented Approach to Future Multilateral Trade Negotiations*, TD/TC(96)6 (1996).

that increased globalization of production has made it difficult to identify the national origin of both products and firms.¹⁶ Consequently, under this view, what is important is devising policies that affect the operation of the national and international market, rather than the national identity of firms or imported goods. The focus of such an approach in trade liberalization negotiations would be on reforming national laws that discriminate between firms on the basis of nationality, national laws that unnecessarily distort the market, and international rules that are essential for the efficient operation of global markets.

Thus, despite their mutually supportive roles, trade policy and competition policy often share an uneasy relationship, diverging and clashing at many points.¹⁷ The underlying rationale of multilateral trade liberalization is to increase aggregate world wealth and achieve global productive efficiency. Competition policy is focused on enhancing consumer welfare or total welfare (consumer plus producer welfare) within national markets. Much of national trade policy is consumed with fashioning adequate trade remedy laws (e.g., safeguards, antidumping, countervailing duty). National trade policy makers and legislators decide whether to sacrifice consumer welfare for other goals, including protecting producers or workers within an industry threatened with import competition.¹⁸ So too with competition policy. For example, public choice theory posits that governments may deviate from a welfare-maximizing policy for the sake of other non-economic ends, such as protecting "national champions," preventing industrial consolidation that would squeeze out politically-influential small producers, and dispersing control of economic resources.¹⁹ Even when governments have welfare-maximization in mind when they formulate their competition policy, it will be the welfare maximization of their constituents, not of foreign consumers and producers who do

16. *Id.* at 3.

17. See generally *Consistencies and Inconsistencies Between Trade and Competition Policies*, *supra* note 9 (noting areas of manifest similarities, divergences, and differences in the policy domains of trade and competition).

18. See Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 INT'L REV. L. & ECON. 27, 45-51 (1996) (analyzing GATT Article XXIV on regional trade arrangements using a public choice model). See generally Alan O. Sykes, *Protectionism as a Safeguard: A Positive Analysis of the GATT Escape Clause with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991) (examining GATT Article XIX on safeguard relief from a public choice perspective).

19. See THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 189-287 (Fred S. McChesney & William F. Shughart II eds., 1995) (analyzing antitrust policy from a public choice perspective).

not vote. Competition policy thus reflects national concerns. For example, export cartels are excepted under many countries' competition laws.²⁰ The upshot is that consumer welfare in the country of importation may be sacrificed for the benefit of producers in the country of exportation. If total global welfare is reduced as a consequence, then the optimal national policy of the country of exportation will not match the optimal global policy. In such a policy environment, reaching an international agreement on competition policy seems highly improbable.²¹ For the country exercising extra-territorial antitrust jurisdiction, its national welfare may be enhanced, but global welfare may be reduced.

Competition policy can also clash with the market access goal of trade policy to the extent competition policy fails to regulate or actively encourages business practices that are anti-competitive. Such government-condoned business practices that affect market access include (1) export cartels, (2) import cartels, and (3) trading companies.²² Behaviors by domestic firms in cartels, and behavior by importing countries when acting through state trading enterprises, can be anti-competitive when it blocks or impedes market access to imported goods from foreign competitors. As reflected in the 50-year-old GATT-WTO system, trade policy has an international perspective that is built on reciprocity and mutually beneficial concessions on market access. If competition policy allows private behavior to erode the benefit of this negotiated bargain by foreclosing market access to exporters, then competition policy will undermine trade policy. If private anti-competitive behavior is widely tolerated by national antitrust enforcement authorities, and if such behavior has a significant negative impact on market access to foreign producers, then support among

20. France, Germany, Japan, the United Kingdom, and the United States, and the EU authorize export cartels. See Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, in ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 93-94 (John O. Haley & Hiroshi Iyori eds., 1995); Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 INT'L LAW. 117, 126 (1995); A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571, 575-77 (1992).

21. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1510-21 (1998) (analyzing the welfare enhancing effects of national versus international antitrust legal regimes).

22. See OECD, *COMPETITION AND TRADE POLICIES: THEIR INTERACTION* 11-14 (1984); Barry Hawk, *Overview*, in ANTITRUST AND MARKET ACCESS: THE SCOPE AND COVERAGE OF COMPETITION LAWS AND IMPLICATIONS FOR TRADE (OECD 1996) [hereinafter Hawk]; Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM. L. & POL'Y J. 1 (1995) (examining the history of world competition rules and alternative approaches to competition in the GATT agenda).

exporters—the constituency with the most to lose—for a liberal trade policy will suffer.²³

While competition policy and trade policy share the common goals of increasing efficiency and encouraging market access, could one policy replace the other? Although this suggestion might seem fanciful, just such a proposal has been floated in the case of the antidumping duty law.²⁴ Trade policy is at times schizophrenic. Trade policy encourages the opening of foreign markets to imports, but trade remedy laws authorize the imposition of trade barriers to protect domestic producers from import competition. Thus, it is important to carefully distinguish the means by which these two policies are executed through the respective remedies available under trade law and competition law. When examined in the light of law rather than policy, the two seem to work at cross-purposes, at least at the national level.

Competition law and trade remedy laws differ in respect to the interests they are intended to protect. Take, for example, U.S. anti-trust and trade remedy laws. U.S. trade remedy laws—from the countervailing and antidumping duty laws to escape clause relief—are designed to protect domestic producers and the workers in the adversely affected industries from import competition. Generally the last thing that U.S. trade remedy laws are concerned with is market contestability or the maximization of consumer welfare. Trade remedy laws are not concerned with whether imports improve competition or lower inflation. Instead, trade remedy laws are concerned with protecting domestic industries, firms, and workers, not with preserving competition.

Trade remedy laws can also be abused by domestic producers who petition their government to initiate an unfair trade practice proceeding solely for the *in terrorem* effect such a petition might have on foreign competitors. Competitors might react by unilaterally raising their prices in the case of an antidumping proceeding, entering into a price undertaking or suspension agreement with the investigating authorities pursuant to which they agree to raise prices, limiting their exports, or exiting the market altogether.

23. See Robert E. Hudec, *A WTO Perspective on Private Anti-Competitive Behavior in World Markets*, 34 *NEW ENG. L. REV.* 79, 83 (1999).

24. See Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 *GEO. MASON L. REV.* 479, 486-88 (1998). An ABA Task Force considered such a convergence/substitution in the context of NAFTA, replacing the antidumping duty law in part with the Robinson-Patman Act on discriminatory pricing. See *REPORT OF THE ABA ANTI-TRUST SECTION TASK FORCE ON THE COMPETITION DIMENSION OF THE NORTH AMERICAN FREE TRADE AGREEMENT*, ch. 6 (1994).

Unfair trade remedy proceedings, if abused, can permit collusive action on the part of domestic producers to restrain or eliminate foreign competition in the domestic market. Thus, the unfair trade remedy laws may themselves be the instrument of restrictive business practices (RBPs). The filing of an unfair trade remedy petition is not a *per se* anti-competitive practice, but in the United States if such petitions are baseless and used to extract concessions from foreign competitors through price undertakings, they qualify for treatment under the *Noerr-Pennington* doctrine. Under this antitrust doctrine, firms that petition the government for enactment of favorable laws or the application of existing laws are not subject to the provisions of the antitrust laws prohibiting collusion or cartel-like behavior.²⁵ Under the sham exception to the doctrine, however, baseless claims filed as part of a conspiracy to harass a competitor are subject to prosecution under the antitrust laws.²⁶

In contrast to the trade remedy laws, competition law, at least in the United States, has at its goal the maintenance of competitive markets, thereby maximizing and promoting consumer welfare. It is not concerned with protecting domestic firms from foreign competition. The overarching policy goal of competition law is to ensure competitive domestic market structures and the efficient allocation of resources by prohibiting practices that restrain competition or create barriers to new entrants. The principal concern is with protecting competition, not competitors. Competition policy generally offers no refuge for inefficient competitors against lower prices that are the product of efficiency, economies of scale, lower unit labor costs, or technological superiority, so long as the advantage is fairly obtained. Nor, in most countries, does competition law permit departure from these principles for firms that are caught in a recession, are faced with shrinking markets, or are technologically obsolete.

25. See *United Mine Workers v. Pennington*, 381 U.S. 657, 658 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 127 (1961).

26. See, e.g., *Professional Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 60-61 (1993) (finding that litigation must be objectively baseless and amount to an attempt to interfere directly with the business relationships of a competitor to fall under the sham exception); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) (finding that the sham exception applies in situations where individuals use the governmental process itself as an anti-competitive tool); *Chemicor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999) (finding that protection under the *Noerr-Pennington* doctrine will apply despite claims involving misrepresentations); see also *Music Center S.N.C. Ci Luciano Pisoni & Cia v. Pressing Musical Instruments Corp.*, 874 F. Supp. 543 (E.D.N.Y. 1995) (finding that antidumping petitions do not constitute a sham litigation within the *Noerr-Pennington* immunity exception).

A second point where the gears of competition law and the unfair trade remedy laws do not mesh smoothly are the extent to which competition policy criteria are considered in the enactment and administration of the unfair trade laws, specifically, the antidumping law. The point of disconnect focuses on the role that price plays in the administration of these two sets of laws. The antidumping law is triggered when sales in the country of importation are at prices below those charged in the home market of the foreign producer, provided those imports cause injury to the domestic industry as a whole (not to just one or two firms within a multi-firm industry). An alternative measure of dumping under U.S. law (permissible under the WTO Antidumping Agreement) is if the imported goods are sold at prices that fail to cover the total cost of producing those goods in the home market. Such imports, if they also cause injury, are subject to antidumping duties as well. Intent to eliminate competitors is not an element of an antidumping case. Competition law, on the other hand, encourages price competition and only intervenes where pricing is predatory, i.e., set below marginal cost or average variable cost, or set on a discriminatory basis with the goal of restraining competition through the allocation or division of markets. Although a pricing practice may cause a rival's exit, it is predatory only if the pricing practice would prove to be unprofitable without the additional monopoly power (and the ability to capture monopoly rents) resulting from the exit.

Another misfit between the antidumping law and antitrust laws are the defenses that are available in the latter but not the former. For example, defenses that would be available in a price discrimination case—meeting competition or other cost justification—are unavailable in antidumping proceedings.²⁷

II. THE INVESTMENT AND COMPETITION POLICY RELATIONSHIP

Much of the recent literature confirms that the effects of investment²⁸ are beneficial for investor country and host country alike. For example, the OECD noted the beneficial effects of foreign direct investment (FDI) in a 1998 communication to the WTO:

Direct investment by MNEs [multinational enterprises] has the potential rapidly to restructure industries at a regional or global

27. See Applebaum, *supra* note 24, at 487-88 (discussing procedural and substantive differences between antitrust and trade remedy law).

28. The term "investment" refers to foreign direct investment, i.e., business investment, including the purchase or sale of business enterprises and the establishment of a greenfield investment, not to a portfolio investment.

level and to transform host economies into prodigious exporters of manufactured goods or services to the world market. In so doing, FDI can serve to integrate national markets into the world economy far more effectively than could have been achieved by traditional trade flows alone. As with private sector investment more generally, the benefits from FDI are enhanced in an environment characterized by an open trade and investment regime, an active competition policy, macroeconomic stability and privatization and deregulation. In this environment, FDI can play a key role in improving the capacity of the host country to respond to the opportunities offered by global economic integration, a goal increasingly recognized as one of the key aims of any development strategy.²⁹

The WTO Secretariat echoed the OECD's conclusions and offered some of its own insights on the importance of FDI:

Despite the difficulties associated with the measurement of the efficiency-enhancing effects induced by FDI, let alone with the assessment of the specific channels by which a transfer of technology affects local productivity, the empirical literature offers some important conclusions. First, there appears to be a wide consensus that FDI is an important, perhaps even the most important, channel through which advanced technology is transferred to developing countries. Second, there also seems to be a consensus that FDI leads to higher productivity in locally owned firms, particularly in the manufacturing sector. Third, there is evidence that the amount of technology transferred through FDI is influenced by various host industry and host country characteristics. More competitive conditions, higher levels of local investment in fixed capital and education, and less restrictive conditions imposed on affiliates appear to increase the extent of technology transfers.³⁰

Noting the benefits of FDI, the United Nations Conference on Trade and Development (UNCTAD) added in its 1997 World Investment Report that a liberal FDI regime must be complemented by supported by rules on competition:

[FDI] continues to be a driving force of the globalization process that characterizes the modern world economy. The current boom in FDI flows, which has been accompanied by increasing flows of foreign portfolio equity investments, underscores the increasingly important role played by transnational corporations (TNCs) in both developed and developing countries. This role has been facilitated by the liberalization of FDI policies that has

29. WTO, Working Group on the Relationship between Trade and Investment, *Foreign Direct Investment and Economic Development* 4-5, WT/WGTI/W/26 (Mar. 23, 1998).

30. WTO Secretariat, *Trade and Foreign Direct Investment*, reprinted in Press Release, WTO, Trade and Foreign Direct Investment (Oct. 9, 1996), available at http://www.wto.org/wto/english/news_e/pres96_e/pr057_e.htm (last visited May 17, 2000) (footnotes omitted) [hereinafter *Trade and Foreign Direct Investment*].

taken place in many countries in recent years, as part of an overall movement toward more open and market-friendly policies. However, reaping the benefits of FDI liberalization requires not only that barriers to FDI are reduced and standards of treatment established—the focus of most FDI liberalization to date—but also that competition in markets is maintained.³¹

National laws and regulations that discriminate against foreign direct investment distort international trade in much the same way as do tariffs, quotas, and other NTBs. By favoring domestic investors or discriminating against foreign investors, the most efficient producers may not be able to penetrate a market due to government interference in the market. Since the 1980s, the worldwide trend in national legislation regulating FDI has been to adopt laws that attract foreign investors by creating a favorable investment climate.³² UNCTAD reported that in 1997, 151 changes in FDI regulatory regimes were made by 76 countries, 89 percent of which in the direction of creating a more favorable environment for FDI.³³ UNCTAD also reported that: “the network of bilateral investment treaties (BITs) is expanding as well, totaling 1,513 at the end of 1997,”³⁴ one BIT was concluded on average every two and a half days in 1997, and “[t]he number of double taxation treaties also increased, numbering 1,794 at the end of 1997.”³⁵ UNCTAD concludes “the common thread that runs through the proliferation of both types of treaties [] is that they reflect the growing role of FDI in the world economy and the desire of countries to facilitate it.”³⁶ The effects of these liberalization measures are reflected in the growth of foreign direct investment. Worldwide FDI grew 25 percent in 1999 to a record \$827 billion.³⁷ Developing countries received nearly \$200 billion of that total, an increase of 15 percent.³⁸

31. U.N. CONFERENCE ON TRADE & DEV., *WORLD INVESTMENT REPORT 1997: TRANSNATIONAL CORPORATIONS, MARKET STRUCTURE AND COMPETITION POLICY* at xv, U.N. Doc. UNCTAD/TDR/17, U.N. Sales No. E.97.II.D.10 (1997).

32. See U.N. CONFERENCE ON TRADE & DEV., *WORLD INVESTMENT REPORT 1998: TRENDS AND DETERMINANTS* at 56 tbl. III.1, U.N. Doc. UNCTAD/WIR/1998, U.N. Sales No. E.98.II.D.5 (1998) (listing the 143 countries that have enacted special FDI legal regimes) [hereinafter 1998 *WORLD INVESTMENT REPORT*].

33. Overview, 1998 *WORLD INVESTMENT REPORT 12*, available at <http://www.unctad.org/en/doc/wir98ove.en.pdf> (last visited May 17, 2000).

34. *Id.*

35. *Id.*

36. *Id.* at 12-13.

37. See *Business This Week*, *ECONOMIST*, Feb. 12, 2000, at 5.

38. The tremendous FDI spurt was fueled by cross-border mergers and acquisitions (\$797 billion), rather than greenfield investment in new plants and factories. Daniel

What role does a liberal investment policy play in the trade-investment-competition policy relationship? An open and hospitable climate for investment between countries increases the general welfare of both host and investor country, promotes economic efficiency, stimulates competition among firms, and, in the end, benefits consumers. An investment policy that encourages foreign direct investment permits foreign producers to compete with domestic producers of the like product in the latter's home market, thereby introducing static and dynamic efficiencies. Increasing competition within a host country's domestic market can translate into lower prices for consumers. A policy of open investment supports a liberal trade and competition policy by encouraging the movement of capital to markets where competition is then either introduced or increased, and resources are used more efficiently and transformed into goods and services for local and worldwide distribution. An open investment climate—while not the sole determinant of whether an investment will be made, but clearly an essential one—greatly increases the chances for new market entrants, and with them, increased competition. Not only does an open FDI legal regime increase competition in markets for goods and services that are tradeable, but it also makes local and immovable markets, where international trade does not provide competition, more competitive, as is the case with the delivery of many services. The availability of new service suppliers enhances competition. A liberal investment climate can also mitigate or eliminate local distribution bottlenecks that might prevent competition, especially in situations where local manufacturers own local distribution networks.³⁹

While it is argued—mostly by developing countries—that MNEs are able to engage in restrictive business practices in host countries which result in monopoly profits, lower efficiency, and barriers to entry by potential competitors, the WTO Secretariat has made the alternative argument that the entry of an MNE “might have the effect of breaking up a comfortable domestic oligopolistic market structure and stimulating competition and efficiency. . . . The empirical evidence, however, points strongly to pro-competitive effects.”⁴⁰ The WTO Working Group on the Interaction between

Pruzin, *UN Agency Says FDI Jumped By 25 Percent in '99 to \$827 Billion*, 17 Int'l Trade Rep. (BNA) 234, 234 (Feb. 10, 2000).

39. Report of the WTO Working Group on the Interaction between Trade and Competition Policy, at 28 para. 126, WT/WGTCP/2 (Dec. 8, 1998) [hereinafter WGTCP 1998 Report].

40. *Trade and Foreign Direct Investment*, *supra* note 30, at 16.

Trade and Competition Policy (WGTCP) has also noted that open policies toward FDI and properly functioning competition policies are mutually supportive. Liberal investment rules make markets contestable, thereby challenging domestic oligopolies and reducing the likelihood of cartels and monopolies.⁴¹ At the same time, effective competition policies can ensure against possible abuses of market power by foreign investors. Thus, for example, consider an exporter who finds himself unable to penetrate a foreign market because incumbent wholesalers and retailers, owned or controlled by local producers of competing goods, will not handle his goods. With open investment rules in place, the exporter could establish a new distribution channel or purchase an existing one, thereby eliminating the local distribution bottleneck. In short, a liberal investment policy, can simultaneously promote competition and trade in the host-country market, and perhaps in the global market as well.

Whether a potential host country has in place and actively enforces antitrust laws is part of the mix of local business laws that foreign investors consider when asking, "Does a fair and predictable legal environment for doing business exist in the host country?" If competition laws are in place and are regularly enforced, then potential investors will have at their disposal the means of combating local cartels or monopolies that abuse their position. The implementation of a transparent and effective competition law and policy can be an important factor in enhancing the attractiveness of an economy as a site for foreign investment and in maximizing the benefits of foreign investment.⁴² Likewise, local firms will have the same ability to prevent abuses by foreign investors through a transparent and effective competition law and policy. Conversely, if antitrust law does not exist in a potential host country, or if it is loosely or discriminatorily enforced, then potential investors might look to other host countries.

In sum, liberal trade, investment, and competition policies can be mutually reinforcing. As noted in a Korean submission to the WTO Working Group on Trade and Investment:

[O]ne can generalize that trade policy determines the relevant market for competition policy, and investment policy determines the relevant players in the market. Therefore, investment policy cannot attain its competition objective unless the effect of

41. WTO Working Group on the Interaction between Trade and Competition Policy, at 24 para. 72, WT/WGTCP/3 (Oct. 11 1999) [hereinafter WGTCP 1999 Report].

42. See WGTCP 1998 Report, *supra* note 39, at 12.

trade policy in determining the relevant market is carefully considered.⁴³

The common theme shared by all three policies is to ensure that the market is free from restraints that impede the efficient allocation of resources, thereby maximizing aggregate wealth.

Despite their intimate interrelationship, these policies have points of departure as well. Competition policy, for example, has its focus on "behind the border" (national) issues, rather than international issues, whereas trade and investment policy address "at the border" governmental measures. Moreover, competition policy deals with the efficient allocation of resources within that narrower, national market. Consequently, what might be an efficient allocation of resources within a national market might not be so at the global level. National antitrust laws also exempt certain sectors of the national economy from application of the antitrust laws on grounds of national security, food security, and sovereignty over natural resources. Similarly, international trade law permits the imposition of a temporary safeguard remedy to protect domestic industry from fairly traded imports, thus conflicting with the goal of allocative efficiency in the market. So too in the case of investment, national laws prohibit foreign ownership of certain industries or sectors of the national economy on the grounds of, for example, national security or sovereignty over natural resources. In short, allocative efficiency is not a shibboleth in trade, investment, or competition policy. A somewhat less charitable assessment is that these three policies are at times contradictory and in a state of conflict.

III. THE WTO WORK PROGRAMS ON INVESTMENT AND COMPETITION POLICY

Over its fifty-year history, the GATT-WTO system has had as its primary goal the elimination of government, as opposed to private, barriers to international trade. The kinds of government conduct restricting international trade that have been of greatest interest to the GATT-WTO members include: reducing and eliminating tariffs on imported goods, restricting the use of import and export quotas, imposing disciplines on the imposition of safeguard measures, encouraging state-run enterprises (e.g., transportation and mineral extraction industries) to adopt market disciplines in their purchas-

43. Working Group on the Relationship between Trade and Investment, Communication from the Republic of Korea, *Relationship Between Investment and Competition Policy*, at 6, WT/WGTI/W/57 (Oct. 22, 1998).

ing decisions, regulating the use of antidumping actions, discouraging the provision of subsidies to sunset and sunrise domestic industries not otherwise internationally competitive, and limiting the extent to which governments can restrict imported goods on the basis of standards. All of these trade liberalization measures can have the salutary effect of indirectly combating certain restrictive business practices engaged in by domestic firms, such as price fixing, by allowing greater import competition that will break up such illegal arrangements through price competition.

It is unquestionably true that to the extent private firms engage in anti-competitive practices, they can impede international trade flows and retard economic development. Some observers contend that restrictive business practices may now constitute a more important barrier to market access than border controls.⁴⁴ While there is no empirical evidence to support this contention, it is unquestionably true that governmental barriers to market access are also known to be an important impediment to the free flow of goods and services across national borders. Indeed, the point has been made in the discussions at the WGTCP that:

although anti-competitive practices of enterprises might well have a detrimental impact on economic development, it was also important to consider the impact of anti-competitive policies and measures of governments. In many cases, this could be as great or greater than that of purely private anti-competitive practices. Furthermore, in many cases, ostensibly private anti-competitive behavior was itself prompted or facilitated by government actions.⁴⁵

Whether governmental measures are more important than private RBPs in their impact on trade and competition is an empirical question, the answer to which could differ from country to country and from economic sector to economic sector. Nevertheless, a closely-related question to the one of the impact of restrictive business practices on international trade flows is to what extent governments erect similar barriers to trade by directly or indirectly supporting or condoning private RBPs. Protectionist pressures can lead governments to shelter weak industries and firms from foreign competition. Protectionist measures are introduced under the justification that certain domestic producers are to be preferred over their international competitors in the market in order to boost domestic employment and income. Government procurement laws with buy-national directives, for example, discriminate against the

44. See Hawk, *supra* note 22, at 8.

45. WGTCP 1998 Report, *supra* note 39, at 15 para. 40 (footnote omitted).

lowest cost supplier of a good or service when the supplier is foreign.

Paradoxically, the increased globalization resulting from GATT-WTO trade liberalization has increased the opportunities of private parties to engage in international, anticompetitive behavior. In partial recognition of the role that private conduct plays in restricting trade, at least three WTO agreements speak directly to the issue of restrictive business practices.

First, Article 9 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement)⁴⁶ directs the Council for Trade in Goods to consider whether the TRIMs Agreement should be complemented with provisions on investment and competition policy. Two Working Groups were established to consider these questions in 1997, and their work program continues to date. The contributions of WTO members show that there are many areas of convergence and divergence in national legislation regulating restrictive business practices. The Working Group on the Interaction between Trade and Competition Policy (WGTCP) was most active in 1998 and 1999. The Working Group's 1998 report recommended that its mandate be extended to study three areas more fully: (1) the relevance of the core GATT principles of national treatment, most-favored-nation treatment, and transparency to competition policy; (2) possible approaches to promoting cooperation among WTO members; and (3) the contribution of competition policy to achieving the WTO's objectives.

The Working Group on the Relationship between Trade and Investment was also active in 1998 and 1999. The substantive work performed by the Group included: (1) studying the implications of the relationship between trade and investment for development and economic growth; (2) the economic relationship between trade and investment; and (3) a stocktaking of existing international instruments and activities regarding trade and investment. Work continues on identifying common features and differences in existing multilateral, regional, and bilateral agreements on investment.

Second, Articles 8, 31, and 40 of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agree-

46. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994).

ment)⁴⁷ address issues of anticompetitive practices in licensing agreements, the abuse of intellectual property rights, and restrictions on compulsory licensing.

Third, Articles VIII and IX of the General Agreement on Trade in Services (GATS)⁴⁸ prohibits monopoly service suppliers from discriminating against foreign firms when supplying their services and obligates WTO members to enter into consultations with other members on restrictive business practices of service suppliers.

As one authority on the subject of international competition law and policy has observed, the possible outcomes at the WTO vary from doing nothing to adopting a fully harmonized international antitrust code.⁴⁹ The current literature and the reports submitted to the WTO Working Group on Trade and Competition Policy show that there is near unanimity that horizontal agreements to fix prices and divide markets are anti-competitive and should be prohibited. Countries, however, agree on little else. The WGTCP has been unsuccessful in bridging the many gaps that exist among WTO members regarding the efficacy or scope of a WTO competition policy agreement. Differences exist on virtually all other facets of competition law—for example, mergers, resale price maintenance, parallel imports, vertical restraints, and abuse of a dominant position. These divergences reflect differences in objectives, priorities, the role of government in the economy, and discretion in the application of flexible competition rules, such as the rule of reason. The following table summarizes the degree of consensus on regulation at the national level, the applicable legal standards, and on regulation at the multilateral level:

47. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81, 87 (1994) [hereinafter TRIPS Agreement].

48. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994).

49. See Bernard Hoekman, *Harmonizing Competition Policy in the WTO System*, 1 WORLD ECON. AFFAIRS 2, 8-11 (1997).

Restrictive Business Practice	Degree of Consensus to Eliminate/Regulate Through National Competition Laws	Degree of Consensus on Applicable Legal Standard	Degree of Consensus to Eliminate/Regulate Through Multilateral Agreement
Hard-Core Cartels on Price Fixing, Bid Rigging, Output Restriction, and Market Allocation	High	High	Moderate to High
Export Cartels	High for Importing Countries, Low for Exporting Countries	High for Importing Countries, Low for Exporting Countries	Low to Moderate
Vertical Agreements	High	Low	Low
Abuse of a Dominant Position	High	Low	Low
Mergers	High	Low	Low

This table suggests that negotiating an international agreement either on minimum competition law standards or on core principles will be difficult, if not impossible. In 1991, the American Bar Association's Special Committee on International Antitrust concluded that no global competition law standards are feasible, a view echoed in 2000 by the International Competition Policy Advisory Committee.⁵⁰ Professor Daniel Gifford notes that "international discussion about harmonizing competition laws presents a substantial challenge, since the participants are likely to approach the subject with preconceptions arising out of their differing cultural experiences."⁵¹ Professor Eleanor Fox adds that "when nations continue to have different rules (leading to conflict), despite the enormous amount of cross-fertilization that occurs, that tends to indicate rooted differences in countries' preferences, which in turn may indicate a low feasibility for convergence."⁵² In June 1999, the OECD sponsored a conference attended by 200 trade and competition officials, academics, and business and labor groups from the 29 OECD countries and 30 non-member countries.⁵³ The next round of WTO multilateral trade negotiations produced no consensus on the inclusion of competition policy.⁵⁴ In short, building

50. See 2000 INTERNATIONAL COMPETITION POL'Y ADVISORY COMMITTEE FINAL REP. 271 [hereinafter INT'L COMPETITION POL'Y REP.]; 1991 A.B.A. SEC. ANTITRUST L. REP. 294.

51. Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 4 (1997); see also Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL L. REV. 1049 (1995).

52. Eleanor M. Fox, *Comments in BROOKINGS TRADE FORUM*: 1998, at 375, 376.

53. *OECD Antitrust/Trade Conference Shows Disparate Approaches Toward Reconciliation*, 77 Antitrust & Trade Reg. Rep. (BNA) 41, 41 (July 8, 1999).

54. *Id.*

a consensus for a multilateral agreement on competition policy continues to be a work in progress.

Regarding foreign investment, despite the arguments for liberalizing national barriers to foreign investment, the failure of the OECD to conclude the Multilateral Agreement on Investment (MAI) in 1998 shows that making progress on a comprehensive multilateral agreement on investment is no easy task. Although the OECD MAI would have been open to acceptance by all countries regardless of OECD membership, many developing countries are hostile to the idea in the absence of a complementary set of rules on restrictive business practices. Some developing countries fear that investment by multinational corporations can result in local monopolies that in turn can engage in predatory pricing that drives local competitors out of business. In the end, of course, it was the OECD members themselves who spiked the Agreement. At the risk of laying too much blame on any one country, France had strong reservations about the negative impact the MAI would have on its cultural industries (a misapprehension undoubtedly shared by Canada).⁵⁵ Other OECD members felt unrelenting pressure from domestic environmental groups who pressed their case against the MAI as being a threat to the global environment. In addition, labor advocacy groups wondered how the MAI might negatively affect developing-country labor markets by developed-country multinational investors. In the end, the OECD MAI was a dead letter by late 1998, notwithstanding the high hopes shared by most participants in the negotiations that a successful conclusion of the negotiations was barely weeks away.

Although no comprehensive WTO agreement regulating all aspects of FDI currently exists, the GATT-WTO system does integrate trade and FDI in several important respects. The treatment of FDI in WTO agreements is fragmented and limited, but ever expanding in the services sector under the GATS. With the collapse of the OECD negotiations on a Multilateral Agreement on Investment, the spotlight has shifted to the WTO as the forum for possibly concluding such an agreement. The lesson for the WTO is clear: tread carefully. Moving the discussions on a multilateral investment agreement from the OECD to the WTO could be pouring old wine into a new and bigger bottle.

Support for international disciplines on investment and private RBPs came from the United States during the drafting of the ill-

55. See generally UNCTAD, *Lessons From the MAI* (1999) (presenting different viewpoints concerning the Multilateral Agreement on Investment).

fated Havana Charter on the International Trade Organization in 1947, when the United States supported chapters on investment and restrictive business practices. More recently, the United States has complained about private barriers to market access in Japan where vertically integrated firms (*keirestu*) buy exclusively from each other. Whether the United States became disenchanted with multilateral efforts to resolve competition law disputes, or whether it simply saw no advantage in pursuing multilateralism when it could exercise extraterritorial antitrust jurisdiction, is not clear. Whatever the reasons, the United States dropped its support for international disciplines and turned instead to unilateral and bilateral approaches to the problem. Still, the United States acknowledges the need for international cooperation and information sharing in cross-border competition investigations.

Today, governments other than the United States (primarily Canada, the EU, and Japan), international organizations, policy makers, and academics argue that the time is now ripe for WTO agreements on investment and restrictive business practices.⁵⁶ In connection with an agreement on competition policy, the argument runs that harmonization of national antitrust laws would have at least three salutary benefits. First, a WTO competition policy agreement that harmonized national laws would provide a more predictable legal environment within which multinational firms could operate. Second, WTO-centered dispute settlement would reduce duplication of enforcement efforts by national enforcement authorities. Third, harmonization under WTO auspices would avoid conflicting jurisdictional disputes and potential conflicting decisions by national enforcement authorities.

Yet business groups, other academics, the U.S. government, and other countries are moderately suspicious of multilateral solutions that call for the harmonization of national competition laws and

56. See Sir Leon Brittan, *The Need for a Multilateral Framework of Competition Rules*, in TRADE AND COMPETITION POLICIES: EXPLORING THE WAYS FORWARD 29 (OECD ed., 1999); Daniel Pruzin, *United Nations Calls for WTO Role in Checking Multinational Monopolies*, 16 Int'l Trade Rep. (BNA) 1209, 1209 (July 21, 1999); Daniel Pruzin, *EU Outlines Goals for WTO Talks on Services, IP, Competition Policy*, 16 Int'l Trade Rep. (BNA) 968, 968 (June 9, 1999); *Japan FTC Proposes Global Rules in the WTO for Competition Policy*, 16 Int'l Trade Rep. (BNA) 720, 720 (Apr. 28, 1999); *WTO Cites Need for Competition Rules for Business Practices that Restrict Trade*, 14 Int'l Trade Rep. (BNA) 2221, 2221-22 (Dec. 24, 1997); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 346-47 (1997); Eleanor Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 1-5 (1997). *But see* Friedl Weiss, *From World Trade Law to World Competition Law*, 23 FORDHAM INT'L L.J. 250, 271-72 (acknowledging various advantages to WTO regulation on competition but concluding that it is not yet time for a comprehensive agreement).

the resolution of international competition law disputes in an international dispute settlement forum such as the WTO.⁵⁷ For this group, multilateralism is no panacea. Harmonization of national competition laws will not necessarily address issues of efficiency in a global marketplace. Instead, national authorities will be focused on the impact to the domestic market of restrictive business practices. EU and U.S. trade officials, for example, would use international competition disciplines to promote exports and reduce conflict in cross-border merger approval. But they are probably less interested in exposing domestic firms to competition law disciplines when those firms are engaged solely in export activity. Smaller countries, on the other hand, are also interested in market access but would welcome an international agreement and enforcement mechanism that reaches anti-competitive practices engaged in abroad but with effects in their domestic market. In addition, not all countries will benefit equally from such an agreement. Competition policy seeks generally to restrain the anti-competitive behavior of firms and thereby increase consumer welfare. But firms that engage in restrictive business practices and consumers whose welfare is to be increased are distributed unequally among countries. Countries thus have different incentives at different times for regulating or not regulating firms that engage in RBPs. For these reasons, the prospects for successfully concluding a multilateral agreement on competition policy seem remote.

Before its indefinite postponement in December 1999, several WTO members (including the EU, Japan, and Korea), academics, and other commentators urged that the WTO Millennium Round include on its agenda negotiations leading to multilateral rules on investment and antitrust.⁵⁸ Japan would like to see the WTO

57. See, e.g., INT'L COMPETITION POL'Y REP., *supra* note 40, at 263-67; Joel I. Klein, *A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust*, in TRADE AND COMPETITION POLICIES: EXPLORING THE WAYS FORWARD 37 (OECD ed., 1999) (presenting an argument against WTO negotiations on antitrust rules, based on a lack of ability to foresee future issues); Don Wallace, Jr., *Reasons for Skepticism*, 34 NEW ENG. L. REV. 113 (1999) (questioning the need for a global solution); Joel I. Klein, *No Monopoly on Antitrust*, FIN. TIMES, Feb. 13, 1998, at 24 (arguing that WTO involvement in antitrust policy is premature); Merit Janow, *Unilateral and Bilateral Approaches to Competition Policy Drawing on Trade Experience*, in BROOKINGS TRADE FORUM:1998 253 (discussing the international impact of domestically-regulated antitrust policy); Gary G. Yerkey, *U.S. Opposes Plan to Negotiate Agreement in WTO, Officials Say*, 14 Int'l Trade Rep. (BNA) 2034, 2034-35 (1997) (noting U.S. opposition to such the adoption of a WTO agreement aimed at eliminating anti-competitive business behavior).

58. See *Prospects Diminishing for Talks on Rules Covering Investment, Competition*, 16 Int'l Trade Rep. (BNA) 1598, 1598 (1999); *The Border of Competition*, ECONOMIST, July 4, 1998, at 69; *Co-operate on Competition*, ECONOMIST, July 4, 1998, at 16. Switzerland and the Central

assume jurisdiction over international antitrust issues as a way of fending off the bullying tactics of the United States to push Japan to enforce its antitrust law more aggressively. It seems, however, that an equal or even greater number of WTO members resisted this call,⁵⁹ including the United States, Mexico, India, Pakistan, Egypt, Hong Kong, the member-countries of ASEAN, and several Central American countries. In the case of competition policy, the 138-member WTO is hardly of one mind as to what constitutes anticompetitive behavior. First of all, just more than half of the WTO membership has enacted some type of competition law, and in many of those countries enforcement mechanisms and institutions have not been thoroughly tested. Among the countries that do have a competition law in force, some countries favor price fixing, while others condemn it. In addition, some countries are suspicious of vertical agreements between wholesalers and retailers, and between manufacturers and suppliers.

The enforcement mechanisms vary as well among countries. The process in the United States is largely judicial, whereas in the EU the process is more administrative in nature. Private parties may sue under U.S. antitrust law and may recover treble damages, while in some other countries the enforcement process is left to government authorities. Criminal prosecutions can be brought under U.S. antitrust law, while in some other countries competition law violations are a civil matter only.

Suspensions exist in the United States that the EU's call for a comprehensive trade negotiation round that includes negotiations on investment and competition policy is a red herring designed to draw attention away from negotiations on agricultural subsidies, a politically sensitive issue within the EU.⁶⁰ In addition, in connection with negotiations on competition policy rules, the United

European Free Trade Agreement countries (Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia) also supported WTO negotiations on competition policy rules. *Prospects Diminishing for Talks on Rules Covering Investment, Competition*, 16 Int'l Trade Rep. (BNA) 1598, 1598 (1999). See generally Fox, *supra* note 22 (examining the history of world competition rules and alternative approaches to competition in the GATT/WTO agenda); Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289 (1995) (discussing options for an improved global competitive regime); Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097 (1995) (arguing for the adoption of standard competition rules within the WTO).

59. See, e.g., *U.S. Outlines Priorities for WTO Seattle Ministerial*, 16 Int'l Trade Rep. (BNA) 1285, 1285 (1999) (noting competition and investment policy were conspicuously excluded from United States's goals for the WTO's 1999 meeting).

60. See *EU Official Says Support Growing for Comprehensive Trade Round*, 16 Int'l Trade Rep. (BNA) 1284, 1284 (1999).

States, speaking chiefly through the Justice Department, is of the opinion that reaching agreement on common antitrust rules within the WTO is preordained to fail given the diverse composition of the WTO membership.⁶¹ Concern has also been expressed over trade-offs and compromises in WTO negotiations over common competition rules in order to conclude negotiations on, for example, agriculture.⁶² The Justice Department has no desire to see U.S. antitrust rules used as bargaining chips in WTO negotiations on trade in agriculture or services.⁶³ A similar reservation is that WTO negotiations on common rules could result in a ratcheting down that would weaken strong national rules, as well as an ossification of rules that are included in a multilateral agreement.⁶⁴ The Justice Department also questions the wisdom of allowing WTO dispute settlement panels to possibly second-guess the Justice Department in its handling of antitrust cases.⁶⁵ A closely related objection is that businesses and national authorities will be reluctant or will flatly refuse to turn over confidential business information to a WTO panel for fear that such information will find its way into the hands of a foreign competitor.⁶⁶ The EU has responded to part of this criticism by advocating a competition policy agreement that is not covered by the WTO Dispute Settlement Understanding.⁶⁷

At the WTO, an active debate over the merits of multilateral agreements on competition policy and investment has just begun—this not surprising. First, before 1950, few countries even had competition laws, and those that did took a benign approach to cartels.⁶⁸ Second, not until the late 1980s did any country with a competition law other than the United States apply their law to extraterritorial conduct affecting their markets. Today, the extraterritorial application of countries' competition laws is not reserved exclusively to the United States. Third, because of the success of the GATT-WTO trade system in globalizing national economies, coupled with the boom in transnational mergers and

61. Joel I. Klein, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Address before the Royal Institute of International Affairs Chat ham House London 8 (Nov. 18, 1996), available at <http://www.usdoj/atr/public/speeches/jikspch.htm>.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Joanna Shelton, *Competition Policy: What Chance for International Rules?* 2 OECD J. COMPETITION L. & POL'Y 57, 60 (1999).

68. *Id.*

acquisitions, an increasing number of competition law enforcement actions have cross-border effects.

To the extent they exist, private restraints and agreements can make it difficult, if not impossible, for foreign firms to gain market access overseas for its goods, services, and capital. But can private anticompetitive behavior be successful in stifling competition without the tacit or active support of government? Should the adoption of minimum standards on competition law and enforcement be required of all WTO members, just as minimum standards of intellectual property protection are mandated for all WTO members under the TRIPS Agreement? The absence of competition law in most WTO-member countries does not necessarily present an insurmountable obstacle to a WTO agreement on competition policy, just as the absence of intellectual property protection in many WTO members did not prevent the conclusion of the TRIPS Agreement.

Do the international dimensions of national antitrust enforcement support the argument for a WTO competition policy agreement? Would such an agreement reduce international frictions in the area of transnational mergers and acquisitions, an increasingly popular mode of entry into foreign markets? International merger and acquisition (M&A) activity is a general concern because it can reduce the competitiveness or contestability of a market. It is of special concern to the national authorities of the acquired firm because it represents a diminution of national sovereignty and control over domestic enterprises. The growth in foreign direct investment underscores the importance to some of reaching a WTO competition policy agreement that takes into account these trans-border concerns.

Several benefits of having a WTO multilateral agreement on competition policy have been identified.⁶⁹ First, although it is widely agreed that private anti-competitive practices can, in theory, have an adverse impact on both international trade and investment, no WTO mechanism exists for policing these practices. A multilateral agreement on competition policy would fill this gap. Second, because private anti-competitive practices increasingly have an international dimension, there is a need for multilateral cooperation among national enforcement authorities to complement bilateral and regional efforts in this regard. Third, a multilateral agreement on competition policy will foster a competition

69. See WGTCP 1999 Report, *supra* note 41, at 24 para. 74.

culture, thus reinforcing the GATT-WTO system overall. Finally, a multilateral agreement on competition policy could reduce transaction costs for businesses engaged in cross-border transactions regarding compliance with various countries' competition laws.

Despite the purported benefits of a WTO agreement on competition policy, whether the WTO will ever conclude multilateral agreements on either investment or competition policy remains doubtful. U.S. Trade Representative Charlene Barshefsky stated in late 1998 that work on an agreed set of competition rules under WTO auspices was not yet sufficiently well advanced to warrant WTO negotiations on such an agreement.⁷⁰ She also stated in May 1999 that she saw no possibility of MAI-type negotiations at the WTO.⁷¹ Considering the diverse and broad WTO membership, an argument can be made that the WTO is the proper forum for concluding such multilateral framework agreements, not only because of its broad-based membership, but because of the close link between trade, liberalized investment rules, and international enforcement of mutually-agreed upon competition rules. But having said that, policy makers and government officials would be foolish to ignore the lesson of the OECD MAI fiasco. Extrapolating from the collapse of the MAI, the lesson is clear: if a small club of developed countries could not reach a binding agreement on a subject such as foreign investment, where most of them have a relatively open investment climate and where their foreign investment laws are not dramatically far apart, then what chance is there of reaching agreement on competition policy under WTO auspices—a subject that touches the sensitive and raw nerve of national sovereignty—among 138 economically, politically, and culturally diverse nations?

In addition, from the integration of national economies it does not inexorably follow that a multilateral legal approach to competition law and policy, let alone a multilateral approach under WTO auspices, is necessarily the right approach. Multilateralism is no desideratum. Indeed, it has limits that policymakers need to recognize. The legal and political arguments against such an approach are formidable and convincing. Strengthening domestic antitrust laws to eliminate restrictive business practices that close off market access to imported goods and services seems a more preferable and

70. See *U.S. Welcomes WTO Decision to Continue Antitrust Talks But Rules Out Negotiations*, 15 Int'l Trade Rep. (BNA) 2087, 2087 (1998).

71. *WTO Trade Agenda Left Unresolved at Conclusion of OECD Ministerial Meetings*, 16 Int'l Trade Rep. (BNA) 914, 914 (1999).

effective approach, one that countries would more readily embrace than would be the case with multilateral rules that are forced down their throats. Forcing the liberalization of domestic laws on foreign direct investment likewise may be a solution in search of a problem. Although we do not live in a market economist's perfect investment world (i.e., a world that is barrier free to the flow of investment capital from whatever source), bilateral and regional agreements on investment, WTO commitments on non-discrimination and market access to goods and services, not to mention unilateral "disarmament" in the form of domestic laws that place no barriers in the way of foreign capital, have made any multilateral investment agreement in large part redundant.

Today, the WTO's prestige, reputation, and authority are at an all-time low. It is a fragile institution. When you visit the WTO web site, the WTO reminds the visitor of just how fragile it is with an image of an egg. The United States, its most powerful member, has been ambivalent at times in its support of the WTO and its goal of promoting liberal trade. The commitment of the United States to U.S. participation in the WTO is less than whole-hearted.⁷² But even the most vocal government critics of the WTO have called for reform of the Organization, not for U.S. withdrawal from it.⁷³ At the same time intemperate and pandering remarks by President Clinton at the WTO Seattle Ministerial Conference in late 1999, suggesting that the WTO conclude an agreement on core labor standards that would be enforced through trade sanctions, steeled the resolve of developing countries not to be steam rolled by the

72. Despite the U.S. Trade Representative's ringing endorsement of continued U.S. WTO membership in her March 2000 Report, a resolution was introduced in Congress calling for U.S. withdrawal from the WTO pursuant to section 125 of the Uruguay Round Agreements Act. See Uruguay Round Agreements Act, 19 U.S.C. § 3535 (mandating a five-year review of U.S. participation in the WTO); 2000 TRADE POL'Y AGENDA & 1999 ANN. REP. OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM; Gary G. Yerkey, *USTR Sends Report to Congress Urging Continued U.S. Participation in WTO*, 17 Int'l Trade Rep. (BNA) 394, 394 (Mar. 9, 2000). That resolution was defeated in the House of Representatives on June 21, 2000 by a vote of 363-56, compared to a November 1994 House vote of 288-146 to join the Organization and approve the Uruguay Round Agreements. Press Release 00-49, Office of the United States Trade Representative, *USTR Barshefsky Hails Overwhelming House Vote on WTO, Bipartisan Vote Rejects U.S. Withdrawal from WTO* (June 22, 2000), available at <http://www.ustr.gov/releases/2000/06/00-49.html> (last visited August 13, 2000).

73. See Gary G. Yerkey, *USTR Set to Issue Report Defending Continued U.S. Participation in WTO*, 17 Int'l Trade Rep. (BNA) 341, 341 (Mar. 2, 2000) (explaining that House Minority Leader Richard A. Gephardt continues to support U.S. participation in the organization, but dispute settlement system needs to be reformed).

WTO's developed-country members at any new, WTO trade negotiation round.

All of these developments are unfortunate because the WTO sets rules that bind rich countries and poor countries alike. The big losers from the debacle in Seattle may in fact be the developing countries. A liberal trade policy is a policy of increased competition and opportunity; such a policy holds great promise for the developing countries of the world.

IV. THE LIMITS OF MULTILATERALISM

Although multilateral agreements on investment and competition policy negotiated under WTO auspices have their advocates, at present it remains an open question whether anti-competitive business practices that have international trade effects should be made the subject of a WTO agreement on competition policy. Only after a consensus builds for a WTO-sponsored agreement on trade-related aspects of competition policy will it be appropriate and fruitful for the WTO members to tackle this subject. And not until the question shifts from whether the WTO should address this issue to how the WTO should deal with these issues will the time be ripe to broach the subject of negotiating a WTO multilateral agreement on competition policy.

Assuming that a consensus does build, is a WTO competition policy agreement a solution in search of a problem? To what extent are purely private RBPs a significant barrier to market access? The OECD Secretariat noted in 1999 the absence of reliable data on the scope of this problem:

Given the lack of any measure or systematic data, anecdotes are relied upon. The survey data that was presented at the conference involved only a small number of respondents and could not be extrapolated. Given the lack of data, some suggested that there should be no presumption that the current regime is bad or needs changing.⁷⁴

74. OECD Secretariat, *Summary, in TRADE AND COMPETITION POLICIES: EXPLORING THE WAYS FORWARD* 12 (OECD ed. 1999). Proponents of a multilateral agreement insist that anti-competitive practices increasingly have an international dimension, which thereby affects the interests of many WTO members. They also add that the notion that anti-competitive practices are unimportant is inaccurate, considering the frequent occurrence of anti-competitive practices with cross-border effects, investigations against international cartels, and merger reviews involving more than one jurisdiction. Nevertheless, supporting evidence remains anecdotal. See WTO, Working Group on the Interaction between Trade and Competition Policy, Communication by the European Community and Its Member States, *Impact of Anti-competitive Practices on Trade*, WT/WGTCP/W/62 (Mar. 5, 1998); WTO, Working Group on the Interaction between Trade and Competition Policy, Communica-

Is there even such a phenomenon as a purely private RBP? The available evidence suggests that in many instances anti-competitive business practices by private firms receive either active or tacit government support. When asked to provide examples of the interaction between trade and competition policies as part of an OECD survey, the issues listed by the responding governments did not involve strictly private arrangements but rather arrangements in which the government was an essential participant.⁷⁵ WTO members may still protect domestic firms even after dismantling tariff and other barriers to trade, either by failing to provide, or to provide adequately, effective competition laws and enforcement mechanisms, or simply by deliberate non-enforcement of competition laws. These lapses—the classic “beggar-thy-neighbor” policy—create a market advantage over countries with stricter competition rules. If, in fact, most private RBPs are government supported, query: do existing WTO legal instruments provide an adequate mechanism for addressing them? A GATT Article XXIII:1(a) nullification or impairment complaint could be brought against private RBPs that receive active government support, and a GATT Article XXIII:1(b) non-violation nullification or impairment complaint would provide a means of challenging private RBPs that receive tacit government support, such as through weak or lax competition law enforcement.⁷⁶ These remedies are discussed more fully below.

Besides government support of private RBPs, government barriers to market access are arguably much more important trade barriers than private RBPs. Even after full implementation of the Uruguay Round agreements, a substantial number of high tariffs and non-tariff barriers to trade will remain in place, especially in sectors of special interest to developing countries, such as agricultural trade, textiles and clothing, and footwear and leather goods. In most other trade sectors, competition will be enhanced more by trade liberalization or by greater international cooperation between national enforcement authorities than by the introduction of competition law reforms by the WTO. Even though border measures are waning as barriers to market entry for trade in most goods, they have not disappeared. Government measures, such as product standards, safeguard measures to protect domestic indus-

tion from Norway, *Impact of Anti-Competitive Practices of Enterprises and Associations on International Trade*, WT/WGTCP/W/73 (Mar. 30, 1998).

75. See OECD, *Cases of Interaction between Trade and Competition Policy*, COM/TD/DAFFE/CLP (92) 50 (1992).

76. See Hudec, *supra* note 23; Bernard Hoekman & Peter C. Mavroidis, *Competition Policy and the GATT*, 17 *WORLD ECONOMY* 121 (1994).

tries from import competition, subsidies to domestic producers, and restricted market access for services trade are arguably still more important barriers to trade than are private RBPs. International trade continues to be hampered by governmental market distortions, such as government procurement policies that discriminate against foreign goods and services, and distortions flowing from regional trade arrangements. Further trade liberalization and a recommitment to the core non-discrimination principles of most-favored-nation and national treatment offer more effective means for reducing barriers to trade and promoting competition.

Moreover, WTO provisions on trade-related competition policy issues—Article IX of GATS, Article 40 of the TRIPS Agreement, and Article 9 of the TRIMS Agreement—recognize the sovereign right of WTO members to regulate RBPs, without actually prescribing substantive competition rules. This decentralized approach is a reflection of the lack of consensus on what the competition rules should be and what the best legal instruments are for dealing with RBPs, which contrasts with the general consensus among economists and government officials that liberalization of government barriers to trade leads to beneficial welfare effects. In addition, a proposal for a multilateral WTO competition policy agreement is inconsistent with the culture of the WTO. In the GATT-WTO system, members are required to ensure that their domestic laws are in conformity with the rights and obligations of the relevant WTO Agreements. The WTO Agreements are largely proscriptive, not prescriptive, in nature. For example, the Antidumping Agreement prescribes the requirements for members who have or wish to enact an antidumping duty law, but no member is required to enact antidumping legislation. Even where a WTO Agreement is prescriptive, such as the TRIPS Agreement, the WTO leaves it to the individual member to determine how it should give effect to GATT-WTO prescriptions in its domestic legislative or administrative processes.

Nevertheless, even if one concludes that it would be premature, unwise, and unnecessary to launch negotiations on a WTO agreement on competition policy, two anti-competitive practices of foreign firms that distort competitive conditions in export markets illustrate the need for greater cooperation among trading nations and, perhaps, multilateral proscriptions: price discrimination and collusive behavior through export cartels. The first is dealt with under the antidumping duty laws and the price discrimination proscriptions of competition law. The fit of the two bodies of law, as

has been exhaustively explored in the literature, is poor, but at least there is in place WTO-approved rules regulating the use of antidumping measures.

In the case of export cartels, on the other hand, the WTO has no clear mechanism in place to deal with this anti-competitive practice, other than an Article XXIII:1(b) non-violation nullification or impairment complaint. Export cartels may reduce the welfare of consumers in the foreign import market, but they increase the welfare of producers in the country of exportation. In the absence of an agreement on positive comity, export cartels cannot be disciplined because the jurisdiction able to investigate effectively and gather evidence is unwilling to do so, and the jurisdiction with the incentive to investigate is prevented from doing so because of its inability to collect information. A third area of friction with an international dimension involves multi-jurisdictional conflicts over proposed mergers.

In any event, even assuming the potential utility of international rules to regulate private RBPs, the WTO is not the ideal international organization for negotiating or developing such rules, or for policing such practices. The GATT-WTO system is less concerned about economic efficiency than it is about market access, less concerned about enhancing total welfare (consumer plus producer welfare) in markets than it is about ensuring that producers have access to export markets. The GATT-WTO system is at its core a forum with a mercantilist approach to multilateral trade negotiations—that is, a system that is market-access oriented and that promotes global trade through reciprocal trade concessions. In that capacity the GATT-WTO system plays an important role in making markets more competitive by reducing government tariff and non-tariff barriers to trade. It has been successful in that role it for over fifty years, but not completely successful. Despite fifty years of effort toward trade liberalization, the restrictive and distortive effects of government measures, especially trade remedies, still appear to be more harmful to trade and competition than those of private RBPs.⁷⁷ Would not further work by the WTO toward completing its unfinished agenda of opening markets to foreign goods and services be a more effective means of promoting the contestability of markets? The closer countries move toward open market access, the less opportunity there will be for RBPs to be pursued in domestic and international markets. Accordingly, the WTO should stick

77. See WGTCP 1998 Report, *supra* note 39, at 21 para. 59.

to its assigned role by completing the unfinished agenda of reducing and eliminating government barriers to trade in goods and services. Promoting liberal trade, coupled with fostering an open investment climate, should be the WTO's focus. These goals in themselves are part of competition policy, although they go by different names. This approach can be defended on the economic ground that competition would be enhanced more by trade liberalization than by the introduction of new WTO rules relating to national competition laws and international cooperation. It can be defended on the legal ground that the traditional GATT-WTO portfolio has been to focus on governmental measures affecting conditions of competition.

The legal and economic framework within which international rules on competition policy would be negotiated and agreed upon is an important one. But equally, if not more important, is the political context. A WTO approach to trade and competition policy, as just described, is preferable to an agreement on competition policy on the political ground that the time is not ripe for detailed discussions under WTO auspices on the harmonization of national competition laws and policies.⁷⁸ Do countries have the political will and desire to reach agreement on international competition policy? The United States opposes any agreement on competition policy negotiated under WTO auspices, while the EU is its chief proponent.⁷⁹ So where do the parties go from here?

From the foregoing discussion, it can be safely said that if market access is prevented by RBPs, then those practices have cross-border effects and, consequently, such practices pose a threat to international competition. Is the harm sufficient that an international response is necessary? Are national competition laws adequate to the task of addressing the problem?⁸⁰ The major players in the international trade arena—the EU, Japan, and the United States—have antitrust legal regimes in place. A great deal of divergence, however, exists among those systems. What is more, even assuming aggressive enforcement by national authorities, their focus will tend to be on the national impact of anti-competitive business practices, not on their international ramifications. An example of

78. See *id.* at 25-26 para. 75.

79. See *U.S. Opposes Plan to Negotiate Agreement in WTO, Officials Say*, 14 Int'l Trade Rep. (BNA) 2034 (1997). See generally Fox, *supra* note 22 (concluding that previous experience has led the EU to pursue worldwide efforts on world competition, while the United States has been reluctant to pursue the such efforts).

80. *Intellectual Property Rights, Economic Power, and Global Technology Integration*, 72 CHI.-KENT L. REV. 463, 470 (1996) (questioning the effectiveness of national competition laws).

the inconsistent treatment caused by this myopic perspective is the Boeing/McDonnell Douglas merger in 1995. The Federal Trade Commission gave unqualified approval to the merger, yet the EC Commission attached several conditions to its approval. Interestingly, the Boeing/McDonnell Douglas merger was not a consequence of the growth of international trade or of foreign direct investment. Yet certain conflicts of jurisdiction in the area of competition law enforcement arose as a direct consequence of the growth of international trade and of foreign direct investment.

In addition, the countries most vulnerable to restrictive business practices are also the countries least capable of combating them: developing countries. Although more and more developing countries and transition-economy countries have adopted competition laws, most of them have not. One defensive (and cheap) response has been to protect local firms and infant industries by restricting access of foreign investors and foreign traders to their markets. The upshot is the impoverishment of the protectionist country, damage to international competition, and an overall decline in aggregate world wealth.

On the other hand, national regulation of restrictive business practices—augmented by bilateral cooperation agreements—while perhaps less efficient, is arguably a more effective way to address the problem of cross-border antitrust violations. Regulation at the international level creates additional transaction costs, raises concerns of political legitimacy within the country where business conduct is being challenged, and thus could strain international relations. While bilateral agreements on antitrust cooperation and information sharing between countries are useful, the ultimate goal could be a multilateral agreement harmonizing the antitrust laws of all nations. At present, the WTO Dispute Settlement Body is an untested forum for resolving competition policy disputes. But harmonization is a lofty goal, especially in light of each nation's strong self-interest in the field of competition law and policy. Would not international regulation of restrictive business practices avoid duplication of effort at the national level by several national authorities? The answer given by Judge Diane Wood is that “the existence of many authorities does not itself make the case for internationalization, because competition cases in the end deal with competitive conditions in particular countries.”⁸¹ The legal approach taken by the GATT and WTO agreements in addressing

81. Wood, *supra* note 58, at 5.

the trade-competition policy relationship has been anything but coherent or comprehensive. But the legal approach taken to address the issue matters very little if the political will is lacking to conclude an international agreement. Moving the key players to the point where they perceive it to be in their national interest to have such international rules is the crucial first step. Once that threshold is crossed, the question of the legal vehicle by which to negotiate these rules can be explored, whether as a stand-alone international convention, such as the ill-fated OECD Multilateral Agreement on Investment, or under the auspices of another international organization, such as the WTO. If such an agreement is to be negotiated, close attention must be paid to whether it makes economic, legal, and political sense to negotiate it within a broader international legal regime, such as the GATT-WTO system, or as a stand-alone agreement negotiated under the auspices of the United Nations or the OECD. Fortunately, we have real-world experiences by which to judge the success of bilateral and regional agreements on competition policy. On the other hand, elevating those bilateral and regional efforts to the multilateral plane takes us into uncharted waters. A large body of scholarship and studies has accumulated over the last ten years that advocates adoption of multilateral competition rules under WTO auspices. Powerful WTO members, most notably the EU, have weighed in favor of a WTO agreement on competition policy.

Yet several essential conditions must exist before negotiating and successfully concluding such an agreement. The first condition is a consensus among policy makers as to what constitutes prohibited, anti-competitive behavior by private firms and the value of having an open trade environment. Because of different political and economic philosophies among WTO members as to the proper role of government in the national economy and in regulating private business behavior, that consensus is lacking. For example, what types of business behavior should constitute a *per se* violation of competition laws and what conduct should be subject to a balancing test (a rule of reason) that weighs the pro-competitive effects of business behavior against its anti-competitive effects? Again, a consensus does not exist.

The second condition is a consensus on the optimal legal instrument for promoting competition policy. Here again, issues of national sovereignty, especially within the United States, point in the direction of national rules enforced extraterritorially and bilateral legal instruments to address transborder antitrust problems.

Closely related to the national sovereignty hurdle blocking a multilateral antitrust agreement are powerful, and too often underestimated, sentiments of nationalism and national pride that prevent a consensus from building for a multilateral agreement. This sentiment runs especially strong when the topic is protecting national champions from being out-competed by foreigners. These strong nationalistic proclivities undermine efforts to conclude a multilateral competition policy agreement, either under WTO auspices or in any other forum.

The third condition is a consensus on the best forum for negotiating multilateral rules on antitrust and the structure of those negotiations. Many solid arguments can be made for holding such negotiations in the WTO. Even better arguments can be made for assigning responsibility for developing international competition rules to the OECD, which has studied this question extensively. Assigning to the WTO the task of policing private conduct would expand its portfolio substantially. The WTO and its predecessor, GATT, have had as their *raison d'être* the elimination of *government* barriers to international trade and, under the GATS, services as well. This historical fact does not necessarily dictate that the WTO's mandate and focus remain on government barriers to trade to the exclusion of private anti-competitive conduct in perpetuity. Nevertheless, until the WTO has fulfilled its primary mandate, that is, until it has completed the unfinished business of eliminating the many government-supported barriers to market access—barriers that are far and away more important economically than any private barriers to market access—it would be premature, ill-advised, and dangerous to the health of the institution to expand its mandate.

While the WTO is not *in extremis*, constitutionally it is not sufficiently robust to resolve satisfactorily all competition policy disputes between its members. Although the WTO might indeed be a natural forum for negotiating such an agreement, as suggested by some scholars,⁸² because of the opportunities for using bargaining chips and making trade-offs among and between trade sectors, the single undertaking, "package deal" approach that characterized the Uruguay Round makes the WTO a far less promising forum for successfully negotiating a competition policy agreement whose terms would be considered acceptable to all WTO members. On

82. See Ernest-Ulrich Petersmann, *International Competition Rules for Governments and for Private Business: A Trade Law Approach for Linking Trade and Competition Rules in the WTO*, 72 CHI.-KENT L. REV. 545, 560-61 (1996).

the other hand, if the structure of negotiations is one that includes many agenda items, the opportunity then exists for compensating a WTO member with a concession in the services sector, for example, in exchange for a concession it makes in the competition policy negotiations.

The fourth condition is a consensus that a comprehensive, global approach to addressing restrictive business practices under WTO auspices is preferable to deepening and broadening the existing patchwork of bilateral and regional agreements, complemented by the restrictive business practice provisions in several WTO agreements. While more bilateral agreements might not be a bad development, bilateral cooperation agreements do not address the issues of countries with no competition law or of countries where competition laws are either not enforced or are weakly enforced. Regional agreements based on minimum RBP standards work best among countries with common cultures, histories, and legal traditions. The Australia-New Zealand Closer Economic Relations Agreement (ANZCERTA) and the EU are examples. Indeed, such commonalities may be necessary conditions.

The fifth condition is a consensus that it is in each country's national, economic self-interest to conclude a multilateral agreement on competition policy. Such a consensus unquestionably developed in the case of trade in goods, as evidenced by the broad-based membership in the WTO. But even then many countries' commitment to the goal of free trade has been less than unflagging over the past fifty years, and the consensus, such as it is, took over two hundred years to develop from the time Adam Smith and David Ricardo first wrote on the economic benefits of liberal trade.

The sixth condition is a consensus that a WTO agreement on competition policy is to reduce the friction caused by the extraterritorial application of national antitrust laws. As noted in a 1984 OECD Report on Competition and Trade Policies, "[a]lthough there seems to be growing observance of moderation and self-restraint, in the absence of multilaterally agreed upon criteria, unilateral approaches are not likely to be successful in resolving all conflicts which may arise."⁸³ That assessment begs the question: would an international agreement on RBPs be any better at resolving, or at least reducing, the frictions? At present, international antitrust enforcement in today's global economy is characterized by three features: (1) the extraterritorial application of a country's

83. OECD, *COMPETITION AND TRADE POLICIES: THEIR INTERACTION* 138 (1984).

antitrust laws to conduct occurring wholly or partly outside that country where such conduct causes anti-competitive effects in that country; (2) cooperation between national authorities in the enforcement of their competition laws; and (3) the adoption of principles on positive comity to avoid disputes arising from a country's failure to prevent RBPs that occur in its territory that cause injury to another country.⁸⁴ The current legal regime for cross-border enforcement of competition law—largely bilateral, less often regional—is not frictionless. If developing and applying international rules on competition policy are the preferred solution for resolving cross-border antitrust disputes, how are such international rules to be enforced? Are lapses in enforcement to be punished through trade sanctions? Would the imposition of trade sanctions be consistent with the WTO's mission of promoting liberal trade? Would such an international sanctioning mechanism reduce international friction or only exacerbate it?

The WTO, as a forum for sorting out questions of conflicting and overlapping jurisdiction between national enforcement authorities, is no desideratum. Indeed, to the extent that rules on international antitrust enforcement are multilateralized under WTO auspices, the greater the risk of heightened global tensions among WTO members. The WTO dispute settlement mechanism cannot itself eliminate or reduce political friction. The experience from the protracted *Hormone Beef* and *Bananas* disputes teaches that WTO dispute settlement, as improved as it is from its GATT predecessor, has not been the silver bullet that its supporters thought it would be. As Professor Russell Weintraub notes, "Folks who cannot prevent the banana war between the United States and the European Union are not ready for so ambitious a project as unifying antitrust law."⁸⁵ On the contrary, the WTO dispute settlement mechanism has at times increased trade tensions. The dispute settlement mechanism might give the victorious WTO member international bragging rights, but it does little to reduce frictions and might instead inflame the losing party. The wrenching experience of the *Hormone Beef* and *Bananas* disputes, coupled with the pointless *Antidumping Act of 1916* complaint and dispute settlement proceeding, provides ample support for the view that

84. See Crystal L. Witterick, *Regulation of Competition in the Canada/U.S. Context—Extraterritorial Reach of U.S. Antitrust Law A Canadian Perspective*, 24 CAN.-U.S. L.J. 299, 299-300 (1998).

85. Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27, 35 (1999) (footnote omitted).

the WTO cannot be expected to act as the parent that disciplines the unruly child whenever it misbehaves.

In the end, experience shows that the good will of the disputing parties is the essential ingredient to bringing a WTO dispute to a mutually satisfactory conclusion. Even if WTO members were to take a minimalist approach and agree to certain common rules on restrictive business practices, asking the WTO to step in to resolve an international antitrust dispute would not necessarily reduce international friction. On the contrary, it could exacerbate tensions if it meant condemning an antitrust enforcement action that the WTO member deemed to be in its national interest. If a WTO agreement on competition policy was adopted, how would the alleged failure of a WTO member to enforce its national competition laws be satisfactorily resolved? Can WTO panelists—even competition law experts—fully appreciate a WTO member’s national competition laws and the policies that inform it? If antitrust law enforcement is turned over to the traders, will the enforcement focus shift from protecting competition and consumers to protecting domestic producers from import competition? A good international trade agreement (“good” meaning a trade agreement that liberalizes trade and opens markets) may reduce international friction by integrating national economies into a global economy of mutual dependency. But a good international agreement on competition policy may increase political tensions in both the near and long term. Again, the experience to date with the WTO dispute settlement process provides ample support for the view that closer economic integration is not a course that always runs smooth.

Should non-enforcement of national competition laws constitute GATT nullification or impairment? Is a WTO panel competent to judge what constitutes an appropriate exercise of discretion by national antitrust enforcement agencies? The WTO lacks the authority and competence to adjudicate individual competition cases and to enforce antitrust laws.⁸⁶ The obstacles to reaching a multilateral agreement on conduct deemed anti-competitive, coupled with the difficulties of presenting sufficient evidence in a WTO panel proceeding, would undermine the integrity and acceptance of the results of the WTO dispute settlement process. Clear, bright-line legal standards of what is or is not a prohibited anti-competitive practice are an absolute necessity if the WTO is to assume the role of global antitrust adjudicator. That kind of global

86. See James Rill, *Comments*, in *BROOKINGS TRADE FORUM*: 1998, at 382.

consensus across a broad spectrum of RBPs, however, is not even on the distant horizon.

Assuming that an adequately robust and credible dispute settlement process exists or can be fashioned at the WTO to resolve trade-related competition law disputes, do the WTO members have the will to abide by adverse dispute settlement decisions? Given the WTO's track record to date of panel and Appellate Body reports being ignored by the losing WTO member, the precondition of a robust and credible dispute settlement mechanism has not been satisfied. It is ironic that the chief advocate of a WTO competition policy agreement, the EU, is also the WTO member with arguably the worst record of compliance with WTO panel and Appellate Body rulings. The EU has raised the practice of foot dragging to an art form given its record of non-compliance with the WTO's rulings in the *Bananas* and *Hormone Beef* disputes.⁸⁷ Its decision to bring WTO dispute settlement proceedings challenging the U.S. Antidumping Act of 1916 and Section 301 of the Trade Act of 1974 has been nothing short of reckless. In fairness to the EU, the same could be said of the United States in bringing the *Bananas* complaint in the first place. The incessant bickering between the United States and the EU has put tremendous stress on the WTO dispute settlement mechanism.

As an alternative to binding dispute resolution, it has been suggested that simply exposing anti-competitive business practices is itself sufficient to bring about a change in firm behavior. In Sweden, for example, under its 1946 competition law, enforcement authorities had investigatory powers and could announce their findings, but had no authority to prosecute violators. Making information about these firms and their RBPs public was deemed sufficient to convince them to respect the law and desist from their anti-competitive practices.⁸⁸ In short, the most effective policy for

87. See Daniel Pruzin, *EU Initiates WTO Complaint Against U.S. Carousel Retaliation*, 17 Int'l Trade Rep. (BNA) 884, 884 (June 8, 2000); Joe Kirwin & Gary G. Yerkey, *EU Proposes Amended Legislation to Outlaw Growth Hormone; Seeks Lifting of Sanctions*, 17 Int'l Trade Rep. (BNA) 854, 854 (June 1, 2000); *USTR Steps Up Pressure on EU to Comply with Beef and Banana Rulings*, 17 Int'l Trade Rep. (BNA) 853, 853 (June 1, 2000); Jane Winebrenner, *No Progress Made at EU-U.S. Summit on FSC Proposal, Beef, and Bananas*, 17 Int'l Trade Rep. (BNA) 852, 852 (June 1, 2000); Gary G. Yerkey, *Farmers Urge USTR to Hit New Countries in Disputes with Europe over Beef, Bananas*, 17 Int'l Trade Rep. (BNA) 884, 884 (June 1, 2000).

88. See Yves Bourdet, *Policy Toward Market Power and Restrictive Practices*, in INTERNATIONALIZATION, MARKET POWER AND CONSUMER WELFARE 301 (Yves Bourdet ed., 1992).

combating RBPs may be a policy of competition advocacy that promotes transparency, rather than competition enforcement.⁸⁹

The seventh condition concerns some meeting of the minds on the issue of merger control. Having more than one jurisdiction examine the anti-competitive effects of a merger increases the transactions costs of the parties and adds to legal uncertainty. One of the rationales for the 1989 EU Merger Control Regulation was to eliminate the transaction costs associated with multiple filings with EU-member state antitrust enforcement authorities by giving the European Commission exclusive jurisdiction over mergers with a "Community dimension."⁹⁰ At a minimum the costs of pre-merger reporting and notification requirements are increased because firms are required to make multiple filings with several different competition authorities under penalty of fines and other sanctions. Just how onerous these multiple pre-merger notification filings are is the subject of some anecdotal dispute. Although it may not be true across the board, firms engaged in large M&As will generally be sophisticated enough to retain knowledgeable counsel for whom multiple pre-merger filings are routine. Of course, being routine does not mean cost-free. But as a percentage of the deal, the transaction costs associated with multiple pre-merger notifications are *de minimis*. Moreover, given that national competition authorities will be asking precisely the same questions of the parties in most cases, the same information that is collected for completing one pre-merger notification can be used for all others.

The legal uncertainty associated with multiple M&A filings presents a concern of a slightly different dimension. It is possible that one national authority will approve a proposed merger unconditionally, while another will impose conditions or reject it altogether. The Boeing/McDonnell Douglas merger illustrates the point, with the Federal Trade Commission giving its unconditional approval to the merger, and the European Commission balking unless Boeing agreed to several conditions. Overlapping jurisdiction because of extraterritorial enforcement of competition law not only can create legal uncertainty, but can also be a source of political friction. That said, it does not necessarily follow that the only possible solution to this predicament is a multilateral one in

89. See Jose Tavares de Araujo, & Luis Tineo, *The Harmonization of Competition Policies Among Mercosur Countries*, 24 *BROOK. J. INT'L L.* 441, 443 (1998).

90. In the first recital of its preamble, the Merger Control Regulation provides that multiple notification of the same transaction increases legal uncertainty, effort and cost for companies, and may lead to conflicting assessments. 1997 O.J. (L 180) 1; Council Regulation 4064/89, 1989 O.J. (L 395) 1, *as amended*, 1990 O.J. (L 257) 13.

the form of a WTO competition policy agreement. The cure of a multilateral mechanism for resolving such conflicts may be worse than the disease. The heavy mix of law and policy when national authorities evaluate a merger implicates deep-rooted feelings of national sovereignty. Reformers ignore this inconvenient fact at their peril.

Rather than reach for a multilateral solution, bilateral solutions that take the form of mutual cooperation agreements, or unilateral solutions in the form of comity and wise self-restraint, are immediately "doable." For example, when Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, amending the Sherman Act and requiring pre-merger notification, the law was essentially unlimited in its jurisdictional reach. Subsequent regulations tempered the Act's reach by introducing principles of comity in the exercise of jurisdiction under the Act.⁹¹ Bilateral and unilateral solutions also take better account of the legal and political realities that a multilateral solution either ignores or papers over.

The eighth condition is a consensus that responsibility for international competition policy should be taken out of the hands of national competition enforcement authorities and placed in the hands of trade officials. Taking such a step would have profound consequences for competition policy. Although the purposes of trade and competition policy are broadly the same—to open markets, enhance efficiencies, and increase world wealth—the two bodies of law and their underlying policies are not entirely congruent. To cite just one example, trade policy officials may deem as unlawful all vertical restraints that block or impede market access without asking, as would national antitrust enforcement authorities, whether such restraints create efficiencies that, on balance, maximize consumer welfare. The *U.S.-Japan Film* dispute is a case in point that demonstrates this policy disconnect.⁹²

V. MAINTAIN THE STATUS QUO?

Of the options available at the WTO with regard to competition policy—a minimum standards agreement on competition policy, a framework agreement on competition policy, the introduction of more competition principles into existing WTO agreements, or maintaining the status quo—the option that seems the most sensi-

91. See 43 Fed. Reg. 33,497 (1978).

92. See generally William H. Barringer, *Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute*, 6 GEO. MASON L. REV. 459 (1998) (discussing the Kodak Section 301 case and the WTO case filed by the United States).

ble at present is to maintain the status quo. In support of maintaining the status quo, it can be argued that the WTO's priorities should be on removing government barriers to trade, including restrictions on foreign direct investment. Trade and investment liberalization, the argument runs, are the most powerful pro-competitive instruments immediately available to the WTO. A WTO agreement on competition policy could be a solution in search of a problem. With the exception of the *U.S.-Japan Film* dispute, the absence of competition law issues in GATT-WTO jurisprudence implies that anti-competitive practices are not a significant issue in the context of international trade and market access.⁹³

Moreover, the GATT-WTO system offers more to its members than just a forum for consulting *inter se* on the trade and competition policy relationship. Existing GATT-WTO instruments contain the bases for making legal challenges to private RBPs affecting trade. GATT Article XXIII:1 provides that a contracting party may initiate a dispute settlement proceeding if it:

should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement,
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation, . . .

The threshold question in determining which type of Article XXIII proceeding may properly be brought is whether the existence of private RBPs that restrict trade constitutes a violation of GATT 1994⁹⁴ or of a WTO Agreement, or whether it instead comes under the heading of non-violation nullification or impairment. As explained more fully below, each type of Article XXIII:1 proceeding carries with it distinct procedures and remedies.⁹⁵

93. See J. Michael Finger & K.C. Fung, CAN COMPETITION POLICY CONTROL 301?, 49 *AUSSENWIRTSCHAFT* 379, 380 (1994) (analyzing complaint data from the mid-1980's to mid-1990's and concluding that antitrust violations have not been a factor in the filing of Section 301 petitions).

94. GATT 1994 consists collectively of the following legal instruments: GATT 1947, as amended and modified; waivers granted under GATT 1947 and still in force on the date of entry into force of the WTO Agreement; the Marrakesh Protocol, to which the WTO Members schedules of market access commitments are appended; and the six Uruguay Round Understandings included in Annex 1A that amend and clarify GATT 1947.

95. See Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles Heel of the Dispute Settlement Process?* 39 *HARV. INT'L L.J.* 311, 328 (1998) (analyzing

A. *Article XXIII:1(a) Nullification or Impairment Complaints*

Outside of the specific contexts of a WTO agreement with competition law commitments⁹⁶, a WTO member would have a difficult, if not impossible, task of establishing that another member has violated GATT by failing to enact competition laws or to enforce its competition laws. No specific provision of GATT 1994 imposes a general obligation on WTO members to enact, maintain, or enforce a national competition law. Nevertheless, there are several situations in which a WTO member could be found to be in violation of a GATT 1994 article or one of the WTO agreements with competition policy provisions.

First, if a WTO member has authorized a private firm to act as an import monopoly, such a monopoly would violate GATT Article II:4 if it treated imports in such a way “so as to afford protection on the average in excess of the amount of protection provided for” in the member’s tariff binding for that imported product. Thus, for example, if an import monopoly were to mark-up the price of imported goods on grounds other than “normal commercial considerations,” such a price mark-up would violate Article II:4,⁹⁷ regardless of whether the imports were still competitive with the like domestic product despite the price mark-up.

Could an import cartel or an exclusive distribution network be found to violate Article II:4? Recall that Article II:4 provides, “[i]f any contracting party establishes, maintains or authorizes, formally or *in effect*, a monopoly of the importation of any product . . . [emphasis added].” If an import cartel or exclusive distribution network refused to deal in the goods of foreign producers or exporters, and a contracting party failed to take action against the cartel or network, would not the toleration of that anti-competitive activity violate Article II:4? Despite the fact that there would be an absence of formal government authorization of the anti-competitive activity, the importing country’s toleration of that activity would *in effect* establish, authorize, or maintain an import monop-

Article XXIII:1); Hudec, *supra* note 23, at 89-91. A majority of the members of the International Competition Policy Advisory Committee believes that the WTO as a forum for review of private RBPs is not constructive. See INT’L COMPETITION POL’Y REP., *supra* note 50, at 274.

96. Examples of such agreements include the TRIPS Agreement and its provisions, an abuse of intellectual property rights (IPRs) in licensing agreements or the GATS and the competition policy principles agreed to in the Reference Paper to the Agreement on Basic Telecommunications.

97. See Report of the GATT Panel, Canada? Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 27, 85-86 paras. 4.5-4.8.

oly. The cartel's or distribution network's refusal to deal would be the functional equivalent of a trade-prohibitive tariff, and would clearly frustrate the benefit of the bargain reflected in the tariff binding listed in the importing member's schedule of tariff concessions. The language of Article II:4 is certainly broad enough to include types of "protection" other than price mark-ups ("such monopoly shall not . . . operate *so as to afford protection* on the average in excess of the amount of protection provided for in that Schedule" [emphasis added]). In this connection, the Interpretative Note to Article II:4 is instructive. It states that Article II:4 is to be interpreted in light of the provisions of Article 31 of the Havana Charter. Article 31.5 provides that import monopolies are to import and offer for sale such quantities of the product as are sufficient to satisfy the full domestic demand for the imported product. Therefore, the obligations of Article II:4 arguably cover conduct that denies imported goods the opportunity to compete with domestic goods.⁹⁸

Second, the national treatment obligation of GATT Article III:4 requires that imported products receive treatment no less favorable than the like domestic product in connection with national "laws, regulations or requirements *affecting* their internal sale, offering for sale, purchase, transportation, distribution or use . . . [emphasis added]." It is worth recalling that the GATT drafters did not use the word "governing," implying that Article III:4 covers laws and regulations that might adversely affect the conditions of competition between the domestic and imported products in the internal market. Competition law obviously is such a national law, regulation, or requirement within the meaning of Article III:4.⁹⁹ Article III:4 could, therefore, be the basis of an Article XXIII:1(a) complaint if an importing country's competition laws discriminated against imported goods vis-a-vis the like domestic product either *de facto* (a measure that in its application upsets the competitive relationship between domestic and imported goods as it existed at the time when a relevant tariff concession was

98. See, e.g., Report of the GATT Panel, Republic of Korea B Restrictions on Imports of Beef, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 202, 300 para. 106 (advising that an import monopoly was not to charge on the average a profit margin which was higher than that which would be obtained under normal conditions of competition in the absence of the monopoly).

99. See Report of the WTO Panel, United States Anti-Dumping Act of 1916, WT/DS162/R, para. 6.269 (2000) (ruling that the Anti-Dumping Act of 1916 is an internal law within the scope of Article III:4) [hereinafter Anti-Dumping Act of 1916 Dispute].

granted) or *de jure* (a measure that on its face discriminates against imported products).¹⁰⁰

The subject matter of the complaint would not be private anti-competitive behavior, but rather the discriminatory application of national competition law to imports compared to domestic products in a manner that upsets the competitive relationship between the two. As noted earlier, Article III does not employ a trade effects test; instead, the inquiry is whether national legislation upsets "effective equality of competitive opportunities."¹⁰¹ Such discrimination covers not only the substantive provisions of competition law, but also its procedural provisions. Thus, for example, if a country's competition law gave domestic firms a right to file a private antitrust lawsuit against anti-competitive conduct within their national market, but denied such a right to foreign firms whose exports to that market were being blocked by anti-competitive behavior within that market, a *prima facie* case of GATT nullification or impairment would be made out under Article III:4.

Similarly, if competition laws were enacted that targeted foreign firms and their imported products, but without any parallel legislation in place targeting domestic firms, an Article III:4 claim might exist. In the 2000 panel and Appellate Body reports on *United States—Anti-Dumping Act of 1916*,¹⁰² the EU and Japan complained that the Anti-Dumping Act of 1916 violates Article III:4, *inter alia*, because imported products could be the subject of a U.S. legal proceeding alleging price discrimination under a trade law remedy (i.e., the antidumping duty law¹⁰³), or under a competition law remedy (i.e., the Anti-Dumping Act of 1916¹⁰⁴), whereas domestic firms could only be subject to an action for price discrimination under the Robinson-Patman Act.¹⁰⁵ In addition, the EU and Japan claimed that the 1916 Act violates Article III:4 of GATT 1994 to the extent that it provides less favorable treatment to imported goods than is granted to U.S. goods under the Robinson-Patman Act in terms of the difference in (1) pleading requirements, (2) the use

100. See Report of the WTO Panel, Japan Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, para. 10.20 (adopted Apr. 22, 1998) [hereinafter U.S.-Japan Film Dispute].

101. *Id.*

102. See Report of the WTO Panel, United States Anti-Dumping Act of 1916, WT/DS162/R (2000); Report of the Appellate Body, United States Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R (2000).

103. See 19 U.S.C. §§ 1673-1673g (1988).

104. See 15 U.S.C. §§ 71-74 (1994).

105. See 15 U.S.C. § 13(a) (1994).

of the intent requirement in the 1916 Act instead of a requirement of “effect” under the Robinson-Patman Act, (3) the cost recoupment requirement, (4) the statutory defenses available under the Robinson-Patman Act and not expressly provided for in the 1916 Act, and (5) the conduct subject to penalties.¹⁰⁶

In exercising the principle of judicial economy, the panel and the Appellate Body disposed of the dispute in favor of the EU and Japan on other grounds and declined to examine the question whether the 1916 Act violates the national treatment obligation.¹⁰⁷ Nevertheless, the 1989 GATT panel report in *Section 337 of the Tariff Act of 1930* is instructive and strongly suggests that the EU and Japan had a compelling Article III:4 claim.

Following a complaint by the European Community, in January 1989, a GATT panel issued a report in which it agreed with the EC that Section 337¹⁰⁸ violated the national treatment obligation of GATT Article III:4. The panel found that Section 337 discriminated against imported articles vis-a-vis the domestic like product in six respects.¹⁰⁹ First, a Section 337 complainant had a choice of two fora—the International Trade Commission or federal district court—in which to challenge imported articles that allegedly infringed IPRs, whereas articles manufactured domestically in the United States could only be challenged in federal court. Second, foreign producers and importers of challenged products were at a potential disadvantage vis-a-vis their U.S. domestic counterparts, given the strict time limits applicable in Section 337 proceedings, with no corresponding time limits applicable in federal court actions. Third, a Section 337 respondent could not bring a counterclaim (*e.g.*, a counterclaim alleging an antitrust violation by the complainant for abusing its exclusive rights under a patent, trademark, or copyright), whereas a federal court defendant had that option. Fourth, relief in the form of a general exclusion order against infringing imports was available in a Section 337 proceeding. In contrast, no corresponding remedy was available against infringing articles of U.S. origin in a federal court proceeding. Fifth, exclusion orders were automatically enforced by the U.S. Customs Service, whereas any injunctive relief ordered by a federal court in a private civil action required for its enforcement separate

106. See Anti-Dumping Act of 1916 Dispute, *supra* note 99, para. 6.7.

107. See *id.* paras. 6.270-6.272.

108. Tariff Act of 1930, 19 U.S.C. § 1337(a).

109. See Report of the GATT Panel, United States—Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 391 para. 5.20.

contempt proceedings brought by the successful plaintiff. Sixth, foreign producers and importers of challenged imports faced the prospect of defending parallel or successive administrative and judicial proceedings. In contrast, products of U.S. origin were not exposed to the same gauntlet.¹¹⁰

The panel recommended that the United States amend Section 337 to remedy the inconsistencies with Article III:4. Although it took over six years, Congress finally did amend Section 337 in December 1994 to remedy the national treatment violations.¹¹¹

Applying the GATT panel's analysis to the Anti-Dumping Act of 1916, given that a domestic firm facing below-cost import competition has available two fora in which to proceed against such imported goods (i.e., an administrative as well as judicial forum), whereas below-cost, domestically-produced goods can only be the subject of legal proceedings filed in a judicial forum, the EU and Japan certainly had a colorable national treatment claim against the Anti-Dumping Act of 1916. Moreover, if, as alleged, the Anti-Dumping Act of 1916 subjects foreign defendants accused of price discrimination to more onerous legal requirements compared to similarly circumstanced domestic defendants accused of price discrimination under the Robinson-Patman Act, then such a disparity in competitive conditions would likewise draw into question whether the 1916 Act is consistent with the national treatment obligation.¹¹²

There is a third situation in which a WTO member could be found in violation of a GATT 1994 Article. If the WTO member's toleration or encouragement of an import monopoly, import cartel, or exclusive distribution network could be the basis for a GATT complaint under Article III:4, then the government's toleration or encouragement of a private export cartel could likewise be the basis of a GATT Article XXIII:1(a) complaint pursuant to Article XI, which prohibits import and export quotas. Assume that a group of firms within a country manufacture the same product for which

110. *Id.*

111. See F. David Foster & Joel Davidow, *GATT and Reform of U.S. Section 337*, 30 INT'L LAW. 97 (1996) (assessing the 1994 amendments to Section 337); Tom M. Schaumberg, *A Revitalized Section 337 to Prohibit Unfairly Traded Imports*, in THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 487 (1995).

112. A more difficult case to prove, but one which would implicate a national treatment violation as well, would be one claiming that national competition law enforcement authorities have exercised their discretionary enforcement authority in a discriminatory manner by bringing price discrimination cases against foreign exporters, while consistently declining to investigate or institute proceedings against domestic firms accused of the same or similar anti-competitive conduct in the domestic market.

the supply is insufficient to meet total world demand. They agree on their respective market shares and to limit the supply of the product exported to foreign markets in order to keep prices artificially high and thereby reap supranormal profits. National antitrust enforcement authorities might not have sufficient incentive to take action against the export cartel, so long as consumer welfare in their country is not being reduced. Would the failure of national antitrust enforcement authorities to break up the export cartel violate the Article XI prohibition on quantitative restrictions?

Article XI:1 is directed at governmental restrictions or prohibitions on imports or exports, “whether made effective through quotas, import or export licenses or other measures.” It does not discipline purely private conduct. A distinction could be drawn between government toleration of export cartel activity and government encouragement of such activity. While the former might successfully escape challenge under Article XI:1, the latter could be the basis for a GATT complaint. The 1988 GATT panel in *Trade in Semi-Conductors* ruled that “measures” include government conduct that is not legally binding or mandatory. In determining that “administrative guidance” from the Japanese government to Japanese exporters of semi-conductors was a “measure” for purposes of Article XI:1, the panel recognized that not all non-mandatory governmental requests to restrict exports could be regarded as measures within the meaning of Article XI:1. “Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors. There was thus a wide spectrum of government involvement ranging from, for instance, direct government orders to occasional government consultations with advisory committees,”¹¹³ the panel noted.

The reach of the *Semi-Conductors* ruling was tested in the *U.S.-Japan Film* dispute. The United States did not allege that Japan’s toleration of allegedly anti-competitive behavior by private actors violated GATT. Instead, the United States argued that Japan promoted the establishment of the exclusive distribution network for film.¹¹⁴ The United States attempted to link several seemingly unrelated acts by the Japanese government as proof of an Article XI:1 “measure.” While the panel did not fault the United States’ legal argument, it was unable to make a connection between the

113. See Report of the GATT Panel, Japan—Trade in Semi-Conductors, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 116, 154 para. 108.

114. See *U.S.-Japan Film Dispute*, *supra* note 100, at paras. 6.243-6.247, 6.609-6.612, 10.22.

acts of the Japanese government and the establishment of the exclusive distribution network.¹¹⁵

In light of the *Semi-Conductors* case, active government encouragement in the form of legislation that immunizes the hypothetical export cartel from competition law scrutiny would arguably be a "measure" that violates Article XI:1. Article XI:1, however, speaks in terms of affirmative government conduct that restricts or prohibits exports. Therefore, unless the mere acquiescence in such cartel activity would qualify as a "measure," government toleration of or acquiescence in an export cartel that divided markets and restricted the supply of its products for export to foreign markets would not violate Article XI:1. GATT 1994 generally limits governments in the action they may take to restrict trade flows, and does not impose on them an affirmative obligation to take positive steps to promote trade flows.

Fourth, GATT 1994 and other WTO agreements direct WTO members to restrict the activities of monopolies in at least four situations when those monopolies abuse their dominant position by restricting or preventing market access:

1. Private import or export monopolies established under GATT Article XVII.

Article XVII does not prohibit a member from establishing import or export monopolies, but it does regulate their operation and effects on trade when they make purchases or sales. Although no GATT or WTO panel has ever found a measure to be in violation of Article XVII itself, GATT panels have found that Article XVII state trading enterprises have violated the Article XI prohibition on import or export quotas and the national treatment obligation.¹¹⁶ Article XVII:1(b) also requires government-authorized import and export monopolies to "afford enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in [the monopoly's] purchases or sales." Thus, a WTO member that has authorized a private import or export monopoly could be found to be in violation of GATT if it allowed such a monopoly to, in effect,

115. *See id.* at paras. 10.39, 10.204.

116. *See, e.g.*, Report of the GATT Panel, Canada Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, Mar. 22, 1988, GATT B.I.S.D., (35th Supp.) 37, 90 para. 4. (finding a violation of Article XI); Report of the GATT Panel, Republic of Korea Restrictions on Imports of Beef, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 268, 301-02 paras. 114-15 (finding a violation of Article XI).

abuse its dominant position by acting in a manner inconsistent with the Article I most-favored-nation obligation or the national treatment obligation of Article III.¹¹⁷

2. GATS competition policy commitments.

The few instances where a WTO member has an affirmative obligation to take action against private anti-competitive behavior are to be found in the GATS and its subsidiary agreements.

a. Abuse of dominant position by monopoly service suppliers generally.

GATS Article VIII, *Monopolies and Exclusive Service Suppliers*, obligates members to ensure that any monopoly services supplier in its territory, whether public or private, does not act in a manner inconsistent with the GATS Article II MFN requirement, that is, it does not discriminate among foreign firms in the provision of services. That Article further requires that, with respect to services sectors covered in a member's schedule of market access commitments, members ensure that when a monopoly supplier, or an exclusive service supplier whose rights are granted by the government, compete in the supply of a service outside the scope of their government-granted rights, they do not abuse their monopoly position by acting in a manner inconsistent with that member's commitments on national treatment and market access for foreign service suppliers.¹¹⁸ The operative phrase in Article VIII is "[e]ach

117. See, e.g., Report of the GATT Panel, Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 27, 85 paras. 5.31; Report of the GATT Panel, Thailand Restrictions on Importation of and National Taxes on Cigarettes, 1990, GATT B.I.S.D. (37th Supp.) at 200, 223-26 paras. 76-81. Arguments have also been made that the national treatment commitment is incorporated by reference in Article XVII. GATT panels, however, have either declined to rule that the national treatment obligation is part of Article XVII or have suggested that it is not. See, e.g., Report of the GATT Panel, Belgian Family Allowances, Nov. 7, 1952, GATT B.I.S.D. (1st Supp.) at 59, 60 para. 4 (finding that national treatment obligation is not part of Article XVII); Report of the GATT Panel, Canada, Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 37, 90 para. 4.27 (disposing of the complaint on other grounds).

118. Article VIII provides in part:

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II [the MFN commitment] and specific [market access] commitments;
2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly right and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly

Member shall ensure,” language that is mandatory, not hortatory. The failure to observe these Article VIII commitments could be the basis for an Article XXIII:1(a) nullification or impairment complaint.

b. Abuse of dominant position by a monopoly service supplier in the basic telecommunications sector.

Effective antitrust laws can be an immeasurable aid to investors by preventing local monopolies from abusing their position toward new entrants. This is especially true for network industries, such as basic telecoms, where an investor may have to rely on local transmission facilities, typically owned by state monopolies, to provide a competitive service. The 1997 WTO Agreement on Basic Telecommunications contains important competition rules, the violation of which could be the basis for an Article XXIII:1(a) nullification or impairment complaint. The Negotiating Group on Basic Telecommunications developed a Reference Paper on competition principles that requires national telecom regulators to be established and to referee interconnection with former or existing telecom monopolies. In the context of a WTO member's duty to regulate anti-competitive behavior, the Reference Paper contains two highly relevant provisions: (1) those WTO members that have agreed to the terms of the Reference Paper must maintain appropriate measures for the purpose of preventing specific anti-competitive practices by major suppliers, such as cross-subsidization, withholding technical and commercial information, or using information obtained from competitors with anti-competitive results; and (2) WTO members must ensure that interconnection is cost-based, timely, and on non-discriminatory terms, rates, and quality.

This second provision is probably the most important one affecting market access because without interconnection, customers of one service supplier cannot communicate with customers of others. Although the Reference Paper identifies three types of conduct that may be anti-competitive—cross-subsidization, withholding technical information, and misusing competitors' information—it does not define the term “anti-competitive.” In the case of anti-competitive cross-subsidization, for example, anti-competitive behavior would presumably occur if a major service supplier that has market power were to use the supranormal profits it earns from that segment of the market to sustain a loss-making

position to act in its territory in a manner inconsistent with such commitments.

operation in a segment of the market where there is competition. This is only speculation, however. What would constitute anti-competitive behavior in situations involving withholding technical information and misuse of competitors' information is not clear. In addition, the Reference Paper does not specifically obligate members to prevent these anti-competitive practices, but only to adopt appropriate measures for the purpose of preventing them. This might put too fine a point on it. Without an obligation to take effective action to prevent these RBPs, the commitments made in the Reference Paper would ring very hollow indeed. GATT and WTO panels have seldom hesitated to give terms in GATT a generous reading that serves to promote the goal of market access.

Commentators have suggested that in order for the Reference Paper to be effectively implemented, a necessary precondition is the conclusion of a WTO agreement on competition standards—in effect, a reference paper for the Reference Paper.¹¹⁹ Others believe that such an auxiliary WTO competition principles agreement is not essential and place their faith in the ability of WTO panels to develop such competition principles.¹²⁰ Panels would draw from core competition law principles in ruling on whether private conduct is anti-competitive. In addressing private conduct where consensus on competition law principles breaks down, panels would presumably be guided by the objectives of the Reference Paper and of the Basic Telecoms Agreement itself, which are market access. Professor Robert Hudec writes:

Whatever the answers are [from WTO panels], they will only be answers for this one area of government-to-government legal relations, affecting only the private firms involved in that sector of the economy. There would seem to be no good reason why the answers given by dispute settlement panels would be any less acceptable than in any other area of WTO law. There is not threat here to the integrity, and sovereignty, of national competition laws. Just a slight dent, perhaps, in their pretensions as exclusive arbiter.¹²¹

This “one area of government-to-government legal relations, affecting only the private firms involved in that sector of the economy,” as Professor Hudec describes it, was a \$600 billion industry in 1997 and, by one estimate, is expected to double or triple over ten

119. See Marco C.E.J. Bronckers & Pierre Larouche, *Telecommunications Services and the World Trade Organization*, 31 J. WORLD TRADE 5, 26-28 (1997).

120. See Hudec, *supra* note 23, at 93.

121. *Id.* at 93-94.

years.¹²² In 1999, world export trade in commercial services was \$1.34 trillion.¹²³ His assessment may also underestimate the power of competition law enforcement authorities and their sensitivity to “turf” issues. And although he does not spell out what the objectives of the Reference Paper are that would guide WTO panels in their formulation of competition law principles in non-core competition policy areas, it is worth remembering that market access *über alles* is the trade policy mantra. Efficient markets in the service of consumer welfare is the competition policy pole star. This is a critical policy difference, one where trade policy and competition policy are a poor fit. The seeds of conflict may be sown if mediating this tension is left to WTO panels.

- c. Denial of market access to the financial services sector by government-authorized monopolies and other private organizations.

Pursuant to the GATS Understanding on Commitments in Financial Services, members must list in their schedule of financial services commitments existing monopoly rights and “shall endeavor to eliminate them or reduce their scope.”¹²⁴ Regarding national treatment violations by private organizations, when membership or participation in any self-regulatory body, securities or futures exchange, or any other organization is required by a member as a condition of supplying a particular financial service on an equal footing with resident financial service suppliers, members must ensure that such entities accord national treatment to non-resident financial service suppliers.¹²⁵

These are two of the rare instances where GATT-WTO provisions impose an affirmative competition policy obligation on WTO members to ensure market access by eliminating or reducing the market power of financial services monopolies, public or private, and to ensure that foreign financial services suppliers have access to membership in private exchanges and other self-regulatory bodies.

122. See Statement of Ambassador Charlene Barshefsky, Basic Telecom Negotiations, Feb. 17, 1997, available at <http://www.ustr.gov/agreements/telecom/barshefsky.html> (last visited April 22, 2000) (noting that today's \$600 billion industry will double or even triple over the next ten years under this agreement).

123. See 1999 WORLD TRADE ORG. ANN. REP. 9 (2000).

124. Understanding on Commitments in Financial Services, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Trade Negotiations Committee Doc. MTN/FA III-7(e) (Apr. 15, 1994).

125. See *id.*

3. Abuse of intellectual property rights.

Articles 8 and 40 of the TRIPS Agreement permit WTO members to take action against licensing practices that restrain competition and other measures against the abuse of intellectual property rights, respectively. The TRIPS Agreement, however, does not require the adoption of laws to prevent such abuses. If a member has such competition laws and proceeded against what it considered to be an abuse of TRIPS, another member would have a basis for an Article XXIII:1(a) complaint if the member's measures are inconsistent with the other provisions of the TRIPS Agreement.¹²⁶

B. *Article XXIII:1(b) Non-Violation Nullification or Impairment Complaints*

Although the overwhelming majority of GATT and WTO panel proceedings involve alleged breaches of GATT-WTO legal obligations, a WTO member may nevertheless complain that GATT benefits that were to accrue to it have been nullified or impaired because of GATT-legal conduct by another member or of any other situation. Although the non-violation remedy is an important and accepted tool of WTO-GATT dispute settlement for over 50 years, few non-violation cases have been decided and those that have been have all been decided under Article XXIII:1(b), none under Article XXIII:1(c).¹²⁷ This suggests that both the GATT contracting parties and WTO members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. The panel reports in the *EEC-Oilseeds* case and the *U.S.-Japan Film* dispute confirm that the non-violation nullification or impairment remedy should be approached with caution

126. See TRIPS Agreement art. 8, *supra* note 47, 33 I.L.M. at 87.

127. There have been nine cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. See Report of the GATT Panel, United States – Agricultural Waiver, BISD, Nov. 7, 1990, (37th Supp.) at 228; Report of the GATT Panel, EEC – Oilseeds, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86; Report of the GATT Panel, Japan - Trade in Semi-conductors, May 4, 1988 GATT B.I.S.D. (35th Supp.) at 116; Report of the GATT Panel, EC -Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, GATT Doc. L/5576 (unadopted, Feb. 7, 1985); Report of the GATT Panel, EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, GATT Doc. L/5778 (unadopted, Feb. 20, 1985); Report of the GATT Panel, Uruguayan Recourse to Article XXIII, Nov. 16, 1982, GATT B.I.S.D. (11th Supp.) at 95; Report of the GATT Panel, Treatment by Germany of Imports of Sardines, Oct. 31, 1952, GATT B.I.S.D. (1st Supp.) at 53; Report of the Working Party, Australian Subsidy on Ammonium Sulphate, Apr. 3, 1950, GATT B.I.S.D. II/188; *U.S.-Japan Film Dispute*, *supra* note 100; see also Cho, *supra* note 95, at 316-21; Ernst-Ulrich Petersmann, *Violation Complaints and Non-Violation Complaints in Public International Trade Law*, 34 GERMAN Y.B. INT'L L. 175, 192 (1991).

and treated as an exceptional concept.¹²⁸ The reason for this caution is straightforward: members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.

A claim of Article XXIII:1(b) non-violation nullification or impairment has three elements. A complaint must allege that (1) benefits accruing to the complaining member under GATT or a WTO Agreement have been (2) nullified or impaired (3) "by the application of another contracting party of any measure," although that measure is not prohibited under GATT or any WTO Agreement. The complaining party must submit a detailed justification in support of its complaint.¹²⁹ In GATT practice, non-violation nullification or impairment claims have arisen where a country that made a tariff concession thereafter acted in a way that frustrated the reasonable expectations of market access created by the concession.¹³⁰ The reasonable expectations element is a temporal element: a comparison must be made of the competitive relationship between the domestic and imported products at the time when a relevant tariff concession was made and at the current time. In order for a non-violation claim to succeed, the action taken by the responding member could not have been reasonably anticipated by the complaining member at the time the concession was first negotiated.¹³¹

The formal remedy available for an Article XXIII:1(b) proceeding differs slightly from the remedy available under Article

128. In EEC - Oilseeds, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept." Report of the GATT Panel, EEC - Payments and Subsidies Paid to Processors of Oilseeds and Related Animal-Feed Proteins, Feb. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86, 118 para. 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty." *Id.* para. 113. See U.S.-Japan Film Dispute, *supra* note 100, para. 10.36; see also EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION 2.27, 2.27-1 (noting that if all of these provisions were taken literally their potential scope would be enormous).

129. See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 26.1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND, Apr. 15, 1994, 33 I.L.M. 1125, 1127 [hereinafter DSU].

130. See Report of the GATT Panel, EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 para. 148; 2 WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 657-68 (1995).

131. See U.S.-Japan Film Dispute, *supra* note 100, at para. 10.76.

XXIII:1(a). The WTO Dispute Settlement Understanding (DSU) provides special procedures applicable to disputes involving non-violation nullification or impairment complaints. Under DSU Article 26.1, following a successful Article XXIII:1(b) complaint, the panel or Appellate Body is to recommend that the parties reach a mutually satisfactory adjustment of their dispute. The losing party is under no obligation to withdraw the offending measure or practice, but it must make “a mutually satisfactory adjustment” and compensation may be part of the final settlement.¹³² A successful Article XXIII:1(b) complainant is thus entitled to compensation and may retaliate if suitable compensation is not forthcoming.¹³³

A generalized Article XXIII:1(b) complaint that a member’s failure to maintain or enforce its competition law has left unchecked private RBPs within that member’s territory, which have prevented market access, probably would not be cognizable as an Article XVIII:1(b) claim. First, an Article XXIII:1(b) complainant must present “a detailed justification” in support of its claim that the responding member’s measure has upset the competitive position of the imported products in issue.¹³⁴ The complainant must establish the existence of a concession and then identify specific, affirmative conduct by another member—in the words of Article XVIII:1(b), “the application of another contracting party of any measure”—that has denied the complainant of the benefits of the concession, i.e., has put the imported products in issue at a competitive disadvantage. Thus, a causal connection must be established between the measure and the injury.

Second, in proving nullification or impairment of a benefit in the context of private anti-competitive conduct, the complaining member would have to show that it had a reasonable expectation that at the time it negotiated trade concessions with the responding member, the responding member would enforce its competition laws to prevent private barriers to market access.¹³⁵ If the private barriers were known to exist at the time the trade concessions were negotiated, however, then the complaining member is in effect estopped from raising them later on the ground that the complaining member should have specifically negotiated for their

132. DSU art. 26.1(b), (d), *supra* note 109, 33 I.L.M. at 1127.

133. *See* Hudec, *supra* note 23, at 90. It has also been suggested that a non-violation complaint proceeding can be a valuable transparency device. *See* Hoekman & Mavroidis, *supra* note 76, at 140-41.

134. *See* McGOVERN, *supra* note 128, 2.27-5, 2.27-6.

135. *See, e.g.*, Report of the Working Party, Australian Subsidy on Ammonium Sulphate, 1952, GATT B.I.S.D. (1st Supp.).

removal at the earlier negotiations.¹³⁶ The burden is on the responding member to show that prejudice to the benefits of the concession could have been anticipated at the time the concession was negotiated.

In evaluating whether a member's expectations are reasonable, the matter is straightforward at the polar extremes—the complained-of measure was either in effect at the time the concession was negotiated or it was not even contemplated. In a panel proceeding involving facts in between these two extremes, a GATT panel concluded that because of public discussions during the Tokyo Round negotiations of EC tariff preferences for citrus products from Mediterranean countries, the United States must have been aware that the value of the tariff concessions it received from the EC for such products would be adversely affected.¹³⁷ In a variation on these facts, in the *U.S.-Japan Film* dispute the panel concluded that a measure that is introduced after the close of tariff negotiations is presumptively unanticipated, but this presumption can be rebutted if the responding member shows that the new measure was clearly contemplated on the basis of a measure in place prior to the negotiations. Measures introduced before the close of negotiations, however, give rise to the opposite presumption. The complaining member is on notice of such measures from the date of their publication, and can only rebut the presumption by showing that it could not have reasonably anticipated their effect.¹³⁸

Regarding the third element, a “measure,” the failure to investigate or prosecute anti-competitive conduct within a member's territory would not likely qualify as a “measure,” unless that failure or refusal was based on a regulation or guideline promulgated by national enforcement authorities stating that certain conduct was exempt under the national competition laws. In this connection, the following statement by the panel in the *U.S.-Japan Film* report is worth noting: “a Member's industrial policy, pursuing the goal of increasing efficiency in a sector, could in some circumstances upset the competitive relationship in the market between domestic and

136. See Hudec, *supra* note 23, at 98-99 (noting that barriers cannot be considered a breach of expectations unless they were in fact not known at the time the bargain was actually made, on the theory that known hazards are always discounted in the prices paid in a deal).

137. See Report of the GATT Panel, EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, GATT Doc. L/5576, para. 4.34 (unadopted, Feb. 7, 1985).

138. See *U.S.-Japan Film Dispute*, *supra* note 23, paras. 10.79-10.81, 10.103.

imported products in a way that could give rise to a cause of action under Article XXIII:1(b).¹³⁹ The panel generally favored an expansive interpretation of the term. The term “measure” is thus broader than the term “requirement” used in Article III:4. Professor Hudec is undoubtedly correct when he states that “[d]oing nothing would not normally be considered a ‘measure,’ and on this point WTO tribunals are certain to require strict conformity with the words of the [non-violation nullification or impairment] remedy, given its exceptional character.”¹⁴⁰

When, if ever, could government inaction give rise to an Article XXIII:1(b) non-violation complaint? Consider, first, GATT Article VI on dumping. It does not obligate members from whose territory dumped exports are shipped to prevent such dumping.¹⁴¹ As a practical matter this makes sense, given that it is only injurious dumping that is condemned. The country of importation is in a much better position to investigate and access the injurious impact of dumped imports than is the country of exportation. Nevertheless, Article VI:1 does state that “contracting parties recognize that dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party.” Therefore, it is arguable that upon presentation of satisfactory evidence by the importing member that such injurious dumping is occurring or has occurred, an Article XXIII:1(b) case could be made.

Next consider GATS Article IX, *Business Practices*. The Article provides in part that “certain business practices of service suppliers, other than the practices mentioned in Article VIII, may restrain competition and thereby restrict trade in services.” Members are, therefore, under an obligation to enter into consultations with any other Member with a view to eliminating such RBPs. It also imposes a duty to cooperate by providing non-confidential information of relevance to the matter in issue. Thus, analogous to the American labor law rule that employers have a duty to bargain with unions but no duty to agree, WTO members have a duty to consult and cooperate, but no duty to eliminate offending RBPs.

139. *Id.* para. 10.38.

140. Hudec, *supra* note 23, at 99.

141. See Report of the GATT Panel, Canada Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140, 163 para. 5.18.

C. *Article XXIII:1(c) Non-Violation Complaints.*

The other non-violation complaint provision, Article XXIII:1(c), permits a complaint to be brought if benefits accruing to a member under GATT or a WTO agreement are being nullified or impaired "as the result of the existence of any other situation." A nullification or impairment complaint based a government's failure to take action against private RBPs could be the subject of an Article XXIII:1(c) complaint.

As rare as Article XXIII:1(b) complaints are, Article XXIII:1(c) complaints are even more rare. An example of a GATT Article XXIII:1(c) situation is a 1983 complaint by the EC against Japan that the benefits of successive negotiations with Japan had not been realized due to factors peculiar to the Japanese economy that had allegedly resulted in a lower level of imports. The EC ultimately did not pursue its complaint.¹⁴²

DSU Article 26.2 sets out special procedures applicable to GATT Article XXIII:1(c) complaints. The normal DSU procedures apply only up to the point where the panel report is circulated to the members. Beyond that point, the dispute settlement rules and procedures contained in the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures, apply to issues of adoption, surveillance, and implementation of recommendations.¹⁴³ This means that in GATT Article XXIII:1(c) cases, there is no Appellate Body review, and the GATT 1947 practice of adoption of panel reports by consensus, as opposed to the DSU rule of rejection by consensus, applies.¹⁴⁴

In the context of competition law complaints, as noted above, the failure or refusal of a member to either enact or enforce competition laws would probably not qualify for an Article XXIII:1(b) complaint because the member has not engaged in any affirmative conduct. That failure or refusal would, however, certainly amount to "the existence of any other situation" under Article XXII:1(c). Resolving the issue of nullification or impairment of a GATT benefit would require an examination of what the parties knew at the time they negotiated trade concessions about private conduct

142. See GUIDE TO GATT LAW AND PRACTICE, *supra* note 130, at 670-71. The only other Article XXIII:1(c) complaint is the Uruguayan Recourse to Article XXIII, 1965, GATT B.I.S.D. (13th Supp.) at 35, 45; Uruguayan Recourse to Article XXIII, Nov. 16, 1962, GATT B.I.S.D. (11th Supp.) at 95.

143. Section 337 of The Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 61.

144. Compare *id.* para. 1.3, with DSU art. 16.4, *supra* note 109, 33 I.L.M. at 1125.

restricting market access. It would be incumbent about the complaining member to show that it had no knowledge of such anti-competitive conduct and a reasonable expectation that none would occur to block market access on products for which it had successfully negotiated tariff concessions.

In either type of non-violation complaint, the resources and capacity of the WTO dispute settlement mechanism would be severely tested. Competition law enforcement proceedings brought in national courts are prolix and expensive. Because the private parties themselves would not be on trial in a WTO dispute settlement proceeding, many due process guarantees could be dispensed with in order to expedite the proceeding. Nevertheless, proving that private parties have violated competition laws can be a formidable task. Discovery of confidential business information is facilitated in court proceedings through protective orders and the threat of contempt sanctions for violating that order. But what assurances would businesses have that their confidential information would remain confidential if disclosed to a WTO panel?

More importantly, what would the "reasonable expectations" standard be for showing nullification or impairment of a GATT benefit in either an Article XXIII:1(b) or (c) non-violation case? That the responding member would enact and aggressively enforce competition laws? That it would enact such laws and make a good faith effort to enforce them? Either of these standards would make it difficult to prove a non-violation claim, for under either standard the responding member could successfully defend that it thoroughly investigated the RBP claim and found no cause to proceed. It has been suggested that the standard should be simply that an exporting country has a reasonable expectation that private barriers to trade will not exist in export markets for which trade concessions have been negotiated.¹⁴⁵ Even with this relaxed reasonable expectation standard, a complaining member would still have to prove the existence of a prohibited RBP.

In the case of core competition law principles where consensus has been reached, such as hard-core horizontal restraints, there would be an agreed-upon legal norm against which the private conduct could be measured. But in the case of most vertical restraints, even when agreement exists on the governing legal standard, e.g., the rule of reason, reasonable minds can differ on whether a vertical restraint is on balance pro-competitive or anti-competitive. Nev-

145. See Hudec, *supra* note 23, at 101. See generally Cho, *supra* note 95 (arguing that non-violation cases should be abolished because they are not rules-based).

ertheless, the formidable proof problems would persist, once again drawing into question the capacity of the WTO dispute settlement mechanism to handle such disputes. In cases where consensus does not exist on the legal norms, how is a WTO panel to rule in the absence of a WTO agreement on competition policy? Yet the prospects for negotiating such an agreement appear dim. In the end, perhaps the best solution after all is to leave the resolution of international antitrust disputes to national antitrust enforcement authorities.

A reasonable expectations standard that asks whether private RBPs in an export market are preventing market access looks like a no-fault approach to the issue. The complaining member is not formally accusing the responding member of having failed to take action not otherwise required under GATT-WTO agreements. It would be surprising, however, if responding members—encouraged by their proud competition law enforcement authorities and the concerned domestic firms—did not take umbrage at the insinuation that they were not enforcing their competition laws. One would expect responding members in most cases to vigorously defend against the charge that they in effect tolerated anti-competitive behavior in their domestic market, as well as to champion the cause of their domestic firms by coming to their defense. Besides questions of lost pride, responding members stand to have trade benefits suspended if complaining members are successful in their non-violation, competition policy complaints.

VI. SUMMARY AND CONCLUSION

Trade and competition policy share the goal of ensuring that government and private anti-competitive activity, respectively, does not distort the efficient operation of markets. As noted by Philip Marsden:

Trade officials traditionally have been concerned about the effect that public protectionist measures have on market forces between national markets. Antitrust officials traditionally have been concerned about exertions of market power within national markets. As globalization blurs the boundaries of markets, so too does it blur the borders between these areas of policy. Effective international antitrust enforcement can and does complement liberal trade policy. However, those who seek to reconstitute antitrust as a new trade remedy may be forgetting that market access is a means to an end and not an end in itself. One lowers trade barriers to increase the efficient operation of

market forces; one does not break up efficient market structures to increase trade flows.¹⁴⁶

In short, although the purpose of trade law and competition law is broadly the same—to open markets—the two bodies of law are not congruent. For example, the antidumping duty law punishes conduct that would be considered lawful under the price discrimination and predatory pricing laws. Trade policy officials may deem all vertical restraints that block or impede market access unlawful without first asking, as would national antitrust enforcement authorities, whether such restraints create efficiencies that, on balance, maximize consumer welfare.

It has been suggested that trade policy officials should encourage and even cajole competition policy officials to enforce their competition laws more aggressively.¹⁴⁷ The argument is that “trade policy officials view private trade barriers as a current problem [that] indicates a perception that, on the whole, competition laws in many countries are not presently addressing such private conduct in a sufficiently effective manner.”¹⁴⁸ But should competition law officials pander to trade law officials simply because the latter equate denial of market access with private anti-competitive behavior, in the absence of some showing that market foreclosure is the result of an obvious government-imposed barrier to trade? While calls for greater assertiveness in antitrust law enforcement may in themselves be harmless enough, how are developing countries with either no competition law or effective enforcement mechanism supposed to respond? How are countries with a competition law in place, but with insufficient resources to investigate and prosecute all allegations of private anti-competitive behavior, supposed to respond? Moreover, demands by trade officials for more aggressive competition law enforcement may not be so harmless if they draw attention away from the real culprits. The latter could include a lack of competitiveness on the part of domestic producers and exporters in world markets—a charge that elected officials are reluctant to level at their own constituents—or foreign markets may be closed to imports because of government barriers to trade erected by importing countries, not by private persons. Removing government barriers to trade remains the WTO’s *raison d’être* and its unfinished business. Focusing (obsessing?) on private barriers to trade may be a red herring that distracts the WTO from complet-

146. Philip Marsden, “Antitrust” at the WTO, 13 ANTITRUST 28, 32-33 (1998).

147. See Hudec, *supra* note 23, at 84.

148. *Id.*

ing the job for which it was created, namely, to remove government barriers to trade.

Until such time as trade law and policy reflect a full understanding that not all denials of market access by private actors are *per se* unlawful, competition law and policy should be left to the competition enforcement authorities. In the United States, the process-oriented approach adopted by the Justice Department and the Federal Trade Commission in concluding bilateral antitrust cooperation and mutual assistance agreements with major trading partners (Canada, the EU, and Japan), with minor trading partners (Australia and Israel), and with developing countries (Brazil and Mexico) has created a forum for the constructive exchange of views about national antitrust enforcement activities when those activities cross national borders. The results-oriented approach of the USTR—adversarial and confrontational in nature—is at odds with a conciliatory, cooperative approach that seeks mutually satisfactory resolution of these sensitive policy questions.

Many WTO members remain opposed to a multilateral agreement on competition policy as being both premature and unwarranted. Because nearly 40 percent of the WTO members have not enacted competition legislation or established a competition authority, proposals for a multilateral agreement are premature. In some countries the adoption of measures liberalizing trade and investment flows would be an adequate competition policy, making an agreement on competition policy for them unwarranted.¹⁴⁹ Participants in the WGTCP have conceded that it is unrealistic to expect a convergence of the objectives of trade and competition policy.¹⁵⁰ While competition policy focuses on efficiency and consumer welfare, trade policy's objective is to protect and advance the interests of domestic producers. This divergence can yield a determination, for example, that a given vertical restraint is acceptable under competition policy because there are a sufficient number of competing domestic firms, but is unacceptable under trade policy if it blocks market access to foreign producers.¹⁵¹

Work at the WTO on global competition rules might have a greater chance of proceeding in the right direction if it was informed by one competition policy principle in particular: a concern for consumer welfare. This is not expressly recognized in any of the WTO agreements, as it is assumed that efficiency savings

149. See WGTCP 1999 Report, *supra* note 41, at 17 para. 54.

150. See *id.* at 9 para. 27.

151. See *id.*

from reduced barriers to international trade will trickle down eventually. It is possible for market opening initiatives to have inefficient outcomes, however. This is particularly the case with attempts to manage trade by balancing the market share and profit opportunities of international rivals. Allowing market access principles to override or ignore antitrust's core concern with consumer welfare may put efficient market structures at risk and provide more opportunity for powerful competitors to distort the independence and impartiality of antitrust enforcement.

The economic arguments for government intervention to correct market failures brought on by restrictive business practices may be strong, but those arguments do not necessarily lead inexorably to the conclusion that a multilateral agreement on norms and enforcement is the best response. Forcing the bitter pill of international regulation of competition policy down the throats of countries that are not prepared or willing to accept such rules is a formula for disaster. Developed countries might bully less-powerful developing countries into entering into such agreements as the price of continued WTO membership, but adherence to the commitments made in such agreements will be begrudging and cheating at the margins widespread. In order for international agreements to be durable and robust, parties must perceive them as being in their self-interest.

The WGTCF and the Working Group on the Relationship between Trade and Investment have provided useful first steps in the exchange of views on trade, investment, and competition policy issues. While progress has been made on achieving a better understanding of WTO members' positions on these issues, much still divides them. Because WTO Working Groups are *ad hoc* bodies with no permanent mandate, it might be appropriate to institutionalize the process by creating permanent consultative bodies within the WTO. First, the 1960 GATT Decision on Arrangements for Consultations on Restrictive Business Practices should be resurrected and reinvigorated.¹⁵² Next, standing committees on Trade and Competition Policy and on Trade and Investment could be created that would report directly to the General Council.¹⁵³ These Committees would continue the work started by the two Working

152. Decision on Restrictive Business Practices: Arrangements for Consultations, Dec. 18, 1960, GATT B.I.S.D. (9th Supp.) at 28.

153. WTO standing committees that report directly to the General Council include the Trade and Development Committee, the Trade and Environment Committee, and the Regional Trade Agreements Committee.

Groups. If such standing committees are established, they should be directed to coordinate their work with the OECD, which has made important contributions to the trade-investment and trade-competition policy interface.¹⁵⁴

In conclusion, while the linkages between trade, investment, and competition policy are undeniable, the WTO's current agenda is unfinished, its authority fragile, and its dispute settlement mechanism under stress. To saddle the Organization with yet more hot-button issues—a virtual lightning rod planted on its institutional head—would do little but further undermine the WTO's status and drain valuable and scarce institutional resources away from its primary mission of promoting liberal trade. From a GATT-WTO perspective, maintaining the status quo in the areas of competition policy and investment, coupled with further research and study of these subjects, is the only unambiguously beneficial course of action for the WTO. Now is not the right time, and the WTO is not the right place, for negotiating multilateral agreements on investment and competition policy.

154. See, e.g., OECD, Joint Group on Trade and Competition, *Outline of (A) Core Principles, Common Approaches and Common Standards and (B) Bilateral and Multilateral Approaches* (Oct. 13, 1999); *Consistencies and Inconsistencies Between Trade and Competition Policies* (Feb. 25, 1999); *Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements* (Jan. 29, 1999); *Complementarities Between Trade and Competition Policies* (Jan. 29, 1999). These documents are available at <http://www.oecd.org/daf/clp> (last visited May 17, 2000).