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AFTER SEATTLE: IS THERE A FUTURE FOR TRADE AND COMPETITION POLICY RULE-MAKING?

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I. INTRODUCTION

A great deal has been written and spoken about the “new” trade issue of the relationship between competition and trade policy since the beginning of the Uruguay Round of Trade Negotiations.¹ With the passage of time, it is tempting to no longer see this as a new issue at all. However, because of the limited progress made to date in terms of translating this cacophony into actual rule-making, the trade and competition interface arguably still qualifies as a new issue. This paper will assess the prospects for further multilateral rule-making in this area, particularly in light of the suspension of the World Trade Organization (“WTO”) Ministerial Meeting in Seattle in late November 1999.

That being said, experience to date with the General Agreement on Trade in Services (“GATS”)² negotiations demonstrates that issues of competition, and competition policy, will be critical, in many sectors, to the willingness of WTO members to liberalize their trade in services. The question then arises: How should issues of competition, and competition

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1. See Final Act Embodying the Results of the Uruguay Round of Multilateral, Apr. 15, 1994, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND, vol. 1 33 I.L.M. 81 (1994) [hereinafter Annex].

2. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement]; Annex 1B, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994) [hereinafter GATS Agreement].

policy, enter into these negotiations? One approach may be to pursue negotiations relating to a horizontal competition agreement on trade-related aspects of anti-trust measures ("TRAMs").³ Another approach, however, is to build on the existing competition provisions of the GATS in future sectoral negotiations, or in even more horizontal understandings of principles of domestic regulation with respect to services.

This paper will examine the prospects for achieving, and the relative strengths and weaknesses of, both approaches. The first section of the paper examines the state of multilateral competition policy rule-making. The second section of the paper discusses the existing competition policy provisions in the GATS. The third section of the paper examines the ways in which competition policy concerns might arise in particular service sector negotiations. The paper will conclude that both approaches to negotiations are not mutually exclusive, and therefore could be pursued in parallel.

II. MULTILATERAL COMPETITION POLICY RULE-MAKING

At the outset, it is worth distinguishing between two ways of conceptualizing potential rule-making with respect to competition policy. One approach deals with the international aspects of competition law enforcement.⁴ This could include a consideration of issues of cooperation and coordination between and among competition law authorities. This cooperation and coordination could be with respect to either investigations of private anti-competitive measures, or the enforcement of remedies for such conduct. This cooperation and coordination could be across the full panoply of competition policy concerns, or it could be focused on particular areas such as prohibiting cartels, and reviewing mergers. This form of rule-making could take the form of binding obligations or the expression of non-binding principles, the relevance of which Members consider on

3. See Guillermo Aguilar Alvarez et al., *Future Challenges: New Substantive Areas*, 32 INT'L LAW 993 (1998); Friedl Weiss, *From World Trade Law to World Competition Law*, 23 FORDHAM INT'L L.J. 250 (2000); Hyung Jung, *A Comparative Study on the Question of Extraterritorial Application of the Competition Law*, 18 DICK. J. INT'L L. 305 (2000); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).

4. See Jung, *supra* note 3, at n.143 (citing Professor Ernst Ulrich Petersmann's three approaches to international competition law problems).

a case by case basis.⁵

Another approach to conceptualizing multilateral rule-making with respect to competition policy is to focus on traditional trade concerns with trade distortions and market access.⁶ This approach would emphasize establishing the significant anti-competitive measures that have a substantial impact on international trade, and then negotiating appropriate rules to either prohibit, or discipline such measures. This approach would not necessarily focus solely on the role of competition law authorities. Rather, it would be aimed at core principles to which Members would agree to be bound in order to make their other trade liberalization commitments more robust.⁷

A. *The OECD*

To date, most progress on rule-making, arguably, has been achieved with respect to the first approach.⁸ At the multilateral level, the Organization for Economic Co-operation and Development ("OECD"),⁹ not the WTO, has been the institutional forum for that work. Specifically, the OECD Competition Law and Policy Committee (the "CLP")¹⁰ has generated a number of Recommendations of the OECD Council of Ministers.¹¹ Notable examples of these are the 1998 Recommendation Concerning Effective Action Against Hard Core Cartels ("HCC Recommendation")¹² and the 1995 Revised Recommendation Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade ("Cooperation Recommendation").¹³ As with all Recommendations,

5. *Id.*

6. *Id.*

7. *Id.*

8. See, e.g., Weiss, *supra* note 3, at 250.

9. OECD, About Us, at <http://www.oecd.org/daf/clp/aboutus.htm> (last visited Aug. 27, 2000).

10. *Id.*

11. OECD, Recommendations of the OECD Council Related to Competition Law and Policy, at <http://www.oecd.org/daf/clp/recommendations/rec9com.htm> (last visited Aug. 22, 2000).

12. OECD, Recommendations at the Council Concerning Effective Action Against Hard Core Cartels, at <http://www.oecd.org/daf/clp/recommendations/rec9com.htm> (last visited Aug. 22, 2000).

13. OECD, Revised Recommendation of the Council, at <http://www.oecd.org/daf/clp/recommendations/rec8com.htm> (last visited Aug. 22, 2000).

these are non-binding instruments.¹⁴ There is no particular form of dispute settlement provided in either Recommendation.¹⁵ At most, under the HCC Recommendations, the CLP can serve as a forum for consultations on the application of the Recommendation upon the request "of the Member countries involved."¹⁶ Under the Cooperation Recommendation,¹⁷ the CLP can serve as a forum for exchange of views on matters related to the Recommendation "on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments".¹⁸ Further, the CLP can consider requests for conciliation submitted by Member Countries, and can assist "by offering advice or by any other means, in the settlement of the matter between the Member countries involved."¹⁹

Not surprisingly, the dispute settlement provisions – such as they are – of these non-binding Recommendations have never been used. Absent a substantial change of heart among OECD Member Countries, it is likely that they will never be used. Countries so far seem quite hesitant to multilateralize their bilateral competition policy disputes.

Part of the reason for this reluctance may be based on the rather vague and imprecise nature of these consensus Recommendations. For instance, the HCC Recommendation defines a "hard core cartel" as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce."²⁰ In the United States, however, the adjectival phrase "hard core" in relation to cartels is restricted to a limited class of per se offenses for which no proof of anti-competitive effects would be required.²¹

14. See OECD, *supra* note 11.

15. See OECD, *supra* note 12. See also OECD, *supra* note 13.

16. OECD, *supra* note 12, at 3.

17. OECD, *supra* note 13, at 3.

18. *Id.*

19. *Id.* at 4.

20. OECD, *supra* note 12, at 2.

21. See Agreement Between the Government of the United States of America and the Government of Japan Concerning Co-operation on Anti-Competitive Activities, Oct. 7, 1999, U.S.-Japan, DEP'T ST. BULL. No. 99-137.

Accordingly, vague consensus Recommendations that neither reflect Member Countries' existing laws, nor require change in such laws to reflect the Recommendations are not conducive to binding, or even non-binding dispute settlement. A second reason for the limited use of these dispute settlement provisions is that the CLP does not appear to have adopted guidelines for the conduct of such proceedings, in particular, to deal with any relevant confidential information that might have to be disclosed in order for the matter to be adjudicated, or to provide for working parties consisting of less than all CLP members, to serve as the forum.

In fairness, it should be noted that the CLP has functioned more successfully as a forum for promoting convergence of competition policies among Members Countries, and also as a forum for providing useful technical assistance to certain Observers²² and non-Member countries.²³ There may well be an inherent tension between the CLP's role as a forum for promoting convergence and its role as a dispute settlement forum, which may also account for its reluctance to embrace the dispute settlement function to date.

Similar competition provisions exist in certain bilateral competition policy enforcement agreements. However, none of these appear to be fully binding, or subject to dispute settlement. That being said, to a limited extent, the HCC Recommendation,²⁴ with all of its attendant weaknesses, may demonstrate that countries can agree to certain core principles or common approaches (if not common standards) to dealing with particular anti-competitive measures. That in itself might be a useful element in any architecture for competition policy rule-making in the services context.

B. The Existing WTO Agreements

With respect to the second approach to competition policy rule-making – commitments relating to trade distortions and market access²⁵ – there has been precious little progress to

22. OECD, Non-Member Activities, at http://www.oecd.org/daf/clp/non_member.htm (last visited Aug. 24, 2000).

23. *Id.*

24. OECD, *supra* note 12.

25. *See Jung, supra* note 3.

date. In terms of the WTO Agreements, putting the GATS aside because it will be discussed more fully below,²⁶ it is possible to identify a number of competition provisions.²⁷ For instance, in GATT 1947, article II:4²⁸ deals to some degree with import monopolies; articles III:2 and III:4²⁹ deal with maintaining the competitive conditions between domestic goods and imported like products; article XI prohibits certain import and export related quantitative restrictions; and article XVII deals with certain conditions for state trading enterprises.³⁰ Article 11:1(b) of the Agreement on Safeguards provides that "a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side."³¹ The "similar measures" are specified to include "export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels, and discretionary export or import licensing schemes, any of which afford protection"³² to the importing country's industry. Furthermore, article 11:3 provides that "[m]embers shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1."³³ Additionally, the Agreement on Trade-Related Aspects of Intellectual Property Rights³⁴ also contains provisions³⁵ on licensing that are arguably related to competition law and policy.

As a formal matter, competition policy per se arises only

26. GATS Agreement, *supra* note 2.

27. OECD, Competition Elements in International Trade Agreements: A Post Uruguay Round Overview of WTO Agreements (Jan. 28, 1999) at [http://www.oecd.org/daf/clp\(98\)26/FINAL](http://www.oecd.org/daf/clp(98)26/FINAL).

28. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. 2, para. 4 [hereinafter GATT].

29. *Id.* at arts. 3, 17.

30. *Id.* at arts. 11, 17.

31. Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, *supra* note 2, at Annex IA, reprinted in LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION (Oceana Publications Inc. 1999) [hereinafter Law & Practice].

32. *Id.* at n.4.

33. *Id.* at art. 2, para. 3.

34. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex IC, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

35. *Id.* at arts. 21, 40.

indirectly in article 9 of the Agreement on Trade Related Investment Measures ("TRIMs Agreement").³⁶ Article 9 provides that by the end of 1999, the Council for Trade in Goods shall review the operation of the TRIMs Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text.³⁷ Furthermore, in the course of this review, the Council for Trade in Goods shall consider whether it should be complemented with provisions on investment policy and competition policy.

C. The Singapore Ministerial Agreement

At the WTO Ministerial Conference held in Singapore in December 1996,³⁸ the Working Group on the Interaction between Trade and Competition Policy ("WGTCP") was the Working Group on Trade and Investment.³⁹ This group were instructed to draw upon each other's work if necessary, and also to draw upon and be without prejudice toward the work in UNCTAD⁴⁰ and other appropriate intergovernmental organizations such as the OECD. The Ministerial Declaration further

36. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex IB, *reprinted in* Law & Practice, *supra* note 31 [hereinafter TRIMs Agreement].

37. *Id.* at art. 9.

38. Singapore Ministerial Declaration, WTO, 36 I.L.M. 218 (1996) *available at* <http://www.cvpinstitute.org/links/singapor.htm> (last visited Oct. 15, 2000) [hereinafter Singapore Ministerial Declaration].

39. *Id.* at para. 20. The relevant paragraph of the Ministerial Declaration provides that:

Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:

- a. establish a working group to examine the relationship between trade and investment; and
- b. establish a working group to study issues raised by Members relating to the interaction between trade and competition policy including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

40. *Id.*

clarified that “[i]t is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.”⁴¹ The General Council was instructed to keep the work of each body under review, and to determine after two years how the work of each body should proceed. In December 1998, the mandate of the WGTCP was extended and refined to “... continue the educative work that it has been undertaking pursuant to paragraph 20 of the Singapore Ministerial Declaration.”⁴² To this point, the WGTCP has served primarily as a useful educational forum for the discussion of competition policy among a range of developed and developing countries, and only secondarily as a pre-negotiation forum. Among the items considered by the WGTCP in the first two years of its mandate were:

- a. The Relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy; their relationship to development and economic growth.⁴³
- b. Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application: national competition policies, laws and instruments as they relate to

41. *Id.*

42. WTO, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WT/WGTCP/2, para. 154 (Dec. 8, 1998).

In the light of the limited number of meetings that the group will be able to hold in 1999, the Working Group, while continuing at each meeting to base its work on the study of issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, would benefit from a focused discussion on: (i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade. The Working Group will continue to ensure that the development dimension and the relationship with investment are fully taken into account. It is understood that this decision is without prejudice to any future decision that might be taken by the General Council, including in the context of its existing work programme.

Id.

43. *Id.* at para. 18-31.

trade; existing WTO provisions; bilateral, regional, plurilateral and multilateral agreements and initiatives.⁴⁴

c. The Interaction between trade and competition policy: the impact of anti-competitive practices of enterprises and associations on international trade; the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade; the relationship between the trade-related aspects of intellectual property rights and competition policy; the relationship between investment and competition policy; and, the impact of trade policy on competition.⁴⁵

The WGTCP's work program prior to December 1998, included the identification of many areas that may merit further consideration in the WTO framework, however it never reached that point in its deliberations. It remains to be seen whether in this second phase of the work of the WGTCP, it will move to more of a pre-negotiation or negotiation mode. At this stage, it seems unlikely that the WGTCP will move to much of a negotiation mode because the parties' positions of still seem fairly far apart. Nonetheless, it still may be useful to canvass the positions of major players to assess the implications for horizontal competition policy rule-making with respect to the liberalization of trade in services.

D. The European Union

The European Union (EU) has, perhaps, the most expansive proposal for horizontal rule-making about competition policy. The Communication from the Commission to the Council and to the European Parliament on the EU Approach to the Millennium Round⁴⁶ enumerates four elements on the negotiation of a binding framework of multilateral rules on competition as part of a comprehensive Round. The four elements are:

a. Core principles and common rules relating to the adoption

44. *Id.* at para. 32-43.

45. *Id.* at para. 65-71.

46. Communication from the Commission to the Council and the European Parliament, at <http://europa.eu.int/comm/trade/pdf/0807nr.pdf> (last modified Dec. 13, 1999).

of competition law and its enforcement (i.e. a commitment to adopt a comprehensive competition law, limits on sectoral exclusions, application of principles of transparency and non-discrimination, rights of firms, and private actions in national courts);⁴⁷

b. Common approaches on anti-competitive practices with a significant impact on international trade and investment (i.e. hard core cartels, criteria for assessment of vertical restrictions or abuses of dominance with a foreclosure effect, principles for cooperation on export cartels and international mergers);⁴⁸

c. Provisions on international cooperation, which could include provisions on notification, consultation, and surveillance in relation to anticompetitive practices with an international dimension, exchanges of non-confidential information, and positive and negative comity (although without a binding obligation to investigate on behalf of another country);

d. Dispute Settlement to ensure that the domestic competition law enforcement structures are in accordance with the multilaterally agreed principles, but in no event should there be a review of individual decisions.⁴⁹

Finally, with respect to dispute settlement, the EC position appears to be that WTO panels should consider whether a Member is in breach of the core principles,⁵⁰ or whether its competition law appropriately covers the common approaches. This dispute settlement would not apply in individual cases,⁵¹ and not in respect of positive comity.⁵² Although there ap-

47. The EU Approach to the WTO Millennium Round, COM(99)331/FINAL [hereinafter Millennium Round].

48. *Id.*

49. The Rt. Hon. Sir Leon Brittan QC, Vice President of the European Commission, The Need for a Multilateral Framework of Competition Rules, Keynote Address to the OECD Conference on Trade and Competition (June 29, 1999) [hereinafter Brittan Keynote Address]; The Rt. Hon. Sir Leon Britton QC, The Contribution of the WTO Millennium Round to Globalization: An EU View, Address at the First Herbert Batliner Symposium: Europe in the Era of Globalisation - Economic Order and Economic Law (Apr. 29, 1999); Karel Van Miert, EC Commissioner for Competition, The WTO and Competition Policy: The Need to Consider Negotiations, Address before Ambassadors to the WTO (Apr. 21, 1998).

50. *Id.*

51. *Id.*

52. *Id.*

pears to be wide consensus that dispute settlement should not apply to individual cases because of the complex and fact intensive nature of competition law and policy, it is worth noting that the WTO already deals with complex and fact intensive cases under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")⁵³ or involving environmental measures.⁵⁴ It should also be noted that article 13:2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes provides that panels may seek the counsel of experts with respect to "a factual issue concerning a scientific, or other technical matter raised by a party to a dispute."⁵⁵

As proposed, the dispute settlement would apply to alleged patterns of failure to enforce competition law in cases affecting international trade and investment.⁵⁶ It is not clear how this

53. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex IA, *reprinted in* Law & Practice, *supra* note 31.

54. *See* United States - Measures Concerning Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body (WT/DS58/AB/R October 12, 1998); EC - Measures Concerning Meat and Meat Products (Hormones), Decision by the Arbitrators, (WT/DS48/ARB July 12, 1999); Australia - Measures Affecting Importation of Salmon, Award of the Arbitrator, (WT/DS18/9 Feb. 23, 1999); Japan - Measures Affecting Agricultural Products, Report of the Appellate Body, (WT/DS76/AB/R Feb. 22, 1999). *See generally* Gary N. Horlick, The World Trading System at the Crossroad of Science and Politics, Paper Presented to the Columbia University Conference on The Next Trade Negotiating Round: Examining the Agenda for Seattle (New York, July 22-23, 1999) (on file with the author); and Thomas Cottier, SPS Risk Assessment and Risk Management in WTO Dispute Settlement: Experience and Lessons, Paper Prepared for the Conference on Risk Analysis and International Agreements (Feb. 10-11, 1999).

55. Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex 2, *reprinted in* Handbook of WTO/GATT Dispute Settlement (2000). Professor Frederic Jenny, Vice-Chair of the French Competition Council, Chair of the WTO Working Group on the Interaction Between Trade and Competition Policy, and Chair of the OECD Competition Law and Policy Committee has recently made this point, and also noted that similar provisions can be found in the SPS Agreement and the Agreement on Technical Barriers to Trade. *See* Agreement on Technical Barriers to Trade, Apr. 15, 1994, Preamble, WTO Agreement, *supra* note 2, Annex IA [hereinafter TBT Agreement]. *See* Frederic Jenny, Paper Presented to the Columbia University Conference on The Next Trade Negotiating Round: Examining the Agenda for Seattle (July 22-23, 1999) (on file with the author).

56. *See* Brittan Keynote Address, *supra* note 49. "Furthermore, we have been reflecting within the Community on whether dispute settlement should also apply to a pattern of non-enforcement of domestic competition law. My personal view is that once such a pattern has been established, it should also be subject to some

dispute settlement proposal could practically avoid judging individual cases, especially when what is alleged is a pattern of non-enforcement. Presumably, this will be clarified in subsequent interventions from the EU. In this regard, it is worth considering the observations of U.S. Assistant Attorney General for Antitrust, Joel Klein, stating that he doesn't "know what it means to say . . . that individual cases will not be reviewed but that a 'pattern' may be; a pattern is a series of individual cases, and even if the whole were greater than the sum of its parts, any meaningful dispute resolution powers in this field could not ignore the parts."⁵⁷

E. The United States

In contrast, the U.S. position is much less comprehensive. The U.S. antitrust agencies – the Department of Justice and the Federal Trade Commission – favor an approach that emphasizes bilateral cooperation and coordination in investigation and enforcement. This has sometimes been described as an attempt to multilateralize the Canada-U.S. approach to enforcement cooperation and coordination.⁵⁸ This approach emphasizes the use of treaties on mutual legal assistance in criminal matters and inter-agency cooperation agreements,⁵⁹ which include positive comity provisions, but not the automatic deferral mechanism as in the U.S-EU context.⁶⁰

This U.S. approach is based largely on the development of U.S. antitrust law over time under a "common law," judge-driven case by case model.⁶¹ Accordingly, the United States

appropriate form of dispute settlement." *Id.* See also K. Mheta, Director of EC Competition Directorate, Speech to the 3rd WTO Symposium on Competition Policy and the Multilateral System (April 17, 1999).

57. See Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Address to the OECD Conference on Trade and Competition (June 30, 1999), at <http://www.usdoj.gov/atr/public/speeches/jik97220.htm>.

58. See Joel I. Klein, *Criminal Enforcement in a Globalized Economy* (Feb. 20, 1997), at <http://www.usdoj.gov/atr/public/speeches/jik97220.htm>. See also Joel I. Klein, *Anticipating The Millennium: International Antitrust Enforcement At The End Of The Twentieth Century* (Oct. 16, 1997), at <http://www.usdoj.gov/atr/public/speeches/1233.htm>.

59. See Joel I. Klein, *Criminal Enforcement in a Globalized Economy* (Feb. 20, 1997), at <http://www.usdoj.gov/atr/public/speeches/jik97220.htm>.

60. *Id.*

61. See A. Douglas Melamed, Principal Deputy Assistant Attorney General,

seeks to replicate over time through a network of cooperation agreements with countries that already have competition laws, technical assistance to encourage the adoption of competition laws in those countries without competition laws, and convergence through dialogue in fora such as the OECD CLP, the WTO WGTCF, and other regional fora.⁶² The U.S. (like Canada and the EU) also supports the notion of "peer review" on competition law and policy matters using the Trade Policy Review Mechanism ("TPRM") modeled on the OECD experience with country reviews in the area of regulatory reform.⁶³

In November 1997, Attorney General Janet Reno and Assistant Attorney General for Antitrust, Joel Klein, established an International Competition Policy Advisory Committee (ICPAC).⁶⁴ ICPAC was co-chaired by former Assistant Attorney General for Antitrust, Jim Rill and a former Commissioner of the International Trade Commission, Paula Stern. The Committee included a few leading scholars with knowledge about both trade and competition policy such as Professor Eleanor Fox of New York University, Professor David Yoffie of Harvard University and Professor Merit Janow of Columbia University (who served as Project Director). The remaining Committee members were drawn from the business and legal communities, though it appears that their participation with all but a very few exceptions was extremely sparse.⁶⁵

ICPAC issued its Final Report on February 28, 2000.⁶⁶ The Report itself is very comprehensive, however, and anyone looking for an impetus for a much broader U.S. engagement with respect to multilateral rule-making on competition and trade policy will most likely be disappointed. Indeed, in a Sep-

Antitrust Division, U.S. Department Of Justice, Speech to the 3rd WTO Symposium on Competition Policy and the Multilateral System (Apr. 17, 1999). *See also* Robert Pitofsky, Remarks to the European Institute's Eighth Annual Transatlantic Seminar on Trade and Investment (Nov. 4, 1998).

62. Charlene Barchefsky, Ambassador, Keynote Address to the Global Trading System - A GATT 50th Anniversary Forum, The Brookings Institution (Mar. 4, 1998).

63. OECD, *supra* note 12, at 3.

64. Charter, International Competitiveness Advisory Committee (Oct. 3, 1997), at <http://www.usdoj.gov/atr/icpac/icpac1.htm>.

65. International Competition Policy Advisory Committee, at <http://www.usdoj.gov/atr/icpac/icpac3.htm> (last visited Aug. 23, 2000).

66. *See* Executive Summary, DEPT OF JUST., at <http://www.usdoj.gov/atr/icpac/execsummary.htm> (last visited Aug. 23, 2000) [hereinafter Report].

arate Statement,⁶⁷ “embracing but going beyond”⁶⁸ the ICPAC Report, Professor Eleanor Fox suggested that the Committee had “push[ed] from below to achieve more robust national antitrust enforcement [and] suggest[ed], more tentatively, global cooperation.”⁶⁹

Chapters Two and Three of the Report make detailed recommendations with respect to multijurisdictional mergers,⁷⁰ and Chapter Four makes further recommendations regarding international cartel enforcement and interagency cooperation.⁷¹ On a preliminary reading, each of these chapters make modest but interesting proposals that, if adopted, should ease some of the transaction costs faced by businesses in mergers, and should facilitate more cooperation among national competition authorities (particularly with respect to cartels). I hasten to add that “modest” does not mean easily implemented. Some suggestions, relating to changing existing merger notification thresholds,⁷² review periods⁷³ and timing requirements,⁷⁴ may not be easy to implement in the United States. That is also true in other jurisdictions which are unlikely to link an “appreciable nexus to the jurisdiction”⁷⁵ standard unilaterally.

Chapter Five considers a variety of acts of governments and firms that can restrict international trade. The chapter concludes that neither trade nor antitrust policy tools provide complete solutions to the problems from the mix of government and private restraints. The Report offers two policy approaches to address the problem: more positive comity⁷⁶ and more unilateral extraterritorial enforcement of antitrust enforcement.⁷⁷ Professor Fox, in her Separate Statement, in effect, politely and eloquently dissented from the last half of this conclusion. She said: “[she] believes that solutions, to be legitimate, inclu-

67. See Eleanor M. Fox, Separate Statement of Advisory Committee Member, at <http://www.usdoj.gov/atr/icpac/1a.htm> (last visited Oct. 15, 2000).

68. *Id.*

69. *Id.*

70. Report, *supra* note 66, at 3.

71. *Id.* at 18.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See Report, *supra* note 66, at 20.

77. *Id.*

sive and complete, must be multilateral, and that we must devote more energies to strengthening and constitutionalizing the WTO.⁷⁸

The Report suggests that the WTO continue to focus on governmental restraints rather than addressing either purely private or hybrid (government and private) restraints on trade.⁷⁹ The Report suggests that the U.S. Government should support and pursue additional incremental steps to deepen the work of the WGTCP by pursuing an illustrative and educational agenda.⁸⁰ However, a majority of the Committee were of the view that the WTO should not develop competition rules under its umbrella.⁸¹ Nonetheless, in Chapter Six, entitled "Preparations for the Future," the Committee recommends the creation of a Global Competition Initiative ("GCI") that would act as a sort of G7 for competition policy enforcers.⁸² Despite the modest tone of most of the Committee recommendations, here the Committee goes much further and actually suggests that the GCI be equipped for international mediation of competition disputes.⁸³

In September 2000, days before stepping down as Assistant Attorney General for Antitrust, Joel Klein endorsed ICPAC's GCI proposal.⁸⁴ In doing so, he repeated that the WTO was inappropriate forum for discussing competition policy issues. With respect to the OECD, while praising its recent work on hard core cartels, mergers and positive comity, Klein argued that its limited membership would preclude it from playing anything other than a supportive or coordinating role in moving the GCI forward.⁸⁵ Therefore, as a first step he proposed that:

[I]nterested jurisdictions along with the international bodies already thinking about these issues—e.g., the OECD, WTO,

78. Fox, *supra* note 67.

79. Report, *supra* note 66.

80. *Id.*

81. International Competition Policy Advisory Committee, *supra* note 65.

82. Report, *supra* note 66.

83. *Id.*

84. See Joel I. Klein, *Time for a Global Competition Initiative* (Sept. 20, 2000), at <http://www.usdoj.gov/atr/public/speeches/6486.htm>.

85. *Id.*

UNCTAD, World Bank, and others—might establish a joint working group: first for exchanging information and views (e.g., about ongoing and planned activities, common challenges, approaches each are taking to support sound enforcement practices, areas that are most vexing, greatest opportunities for cooperation, etc.) and then for fully exploring a Global Competition Initiative along the lines laid out in the ICPAC report. In addition, these groups should develop a coordinated and expanded commitment to technical assistance for emerging competition authorities that is essential if we are to develop a global common language.⁸⁶

Klein's successor, Acting Assistant Attorney General for Antitrust, A. Douglas Malamed has given further shape to the GCI proposal.⁸⁷ In his comments, he reviewed four options for achieving coherence of international antitrust enforcement: bilateral discussions between two or a very few antitrust agencies; discussions, consensus-building, and voluntary undertakings in regional and multilateral fora, such as the OECD; negotiation of binding antitrust in the WTO; and building multilateral antitrust consensus through a GCI.⁸⁸ He observed that as a practical matter bilateral cooperation was by its nature a limited option because “as a practical matter be duplicated on a worldwide basis for 90-odd antitrust agencies with very different economies, legal systems, and experiences.”⁸⁹ As for the OECD, he observed that its mandate was too broad, and its membership too narrow for it to serve as a as “vehicle for enhancing convergence on more focused matters among the broad range of antitrust laws and agencies in today's world.”⁹⁰ As for binding rules in the WTO, he repeated the mantra that “the WTO is not, in any event, a suitable forum for negotiation of antitrust rules, and the cause of encouraging sound antitrust enforcement in world markets would be undermined by the application of WTO dispute settlement procedures to the kind of abstract rules that would result from negotiations in that forum.”⁹¹ Noting that bilateral cooperation and consen-

86. *Id.*

87. A. Douglas Malamed, Acting Assistant Attorney General for Antitrust, *Promoting Sound Antitrust Enforcement in the Global Economy* (Oct. 19, 2000).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

sus-building through the OECD should remain central components of any international antitrust policy arsenal, he concluded that none of these three options offers a complete solution to the practical difficulties raised by the internationalization of antitrust.⁹²

As for the GCI, Malamed proposed that its mandate could resemble, at least roughly speaking, that of the OECD⁹³ despite having noted earlier that the OECD mandate was too broad.⁹³ To be more precise, he proposed that:

[T]he GCI would be a forum for study, evaluation and recommendation. It could provide a mechanism for peer review and could work to encourage consensus for action—much as the OECD helped forge consensus with its recommendation on hard core cartels. [He does] not, however, envision the GCI as a forum for the negotiation or implementation of international agreements.⁹⁴

To Malamed, the benefit of such a GCI would be:

[T]o develop an increasingly shared view of the appropriate role for and methods of antitrust enforcement. Developing shared views will reduce differences in the implementation of antitrust laws and build trust among antitrust agencies; could result in greater cooperation in individual investigations; and, perhaps in some circumstances, could even lead to an increased role for deference and comity in international antitrust enforcement. If in the future we can safely conclude that deferring to another antitrust agency on a matter particularly within its jurisdiction would not sacrifice our own legitimate sovereign interests, then antitrust agencies, consumers, and businesses alike will be able to benefit from more efficient international antitrust enforcement.⁹⁵

Malamed correctly identified that funding the GCI from either an institutional or technical assistance point of view would be a determining factor in judging its success. It is too early to determine whether this proposal will gain support outside of U.S. government circles, let alone in other capitals.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

It is unlikely though that it will supplant the ongoing debates in the context of the WTO. At this point, it is probably fair to say that the best hope for survival of the GCI is that does not come to be seen as a crass or undignified attempt to separate foreign competition authorities from their trade counterparts, or a cynical attempt to hijack or derail the current discussions in Geneva. However, therein lies the problem. To the extent that a second parallel track is opened, pressure will be on to explain why the second track could not be better achieved within the WTO, UNCTAD or some expanded OECD.

F. Canada

The Canadian approach is more enigmatic. Like the EU, Canada is supportive of multilateral rules, however, there are indications that Canada is more skeptical about dispute settlement. Specifically, Canada has called for negotiations that build upon the OECD work such as the HCC Recommendation;⁹⁶ the 1998 CLP Framework for Pre-merger Notification;⁹⁷ and ongoing work on rights to remedy and positive comity. To this list, Canada has emphasized the need to establish a common approach to abuse of dominance, core principles, and the elements of a minimum competition law institutional framework (*e.g.* independent investigative agency, independent judicial review/appeal and fair adjudication).⁹⁸ Canada has proposed an agreement of this kind in the form of a plurilateral agreement with a dispute settlement designed to ensure that Members implement their minimum commitments in accordance with their jurisprudence and legal traditions.⁹⁹ However, like the EU, the Canadians suggest rather unconvincingly that this could be done in a way that does not question how countries apply their laws in particular cases.¹⁰⁰ A

96. HCC Recommendation, COM(98)7/FINAL at art. 2, para. 2.

97. Cooperation Recommendation, COM(95)130/FINAL at art. 3, para. 1.

98. Canada, Competition Policy and the International Trade Agenda, Discussion Paper (March 1999) [hereinafter Canada Discussion Paper].

99. *Id.*

100. Konrad Von Finkenstein, Commissioner of Competition, Speech to the International Competition Policy Advisory Committee to the Attorney General, Washington, D.C., (Nov. 2, 1998); *Cf.*, Patricia Smith, Deputy Commissioner of Competition, Economics and International Affairs Branch, Competition Bureau,

consultation Discussion Paper described the Canadian position as favoring:

[a] multilateral agreement on competition policy [which] could include a commitment to fundamental principles such as transparency and non-discrimination; common substantive approaches to address private anti-competitive practices (including hard core cartels, abuse of dominance, merger review); mechanisms to enhance cooperation among countries; as well as dispute settlement provisions. Provisions to encourage effective domestic enforcement of competition laws could also be considered. In addition to facilitating cooperation between parties in addressing anti-competitive behaviour, such an agreement could assist in providing firms with needed assurance as to the rules of business conduct in foreign markets and in ensuring they are treated in a non-discriminatory way.¹⁰¹

Remarks to a Symposium at the University of Toronto, (May 1999):

Some may argue that the workings of the WTO dispute settlement mechanism under these circumstances would not significantly differ from work currently being done in regard to other WTO obligations. But this needs to be scrutinized much more closely. our concern is that it might be difficult if not impossible to confine the dispute settlement procedures to *only* these issues and that, inevitably, dispute settlement would lead to the review of decisions of competition authorities in individual cases. The competition bureau has concerns about the applicability of the existing WTO dispute settlement procedures to competition policy cases. the WTO has no mechanism to deal with the intense fact finding investigation that is fundamental to the economic analysis of competition cases, let alone a proven track record on confidentiality matters. As you can no doubt gather from this and reading between the lines in the paper, we strongly question whether it's full speed ahead on this one! Nevertheless, we believe a lot can be accomplished short of a dispute settlement mechanism. Before we start down the slippery slope of dispute settlement, WTO members may wish to examine other means of reviewing members' records in implementing their competition policy obligations.

Ms. Smith further advocated the creation of a Competition Policy Review Mechanism, and Trade-Related Aspects of Anticompetitive Measures Council to conduct such reviews in lieu of a dispute settlement forum within the WTO.

101. Canada Discussion Paper, *supra* note 86.

G. Japan

As for the last of the Quad countries,¹⁰² Japan has tended to align itself with certain other developing countries, mostly from the Asia-Pacific region, in stressing the need to look at the anticompetitive effects of trade remedies. Japan is more vocal in its support of the EU initiative for multilateral investment rule-making in the context of the WTO, and there may be a certain implied linkage to the EU competition as well. The proposed Japanese framework would include the following elements:

- a. Certain basic principles that all rules of the framework should meet, including a "most-favoured-nation treatment", "national treatment", "transparency" and "competition-oriented principle."¹⁰³
- b. Priorities of anti-competitive practices to be banned (i.e. hard core cartels; horizontal concerted boycotts; and import cartels) and abuse of dominance.¹⁰⁴
- c. Common procedures for review and analysis of mergers.¹⁰⁵
- d. Minimization of exemptions and exceptions from national competition laws.¹⁰⁶
- e. Effective national enforcement structures.¹⁰⁷
- f. Cooperation, notification and exchange of information and conflict avoidance.¹⁰⁸
- g. Dispute settlement procedures applied to: (i) failure to adopt domestic legislation in conformity with obligations stipulated in the framework; (ii) measures that directly vio-

102. See Hisamitsu Arai, Vice-Minister for International Affairs, MITI, Address at Columbia University's Conference on The Next Trade Negotiating Round: Examining the Agenda for Seattle (July 22-23, 1999). In particular, note his remarks with respect to the application of dispute settlement to individual cases suggesting that, "even under existing WTO Rules, a similar problem could arise in the case of a dispute relating to . . . under the TRIPS Agreement." *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Arai, *supra* note 90.

late the framework (e.g. expansion of exemption systems); and (iii) inappropriate actions or tolerances against specific cases.¹⁰⁹

H. *The Developing Countries*

As for developing countries, there does not appear to a groundswell of interest in either the EU proposals for investment or competition rule-making of a horizontal nature. In fact, the compromise between developed and developing countries is implicit in the narrow TRIMs Agreement,¹¹⁰ and the explicit linkage between trade and competition in the Singapore Declaration¹¹¹ remains relatively unchanged. To this point, developing countries have not made clear exactly what they are looking for in terms of the competition link to investment, although this may become clearer as UNCTAD's work (begun in June 1999) on the latest Revision to the Set of Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Progresses.¹¹² One thing that is clear is that developing country views are unlikely to be homogenous on these issues. However, there likely will be sufficient opposition, combined with divisions within, which means that, as a practical matter, successfully achieving horizontal competition policy rule-making will be very difficult.

III. SEATTLE AND ITS AFTERMATH

It is well known that the Seattle Ministerial meeting was not an undiluted success. The talks, which lasted from November 30th until the early morning hours of December 4th, did not result in the launching of a new round of trade negotia-

109. WTO, *Working Group on the Interaction of Trade and Competition Policies Communication from Japan* WT/WGTCP/W/134 (July 14, 1999); WTO, *Working Group on the Interaction of Trade and Competition Policies Communication from Japan* WT/WGTCP/W/119 (May 27, 1999).

110. See TRIPS Agreement, *supra* note 34.

111. See Singapore Ministerial Declaration, *supra* note 38.

112. United Nations Conference of Trade and Development, *Agreed Conclusions of the Intergovernmental Group of Experts on Competition Law and Policy at its Second Session*, U.N. Doc. TD/B/COM.2/CLP/L.5 (1999).

tions. Instead, the talks were suspended. Several points need to be made about this.

First, neither competition law nor investment law were the determining factors leading to the suspension of the talks. Rather, issues of process and transparency, labor, and agriculture appeared to be the most significant sources of disagreement. A text¹¹³ was floated by the Chairs of both the WGTCP and the WGTI that survived into the frozen negotiation text dated December 3, 1999. That is not to say that the text represented a consensus, but rather that more progress was made in this area than in many other areas. This might imply that if further significant progress can be made on the major stumbling blocks in Seattle, then both trade and investment will be addressed more easily than might otherwise be apparent. This is, of course, dependent upon opinions not hardening on these issues during the suspension.

Second, while the Seattle Ministerial meeting remains suspended, progress has been made toward starting a negotiation based on the "built in agenda" from the Uruguay Round in agriculture and services.¹¹⁴ Additionally, there are indications that both the EU and the U.S. are working on developing a package of market access concessions for least-developed countries and steps to make the World Trade Organization more accessible to non-governmental groups.¹¹⁵ This progress demonstrates a desire to fill the vacuum left from Seattle. This bodes well for an eventual launching of a round of negotiations at some point in the future. In this regard, it is useful to recall that the launching of the ambitious Uruguay Round also had an uneven beginning, but in the end, the new issues of services, trade-related aspects of intellectual property rights and to a lesser extent, trade-related investment measures were added successfully to the negotiations.¹¹⁶

113. See WTO, *supra* note 97.

114. WTO *Puts Off Implementation Decisions; Launches Agenda, Services Talks*, INSIDE U.S. TRADE, Feb. 11, 2000, at 3.

115. U.S., *EU To Work Out WTO Market Access, Implementation Package*, INSIDE U.S. TRADE, Feb. 25, 2000, at 12.

116. See generally JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1995).

A. Before Seattle

I want to turn to examine the two texts that were on the table in the letter from the Chairman of the General Council, Ambassador Ali Said Mchumo, to all WTO Members and Observer Governments dated November 19, 1999. One version provided that:

42. Negotiations in this area shall aim to enhance the contribution of competition law and policy to international trade and development, including by strengthening the capacity of all participants to address anti-competitive business practices distorting or impeding international trade and investment, and in order better to ensure that the benefits of trade and investment liberalization are realized and shared by all citizens. To this end, a multilateral framework shall be developed that would enable the following to be addressed:

(a) core principles of competition law and policy, building in particular on the WTO principles of transparency and non-discrimination;

(b) the development of common approaches to anti-competitive practices, while respecting the diversity of national laws and situations;

(c) appropriate modalities and support mechanisms, including sufficient resources, for case-specific, technical and other forms of cooperation among WTO Members, including the exchange of information between relevant authorities;

(d) the particular needs and situations of developing-country participants, including by providing for special and differential treatment.

The framework to be developed shall not provide for the WTO dispute settlement system to be used to review national decisions in individual competition cases. [Provision shall also be made for an examination and possible reform of existing WTO rules from a competition policy perspective.]

43. [Prior to the substantive negotiating phase, an intensive educative and analytical process of up to two years will be undertaken, in order to enable all participants to be adequately prepared for negotiations and to have assessed the possible outcomes and implications.] In order to facilitate the full participation of developing and least-developed country

participants in these negotiations, adequate resources shall be made available for technical cooperation and capacity-building, not only in regard to the establishment and reinforcement of competition policies, laws and institutions but also in regard to issues under negotiation, including through the organization of regional seminars. In this connection, the WTO Secretariat will seek the cooperation of UNCTAD, the World Bank and other relevant intergovernmental organizations.¹¹⁷

The alternative proposal provided that:

57. The Working Group on the Interaction between Trade and Competition Policy shall pursue its present mandate building on the work undertaken to date [and shall present its findings and recommendations on a possible multilateral framework to the Fourth Session]. [The work should focus on the implications for developing countries of the proposals submitted on this subject, in particular in regard to actions to combat anti-competitive practices of firms and to the need for monitoring and reviewing mergers and take-overs which have an impact on international competition. Provision shall also be made for a review of existing WTO rules from a competition policy perspective. Adequate technical cooperation, in cooperation, where appropriate, with other intergovernmental organizations, will be made available to facilitate the above work.]¹¹⁸

It can be seen that, going into Seattle, there was no consensus on whether a negotiation on competition policy should be initiated (and if so, what should be included in it) or whether the educational work of the WGTCP should continue. Paragraph 57 represents what has become known as the "South African" proposal, namely pre-negotiation educational work followed by a decision on a negotiation at a subsequent point.¹¹⁹

117. *Preparations for The 3rd Session of the Ministerial Conference: Letter from the Chairman of the General Council, Ambassador Ali Said Mchumo, to all WTO Members and Observer Governments*, INSIDE U.S. TRADE, Nov. 19, 1999, at 7.

118. *Id.*

119. WTO, *Communication from South Africa*, WT/WGTCP/W/138 (Oct. 11, 1999).

B. Seattle

As of December 3, 1999, the operative text that was under discussion, though by no means a consensus text at that point provided that:

41. Building on the work done on the interaction between trade and competition policy, we agree to continue the educational and analytical work, based on proposals by Members. The issues on which this work shall focus shall include core principles of competition policy and of the WTO, approaches to anti-competitive practices of enterprises, appropriate modalities and support mechanisms for exchange of experience and other forms of cooperation, and measures to address the particular needs and situations of developing countries.

42. This work shall be purposeful and focused, and aim to assist all Members to prepare for, and adequately assess the possible implications of, negotiations on this issue.

A report on this work shall be presented to the Fourth Ministerial Conference, which shall decide whether specific guidance is needed for any negotiation to be launched at that time under the single undertaking.¹²⁰

This text represents something of a compromise between the two pre-Seattle alternatives. The text goes some ways towards enumerating the nature of the work to be addressed by the WGTCP, but neither provides for a negotiation nor rules one out at a later date. It is difficult to measure how much support existed for this proposal in Seattle. United States Trade Representative, Charlene Barchefsky, summed up the situation this way:

In particular, efforts to launch negotiations will falter again if the EU insists on negotiations on investment and competition rules for which there had been no support among members. It was clear in the smaller Green Room meetings at Seattle that full scale negotiations on investment, competition policy, government procurement and possibly other areas

120. *Draft Ministerial Declaration As Discussed in Green Room Dec.*, INSIDE U.S. TRADE, December 10, 1999, at 10.

are not supported by the 'vast, vast, vast majority' of members.¹²¹

C. After Seattle

In the wake of the Seattle meeting, the EU and Japan reiterated their desire for "the improvement and reinforcement of existing rules and disciplines such as anti-dumping, as well as the establishment of additional rules for investment, [and] competition"¹²² However, there are also signs that the internal EU consensus on competition rule-making may be beginning to break down.¹²³ Nonetheless, the recent Communication from the EC to the EU's "Committee 113" (the committee of EU Member states that determines EU policy) continues to emphasize competition rule-making. It states that:

[T]he WTO also needs to update its rules to respond to the effects of globalisation, so that our traders and investors can enjoy a predictable, transparent and non-discriminatory framework in which to make their economic decisions and to compete. Basic rules on investment and competition are necessarily part of such an agenda and will go some way towards providing this environment. There continues to be solid support from a large group of "Friends" of a new round for the inclusion of these issues in a negotiation, and it is a matter of regret that negotiations on two subjects of such systemic importance and of benefit to companies around the world could not be launched.¹²⁴

Remarkably, a competition negotiation does not figure directly into the enumerated strategy of the EC to re-launch a round of trade negotiations.¹²⁵

121. *Barshefsky Urges EU To Scale Back Agenda For WTO Round*, INSIDE U.S. TRADE, Dec. 24, 1999, at 3.

122. *EU-Japan Joint Statement on the WTO*, INSIDE U.S. TRADE, Jan. 14, 2000, at 2.

123. *UK Seeks Ministerial Meeting in New Year to Review WTO Processes*, INSIDE U.S. TRADE, Dec. 24, 2000, at 4.

124. *EU Commission Memo on WTO Strategy*, INSIDE U.S. TRADE, Feb. 18, 2000, at 25.

125. *Id.*

Having said that, it is significant that the WTO General Council decided on February 8, 2000 to reappoint the current Chairs of the WGTCP and WGTI.¹²⁶ By informal agreement, it was subsequently decided on March 27, 2000 that the WGTCP would hold two formal meetings in 2000 and will pursue work in accordance with its existing mandate. On the other hand, at the time of the writing of this article, no decision has been made on extending the time-limit on article 9 of the TRIMS Agreement¹²⁷ which called for a decision to be made on whether to pursue rule-making with respect to investment and competition.¹²⁸ That time limit expired earlier this year, by the terms of article 9 five years after the TRIMS Agreement came into effect on January 1, 1995.¹²⁹

IV. GENERAL CONCLUSIONS

It is difficult to draw definitive conclusions from what is essentially a work in progress. In this section, I have tried to give a static view into the dynamics of a negotiation that is ongoing. On balance, I tend to think that something close to the December 3, 2000 formulation will carry the day if the larger issues surrounding a negotiation - transparency, labor, environment, agriculture, and bio-technology - can be addressed within the political calendars that are operating on both sides of the Atlantic. In other words, the basis of an agreement between the U.S., the EU and Japan seems apparent enough: continued education and a deferral of a decision with respect to a negotiation. What remains unclear is how developing countries will come out on this issue. However, as this formulation is, in essence, the South African formulation, it is hard to see what developing countries lose on the margins by going along with it if their more fundamental concerns are addressed elsewhere.

In the next section of the paper, I discuss how competition

126. Press Release, WTO, WTO Chairs for 2000 (Feb. 8, 2000) (on file with the author).

127. *WTO Holds Off on Ways to Deal With Extensions of TRIMS Deadline*, INSIDE U.S. TRADE, Jan. 28, 2000, at 4.

128. *Id.*

129. *Id.*

rule-making can enter into the next round of negotiations as part of the "built-in agenda" on trade in services.

V. TRADE AND COMPETITION POLICY RULE-MAKING: SERVICES - A POINT OF DEPARTURE

Aside from the practical difficulties of achieving such a multilateral competition law and policy agreement, there is the further question of the desirability of such an agreement for the liberalization of trade in services. In a Canadian public consultation Discussion Paper, certain market access barriers to trade in services were identified:

Example of barriers to market access are: limitations on the numbers of service suppliers (i.e., in the form of quotas, monopolies, rights for exclusive supply); limitations on the total number of services transactions or assets or operations (i.e., usually expressed in terms of a quota); limitations on the total number of persons that may be employed in a particular service sector; measures which restrict the legal entity through which a foreign service supplier may deliver the service (e.g., subsidiaries, branches, joint ventures) - and limitations on the level of shareholding or investment that a foreign service supplier may make.¹³⁰

This is a useful point of departure because it identifies monopolies, quotas, and rights of exclusive supply as key problems. Competition law, particularly if applied to public sector firms, other state-owned enterprises, and firms operating with exclusive and special rights, could potentially be quite helpful in addressing these problems. Further examples of anticompetitive practices that could potentially create market problems for service suppliers can be found in the 1999 USTR Report on Foreign Trade Barriers.¹³¹ For instance, that Report lists certain computer airline reservation system practices of dominant EU firms that may have the effect of adversely affecting the ability of U.S. airline firms to compete in certain

130. Canada, Services Issues Paper (March 1999).

131. United States Trade Representative, 1999 Report to the President on Foreign Trade Barriers, at 131 (1999).

markets.¹³² Interestingly, this case was the subject of the first, and so far, only formal positive comity request under the U.S.-E.C. Cooperation Agreement.¹³³ After almost one year, the case against one of the owners of the reservation system was settled, and the EC filed a Statement of Objections against the practices of the other owner of the system. That part of the case continues, but the example illustrates the link between anticompetitive practices and trade in services. Other potential examples include airport ground handling services reserved to national carriers. In this specific case, the EC has issued a Directive phasing out that practice. The point to be made is that in sectors such as energy, postal services, telecommunications, and others where exclusive rights remain, some multilateral agreement on competition policy could be beneficial in securing market access.

At this point, it is worthwhile to list a few other potential anticompetitive measures, and the potential sectors in which they might arise: abuse of dominance (financial and postal services, transportation, energy); price fixing (shipping, airlines; professional services); bid-rigging (infrastructure, construction); state aids (airlines); as well as a VER-like market access-inhibiting exceptions/carve-outs from national competition laws. I will return to a sectoral analysis below.

With respect to sectors covered in a Member's schedule, GATS article 8 requires the Member to ensure that a monopoly supplier does not "abuse its monopoly position"¹³⁴ when it competes in the supply of services outside its monopoly rights. Article 9:1 provides that "Members recognize that certain business practices of service providers, other than those falling under article 8, may restrain competition and thereby restrict trade in services." Article 9:2 obliges Members to accede to any request for consultation with any other Member concerning such practices "with a view to eliminating" them.¹³⁵ It also imposes a duty to cooperate in the provision of non-confidential

132. *Id.*

133. Hearing on International Antitrust Enforcement Before the Sen. Comm. on the Judiciary Subcomm. on Antitrust, Bus. Rights, and Competition (Statement of Joel I. Klein, Assistant Attorney General, Antitrust Division U.S. Dep't Of Just. (May 4, 1999).

134. GATS, *supra* note 2, at art. 8, para. 2.

135. GATS, *supra* note 2, at art. 9, para. 2.

information of relevance to the matter in question.

To date, there only has been one request for consultations concerning GATS article VIII. That case involves a United States complaint that Belgian law and regulations on the reform of public enterprises imposes conditions for obtaining a license to publish commercial directories in Belgium, and measures governing the acts, policies, and practices of Belgacomm N.V. with respect to telephone directory services, contravene *inter alia* GATS article VIII.¹³⁶ Belgacomm, the former telephone monopolist in Belgium, is 51% owned by the Belgian government (with the other 49% held by Ameritech, Tele Danmark, and Singapore Telacomm)¹³⁷ and is responsible to the Ministry of Telecommunications, which supervises the Institute for Postal Services and Telecommunications.¹³⁸

Interestingly, the United States did not request consultations with the EC at the same time it made the request to Belgium. There appears to be some suggestion that Belgacomm's actions may also be under investigation by the EC for violating an EC Directive.¹³⁹ This is a good example of the potential for competition policy to be used for further liberalization in trade in services, and to address market access barriers. The fact that the United States has complained raises the interesting possibility that while some potential U.S. entrant is being hurt by the alleged infringement, a U.S. firm, in this case, the "Baby Bell", Ameritech, is also benefitting from the alleged practice. What is clear is that consumers in Belgium are probably being hurt by facing higher prices or reduced choice. Competition policy, therefore, may be a useful complement to services liberalization because its tradition of non-discriminatory application of certain principles can benefit both domestic consumers and potential foreign entrants with market access concerns.

We are still in the very early day of GATS articles VIII

136. See Belgium—Measures Affecting Commercial Directory Services, WT/DS80/1, at <http://www.wto.org/search97cgi/s97.htm> (last visited May 12, 1997) [hereinafter Belgian Measures].

137. Ameritech, a U.S. firm, also owns 42% of Tele Danmark.

138. See Belgian Measures, *supra* note 124.

139. See Gary N. Horlick, *The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View*, 32 INT'L LAW 685 at n.25 (Fall 1998). See generally EC Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions – Fourth Report on the Implementation of the Telecommunications Regulatory Package, COM(98)594/FINAL.

and IX, but this case shows, to some extent, the potential of the GATS to apply competition principles to address certain anticompetitive practices. Thus the GATS itself, apart from the much more talked about sectoral context, is already equipped with certain limited competition principles. This has been recognized in the OECD horizontal work on regulatory reform where one of six "efficient regulation principles for market openness"¹⁴⁰ recognizes the need for competition principles to realize and maintain benefits of reform.¹⁴¹ These competition principles are based substantially on GATS articles VIII and IX.¹⁴² This discussion, and the earlier discussion of potential sectors posing anticompetitive problems, suggests that in thinking about making the GATS an even more promising tool for achieving liberalization, perhaps some thought should be given to making articles VIII and IX even more powerful, directly or through some reconsidered notion of GATS article VI on domestic regulation. I will return to this theme below.¹⁴³

A. *The Telecommunications Sector*

The negotiations on basic telecommunications were not completed by the time the Uruguay Round drew to a close in December 1993. It had become apparent, as the Uruguay Round negotiations on services proceeded, that governments saw telecommunications as special because of their importance in the supply of many other services. Without access to telecom services, many other services cannot be delivered, making specific commitments in relation to the latter of dubious value. Thus, paragraph 5(a) of the Annex states that: "[e]ach Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications trans-

140. See OECD, *The OECD Report on Regulatory Reform, Volume II: Thematic Studies* at 316 (1997), at <http://www.oecd.org/subject/regreform/report/htm> [hereinafter Report on Regulatory Reform]; *Trade and Regulatory Reform: Implications of the OECD Country Reviews for Future Rule-making*, OECD TD/TC/WP(99)16 at 5-9. The other five principles are: transparency; non-discrimination; least trade restrictiveness; use of harmonized measures; and mutual recognition of the equivalence of regulatory measures. *Id.*

141. *Id.*

142. *Report on Regulatory Reform*, *supra* note 128, at 316.

143. See discussion, *infra* Part VI.

port networks and services on reasonable and non-discriminatory terms and conditions for the supply of a service included in its Schedule."¹⁴⁴

Suppliers of such services are entitled to access to and use of any public telecommunications transport network or service offered within or across the border. This includes private leased circuits, the right to purchase or lease, to attach terminal or other equipment to the network, and to interconnect private leased or owned circuits with public telecommunications transport networks and services (or circuits leased or owned by another service supplier).¹⁴⁵ These rights are qualified by the right of the entity owning and/or controlling the network to impose conditions on access and use in order to safeguard public service responsibilities, protect the technical integrity of the networks or services, and to restrict network use where this is not required pursuant to a scheduled commitment.¹⁴⁶ The obligations of the Annex extend not only to service suppliers in other sectors, but also to those in the telecommunications sector who would compete with incumbent network operators.¹⁴⁷

Thus to a degree, competition policy-related issues concerning interconnection, market conduct safeguards, and transparency had already been touched upon in the GATS and its associated Annex on Telecommunications. However, some negotiators felt that the Annex commitments were too general to guarantee new entrants adequate opportunity to compete.

The obligations of GATS and the Annex on Telecommunications apply only to those telecommunications sectors that the WTO Members incorporated in their Schedules. Mostly, the Schedules contained what is commonly referred to as "enhanced telecommunications services."¹⁴⁸ Enhanced services are those services in which the voice or nonvoice information

144. See Annex, *supra* note 1. Non-discrimination in this context comprises both MFN and national treatment. *Id.*

145. *Id.* at para. 5(b)i-iii.

146. *Id.* at para. 5(e)i-iii.

147. It should be noted that Annex commitments only apply in those sectors where governments have accepted specific market access and national treatment commitments. Under the GATS, governments have negotiated these commitments on a sector-by-sector basis, and in sectors that are not covered in this manner, the only obligations that apply relate to most-favoured-nation treatment and transparency.

148. Annex, *supra* note 1.

being transferred from one point to another undergoes an end-to-end restructuring or format change before it reaches the customer.¹⁴⁹ In 1994, the Members' Schedules generally included enhanced services, such as electronic mail, voice mail, on-line information, electronic data interchange, value-added facsimile services, code and protocol conversion, and data processing.¹⁵⁰

The Members were not ready in 1994 to make commitments on "basic telecommunications services" because, unlike enhanced services, the supply of basic services has been by state-owned operators or state-sanctioned monopolies.¹⁵¹ Thus, it became increasingly apparent that if negotiations were limited to the traditional trade approach of scheduling commitments on market access and national treatment, there would not be a guarantee that liberalization commitments would translate into effective access to markets.¹⁵² The removal of regulatory entry barriers is clearly a necessary condition of access, but such action would have little impact in the face of non-governmental barriers based on the ability of regulated incumbent firms to frustrate the market entry.

Thus, a significant component of the extended negotiations centered around a quest for a set of acceptable regulatory principles that would be enforceable through WTO dispute settlement procedures. Accordingly, proposals were made to define interconnection rights more specifically. Market conduct safeguards were also sought to ensure that suppliers with market power refrain from a range of anti-competitive practices. Finally, transparency requirements were sought in order to ensure the countries had adopted it. I turn next to a consideration of the Reference Paper.

B. The Reference Paper

The Reference Paper to the GATS Agreement on Basic

149. *Id.*

150. *Id.*

151. *Id.*

152. Patrick Low, *Multilateral Rules on Competition: What Can We Learn From the Telecommunications Sector?*, Address at OECD Workshop on Trade Policy for a Globalizing Economy (Nov. 1995).

Telecommunications Agreement ("Reference Paper")¹⁵³ represents a prominent example of a framework in a WTO agreement that already involves competition principles. Specifically, the Reference Paper contains a general commitment of Members to maintain appropriate measures to prevent suppliers unilaterally, or collectively, from engaging in or continuing anti-competitive practices. A "major supplier" is defined as one with the power "to materially affect the terms of participation (having regard to price and supply), either due to control over essential network facilities or its market position."¹⁵⁴

In addition, the Reference Paper gives several specific examples of anti-competitive practices. These are:

- a. anti-competitive cross-subsidization;
- b. use of information obtained from competitors (with "anti-competitive results");
- c. withholding technical and commercially relevant information.¹⁵⁵

The Reference Paper also applies to "interconnection" issues: *e.g.* the linking with suppliers providing public telecommunications transport networks or services to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier.¹⁵⁶ However, the extent of this obligation is limited to the specific commitments undertaken by a Member in the various schedules of GATS and ABT commitments. Interconnection must be provided:

- a. under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- b. in a timely fashion, on terms, conditions (including technical standards and specifications), and cost-oriented rates that

153. Reference Paper, 36 I.L.M. 367 (1997) [hereinafter Reference Paper].

154. *Id.*

155. *Id.* at § 1.2.

156. *Id.* at § 2.

are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

c. upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.¹⁵⁷

The Reference Paper also builds on transparency in order to ensure that the Agreement can actually be operationalized. The procedures applicable for interconnection to a major supplier will be made publicly available, and a major supplier must make publicly available either its interconnection agreements or a reference interconnection offer.

With respect to settlement of disputes under the Agreement, the Reference Paper appears to distinguish between disputes about anti-competitive practices and disputes about interconnection. There is no particular form of dispute settlement provided for disputes over anti-competitive practices of major suppliers, however, presumably a Reference Paper Signatory's failure to maintain appropriate measures would be subject to dispute settlement. With respect to interconnection, the Reference Paper indicates that for dispute settlement, recourse is to be made to an independent domestic body.¹⁵⁸ A service supplier requesting interconnection with a major supplier will have recourse, either: "at any time"¹⁵⁹ or "after a reasonable period of time which has been made publicly known" to an independent domestic body, which may be a regulatory body.¹⁶⁰ That body must be given the authority to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously. It is conceivable (and not precluded by the terms of the Reference

157. *Id.* at § 2.2.

158. *Id.* at § 2.5.

159. *Id.* at § 2.5(a).

160. In the case where this is a "regulatory body," it must be separate from, and not accountable to, any supplier of basic telecommunications services, and its decisions of and the procedures used by regulators must be impartial with respect to all market participants. See Reference Paper, *supra* note 141, at § 2.5(b).

Paper itself) that the body might not be a sector-specific regulator, but, e.g., a competition authority.¹⁶¹

The Reference Paper also reflects a balance between the objectives of both trade liberalization and competition policy and other social or policy objectives of interest to governments and civil society. Article 3 provides that any Member has the right to define the kind of universal service obligation it wishes to maintain, and such obligations will not be regarded as anti-competitive *per se*. However, those requirements must be administered in a transparent, non-discriminatory, and competitively neutral manner and cannot be more burdensome than necessary for the kind of universal service defined by the Member. Similarly, any procedures for the allocation and use of scarce resources, including frequencies, numbers, and rights of way, must be carried out in an objective, timely, transparent and non-discriminatory manner.

When the ABT entered into force in February 1998, 69 of the 130 WTO members committed to some degree of liberalization of their telecommunication markets.¹⁶² Of these, 44 (representing 99 percent of basic telecommunications revenue among WTO members) permitted entry by foreign carriers.¹⁶³ Furthermore, 55 countries agreed to adhere to the Reference Paper.¹⁶⁴

C. *Implications of the Agreement on Basic Telecommunications*

In this section, I discuss the implications of the ABT for future multilateral rule-making with respect to trade and competition policy issues. First, I identify several unique factors that, in part, made possible this sectoral agreement. Second, I discuss possible ways in which the architecture of this agree-

161. See generally Reference Paper, *supra* note 141.

162. See Toshiaki Takigawa, *The Impact of the WTO Telecommunications Agreement on the U.S. and Japanese Telecommunications Regulations*, 32 J. WORLD TRADE 33, 39 (Dec. 1998).

163. See *id.* at 40.

164. See *id.* at 39-40. Cf. Lawrence J. Spiwak, *From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1998*, 51 FED. COMM. L.J. 111, 176 (1998) (noting that certain "signatory countries agreed to uphold certain 'pro-competitive regulatory principles' yet, at the same time, these signatory countries also condone those signatory countries which refuse to allow any new competitors to enter their market").

ment may be applied in other sectoral contexts, or to other multilateral rule making. Finally, I conclude with a discussion of several normative caveats, which suggest that this model should be invoked with some caution when it comes to other contexts.

1. Factors Facilitating the ABT

First, over the last two decades, there has been a spurt in technological developments in the telecommunications industry globally.¹⁶⁵ These developments on the supply-side have been matched with tremendous growth in demand for traditional and new forms of telecommunication services.

Second, this growth in demand is linked, in part, to the fact that telecommunication services are an important component of, or input into, traded or tradable services.¹⁶⁶ The demand and supply of enhanced services and growth of foreign service suppliers in these areas have also tended to highlight the further gains that could be achieved by liberalisation of basic telecommunications services as well. Furthermore, as barriers between nations decline, and economic interdependence grows, so too does the demand for increased links between national telecommunication networks. Consequently, this interdependence highlighted the need for a multilateral as opposed to a network of bilateral approaches. Furthermore, given the prominence of this sector in the modern global economy, certain growth-oriented developing countries may have chosen to signal their commitment to open trade and investment policies by agreeing to liberalization in this sector.¹⁶⁷

Third, over the same time period many of the leading markets for the demand and supply of telecommunications services have unilaterally liberalised their regulations of first, enhanced telecommunication services, and then basic telecommunication services. This liberalisation has in some cases also involved significant privatisation of incumbent domestic mo-

165. See generally OECD, *Information Technology Outlook 1997 (1997)*; OECD *Communications Outlook 1997*, Vol. 2 at 31 (1997).

166. Patrick Low & Aadityi Mattoo, *Reform in Basic Telecommunications and the WTO Negotiations: The Asian Experience*, at http://www.wto.org/english/res_e/reser_e/pera9801.wpf (last visited Feb. 1998).

167. *Id.*

nopolies. This trend has been accompanied by increasing application of competition principles by telecommunications regulators, or in some cases the application of competition policy to these sectors.¹⁶⁸ There is wide agreement that this transitional nature of the telecommunications industry, from a highly regulated character with public monopolies, to a less regulated character with more entrants and service providers, was a crucial and unique feature recognition of which helps to explain the competition provisions of the Reference Paper. Once governments had decided to emphasize entry and to open this network industry to international competition, there was a feeling that traditional trade approaches to market access through national treatment and MFN commitments alone would not be sufficient to ensure successful entry by foreign service suppliers without additional competitive safeguards. Hence the Reference Paper builds on both traditional market access concepts as well as competition principles. Although, some might argue that, in this respect, the Reference Paper could be seen as going beyond the existing approaches to access to "essential facilities" under the competition laws of many countries.

Fourth, the successful negotiation of the ABT may have something to do with the inherent character of trade in services as compared to trade in goods. It may be that trade in services is seen as inherently implicating "behind the border" domestic regulation to a much greater degree than the traditional "at the border" tariff or non-tariff barriers emphasis of the liberalization of trade in goods. Even where the national treatment commitment applies behind the border to imported "like" products, it is less likely to call into question the existing domestic regulatory scheme and choices as appears to be the case in trade in many services. Accordingly, nations have been more hesitant to apply the broad traditional approach to applying the most-favoured-nation ("MFN") and national treatment principles than has been the case with trade in goods.

Therefore, from a pragmatic viewpoint, a negotiating approach based on a degree of up front liberalisation, and disciplines on domestic regulation may have been important. It

168. See generally OECD, *Competition in Telecommunications* OCDE/GD(96)114; see also OECD, *Developments In Telecommunications: An Update Aide Memoire*, at <http://www.oecd.org/daf/clp/roundtables/tel-aidmm.htm> (last visited Jan. 1998).

may be that, for this reason, trade liberalisation and competition law and policy can act in a particularly focused and complementary fashion to promote pro-competitive reform of existing domestic regulation. While competition authorities will be concerned with promoting competition within the domestic market, trade officials will also be concerned with the relationship between the domestic market regulation, and export and foreign investment opportunities of domestic firms.

These four factors may not be necessary, but rather sufficient conditions for trade and competition policy to work in a complementary fashion in respect of multilateral rule making. Accordingly, one might suggest that other highly regulated tradable service sectors characterised by network effects (e.g. electricity) may be candidates for the ABT approach to multilateral rule making. I will return to this point below.

2. Architecture

Although the ABT is a sectoral agreement with respect to trade in services, its architecture might have implications for both trade in goods, and more general multilateral competition rule making. As discussed above, the ABT builds on the GATS commitment of: MFN and national treatment linked to schedules of commitments; transparency; disciplines on the abuse of a monopoly position by a monopoly supplier; and multilateral dispute settlement. In addition the ABT incorporates the Telecommunications Annex to the GATS which addresses issues of access and use of public telecommunications transport networks and services.¹⁶⁹ Similarly, the ABT incorporates the Reference Paper; at least insofar as concerns the 55 countries that have agreed to adhere to it.¹⁷⁰ The Reference Paper also addresses issues of anticompetitive practices and interconnection.¹⁷¹

It may be worth giving further consideration to this aspect of the Reference Paper. As discussed above, the Reference Paper defines a "major supplier" as a supplier that has a mate-

169. See generally Annex, *supra* note 1, at 1194.

170. Takigawa, *supra* note 150, at 40.

171. Reference Paper, *supra* note 141, at § 1.1, para. 2.

rial effect on price or quantity by virtue of controlling an essential facility or using its market position.¹⁷² No further definition is given of the term "essential facility" suggesting that each jurisdiction has, at least, some degree of regulatory flexibility. With respect to the major supplier's abuse of its market position, more guidance is given by a non-exhaustive list of anticompetitive practices – cross-subsidization; the misuse of competitors' confidential information (presumably obtained from interconnection or through horizontal collusion); and withholding important information relating to an essential facility. In the context of the application of competition policy in most OECD Members, at least as regards telecommunications, this list is probably uncontroversial insofar as it goes. However, what is important here is that Members have agreed to a framework for thinking about anticompetitive practices in the telecommunications area while retaining important degrees of freedom to implement their regulatory policy choices. This point holds true even with respect to interconnection issues discussed in the Reference Paper. Again, if there were a failure to meet this obligation permanently this would likely be a matter for multilateral dispute settlement.

Thus, the Reference Paper provides a flexible approach to dealing with certain trade and competition concerns. This flexible architecture is also manifested in the dispute settlement provisions of the Reference Paper. Countries have an obligation to maintain "appropriate measures" to prevent major suppliers from engaging or continuing to engage in anticompetitive practices. There is no obligation with respect to the detailed application of those laws. However, the WTO dispute settlement provisions could address the issue of whether a particular measure is "appropriate" without making a judgment about the application of the measure in any particular case. With respect to interconnection issues, countries are required to provide access to an independent "regulator," and such regulator is subject to certain other procedural requirements.

172. *Id.* at 367.

3. Caveats

Three important caveats about the ABT model of dealing with trade and competition concerns can be identified at this stage. First, it might be argued that if governments agree to create mutual obligations to enforce a given set of regulatory principles, they could be viewed as having tied themselves into an established pattern of regulation. This approach may be appealing from the point of view of opening up market access on a broadly reciprocal basis. However, it also has the potential drawback of locking in a uniform approach in circumstances that might be quite different among countries. In the specific context of the ABT and the Reference Paper, and the more general context of possible future multilateral initiatives that might build upon the flexible architecture described above, this will not necessarily be the case. That is so because the Reference Paper does not set forth a detailed or mechanical "common standard" for regulation of the telecommunications sector. Rather, the Reference Paper provides an approach to applying principles of competition to the telecommunications sector while leaving significant freedom and flexibility for Members to implement their regulatory policy choices.

This problem, to the extent that it exists, can also be addressed through the design of the regulatory principles that do not apply when a given threshold of diversification in relation to the sources of supply available in a market has been attained. Even so, multilateral uniformity may still in some circumstances lead to a suboptimal degree of regulatory intervention. In other words, the regulatory authorities, or the governments, to whom they are ultimately responsible, could find that multilateral commitments make regulatory forbearance harder in circumstances where it might otherwise seem desirable. Again, for the reasons described above, in the specific context of the ABT and the Reference Paper, and the more general context of possible future multilateral initiatives that might build upon its flexible architecture, there is no *a priori* reason to expect this result to occur.

The third caveat is the risk that regulatory interventions putatively designed to promote competition instead become primarily used to protect competitors, not competition. However, given the flexible architecture of the ABT and the Reference

Paper, there does not appear to be any *a priori* reason to expect the problem of rent-seeking to be worsened by the multilateral agreement. On the contrary, the embodied emerging consensus among trade and competition officials about telecommunications regulation would seem to strengthen, rather than weaken the hands of those authorities wrestling with these forms of rent seeking behaviour. It must also be recognized that antitrust laws and their enforcement may, in certain jurisdictions – inside and outside the OECD – reflect multiple objectives, including industrial policy considerations. It is also true that antitrust authorities may be subject to the similar problems of capture and political influence as other types of regulators.

This section of the paper has attempted to set forth some of the implications of the ABT for multilateral rule making in respect of trade and competition policy issues, while recognizing that there are discrete factors that led to the creation of what one commentator has called “a unique and slightly divergent method for the establishment of international competition.”¹⁷³ Where similar conditions are present, the ABT might provide a useful model for dealing with these issues in other sectors such as electricity.

The next section of the paper looks at the other GATS sectoral “agreement” that refers to competition policy – Financial Services.

D. The Understanding on Financial Services

The Understanding on Financial Services (“Understanding”) is similar to the Reference Paper to the Basic Telecommunications Agreement. It has no independent status as a WTO or GATS Agreement *per se*, except to the extent that it has been reproduced into Members Schedules of Specific Commitments as provided for in the Annex on Financial Services to the GATS.

The Understanding makes certain market access provi-

173. James F. Rill et al., *Institutional Responsibilities Affecting Competition in the Telecommunications Industry: A Practicing Lawyer's Perspective*, Working Draft Paper, prepared for the European University Institute 1998 EU Competition Workshop, at 23 (1998).

sions with respect to monopoly rights. It provides that in addition to Article VIII of the GATS “[e]ach Member shall list in its schedule pertaining to financial services existing monopoly rights and shall endeavour to eliminate or reduce them.”¹⁷⁴ Furthermore, this additional commitment applies to other activities conducted by a public entity for the account or with the guarantee of using the financial resources of the Government.

E. Disciplines on Domestic Regulation in the Accountancy Sector

The WTO Disciplines on Domestic Regulation in the Accountancy Sector (the “Accounting Disciplines”) were adopted by the Council on Trade in Services in December 1998. Unlike the Reference Paper or the Financial Services Understanding, the Accounting Disciplines have not yet been incorporated into any country’s Schedule of Commitments. The Working Party on Professional Services continues to aim to develop general disciplines for professional services, while retaining the possibility to develop or revise sectoral disciplines, including accountancy. No later than the conclusion of the forthcoming round of services negotiations, the disciplines developed by the WPPS are intended to be integrated into the GATS. Until the formal integration of these disciplines into the GATS, Members are enjoined, to the fullest extent consistent with their existing legislation, not to take measures which would be inconsistent with these disciplines.¹⁷⁵ As such, their status at present represents that of hortatory guidelines.¹⁷⁶ As such, they do not appear to be subject to the dispute settlement provisions of the WTO. This architecture may serve as a useful precedent in the event that the OECD non-binding Recommendations approach

174. The Understanding on Financial Services, art. B(1), at http://www.wto.org/english/docs_e/legal_e/final_e.htm (last visited Oct. 13, 2000). Legitimate objectives are defined in Article II:2 as, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

175. WTO, Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector, S/WPPS/4, (Dec. 10, 1998).

176. *Id.* at attach. 1, para. 3.

to international competition policy rule-making were adopted within the WTO.

In addition to that architectural point, the Accounting Disciplines do contain provisions on licensing that are similar to concerns of competition policy enforcers.¹⁷⁷ For instance, they provide that where membership of a professional organization is required, in order to fulfil a legitimate objective specified in the text, Members shall ensure that the terms for membership are reasonable, and do not include conditions or pre-conditions unrelated to the fulfillment of such an objective.¹⁷⁸ Furthermore, where membership of a professional organization is required as a prior condition for application for a license (i.e. an authorization to practice), the period of membership imposed before the application may be submitted shall be kept to a minimum.¹⁷⁹ Both of these conditions focus on reducing barriers to entry which could pose both market access and competition problems.¹⁸⁰

In addition, the market access provisions prohibit, in sectors where market-access commitments are undertaken, a Member from maintaining or adopting either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.¹⁸¹

This section of the paper has reviewed the competition provisions in the GATS and its associated "agreements" to date. A key conclusion is that the GATS itself may be a robust tool to apply competition policy to the liberalization in trade in services. However, certain sectors require additional tailored competitive safeguards in order to make parties willing to accept reciprocal market access concessions. Furthermore, the GATS shows some interesting architectural ways of introducing new and complicated subject matters into the WTO. This is demonstrated in the sectoral "plurilateral" commitments in the

177. *Id.* at attach. 2 ("Disciplines on Domestic Regulation in the Accountancy Sector").

178. *Id.* at part III ("Licensing").

179. *Id.*

180. S/L/64 (Dec. 14, 1998), art. 4, para. 10.

181. *Id.* at art. 16, para. 2.

Reference Paper with respect to Basic Telecommunications, and in the Undertaking with respect to Financial Services. On a more basic level, the Accounting Disciplines integrate a transitional concept of non-binding guidance into the framework of WTO Agreements. In addition, each of these examples warrants further consideration to determine what general competition principles might be applied horizontally within the GATS framework through the Article VI provisions on domestic regulation. I turn to that issue in the next section of the paper.

VI. AN EXPANDED GATS ARTICLE VI

Article VI of the GATS deals with domestic regulation.¹⁸² At its most basic level, it provides that in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner.¹⁸³ Further provisions require each Member to maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. However, these provisions are not to be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.¹⁸⁴

Article VI:4 sets out specific rules to apply to measures relating to qualification requirements and procedures, technical standards, and licensing requirements to ensure that they do not constitute unnecessary barriers to trade in services.¹⁸⁵ The Council for Trade in Services is given the authority to develop any necessary disciplines aimed at ensuring that such requirements are, *inter alia*:

- a. based on objective and transparent criteria, such as com-

182. GATS Agreement, *supra* note 2, at art. 6.

183. S/L/64 (Dec. 14, 1998), at art. 6, para. 1.

184. *Id.* at art. 6, para 2.

185. *Id.* at art. 6, para. 4.

petence and the ability to supply the service;

- b. not more burdensome than necessary to ensure the quality of the service; and
- c. in the case of licensing procedures, not in themselves a restriction on the supply of the service.¹⁸⁶

Pending the agreement on those disciplines, Article VI provides that in sectors in which a Member has undertaken specific commitments, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments.

As currently structured, Article VI applies to measures relating to qualification requirements and procedures, technical standards and licensing requirements. Arguably, competition law and policy may be relevant to all such measures. The further requirement in Article VI is that such measures in domestic regulations not constitute unnecessary barriers to trade in services. Again, competition law and policy can be an important instrument in ensuring that these measures are administered in a way that pays particular attention to strategic or other regulatory barriers to trade in services.

The question that emerges is whether in the GATS 2000 negotiations, a means can be found to integrate more directly certain competition law and policy concerns, and other competitive safeguards into Article VI.¹⁸⁷ In other words, some consideration might also be given to further horizontal GATS measures that have a more *ex ante*, pro-active effect in the implementation of domestic regulation in a manner that also serves to discipline certain anticompetitive measures affecting international trade. In this regard, one could imagine some combination of principles, perhaps akin to the six efficient regulatory principles for market openness that have emerged

186. *Id.*

187. See Geza Feketekuty, Competition Policy and the WTO: Implications of Recent Developments in the Services Sector, Paper Presented to the Third WTO Symposium on Competition Policy and the Multilateral Trading System (Apr. 17, 1999); See also Geza Feketekuty, Market Competition and Regulatory Reform in Services: Removing Obstacles to Competition and Growth, Paper Presented to a Preparatory Conference Sponsored by the American Enterprise Institute; the Brookings Institute; the Center for Business and Government, Harvard University; and the CSI Research and Education Foundation (June 1, 1999).

from the OECD regulatory reform work described above.¹⁸⁸ Under this approach, one might consider building competition principles to address interconnection and access issues, and perhaps others as well into a revision of GATS Article VI, or alternatively perhaps in the GATS Article XVI market access commitments.

Relevant experience may be found in the history of Article VI of the GATT 1947 which sets forth the discipline on antidumping measures and the successive interpretations, codes and understandings which culminated in the Uruguay Round with the Agreement on the Interpretation of Article VI of the GATT.¹⁸⁹ One could consider a gradual expansion of the GATS Article VI commitment through a similar iterative process. This might be a useful option to consider to the extent that a horizontal agreement on competition policy is not feasible at this time, or to the extent that an endless series of sectoral agreements with competition policy is not seen as desirable at this time.

One immediate way of conceptualizing this would be to back the commitments in GATS Article VIII with respect to monopoly leveraging, and Article IX with respect to anticompetitive practices into an expanded understanding of domestic regulatory requirements. Further insights might be gained from looking at the experience in those sectors where agreements embodying competition policy have already been achieved. However, it should be plainly stated that not all such features such as "essential facilities" concepts might properly form part of a generic GATS Article VI competition provision.¹⁹⁰ This "half-way" house in a sense would build on the important recognition of the ties between competition law and policy and domestic regulation.

Of course, if this approach were adopted, consideration would have to be given to striking the appropriate balance between the other legitimate goals and policy rationales of domestic regulation and the other principles that would be

188. See OECD Report on Regulatory Reform, *supra* note 128.

189. See GATS Agreement, *supra* note 1, at art. 6.

190. Recent OECD work on competition policy and regulation might also provide some useful insights. See OECD, *Promoting Competition In Sectors With A Non-Competitive Component: Report by the Secretariat*, DAFFE/CLP/WP2(99)4 (Apr. 13, 1999).

included in any further disciplines on domestic regulation. In this regard, it may be worth considering how such other principles might relate to the existing GATS article VI:4, which adopts "necessity" as the central rule to assess the compatibility with the GATS of trade restrictive domestic regulatory measures. The chapeau of article VI:4 identifies the main objective of the disciplines on domestic regulation, which the Services Council is called upon to develop: to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing procedures do not constitute unnecessary barriers to trade in services."¹⁹¹

In the following section of the paper, I highlight potential competition policy issues that might emerge for negotiation if a sectoral approach to liberalization on trade in services is adopted. The competition concerns discussed might also be addressed using the iterative Article VI approach outlined above.

VII. OTHER SECTORAL ISSUES FOR COMPETITION POLICY IN THE GATS

In this section of the paper, I briefly review some potential competition policy issues to be addressed in further sectoral GATS negotiations. At this stage, the analysis is of a summary nature drawing on the GATS sectoral working background notes and recent OECD studies.¹⁹² My purpose here is to flag some of the possible competition concerns that might arise as the sectoral negotiations progress. My intention is not to be definitive but rather to suggest some possible lines of consideration for negotiators.

191. To date, the Working Group on Article VI has focused on necessity, transparency, equivalence and mutual recognition. *See generally* WTO Council for Trade in Services, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services: Note by the Secretariat*, S/C/W/96 (Mar. 1, 1999); WTO Working Party on Domestic Regulation, *Report on the Meeting Held May 17, 1999: Note by the Secretariat*, S/WPDR/M/1 (June 14, 1999); WTO Working Party on Domestic Regulation, *Report on the Meeting Held July 14, 1999: Note by the Secretariat*, S/WPDR/M/2 (Sept. 2, 1999).

192. The 20 WTO Sectoral Papers on Trade in Services, at <http://www.wto.org/wto/services/w65.htm> (last visited Oct. 15, 2000).

A. *Distribution Services*

A lot can be said about distribution services and the application of competition policy. However, since my goal is not to settle that issue in this paper, at this stage, I simply pose some questions for further analysis in the event that negotiations on liberalization in this sector is pursued. Do private practices create welfare-reducing barriers to trade in distribution services? If so, is there a case for developing certain pro-competitive regulatory to address those distortions? Alternatively, would excessively stringent competition policy norms themselves inhibit the development of efficient distribution arrangements? Is it sufficient for national competition law and policy to be administered on a non-discriminatory basis in examining distribution issues, or does entry into retailing by foreign service providers require some special analysis to account for qualitative differences between foreign and domestic firms?

B. *Postal and Courier Services;¹⁹³ Energy Services; Land Transport Services – Rail Transport*

These sectors are examples of network industries that are similar to the telecommunications context discussed above. These sectors raise a number of competition concerns ranging from abuse of dominance to access to essential facilities. They thus may be particularly well-suited for a consideration of the extension of competitive safeguards similar in type to those set forth in the Reference Paper with respect to Basic Telecommunications.

C. *Air Transport Services*

This sector seems to be particularly ripe for the consideration of competition policy safeguards for the liberalization of trade in services. Among the issues that could be considered

193. See generally OECD, *Promoting Competition in Postal Services Background Note*, DAFFE/CLP/WP2(99)1 (Jan. 27, 1999).

are: abuse of dominance (by private or state-owned carriers); price-fixing; market (slot) allocation; access to and use of essential (ground handling) facilities; and perhaps even predatory pricing.¹⁹⁴ Some of these concerns might be more suited to the approach taken in the Reference Paper.

D. Maritime Transport Services

In June 1996, the post-Uruguay Round negotiations on liberalization in this sector were suspended, pending the resumption of comprehensive negotiations in the context of GATS 2000.¹⁹⁵ Among the issues that could be considered in future negotiations are: the application of competition policy safeguards to liner shipping alliances (whether consortia or conferences); the continued need for exemptions from competition laws; and the enforcement of laws against price fixing and other cartel behaviour with respect to harbour services.

E. Land Transport Services – Road Transport

The road transport services is, unlike the other transportation services, not inherently a network industry. For that reason, concerns relating to monopolization and abuse of dominance using vertical restraints seem less important than horizontal concerns relating to bid-rigging, price-fixing, and market allocation. In other words, a general competition law should address the market access concerns in this sector. Other possible concerns relate to regulatory standard-setting measures and licensing agreements administered in a discriminatory or unnecessarily restrictive manner to the detriment of foreign entrants. This sector also would seem to be an example of the limitations of a purely sectoral approach to addressing competition concerns. It might be that multi-modal regulations upstream have downstream anti-competitive effects in the road transport service sector.

194. See generally OECD, *Competition Policy and International Airport Services*, DAF/CLP(98)3 (May 14, 1999).

195. WTO, *Decision on Maritime Transport Services*, Adopted by the Council for Trade in Services, June 26, 1996, S/L/4 (July 3, 1996).

F. Environmental Services

Several questions arise from the highly concentrated nature of this sector in most countries because of its “public monopoly” characteristics. How far do the disciplines of GATS Article VIII ensure that the behavior of monopolies supplying environmental services is not discriminatory? Is there a case for developing certain pro-competitive regulatory principles? Are broad exemptions from the application of competition policy necessary in order to achieve the objectives of the regulations that give rise to this industry in many cases?

G. Construction and Related Engineering Services

This sector raises a number of potential competition problems for which competition policy safeguards might be considered in the context of future negotiations. These concerns range from concerns about bid-rigging and other cartel behavior, to licensing and standard setting concerns.

H. Audiovisual Services

With the increased number and variety of network-based services, competition policy also needs to play a much greater role in the regulation of audiovisual content. However, the evolutionary nature of convergence also means that competition policy may need to be applied with a more constant and detailed attention to market, sectoral, product and technological evolution. Given the political sensitivity of this sector in some countries, perhaps some benefit could be gained by studying the balance between the competitive safeguards and universal service requirements in the Reference Paper with respect to Basic Telecommunications.

I. Advertising Services; Legal Services; Architectural and Engineering Services; Education Services; Health and Human Services

The basic approach to issues of licensing in the accounting

disciplines might be applicable in these sectors also. However, the issues of concern are potentially deeper than just ones of licensing in the professions, but also market operation such as restrictions on advertising, and horizontally, who gets to participate in the decision making process on market regulation? Consideration might also be given to the transitional architecture of non-binding guidance in the Accounting Disciplines to begin to apply competition principles to cross-border trade in professional services.

J. Tourism Services

This sector does not appear at first glance to present the need for any particular competition policy safeguards. However, in some cases, licensing agreements might be granted in anticompetitive ways, and local or national service providers might still be granted preferential treatment that gives rise to concerns about monopolization or abuses of dominant provisions. The tourism sector is a good example of how downstream service sectors can be affected by anticompetitive upstream behavior. For instance, tourism might very well be affected by anticompetitive distortions caused in transportation (air, rail, or maritime) or in advertising. Thus, it is a good illustration of how a purely sectoral approach to dealing with competition concerns might not yield the full benefits of trade in services.

K. Computer and Related Services

This sector may be characterized by some aspects of network industries. To that extent, it may share some of the same competition concerns relating to access to essential facilities that were identified above in relation to other service sectors. It is also a sector that may demonstrate the limitations of a sectoral approach to dealing with competition concerns. For instance, it may be that restrictions and distortions in another service sector such as telecommunications are also the source of competitive distortions downstream in this sector.

In this section of the paper, I have tried to sketch out some preliminary ideas of where competition concerns might

arise in various service sectors, and where those restrictions might have adverse effects on trade in services. As negotiations proceed, much more detailed work will have to be done to put flesh on these bones. The Table below represents an attempt to draw some subjective impressionistic judgements about the relative importance of various rudimentary competition concerns in each sector. Each sector is analyzed to give an idea where horizontal concerns (agreements among competitors), vertical concerns (agreements between firms at different levels of production and distribution), abuse of dominance, and exceptions/exemptions from national competition laws might pose problems. The problems are rated from low to high with high being the greatest source of concern, and low being a very minor level of concern. At some later stage, one could think of grouping the identified concerns in a way that might be useful for an expanded GATS article VI. On first impression, it appears, however, that simply bringing GATS article VIII and IX more closely into the ambit of article VI would provide a first stab at a more robust approach to achieving pro-competitive domestic regulation in a manner that promotes trade in services.

TABLE I: POTENTIAL COMPETITION CONCERNS BY SERVICE SECTOR

SER- VICE SECTOR	HORI- ZONTAL CON- CERNS	VERTI- CAL CON- CERNS	ABUSE OF DOM- INANCE	EXCEP- TIONS EXEMP- TIONS
Distribu- tion	Medium	High	Medium	Low
Postal and Cou- rier	Low	Medium	High	High
Energy	Low	High	High	High

Land Trans- port - Road	High	Medium	Low	Medium
Land Trans- port - Rail	Medium	Medium	High	High
Air Trans- port	High	High	High	High
Maritime Trans- port	High	High	High	High
Environ- mental	Medium	Medium	High	Medium
Construc- tion and Related Engi- neering	High	Low	Medium	Low
Audiovi- sual	Low	Low	High	High
Advertis- ing	Medium	Low	Low	Medium
Legal	High	Low	Low	Medium
Architec- tural and Engi- neering	High	Low	Low	Medium

Educa- tion	Low	Low	Low	High
Health and Hu- man	High	Medium	Medium	High
Tourism	Medium	Medium	Medium	Medium
Comput- er and Related Services	Low	Medium	Medium	Low

VIII. CONCLUSIONS

In this paper, I have examined the GATS implications of integrating competition policy disciplines in the WTO. However, at present, it seems unlikely that comprehensive binding horizontal competition rule-making will be successful. By contrast, I demonstrated that the existing GATS and its associated sectoral "agreements" are fairly robust instruments for integrating competition policy safeguards into sectoral liberalization initiatives, and perhaps more broadly to domestic regulation by some iterative expansion of GATS article VI. In this context, I suggested that in thinking about GATS article VI, the experience under GATS articles VIII and IX, and the provisions in the Basic Telecommunications Reference Paper, Financial Services Undertaking, and Accounting Disciplines deserve much closer scrutiny. If an incremental sectoral approach to integrating competition policy into the WTO is pursued, then I also showed possible issues for consideration in each of the identified service sectors identified by the Council for Trade in Services.

Finally, this paper also showed that apart from sectoral insights, the provisions in the Basic Telecommunications Reference Paper, Financial Services Undertaking, and Accounting Disciplines offer useful architectural approaches to thinking about horizontal rule-making in competition policy within the

WTO. These architectural insights apply both to the context of binding rules, and non-binding rules within the WTO.

Whatever the approach taken to integrate competition policy disciplines into the WTO, there is no mistaking the fact that it will be difficult to achieve the optimal benefit from the liberalization of trade and investment without some serious consideration of issues of competition. It may well be that without the integration of competition policy disciplines in some manner, it will also be very difficult politically for countries to make the necessary reciprocal market access concessions that are essential to moving significantly beyond the status quo.