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COMPETITION LAW AND POLICY IN THE CONTEXT OF THE WTO SYSTEM

Mitsuo Matsushita

I. THE WTO SYSTEM - A NEW MULTILATERAL TRADE ORDER

A. *The Uruguay Round Trade Negotiation and the Establishment of the WTO*

The World Trade Organization (WTO) is the product of the Uruguay Round Multilateral Trade Negotiations (the UR) which is the 8th Round under the General Agreement on Tariffs and Trade (GATT).¹ Beginning in 1986 and ending in 1993,² the WTO was the longest and perhaps the most difficult trade negotiation in the history of the GATT.³ Negotiations were by no means smooth. In fact, the entire process almost collapsed due to the parties failure to agree on such items as agriculture and antidumping matters.⁴ For example, the United States and the European Communities differed on issues relating to agricultural subsidies and the United States and Japan diverged on matters relating to antidumping.⁵ Eventu-

1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinafter GATT], *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1 (4th Supp. 1969). For major works on the GATT, see generally KENNETH W. DAM, THE GATT-LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) [hereinafter JACKSON, LAW OF GATT]; JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989); EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION (2d ed. 1986).

2. David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L.J. 817, 819 (1994). For additional commentary on the concept of the World Trade Organization, see JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990).

3. Robert R. Wilson, *Proposed ITO Charter*, 41 AM. J. INT'L L. 879, 879-85 (1947); *see also* Clair Wilcox, *Basic Principles in Establishment of International Trade Organization*, 15 DEP'T ST. BULL. No. 382, Oct. 27, 1946 (noting the historical developments and fundamental principles which fueled the genesis of the ITO).

4. Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 462 (1994).

5. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [hereinafter Uruguay Round], GATT Doc. MTN/FA (Dec. 15, 1993), 33 I.L.M. 9 (1994), *reprinted in* Office of the U.S. Trade Representative, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Version of 15 December 1993) (1993).

ally, the negotiating parties compromised and on December 15, 1993, the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" was adopted.⁶ On April 15, 1994, the contracting parties signed the Final Act and the WTO was officially born on January 1, 1995.⁷

Although a detailed discussion of the WTO is beyond the scope of this Article, a brief overview of the WTO system is useful. The WTO Agreement (formally entitled "Agreement Establishing the World Trade Organization") includes Annex 1A through 1C, Annex 2, Annex 3 and Annex 4.⁸

Annex 1A through 1C contain the major agreements on subject matters of international trade. Annex 1A, entitled "Multilateral Agreements on Trade in Goods," deals with the liberalization of trade in goods.⁹ This is accompanied by 13 agreements such as "Agreement on Agriculture," "Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade" (Antidumping Agreement) and "Agreement on Safeguards (Safeguard Agreement)."¹⁰ Annex 1B is entitled "General Agreement on Trade in Services and Annexes" (The GATS),¹¹ and Annex 1C is entitled "Agreement on Trade-Related Intellectual Property Rights" (The TRIPs).¹²

Annex 2, entitled "Understanding on Rules and Procedures Governing the Settlement of Disputes," sets out rules on the procedures for settling disputes among member states.¹³ Annex 3, entitled

6. *Report of the Ad Hoc Committee on Restrictive Business Practices, Restrictive Business Practices*, U.N. Economic and Social Council, 13th Sess., 546th Meeting, U.N. Doc. 5/SR 546 (1951); U.N. Doc. E/2380, (1953); Wirth, *supra* note 2, at 819-20.

7. General Agreement on Tariffs and Trade, Restrictive Business Practices (1995).

8. Agreement Establishing the World Trade Organization, GATT Doc. MTN/FA II-A (Dec. 15, 1993) [hereinafter WTO Agreement], in Uruguay Round, *supra* note 5; see also Mitsuo Matushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436, 436-39 (1991) (discussing the Structural Impediments Initiative and the trade policies and negotiations between the United States and Japan).

9. Multilateral Agreement on Trade in Goods, GATT Doc. MTN/FA II-A1A (Dec. 15, 1993), in Uruguay Round, *supra* note 5.

10. Multilateral Agreement on Trade in Goods, GATT Doc. MTN/FA II-A1A (Dec. 15, 1993), in Uruguay Round, *supra* note 5.

11. General Agreement on Trade in Services and Annexes, GATT Doc. MTN/FA II-A1B (Dec. 15, 1993) [hereinafter GATS], in Uruguay Round, *supra* note 5.

12. Agreement on Trade-Related Intellectual Property Rights, GATT Doc. MTN/FA II-A1C (Dec. 15, 1993) [hereinafter TRIPs], in Uruguay Round, *supra* note 5.

13. Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT Doc. MTN/FA II-A2 (Dec. 15, 1993) [hereinafter Dispute Rules], in Uruguay Round, *supra* note 5.

“Trade Policy Review Mechanism” (The TRPM),¹⁴ establishes the TPRM as the body which reviews trade practices of member states and points out issues which are problematical in light of the agreements.¹⁵ Annex 4, entitled “Plurilateral Trade Agreement,” contains four agreements such as Agreement on Government Procurement.¹⁶ A member state must adopt all of the above agreements except for Annex 4 when it joins the WTO agreement.¹⁷ This approach is called a single undertaking.¹⁸

B. Salient Features of the WTO System as Compared with the GATT

1. Extensive Coverage of Areas

There are several important features of the WTO which distinguish it from the GATT. First, the coverage of the WTO is far wider than that of the GATT. For example, for the first time in the history of GATT, there is an agreement on agriculture which prohibits import restrictions¹⁹ and reduces agricultural subsidies.²⁰ In addition to agreements on agriculture, the textile agreement eventually incorporates textile trade into the WTO's regular Safeguard Agreement, which prohibits member states from engaging in “voluntary export restraint” agreement,²¹ and abolishes the “Multilateral Fibre Agreement” (the MFA).²²

Not only are there agreements on trade in goods, such as agre-

14. Trade Policy Review Mechanisms, GATT Doc. MTN/FA II-A3 (Dec. 15, 1993) [hereinafter TPRM], in *Uruguay Round*, *supra* note 5.

15. TPRM, *supra* note 14.

16. Plurilateral Trade Agreement, GATT Doc. MTN/FA II-A4 (Dec. 15, 1993), in *Uruguay Round*, *supra* note 7; see also *International Antitrust Code Will Be Studied by GATT Members*, Antitrust & Trade Reg. Rep. (BNA), No. 1628, (Spec. Supp. Aug. 19, 1993) (discussing the attempts by the International Antitrust Codeworking Group to bring international antitrust law into conformity with modern international business practices).

17. *Report of Special Committee on International Antitrust*, A.B.A. SEC. ANTITRUST L. (1991).

18. Eleanor M. Fox, *Antitrust, Trade & the 21st Century-Rounding the Circle*, 48 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 535, 535-88 (1993).

19. Agreement on Agriculture, GATT Doc. MTN/FA II-A1A, Part III, Art. IV, note 1 [hereinafter Agriculture Agreement] (“These measures include qualitative import restrictions”), in *Uruguay Round*, *supra* note 5; Ernst-Ulrich Petersmann, *Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System*, *Ausnswirtschaft*, 49, Jahrgang (1994), Heft II/III: Ruegger S. 231-277 [hereinafter Petersmann, *Proposals for Negotiating*].

20. Agriculture Agreement, *supra* note 19, at Part III, Art. IV.

21. *Id.* (“Members shall not maintain, resort, or revert to . . . voluntary export restraints.”).

22. *Id.* art. I.

ments on antidumping,²³ countervailing duty,²⁴ and safeguard,²⁵ there are also agreements in "new areas" such as trade in services and trade-related aspects of intellectual property rights.²⁶ In the area of trade in services, the GATT establishes principles of most favored nation²⁷ and transparency.²⁸ Although liberalization in trade in services is in the embryonic stage, it is significant that the WTO has established a framework for its development. In the area of intellectual property rights, the TRIPs²⁹ provides for minimum standards for the protection of intellectual property rights and for a fair and equitable enforcement process.³⁰

2. Improved Dispute Settlement Process

Annex 2 of the WTO Agreement provides for an improved dispute settlement procedure among the member states.³¹ Under this system, when a dispute arises with regard to the interpretation or operation of a WTO agreement, the plaintiff state petitions to the Dispute Settlement Body (the DSB).³² The DSB then turns the complaint over to a dispute settlement panel which is composed of 3 or 5 experts selected by the DSB.³³ The panel reports to the DSB on the compatibility of the practice complained of with the rules of the WTO Agreements.³⁴ If the panel reports that the practice is incompatible, the DSB decides the case in favor of the plaintiff state by a negative consensus.³⁵ The defendant state can then appeal to the Appellate Review Body ("ARB")³⁶ As its name indicates, the ARB

23. See Charnovitz, *supra* note 4, at 462.

24. Agreement on Subsidies and Countervailing Measures, GATT Doc. MTN/FA II-A1A-13, in Uruguay Round, *supra* note 5.

25. See *supra* note 10.

26. See TRIPs, *supra* note 12.

27. GATS, *supra* note 11, art. II.

28. *Id.*

29. TRIPs, *supra* note 12.

30. *Id.*

31. Dispute Rules, *supra* note 13, at Art. I. Under the WTO system, the dispute settlement process is characterized as a "judicial process" as opposed to a "political process" as characterized under the GATT system where negotiations and compromises are the key factor for determination. Put in strong terms, the WTO establishes something like an "international trade tribunal" in which a dispute between member states is adjudicated.

32. Dispute Rules, *supra* note 13, art. 1, ¶ 1.

33. *Id.* art. 6-8.

34. *Id.*

35. *Id.* Negative consensus means that decision will be carried when the panel proposal is not denied by a unanimity of DSB members.

36. Dispute Rules, *supra* note 13, art. 1, ¶ 1.

acts as an appellate court and either affirms or overturns the DSB's judgement.³⁷ If the ARB decision is in favor of the plaintiff state, the DSB again decides the case by a negative consensus.

In the above described dispute settlement process, a dispute settlement panel and the ARB analyze the legality of the practice in question and reach a conclusion as to its validity. However, if the panel or the ARB report that the practice complained of is contrary to rules of the WTO Agreements, the decision is almost automatically adopted in light of the fact that the DSB's decision is by negative consensus and the plaintiff state will most likely vote in favor. This means that the DSB's resolution serves as little more than a ceremonial approval of the panel and the ARB's decision.

There may be concern that the international community is not ready for this advanced dispute settlement process and thus, this new process will not work effectively. It is possible that a powerful state may not observe the decision of the DSB when a vital national interest is at stake. However, in the globalized economy of today, it is necessary to maintain a stable legal order in the world trade. Accordingly, a rule oriented mechanism for settling trade disputes is essential both in the domestic economy and at the international level. Therefore, it is worthwhile to give the new dispute settlement process a try. In the above scheme, the markets of the member states will be more and more integrated and economies will tend to be globalized. This trend is nothing but a continuation from the old GATT regime. However, the pace of globalization will be accelerated.

C. *The Role of Competition Policy in the WTO*

1. *A Historical Background*

Shortly after the Second World War, the Bretton-Woods System was established, with the International Monetary Fund (the IMF) and the Bank of Reconstruction and Development (the World Bank) at the center.³⁸ With regard to trade, a comprehensive charter called "the ITO Charter," also known as the "the Havana Char-

37. *Id.*

38. See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 100 (1991). See generally Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 3 (1993) (discussing various topics regarding the IMF and the World Bank).

ter,"³⁹ was proposed.⁴⁰ Although the ITO Charter was never ratified in the major states,⁴¹ some portions were adopted in the GATT and served as "provisional" trade rules until they were just recently superseded by the WTO.⁴²

For example, Chapter V of the ITO Charter, proposed comprehensive provisions dealing with restrictive business practices.⁴³ These provisions provided for a comprehensive control over price-fixing and other forms of anti-competition law.⁴⁴ The framers of the Charter thought that without provisions which would control anti-competitive practices engaged in by private enterprises, the effect of trade liberalization to be achieved through the reduction of tariff and removal of import restrictions would be offset by the restrictive effects of anti-competitive practices of private enterprises.⁴⁵ Clearly, competition policy and law were integral part of the ITO Charter. Unfortunately, however, because the comprehensive restrictive provisions for the anti-competitive practices of private enterprises were not incorporated in the GATT,⁴⁶ interest in developing an international antitrust code quickly died with its non-ratification of the ITO Charter.⁴⁷ Furthermore, although the U.N. Economic and Social Council also considered the creation of an international code,⁴⁸ there was no concrete result.⁴⁹ International competition law and policy was taken up by the GATT in late 1950's,⁵⁰ again without a concrete proposal.⁵¹ International competition law and policy has also been promoted by the Organization for Economic Cooperation

39. *Havana Charter for an International Trade Organization*, Mar. 24, 1984, U.N. Doc. E/Conf.2/78 [hereinafter *Havana Charter*], reprinted in U.N. Doc. ICITO/1/4 (1948), and in U.S. Dep't of State Pub. No. 3206, Commercial Policy Series No. 113 (1948).

40. P.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AMER. J. INT'L L. 51, 52 (1983).

41. Theresa A. Amato, *Loan Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79, 87 (1990).

42. *Id.* at 87-88.

43. *Id.* at 86.

44. *Id.*

45. See generally CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 3-53 (1949) (providing a historical treatment of the activities leading up to the Havana Conference).

46. GATT, *supra* note 1.

47. Claus-Dieter Ehlermann, *Address: The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833, 839 (1994) (emphasizing that GATT failed to address private restrictive practices).

48. SIDNEY DELL, *THE UNITED NATIONS AND INTERNATIONAL BUSINESS* 15-19 (1990).

49. *Id.*

50. JACKSON, *LAW OF GATT*, *supra* note 1, at 51-53.

51. *Id.*

and Development (OECD).⁵² The OECD engaged in an exchange of information and a coordination of competition policies among the enforcement authorities of member states, which resulted in the publication of several reports on competition policy subjects.⁵³

Although defunct, the ITO Charter shared the common purpose of liberalizing trade through the creation of a uniform competition law. Thus, as it was true with the ITO, competition law and policy is a necessary part of the WTO.

2. *An Increasing Role of Competition Policy in the WTO*

Although the WTO system is not without defects, free trade will be more effectively promoted than under the GATT system because of the WTO's further reduction of tariffs.⁵⁴ The WTO agreements also include an increase in the coverage of liberalization measures, such as trade in services and trade-related aspects of intellectual property rights, the abolition of voluntary export restraint and a more effective dispute settlement process.⁵⁵ As mentioned earlier, because anti-competitive practices of private enterprises offset the liberalization of trade in goods and services, it is necessary to construct some principles and mechanisms to promote competition policy at the international level in order to maintain the effectiveness of the WTO's liberalization of trade in goods and services.

3. *Need for Ensuring a Fair Opportunity to Market Access*

The primary purpose of the WTO system is to maintain free trade among member states.⁵⁶ As such, this system should guarantee a fair and equitable opportunity for market access by enterprises of member states into the national markets of other member states.

52. See ROGER BLANPAIN, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: EXPERIENCE AND MID-TERM REPORT 1979-1982* (1983); ROGER BLANPAIN, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOR RELATIONS, 1976-1979: EXPERIENCE AND REVIEW* (1979).

53. OECD: *Guidelines for Multinational Enterprise*, June 21, 1976, reprinted in 15 I.L.M. 969 (1976); see also Barry E. Hawk, *The OECD Guidelines for the Multinational Enterprises: Competition*, 46 *FORDHAM L. REV.* 241, 244 (1977) (discussing OECD competition guidelines in light of antitrust laws).

54. WTO Agreement, *supra* note 8, at 1-14.

55. For a general discussion of the need for antitrust convergence, see Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 *AMER. J. INT'L L.* 477 (1994); Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 *N.C. J. INT'L LAW & COM. REG.* 394 (1994).

56. WTO Agreement, *supra* note 8, at 1-14.

If impediments to market access, whether governmental or private, are not properly addressed, claims of "unfair trade" among the governments and industries will eventually lead to protectionism. For example, abuses of antidumping legislation or other forms of trade restriction are likely protectionist responses. Therefore, the key concept is "market access." In terms of the WTO system, market access should be regarded as an "equal opportunity" to compete on the merits. Market access in this sense is not necessarily synonymous with an increase of import, investment or other activities in the market of a member state. Rather, import, investment and other business activities are decided by conditions of the market in question and competition laws only guarantee that there will be "opportunities" to compete - not necessarily larger market shares in any given market.

The WTO Agreements attempt to guarantee such market access through the removal or reduction of governmental barriers and the convergence of national institutions such as the intellectual property rights *vis à vis* the TRIPs Agreements.⁵⁷ In addition to these agreements, other measures to ensure market access *vis à vis* private barriers will become increasingly important.

D. Globalized Economy and Incompatibility of Different Regulatory/Business Systems

Assuming the WTO system is effective, the national economies will move toward a "globalized economy."⁵⁸ However, when governmental barriers to trade, such as tariffs and import restrictions, are removed or reduced, different kinds of trade issues will emerge. For example, as transnational business activities increase, differences in domestic regulatory systems of the trading states and differences in business customs and behaviors become impediments.⁵⁹

Similarly, differences in governmental regulation of business ac-

57. Michael I. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. & POL'Y 465, 469 (analyzing the development of the TRIPS, the TRIPS agreement, and the future of intellectual property protection).

58. See Alberto Bernabe-Riefkohl, "To Dream the Impossible Dream": *Globalization and Harmonization of Environmental Laws*, 20 N.C. J. INT'L L. & COM. REG. 205, 207-08 (1995) (noting that the various trade agreements such as GATT, EU, LFTA, and NAFTA, are attempts at a global free trade movement).

59. Kojo Yelapaala, *Strategy and Planning in Global Product Distribution — Beyond the Distribution Contract*, 25 LAW & POL'Y INT'L BUS. 839, 849-66 (1994) (discussing the effect of globalization on business practices).

tivities such as technical standards, taxation, competition rules, environmental protection measure, and labor standards create barriers to enterprises.⁶⁰ Such differences create disparity among states in the conditions in which enterprises engage in business activities and cause differences in competition policy. One such disparity arises with regard to exempted cartels. Such differences adversely affect the "level playing field" and engender claims of "unfairness" in international trade. Consequently, the harmonization of different regulatory systems among the trading states becomes a primary focus.

This is true not only in government regulation of business activities, but also in business customs and corporate behavior. For example, in the context of United States/European Union trade with Japan, "keiretsu" systems (long-term closely interconnected relationships among Japanese enterprises through formal and/or informal relations)⁶¹ and mutual stock-holdings among corporations have been claimed as trade barriers. In the era of globalized economy in which governmental barriers are much less important, such differences in business customs and corporate behaviors acquire an increasing importance as impediments to trade.⁶²

For example, in the European Union (EU), which removed governmental barriers such as tariffs and import restrictions,⁶³ competition policy measures played a vital role in ensuring that the common market operates without hindrances by private restrictive business practices. Articles 85 and 86 together with the Merger Regulation Rule have been applied to ensure that the common market operate effectively.⁶⁴ Special competition rules in the EU, such as vertical territorial allocations imposed by manufacturers on their distributors according to national boundaries of member states, have been strictly applied.⁶⁵ A per se illegality approach to such a vertical ter-

60. Bernabe-Riefkohl, *supra* note 58, at 211-27 (discussing the difficulties in assimilating Free-Trade and Environmental policies, and the conflicts that can arise).

61. Angelina Helou, *The Nature and Competitiveness of Japan's Keiretsu*, 25 J. WORLD TRADE LAW 99 (1991).

62. There is a conflict or incompatibility of systems whether it is a system of governmental regulation or that of private customs. These incompatibility issues are found in many different kinds of governmental regulations and private customs and practices. However, our focus here is on issues related to competition policy.

63. *Political Changes in East Europe to Speed Economic Plans, Experts Say*, Int'l Trade Rep. (BNA) No. 50, at 1669 (Dec. 20, 1989).

64. *See supra* note 7.

65. Frederic Yves Jenny, *Competition and State Aid Policy in the European Community*, 18 FORDHAM INT'L L.J. 525, 535-36 (1994).

ritorial restriction under Article 85 is a unique feature of the EU competition law.⁶⁶ The per se approach symbolizes that the removal of private restrictions on exports and imports is essential to the wholesomeness of the common market system.

Similarly, in the Structural Impediment Initiative (the SII), negotiated between the United States and Japan between 1980 and 1990, restrictive business customs and corporate behaviors were the major impediments to effective market access by foreign enterprises to the Japanese market.⁶⁷ Accordingly, both governments agreed to reforms. For example, reforms to Japanese antimonopoly law included an increase of administrative surcharges and criminal fines to be imposed on enterprises when they engage in cartels.⁶⁸

Differences in business customs and behaviors are rooted deeply in the history of the state and generally are far more wide-ranging and complex than an application of competition rules can possibly tackle. In this sense, a strengthened application of competition rules provides only a partial and insufficient solution. However, competition rules can play a useful role in promoting an open market in which foreign enterprises can find the way to the domestic market of a state through superior efficiency and diligence. Issues described above with regard to the EU common market and the SII are also issues that the WTO must deal with either today or in the future. Although the liberalization of trade in the multilateral trading system under the WTO is not as complete as the common market in the EU, it is a system of trading states in which the principle is free access to each other's market. Although there are more exceptions to the principle of free trade under the WTO than there are in the EU, such exceptions will be reduced in due course.⁶⁹ There will be a greater need to increase the application of competition rules in the framework of the WTO in order to maintain market access among member states.

66. Thomas C. Meyers, *Field-of-Use Restrictions as Procompetitive Elements in Patent and Know-How Licensing Agreements in the United States and the European Communities*, 12 J. INT'L L. BUS. 364, 384 (1991).

67. *Anti-Monopoly Law Needs to be Revised Soon, Japanese Fair Trade Commission Panel Says*, Int'l Trade Rep. (BNA) No. 7, at 230 (Feb. 14, 1990).

68. See Charnovitz, *supra* note 4, at 464.

69. Joseph P. Griffin, *EC and US Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 356 (1994).

E. Extraterritoriality

In some states competition rules are applied to the conduct of foreign enterprises occurring in a foreign state but affecting the domestic market of the applying state.⁷⁰ This is true with competition rules in the United States, the EU and Germany.⁷¹

Under *United States v. Aluminum Company of America*,⁷² the United States courts are authorized to apply United States antitrust laws to conduct that occurs in a foreign state but is intended to affect the United States and does in fact bring about such an effect.⁷³ Recently, the United States Justice Department announced a draft of guidelines on international operations.⁷⁴ The guidelines express the United States enforcement policy with regard to restrictive practices engaged in by foreign enterprises in foreign countries which affect U.S. markets and U.S. business activities abroad.⁷⁵

One of the striking features of the guidelines is the wide-range of subject matter jurisdiction that the Justice Department will assert with regard to the conduct of foreign enterprises in a foreign country.⁷⁶ Another striking feature is its emphasis on "market access" in a foreign market.⁷⁷ A number of hypothetical examples are offered where the conduct of foreign enterprises in foreign countries produces restrictive effects on United States enterprises which intend to export or invest in a foreign country.⁷⁸

Similarly, the European Court of Justice in *A. Ahlstrom Osakeyhtiö v. Commission* ("The *Woodpulp* case")⁷⁹ approved an extraterritorial application of the EU competition rules to conduct by foreign enterprises which occurred in foreign countries but affected the commerce among member states.⁸⁰ It is not clear whether the scope

70. *Id.*

71. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

72. *Id.*

73. *Senior Justice Official Outlines Aim of International Antitrust Guidelines*, Int'l Trade Rep. (BNA) No. 48, at 1608 (Dec. 7, 1988).

74. *Id.*

75. *Id.*

76. *Id.*

77. *See generally* Antitrust Enforcement Guidelines for International Operations, United States Department of Justice Guidelines 22-27 (Nov. 10, 1988).

78. *A. Ahlstrom Osakeyhtiö v. Commission*, 4 Common Mkt. Rep. (CCH) ¶ 14,491 (Sept. 27, 1988).

79. *Id.*

80. *See* James T. Halverson, *Antitrust in a Global Environment: Conflicts and Resolutions, Harmonization and Coordination of International Merger Procedures*, 60 ANTITRUST L.J. 531, 534 (1991) (discussing the *Woodpulp* case).

of jurisdiction established by the *Woodpulp* case covers conducts of foreign enterprises in foreign countries which adversely affect export or investing opportunities of EU enterprises in the market of such foreign countries.⁸¹ It seems that, at least in theory, the scope of application can be stretched to that extent.⁸²

In an era in which national boundaries in economy are fast disappearing, extraterritorial application of competition rules is to a degree inevitable.⁸³ Without such application, transnational business entities could engage in restrictive business practices in a "twilight zone" where no state could fully exercise jurisdiction and yet the harmful effects of such restrictive business practices would be felt in one or more states.⁸⁴ As such, a state may have no choice but to apply its competition rules to the conduct of foreign enterprises abroad when such conduct hurts its economy and when the foreign state has no competition rules or is not willing to apply its own competition rules. In addition, an extraterritorial application of competition rules by one state can arguably increase the economic welfare of one or more states and thereby liberate trade and investment internationally.

In spite of the above, an extraterritorial application of competition rules is a second-best solution. Although an extraterritorial application of competition rules is legally possible in some jurisdictions (notably the United States), such an application is often not as effective as it would be if applied domestically. For instance, there may be difficulty in obtaining personal and enforcement jurisdiction over the defendant enterprise, i.e.; there may be a blocking statute in a foreign state (such as the United Kingdom)⁸⁵ in which the foreign defendant prohibits extraterritorial enforcement. Additionally, the national may prevent the state's enforcement mechanism from

81. *Id.* at 534.

82. See *Increased Use of Extraterritoriality Could Threaten International Business*, [July-Dec] ANTITRUST & TRADE REG. REP. (BNA) No. 1334, at 532 (Oct. 1, 1987). (discussing the "growing incidence of countries trying to apply their national laws outside their borders").

83. See *id.* (stating that the harmful effects felt by states include "discouraging productive economic activity, including international investment, and ultimately to reduce employment and economic growth").

84. *District Court's Decision and Order in In Re Insurance Antitrust Litigation*, Antitrust & Trade Reg. Rep. (BNA) No. 1434, at 432, 444 (stating that "a number of barriers stand in the way of enforcement of any judgment against these defendants by English courts").

85. *United States v. Watchmakers of Switz. Info. Ctr., Inc.*, 134 F. Supp. 710, 711-12 (S.D.N.Y. 1955) (holding that the district court in New York had jurisdiction over a Swiss Corporation which allegedly committed violations of anti-trust and tariff laws in the Southern District of New York).

producing necessary pieces of evidence to a court of a state attempting to apply its competition law.

Also, jurisdictional conflicts often arise from extraterritorial application. The United States antitrust case law is replete with examples in which an attempt on the part of the enforcement authority in the United States resulted in conflicts with other states. The *Swiss Watch Case*,⁸⁶ the *Laker Case*,⁸⁷ and the *Uranium Case*,⁸⁸ are but a few of many such examples. Such conflicts may bring about tensions and ill-feeling between the state applying its competition law and the state to which such an application is made.

If we look at the situation as a whole it seems that an extraterritorial application of competition rules may be a costly attempt to rectify violations and the result may not be as great as one may hope. At this time, it is only the United States which expresses an intention to apply United States antitrust laws extraterritorially. If, however, more states (such as EU, Germany, and Japan) launch a massive attempt to use their competition rules in a similar way, there may be too many tensions and conflicts among trading states. In light of the above, it is useful to think about a better alternative to a unilateral application of competition rules of a state.

This calls for a comprehensive study of the subject and this paper is not intended to discuss the details of extraterritoriality. We only note that considerations of some alternative approaches to extraterritoriality are necessary. They may include a variety of matters such as a scheme of "positive comity," an exchange of informations among the enforcement agencies of the member states and a greater utilization of the dispute settlement process of the WTO Agreement with regard to the jurisdictional disputes.

II. CONVERGENCE OF COMPETITIVE LAW AND POLICY

A. *A Need for Convergence*

The situations described above underscore the need for the con-

86. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984) (affirming a preliminary injunction prohibiting foreign interference which would "rob the court of its jurisdiction").

87. *In re Uranium Antitrust Litig.*, 473 F. Supp. 393, 400-06 (N.D. Ill. 1979) (holding that competitors had standing under antitrust laws to challenge a corporation's use of uranium).

88. *International Antitrust Code Will Be Studied By GAH Members*, Antitrust & Trade Reg. Rep. (BNA) No. 1628, at 259 (For the full DIAC text see *International Antitrust Code Working Group*, Antitrust Reg. Rep. (BNA) No. 1628, at S-9-22 (Spec. Supp. Aug. 19, 1991)).

vergence of competition rules within the framework of the WTO. If convergence of competition rules can effectively be achieved, the problems presented above may be resolved and, if not resolved, greatly mitigated.

As stated before, claims for "unfairness" in trade arise out of disparity in the competitive conditions among the WTO member states resulting from differences in the strength of enforcement of competition rules among them. For example, a weak enforcement of competition rules in a member state leads to a claim by another member state that its industries are disadvantaged due to the foreclosure of the domestic market through restrictive business practices of enterprises in the former state which are allowed to take place by the lack of enforcement. Retaliatory measures by way of import restrictions or other trade restrictions imposed on products exported may be the natural reaction. For example, when products are exported at low prices from the former state to the latter state, there will be a claim that exporters engage in "dumping" of the products. This will lead to proliferation of antidumping actions.

If principles and enforcement of competition rules in member states in the WTO can be effectively converged, claims for unfairness in international trade will be greatly reduced. Enterprises in member states will compete under similar conditions as far as competition law is concerned and the "level playing field" requirement will thereby be satisfied. Such a convergence will also lessen the need for extraterritorial application of competition rules of one member state *vis-à-vis* activities which occur in other member states since competition laws of the locality in which such activities take place can take care of them more effectively.

III. SCHEMES FOR CONVERGENCE

A. *Proposals Already Made*

There are several proposals for convergence of competition rules within the framework of the WTO. A brief review of such proposals follows.

A most comprehensive proposal is the Draft International Antitrust Code ("DIAC") proposed by a group of competition law scholars ("The Munich Group").⁸⁹ The DIAC advocates the establish-

89. Antitrust & Trade Reg. Rep. (BNA) S-20, at 1628 (Spec. Supp. Aug. 19, 1993) (stating that the International Antitrust Authority, a new GATT agency, would have the power to ask

ment of an international antitrust agency which shares the responsibility of enforcement of international antitrust code with the national governments.⁹⁰ The comprehensive antitrust code would cover the major areas of competition law including horizontal agreement, mergers and acquisitions, and the relationship between competition law and industrial policies and customs.⁹¹

Ideas expressed in the DIAC are similar to Chapter V of the ITO Charter and the DIAC was probably drafted with such intention. The DIAC is the most ambitious of the proposals made in recent years.

A more modest proposal is that a task force established by the American Bar Association which advocates an agreement among states with regard to some basic principles such as unlawfulness of cartels and unification of filing requirements under the merger laws of various states.⁹² The ABA proposal advocates partial harmonization through an agreement among states regarding some basic principles without establishing a comprehensive international authority to enforce international rules.⁹³

Professor Eleanor Fox of New York University Law School has further developed this idea and has proposed a scheme in which states agree on "a few fundamental world-linking principles" of competition policy such as, among other things, prohibition of cartels and positive comity.⁹⁴ In this scheme, each state basically enforces its own competition rules while adopting fundamental principles established in an international agreement.⁹⁵

B. A Proposal for a "Modest" International Competition Code

Although a good model for the future, the DIAC proposal is probably premature given the nation state system of today where each state jealously guards its sovereignty. It should be reserved for

national antitrust authorities to initiate enforcement).

90. Thomas J. Schoenbaum, *The International Trade Laws & The New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 420-21 (1994).

91. *Report of Special Committee on International Antitrust*, A.B.A. SEC. ANTITRUST L. (1991); Halverson, *supra* note 81, at 534.

92. Barry E. Hawk, *Antitrust in a Global Environment: Conflicts and Resolutions, Introductory Remarks*, 60 ANTITRUST L.J. 525, 526 (1991) (discussing the Report of the Special Committee on International Antitrust which addresses "detering cartel behavior" and "harmonization of substantive merger rules").

93. Fox, *supra* note 18, at 570.

94. *Id.* at 570-71.

95. *Id.*

the future when globalization of economies will have advanced to a degree where competition law will need a supra-national enforcement process such as in the EU. For today, we should start modestly with a step-by-step approach.

It is useful to formulate a set of principles for competition policy into a code which establishes the minimum standards of competition law to be observed by the member states. We should carefully select the areas of competition policy in which there is a greater need for convergence and a general agreement or consensus with regard to the principles to be applied. An illustrative list of such proposals includes the following:

1. *Horizontal Agreement*

Certain types of horizontal agreements should be held as unlawful in principle. These include agreements among competitors which fix prices, divide markets or otherwise suppress competition, lessen efficiency and have no redeeming virtues.

There are some horizontal agreements which may affect competition but may generate efficiency or may serve other useful purposes. For example, an agreement in which enterprises engage in a joint research and development, a joint production of small enterprises or a joint operation for the disposal of industrial wastes all may enhance useful economic and social purposes. They should be dealt with under "the rule of reason."⁹⁶

2. *Exemption of Cartels*

In varying degrees, exempted cartels such as export cartels, crisis cartels, small business cartels and others are allowed in member states.⁹⁷ There should be a thorough review of such exemptions with regard to the need for them. Member states should agree that they will abolish exempted cartels generally except for exceptional situations such as some types of crisis cartels.

96. *JFTC Expects to Propose Elimination of Cartels Now Exempt From Antitrust Attack*, [July-Dec] *Antitrust & Trade Reg. Rep. (BNA)* No. 1334, at 604 (Nov. 4, 1993) (reporting that the Japan Fair Trade Commission will formally propose "to other government agencies later this month that all cartels currently exempt from the Antimonopoly Law and other statutes be abolished by the end of 1995").

97. See *International Antitrust Working Group*, supra note 89.

3. *Vertical Agreements*

Except for a resale price maintenance agreement, a vertical agreement should be treated under the rule of reason since some vertical agreements may have pro-competitive effects. At this stage a wide-ranging international unification in this area of competition law is probably not possible.

4. *Mergers & Acquisition*

There is a pressing need for harmonization of filing requirements under a unified format to be used in merger laws of member states. Both the DIAC Report⁹⁸ and the ABA Report⁹⁹ propose a filing system under the internationally unified format. This should be promoted and member states should agree on a common format. As far as the substance of merger laws is concerned, it is probably not possible to come up with internationally unified rules under which each member state regulates mergers and acquisitions since the regulation of mergers and acquisitions is closely related to the peculiar industrial structure of the state concerned and its industrial policy.

It is possible, however, to come up with a common format for merger guidelines. This will greatly enhance transparency in the control of mergers and acquisitions by a member state. For example, member states can jointly create a format which should be used when each state issues a set of merger guidelines. A format would include such items as: (i) utilization of HHI for a measurement of concentration, (ii) the efficiency defense, (iii) the failing company doctrine, and (iv) a threshold in terms of assets and/or market share under which there will be no challenge to a merger or acquisition.

5. *Predatory Pricing*

There should be an agreement that each state include a requirement for a below-cost selling (marginal cost, average variable cost, or total cost). The enforcement agency of any member state should decide whether a pricing is predatory on that basis.

The above list is not intended as a comprehensive and exhaustive list but only as an illustration of some items that should be included

98. *Id.*

99. See Hawk, *supra* note 92, at 530.

in an international competition code. With differences and divergences of competition laws of member states, we need to list only such items as can be reasonably expected to be accepted by member states. This is a partial and incomplete convergence program. However, this is probably all we can hope to achieve in the near future.

C. An "Installment Approach" for Antitrust Convergence

Although the WTO is not the only forum in which a scheme of convergence of competition laws can be discussed, we assume that a program of convergence of competition laws will take place within the WTO framework. Of more than 100 states which signed the WTO Agreement, some of them do not have competition laws and many of them are not yet ready for such laws.¹⁰⁰ When one drafts an international competition code today which fits into the reality of all those states, it will be so general and abstract that its substance will be almost empty.

One possibility may be in Annex 4 of the WTO approach. As touched upon earlier, Annex 4 of the WTO Agreement contains agreements whose adoption is optional to member states.¹⁰¹ An example is the optional Government Procurement Agreement.¹⁰² Professor Petersmann proposed that an international competition code may be proposed as an agreement of Annex 4 of the WTO Agreement.¹⁰³ It may be that at least in the initial stage an international competition code among smaller number of member states works more effectively. Such an agreement may be a trilateral agreement in which the United States, the EU and Japan join. This is an agreement among the parties in which "market access" issue is an intensive political issue. It may be an agreement in which such states as the United States, the EU, Canada, Japan, Australia and New Zealand join or it may encompass a larger membership.

As an alternative, Annex 4 may be modified to contain an agreement which contains a comprehensive convergence program, but provides a grace period to developing states such as that in the TRIPs Agreement.¹⁰⁴ This approach has the advantage that devel-

100. See Ernst-Ulrich Petersmann, *International Competition Rules for the GATT-WTO World Trade and Legal System*, 27 J. WORLD TRADE 35 (1993) [hereinafter Petersmann, *International Competition*].

101. See *supra* notes 16-17 and accompanying text.

102. Petersmann, *supra* note 101, at 64-83.

103. *Id.*

104. See *supra* notes 11-15 and accompanying text.

oping states are afforded a preparation period before such states undertake full enforcement responsibility. Although at the initial stage developing states are not the parties to an agreement with full responsibility to carry out obligations under the international code, they are still members of it and, in due course, they will take a full pledge of obligations.

The GATS may be a model for convergence in antitrust matters.¹⁰⁵ The GATS provides for a general scheme for future negotiations in the liberalization of trade in services with the general principles of most-favored nation and transparency.¹⁰⁶ At the moment, the liberalization of trade in services is largely left to future negotiations and the GATS only provides for a scheme for such negotiations.¹⁰⁷ This is due to the fact that trade in services is such a complex field where different kinds of issues are involved and where interests of member states are opposed. Nevertheless, it is very significant that this scheme for negotiation exists since there is a prospect that progress will be made in the future.

The state of affairs with regard to international competition law may not be so different from that in trade in services. In this perspective, therefore, it may make sense to consider whether a negotiating scheme such as the GATS may be adopted with regard to international competition policy.

Inclusion of an international competition code in the WTO Agreement has an advantage in that coordination between competition policy and other policies embodied in WTO agreements such as the TRIPs,¹⁰⁸ the Safeguard Agreement¹⁰⁹ and the Antidumping Agreement¹¹⁰ is easier than it would be if a competition code was established separate from the WTO. Another advantage is that the dispute settlement process incorporated in Annex 2 of the WTO Agreement can be utilized when a dispute arises from the enforcement of competition laws. An example of such a dispute would be insufficient enforcement of competition law by a member state in light of the principles agreed upon in an international competition code and an excessive assertion of extraterritorial jurisdiction by a member state.

105. See *supra* note 11.

106. *Id.*

107. *Id.*

108. See *supra* note 12 and accompanying text (discussing the TRIPs agreement).

109. See *supra* note 10 and accompanying text (discussing the Safeguard Agreement).

110. See *supra* note 10 and accompanying text (discussing the Antidumping Agreement).

III. ADDITIONAL REMARKS

There are several areas of international competition law and policy which are not touched upon in this paper but are closely related to this issue. There are several agreements included in the WTO Agreement that are closely related to international competition policy and should be given due regard.

One is the Antidumping Agreement agreed upon in the UR.¹¹¹ There are inherent biases against importation in the structure of antidumping law as shown in such areas as price calculation, injury determination, standing to bring petition and others.¹¹² In addition to those, the existing antidumping laws of member states have been much abused.¹¹³ In the Antidumping Agreement agreed upon in the UR and included in the WTO Agreement, several principles are included which would rationalize the enforcement of antidumping laws of member states.¹¹⁴ However, there are some exceptions to the principles and, in some other areas, there are setbacks also. The WTO must mitigate the abuses of antidumping legislation by incorporating in it some principles of competition law and policy. This will be a formidable task. However, failure to do so will destroy the effect of trade liberalization intended by the WTO system.

Another is the TRIPs Agreement.¹¹⁵ In the TRIPs, insufficient attention was paid to competition law issues. For example, although there is a provision in the TRIPs that member states can enact a

111. See *supra* note 10 and accompanying text (discussing the Antidumping Agreement).

112. Graig R. Giesze, *Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, As Well As Practical Business Risks and Realities, For United States Exporters to Mexico in the Era of the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 885, 889 (1994) (discussing the profound transformation of United States/Mexico trade relations over the past decade); David Palmeter, *Injury Determination in Antidumping and Countervailing Duty Cases - A Commentary on U.S. Practice*, 21 J. WORLD TRADE L. 7, 45 (1987); A. Paul Victor, *Injury Determinations by the United States International Trade Commission in Antidumping and Countervailing Duty Proceedings*, 16 N.Y.U. J. INT'L L. & POL. 749 (1984); Christopher M. Barbuto, Note, *Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 FORDHAM L. REV. 2047, 2089 (1994) (discussing standard to bring petition).

113. See Roger P. Alford, *Why a Private Right of Action Would Violate GATT*, 66 N.Y.U. L. REV. 696, 708 n.89 (1991) (discussing a proposal to establish a private right of action to counteract illegal dumping in contrast to current procedure in the United States which requires an administrative proceeding to determine the propriety of imposing an antidumping duty); Diane P. Wood, *"Unfair" Trade Inquiry: A Competition Based Approach*, 41 STAN. L. REV. 1153, 1157 (1989) (discussing the principal set of competition laws, other than the United States statutes, loosely known as "trade statutes").

114. See *supra* note 10 and accompanying text.

115. See *supra* note 12.

national law to deal with restrictive conditions attached to licensing of technology, no principle is internationally agreed upon in order to regulate such restrictive conditions.¹¹⁶ As such, it is desirable that the WTO creates some principles.

Also, the TRIPs Agreement carefully avoided establishing an international rule on the prohibition of parallel importation of genuine products under patent and trademark laws.¹¹⁷ There is a divergence among member states with regard to prohibiting parallel importation of products under their patent law and trademark law.¹¹⁸ The prohibition of parallel importation in some member states may be contrary to the principle of competition. This divergence may be a disturbing factor in international trade and the WTO should take up a review of this issue in light of international competition policy.

Last, but not least, is the Safeguard Agreement.¹¹⁹ As pointed out earlier, voluntary export restraint agreements are prohibited in the Safeguard Agreement.¹²⁰ However, a private agreement entered into among enterprises can easily be used in lieu of a governmentally authorized agreement. This is a genuine competition law issue and involves extraterritorial application of competition laws of member states. A review is needed to see if some additional rules and mechanisms are necessary to strengthen the control of such activities by member states under the sponsorship of the WTO in light of coordination between the operations of the Safeguard Agreement and competition law and policy.

116. Antonio Mendoza, *Promoting the Transfer of U.S. Technology Across National Borders: The Enemy Within*, 20 N.C. J. INT'L L. & COM. REG. 97, 99 (1994); John H. Barton & Barry E. Carter, *Symposium: International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 550 (1993).

117. See *supra* note 12 and accompanying text (discussing TRIPs).

118. Cf. William H. Allen, *The Supreme Court's Gray-Market Decision*, 70 J. PAT. & TRADEMARK OFFICE SOC'Y 688, 688-695 (1988); and, Jamie S. Gorelick and Julia E. Guttman, *Parallel Importation After K-Mart v. Cartier ("COPIAT")*, 70 J. PAT. & TRADEMARK OFFICE SOC'Y 696, 696-704 (1988) as an illustration of the divergence in their interpretations of the *K-Mart* decision; see *K-Mart Corp. v. Cartier, Inc. and the Legality of Gray Market Imports*, 75 VA. L. REV. 1397, 1411-15 (1989) (discussing a U.S. Supreme Court case which addressed the validity of customs service regulations which provide exceptions to federal regulation which prohibit importation of all goods bearing a US trademark without the mark owner's written consent); Laurence G.C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 308 (1994) (discussing National Treatment Rules under GATT which was designed to prevent state imposed limitations on imported goods); see also GATT art. XI (prohibiting quantitative restrictions on the importation of goods).

119. See *supra* note 10 and accompanying text.

120. See *supra* note 10 and accompanying text.

IV. CONCLUSION

At this stage of progress in international economies today, the attachment to sovereignty among member states is still very strong. Every international negotiation for a construction of international scheme must take this factor into consideration. On the other hand, a globalization of economies has already progressed to an extent that such an attachment to the national jurisdiction is becoming out dated. There is, therefore, a wide gap between the nation-state system today and the state of the world economy. This creates an uncertainty. However, this uncertainty will remain until there is harmonization in international antitrust matters.