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BASIC PRINCIPLES OF THE WTO AND THE ROLE OF COMPETITION POLICY*

MITSUO MATSUSHITA**

I. PHILOSOPHY COMMON TO COMPETITION POLICY AND THE WTO

Both competition policy and the World Trade Organization (“WTO”) aim to promote and maintain a free and open trading system. The WTO’s task is to establish an international trading system based on a free and open market, and competition policy that covers both domestic and international markets. However, the similarity of their purposes and objectives is unmistakable. The WTO tries to reduce and eliminate governmental trade barriers, such as tariffs and quantitative restrictions. Under the auspices of the General Agreement on Tariffs and Trade (“GATT”) of 1947, eight trade negotiations were conducted, the last of which was the Uruguay Round (1986-1993). The WTO was created as a result of the Uruguay Round, which was about fifty years after the proposals for the Havana Charter and International Trade Organization failed.

As will be discussed later, the WTO is based on the principles of most-favored-nation treatment (“MFN”), national treatment, and transparency. These three principles are the most fundamental principles of the WTO, and all are designed to establish and maintain non-discrimination and openness in the international market. The principles of MFN and national treatment establish “a level playing field” among participants in international trade in different nations by eliminating discriminatory measures adopted by Member governments.¹ The principle of

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1. The MFN principle is declared in Article 1 of the GATT, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, Article II of the General Agreement on Trade in Services, Apr. 15, 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (“GATS”) and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81 (“TRIPs Agreement”). The principle of national treatment is stated in Article III of the GATT, Article II of the GATS and Article 3 of the TRIPs Agreement.

transparency as incorporated in Article X of the GATT, Article III of the GATS and Article 63 of the TRIPs Agreement ensures the openness of governmental regulations and thereby helps maintain predictability for players in international trade.

The coverage of competition policy extends not only to international trade but also to the purely domestic market. The objectives of competition policy vary from country to country. Competition policy aims at controlling not only the activities of private enterprise but also governmental restrictions. In this latter respect, competition policy shares a common goal with the GATT/WTO. The goal of Competition Policy is to establish and maintain the freedom of enterprises, the equality of the competitive conditions under which they compete, and the openness of markets.

A striking similarity exists between the objectives of the WTO and those of competition policy. The key concepts common to both are, *inter alia*, promotion of an open market, provision of fair and equal business opportunities to every participant in the market, transparency and fairness in the regulatory process, the promotion of efficiency, and the maximization of consumer welfare.

II. PROVISIONS IN THE WTO AGREEMENTS CLOSELY RELATED TO COMPETITION POLICY

A number of provisions in WTO Agreements are closely related to competition policy and, in this sense, competition policy is part of the WTO. Examples can be found in GATS, TRIPs, the Agreement on Trade-Related Investment Measures (“TRIMs Agreement”), the Anti-Dumping Agreement, the Agreement on Technical Barriers to Trade (“TBT Agreement”) and the Agreement on Safeguards.² They are scattered

2. The following are the major provisions in the WTO Agreements closely related to competition policy: (a) Article 8.1 of the TBT Agreement provides that Members shall not take measures which have the effect, directly or indirectly, of requiring or encouraging non-governmental bodies performing conformity assessment procedures of products to act in a manner inconsistent with the provisions of Article 5 (the national treatment principle) and Article 6 (TBT measures to be no more restrictive than necessary) of the TBT Agreement; (b) Article VIII of the TATS provides that each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with the Member's obligations under Article II (the national treatment principle) and specific commitments; (c) Article 40 of the TRIPs Agreement authorizes Members to enact legislation prohibiting restrictive conditions attached to licensing agreements regarding intellectual properties; (d) Article 9 of the TRIMs Agreement provides that, within five years after the entering into force of this Agreement, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy; (e) Article 11.1 of the Agreement on Safeguards prohibits

around in different WTO Agreements without being integrated into a coherent body of competition rules. Perhaps due in part to this lack of integration, those provisions have not been effectively utilized to date.

It is important to recognize, however, that the drafters of the WTO Agreements realized the need to incorporate competition provisions. For example, the enforcement of the disciplines of Article 11³ of the Agreement on Safeguards against “voluntary export restraints” cannot be effective unless its Article 11.3⁴ prohibits Members from directing or encouraging private exporters from engaging in restrictive activities which may forestall the overall disciplines of Article 11. Likewise, the objectives of the TBT Agreement cannot be accomplished unless its Article 8.1⁵ prohibition on Members encouraging private trade organizations engaged in product testing and certification to exercise discriminatory restrictions, which would be held as inconsistent with the WTO disciplines if exercised by the governments themselves.

As trade liberalization progresses through international negotiations, issues of how to deal with private trade restraints exercised by private enterprises will become increasingly important. When governments control international trade, cartels and other similar restraints of international trade are relatively unimportant, because trade is restricted by the public authorities anyway and there is relatively little room for private

Members from encouraging or supporting the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to export restraint exercised by the government; (f) Article 3.5 of the Anti-Dumping Agreement provides that, in determining injury, the administering authority must take into account, *inter alia*, “trade-restrictive practices of the competition between the foreign and domestic producers . . .”

3. Article 11.1(a) of the Agreement on Safeguards provides “A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.”

4. Article 11.3 provides “Members 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.” This provision prohibits Members from promoting and encouraging restrictive activities exercised by private exporters and importers, such as export and import cartels. In this broad sense, this provision may be categorized as competition policy. *Id.* art. 11.3. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 112. See also WTO, WTO Legal Texts, at http://www.wto.org/english/docs_e/legal_e.htm (last visited Jan. 30, 2004).

5. Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories operating conformity assessment procedures comply with the provisions of Articles 5 and 6. In addition, Members shall not take measures that directly or indirectly have the effect of requiring or encouraging such bodies to act in a matter inconsistent with the provisions of Articles 5 and 6. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, in LEGAL INSTRUMENTS, *supra* note 4.

restraints of trade. However, where trade liberalization has been achieved, the trading system requires that private trade restraints be dealt with in particular ways.

It is therefore appropriate for WTO Members, trade negotiators, government officials, academics, business communities, lawyers and others to think about the relationship between the WTO system and competition policy. The result of such thinking may result in the establishment of an agreement adopting a form of competition provision in the WTO Agreements or outside the WTO system. Whether such an agreement is established within the WTO or outside it does not matter so much. What is important is that international competition policy, in some form, operates effectively.

III. BASIC PRINCIPLES OF THE WTO

A. *National Treatment*

National treatment is regarded as one of the cornerstones of the WTO. Especially relevant to our purpose here is Article III.4 of the GATT 1994, which requires national treatment with respect to all laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of imported goods.⁶ Similarly, national treatment is provided for in Article XVII of the GATS⁷ and Article Three of the TRIPs Agreement. However, with regard to the GATS, national treatment is not an automatic requirement, but is contingent on the concession of a Member making liberalization commitments in trade in services. Provisions for national treatment are also found in the TBT Agreement, the Agreement on the Application of Sanitary and Phytosanitary measures (“SPS Agreement”) and the Agreement on Government Procurement.

The principle of national treatment is meant to maintain a competitive equality between domestic products and enterprises, on the one hand, and those of other Members, on the other. Although the application of the national treatment principle varies according to whether it applies to trade in goods, trade in services, or intellectual property.⁸ National treatment is

6. General Agreement on Tariffs and Trade 1994, art. III.4, Apr. 15, 1994, WTO Agreement, *in* LEGAL INSTRUMENTS, *supra* note 4.

7. *Id.* art. XVII.

8. The GATT 1994 deals with trade in goods. In this area, the principle of national treatment is universal, which should apply generally unless exempted by Article XX of the GATT 1994 or other provisions of the WTO Agreements. In principle, a border measure on trade in goods should take the

meant to establish a level playing field between domestic and foreign products and enterprises. The scope of “laws, regulations and requirements” in Article III.4 of the GATT 1994 has been interpreted broadly to include any laws and regulations which might adversely modify the conditions of competition between domestic and imported products in the internal market.⁹

It is noteworthy that Article VIII of the GATS requires Members to ensure that any monopoly supplier of a service in its territory, in the supply of the monopoly service in the relevant market, neither acts in a manner inconsistent with that member’s specific commitments nor abuses its monopoly position to act in other markets in a manner inconsistent with commitments. This provision is somewhat similar to “abuse control” exercised by domestic competition law authorities in some countries.¹⁰

B. Most-Favored-Nation Treatment

The Most Favored Nation (“MFN”) principle requires that a Member accord goods and services of another Member treatment no less favorable than that it accords to goods and services of all other Members. This principle also applies in the area of intellectual property. This principle is designed to guarantee equal competitive conditions between goods and services of different foreign members. It applies universally with regard to the GATT 1994, the GATS, and the TRIPs Agreement, although the GATS allows a Member to attach a reservation to this principle and exclude its application in part or in whole.

MFN treatment is provided for in Article I of the GATT 1994, Article II of the GATS and Article 4 of the TRIPs Agreement. Like the principle

form of a tariff, and the tariff rates should not exceed the concession rates agreed upon in trade negotiations. The principle of national treatment enshrined in Article III.4 is to ensure that a tariff concession is not circumvented by an internal measure that discriminates against foreign like-products. In trade in services, the principle of national treatment is not a universal principle. It applies when a Member makes a concession that with regard to a particular sector it grants national treatment to foreign providers of services. Also, it is often hard to distinguish between border measures and domestic measures. For example, if a foreign insurance company of a Member establishes a subsidiary in the territory of another Member and provides insurance services, this is a type of trade in services. However, for the purposes of regulation of this insurance company, there are no border measures similar to tariffs. In the area of intellectual property, national treatment was traditionally envisaged in the Paris Convention and the Berne Convention even before the TRIPs Agreement.

9. *Italian Discrimination against Imported Agricultural Machinery*, BISD 7S/60, L/833, at para. 12 (Oct. 23, 1958).

10. *See, e.g.*, Case 322/81, *NV Netherlandische Banden Industrie Michelin v. EC Comm’n*, 1983 E.C.R. 3461; Case 85/76, *Hoffman la Roche & Co. AG v. EC Comm’n*, 1979 E.C.R. 461; Case 6/72, *Europemballage Corp. & Continental Car Co. v. EC Comm’n*, 1973 E.C.R. 215.

of national treatment, equality of competitive conditions is broadly interpreted. In the *Bananas* case, for example, the Panel and the Appellate Body held that Article II of the GATS should be given a wide scope.¹¹

C. Transparency

The two-part requirement of transparency is also a cornerstone of the WTO. The first part is the obligation imposed on Members of the WTO to publish or make publicly available all relevant regulations before application, the requirement of impartial administration of such regulations and the right to review decisions taken under them. The second part is the requirement that Members give notice of governmental actions to the WTO and other Members.

The principle of transparency is provided for in Article X of the GATT 1994, Article III of the GATS and Article Sixty-three of the TRIPS Agreement. Provisions of transparency are included in many other WTO Agreements in Annex 1A. This principle serves as the basis for a rule-oriented foreign trade policy and for maintaining stability and predictability of the trade law regulations of Members.

D. Due Process of Law

The requirement of transparent governmental processes is an important part of the concept of due process of law. A closely related principle is the procedural due process principle present in the WTO's dispute settlement procedures. The procedures for dispute settlement at the WTO are provided for in the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU").¹² Provisions in the DSU are generally designed to establish due process in the enforcement of the WTO Agreements. Especially significant is Article Eleven of the DSU, which provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and applicability of and conformity with the relevant covered agreements."¹³ Although no similar provision exists for the Appellate Body, the same due process requirement applies to its procedures.

11. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R; WT/DS27/AB/R.

12. Dispute Settlement Understanding, Apr. 19, 1994, WTO Agreement, Annex 2, 33 I.L.M. 1226, in LEGAL INSTRUMENTS, *supra* note 4.

13. *Id.* art. 11.

All of the principles of the WTO discussed above are designed to establish and maintain conditions conducive to competition among enterprises of different members of the WTO in trade in goods, services, and intellectual property, and to ensure that the rule of law prevails in the enforcement of trade rules. It is clear that those principles are common to the WTO system and to competition policy.

IV. CASE-LAW IN THE WTO DISPUTE SETTLEMENT PROCEDURES WHICH HAVE SOME BEARING ON COMPETITION POLICY

The *Photographic Film* case (*Kodak/Fuji*),¹⁴ decided by the Dispute Settlement Body (“DSB”) in 1998, revealed that the WTO was ineffective in dealing with private restraints of trade. In this case, the U.S. government filed a claim with the WTO regarding measures taken by the Japanese government in connection with the distribution of film in Japan. The U.S. government argued that the actions constituted a violation as well as a non-violation of the WTO Agreements. In essence, the U.S. government argued that some restrictive features of the Japanese distribution system, which allegedly had been constructed under directives of the Japanese government, had foreclosed the film market in Japan to foreign-produced film. The United States claimed that the Japanese government imposed “liberalization countermeasures” in the 1970s, when the film market in Japan was liberalized in order to offset the effect of trade liberalization. The U.S. claimed that, under the leadership of the Japanese government, the leading film manufacturer Fuji Film Company, built an exclusive distributorship in Japan and excluded Kodak films from the country. This case involved a distribution system created by Fuji with a market share of about seventy percent, in which four distributors of Fuji acted as exclusive distributors of Fuji products.

The WTO Panel ruled that the United States failed to prove that the Japanese government had in fact constructed this exclusive distributorship agreement in the film industry in Japan. Because the U.S. government decided not to appeal the Panel’s ruling, the Panel Report was adopted and became final.

Although the U.S. government’s claim was rejected by the Panel, this case raised an important issue regarding the relationship between WTO Agreements and competition policy. The U.S. government tried to show that, although on the surface the alleged exclusive distributorship may

14. *Japan—Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, WT/DS44/R (Apr. 22, 1998).

have been a private restraint, the Japanese government played a decisive role in bringing this into existence and, therefore, the restraint was essentially a governmental measure. The U.S. government produced a large volume of documents to prove that the heavy hand of the government was operating in the creation of this distributorship. The Japanese government likewise produced a large volume of documents to disprove the claim of the United States.

In this case, the U.S. action failed, and this failure seems to have been due to the fact that it aimed at the wrong target. Whatever the nature of the Japanese government's "liberalization countermeasures" and the role of the government in the creation of the exclusive distributorship may have been, the central issue in this dispute was that of private conduct, i.e. the distribution policy of Fuji, a private enterprise. Unless it can deal directly with issues of private conduct, the dispute settlement system of the WTO with regards to such conduct will remain largely ineffective.¹⁵

This case shows that the WTO Agreements as they exist today are not efficient in dealing with issues of private restraint of international trade, which may be as detrimental to the free international trading system as governmental barriers. As liberalization of trade progresses through trade negotiations and government trade barriers are lowered and eliminated, the WTO must address issues of restrictive business practices of private enterprises which restrain trade and counteract the effect of liberalization achieved through trade negotiations. In the long run, therefore, the WTO system will not be complete without the inclusion of competition policy within its framework in one form or another. This is indeed the lesson of the *Photographic Film* case.

Two more cases have raised issues related to competition policy. One is the *United States—Anti-Dumping Act of 1916* case¹⁶ in which the

15. One alternative that the United States government could have tried is an extraterritorial application of U.S. antitrust laws. The *U.S. Antitrust Enforcement Guidelines* state that the U.S. government can exercise jurisdiction over actions which occur abroad and bring about the effect of foreclosing that market to U.S. products. See U.S. Department of Justice and the Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations*, Apr. 1995. The U.S. government (and/or Kodak) could have tried this avenue and brought an antitrust action against Fuji. Kodak filed a complaint with the Japanese Fair Trade Commission regarding this matter, but the Commission did not take any action.

16. *United States—Anti-Dumping Act of 1916*, Report of the Panel, WT/DS136/R (Mar. 31, 2000) (the EC Case); WT/DS162/R (May 29, 2000) (the Japan Case); Report of the Appellate Body, WT/DS136/AB/R (Aug. 28, 2000) (the EC Case); WT/DS162/AB/R (Aug. 28, 2000) (the Japan Case). For comments on the Panel and Appellate Body Reports, see Hiroko Yamane, *The Anti-Dumping Act of 1916: A Victory at What Cost?*, 7 INT'L TRADE L. & REG. 1-18 (2001); Mitsuo Matsushita & Douglas E. Rosenthal, *The WTO Makes a Mistake—Analysis and Perspective*, BNA, Antitrust & Trade Reg. Rep., No. 2021, Aug. 15, 2001.

European Communities and Japan claimed that the very existence of the U.S. Anti-Dumping Act of 1916 was a violation of U.S. obligations under the WTO Agreements. The Anti-Dumping Act authorizes criminal prosecution and a treble damage action on the part of a U.S. domestic industry if dumping occurs and if, by that dumping, the U.S. industry is injured. The Panel and the Appellate Body held that this U.S. law is applicable to dumping in the sense of Article VI of the GATT 1994 and, therefore, must conform to the requirements of that Article. Because the Article provides for an anti-dumping duty as the only measure to deal with dumping, the 1916 Act, which provides for criminal sanctions and treble damages as remedies for dumping, is inconsistent with the GATT 1994.

The U.S. Anti-Dumping Act of 1916 was characterized by the Panel and the Appellate Body as an anti-dumping law. In the United States, this law is characterized as “not an antitrust statute but one whose subject matter is closely related to the antitrust rules regarding predation.”¹⁷ However, the scope of anti-dumping legislation and that of competition law regarding dumping may at least partially overlap. International price discrimination, which satisfies the requirements for dumping challenges under Article VI of the GATT 1994 and the Anti-dumping Agreement, may also satisfy the requirements to be challenged under competition law as predatory pricing.

In the United States, the Robinson-Patman Act prohibits price discrimination according to areas if such price discrimination causes competitive injury and there is no justification (such as meeting a competitor's price) for that price discrimination.¹⁸ Given the fact that U.S. antitrust laws are applied extraterritorially, price discrimination by a foreign enterprise, which sets a high price for a product in the domestic market and a lower price when it exports a like-product to the United States may violate that particular law. Remedies for a violation of the Robinson-Patman Act include an injunction issued by courts or the Federal Trade Commission and the award of treble damages for losses sustained by a U.S. domestic industry. If this challenge is made in the United States, other Members of the WTO may file a petition with the WTO's DSB and argue that the only remedy should be an anti-dumping

17. *U.S. Antitrust Enforcement Guidelines*, *supra* note 15, at 8. For U.S. court decisions on this subject, see *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Geneva Steel Co. v. Ranger Steel Supply Corp.*, 980 S. Supp. 1209 (D. Utah 1997); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1190 (E.D. Pa. 1980).

18. 15 U.S.C. § 26 (2000) (injunctive relief); *id.* § 15 (treble damages).

duty under the Appellate Body's holding in the *Anti-Dumping Act of 1916* case.

Because the Panel and the Appellate Body rulings in this case deny a criminal action and the recovery of damages by a private party suffering from dumping, these rulings will have an impact on the relationship between anti-dumping legislation and competition law.

In the *Canada Dairy (II)* case, in which the issue was an agricultural subsidy given by the Canadian government to milk producers in Canada.¹⁹ Under this subsidy regime, the Canadian government established a price support system for milk sold for domestic uses that kept domestic prices at a high level. Originally, the Canadian measures included price controls on fresh milk that was to be sold to processors of milk (dairy products producers) for export purposes. However, this system was challenged by the United States at the WTO because the scheme constituted a prohibited subsidy under the WTO Agreements. This was the *Canada Dairy (I)* case. The Panel and the Appellate Body held that the Canadian subsidy was contrary to the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").²⁰ Thereupon, the Canadian government modified the subsidy system and abolished the price controls on the sales of fresh milk for export purposes.

The United States challenged this regime again and insisted that this was still in contravention of the Agreement on Agriculture and the SCM Agreement. The Appellate Body stated that this new scheme could constitute a subsidy inconsistent with the WTO Agreements if producers of fresh milk sold it to producers of dairy products at a price below cost. However, the Appellate Body could not decide whether there was a below-cost sale or not, because of the lack of fact finding on the part of the Panel.

The issue in this case seems to be the borderline between the realm of subsidy law and that of competition law. One may question whether the concept of subsidy may be stretched to this extent. It may be that this type of issue is more appropriately dealt with as a predatory pricing issue under competition laws. However, if a private party challenges a subsidy of this type as predatory pricing, there may be a counterargument that the remedy should be a countervailing duty under Article VI of the GATT 1994. This is a logical consequence of the *Anti-Dumping Act of 1916* case, which

19. *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW, and WT/DS113/AB/RW (Dec. 3, 2001).

20. *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW and WT/DS113/AB/RW (Oct. 13, 1999).

states that the only remedy to dumping should be the imposition of an anti-dumping duty under Article VI of the GATT 1994.

A recent telecommunications dispute between the United States and Mexico involves competition policy issues. On April 17, 2002, the United States filed a petition with the WTO's DSB to establish a panel to resolve the dispute between the two countries with regard to telecommunications. The United States claims that Mexico failed to honor its GATS commitments regarding the telecommunications industry.²¹ The United States argues that, although Mexico had inscribed specific market-access and national treatment commitments for basic telecommunications services in its GATS Schedule of Commitment, it failed to ensure that Telmex (the dominant Mexican telecommunications entity) provided interconnection to U.S. cross-border basic telecoms suppliers on reasonable rates, terms and conditions. Among other charges, the United States argues that the Mexican rules do not prevent Telmex from engaging in anti-competitive practices.

The Mexican rules give Telmex sole authority to negotiate the rate that foreign basic telecommunications service suppliers must pay to their Mexican counterparts to connect their telephone calls in Mexico. By law, all Mexican basic telecommunications suppliers, including Telmex, must incorporate that rate into their interconnection contracts with foreign cross-boarder basic telecommunication suppliers. The rules also ensure that Telmex receives the greatest share of the revenue generated from this charge, regardless of how many calls it connects from abroad.

The United States argues that the Mexican rules empower Telmex to engage in monopolistic practices with respect to connection rates for cross-boarder basic telecommunications services and create an effective dominance by Telmex to set rates for international interconnection.

This case had just started at the time I was writing this Article, and it is premature to predict the outcome of any Panel and/or Appellate Body proceedings. However, this case is noteworthy not only because it is the first case in which GATS issues are the main subject-matter of dispute at the WTO but also because an issue relating to abuse of a dominant position in a telecommunications market is raised.

21. *DSB Establishes Panels for Mexico Telecom, Poultry Disputes*, Inside U.S. Trade, May 3, 2002; *U.S. Panel Request In Mexico Telecom Fight*, 7-8 (Feb. 15, 2002), Inside U.S. Trade, 8-10 (May 3, 2002).

V. ACTIVITIES OF THE WTO WORKING GROUP ON TRADE AND COMPETITION

The idea of introducing competition law and policy into the trade arena was conceived by the framers of the Havana Charter, the predecessor of the GATT 1947. Chapter V of the Havana Charter was devoted to competition law and policy. Since that time, the idea of international competition policy has been debated in many international fora, including the United Nations, the GATT 1947, the United Nations Conference on Trade and Development (“UNCTAD”) and the Organisation for Economic Co-operation and Development (“OECD”).

The Ministerial Conference of the WTO held in 1997 in Singapore decided to establish a group to study the relationship between competition policy and trade (the “Working Group on the Interaction between Trade and Competition Policy”) with a view towards introducing competition policy into the WTO. The Working Group has published annual reports since its creation.²² These reports reveal that there is general agreement among Members of the WTO that the WTO and competition policy share common objectives, i.e. the promotion of the free market, consumer welfare, and efficiency. There is also a consensus that private anti-competitive practices, such as international cartels dividing up the international market and fixing prices, are harmful to the WTO system. However, views sharply conflict as to the ways to deal with specific issues.

Developing countries are generally opposed to the idea of introducing an agreement on competition policy within the WTO that would be compulsory for WTO Members. The introduction of such an agreement would still be premature for them and may be too intrusive to the national policies of some developing countries. For example, some developing countries argue that excessive WTO intervention into their industrial and development policies may be detrimental to their national goals.

As to the relationship between anti-dumping and competition policy, some argue that trade-restricting features of anti-dumping legislation can be mitigated through the incorporation of some competition principles, while others contend that anti-dumping legislation and competition policy are based on different constituencies and cannot be reconciled.

22. WTO, Working Group on the Interaction between Trade and Competition Policy, Report to the General Council, WT/WCTCP/1 (Nov. 28, 1997); WT/WGTCP/2 (Dec. 8, 1998); WT/WGTCP/3 (Oct. 11, 1999); WT/WGTCP/4 (Nov. 30, 2000); WT/WGTCP/5 (Oct. 8, 2001).

As to the form of a competition policy agreement, some prefer a multilateral scheme similar to that found in the WTO. Others argue that a multilateral agreement is too idealistic and bilateral agreements should be preferred. Others again argue that regional agreements may be more realistic.

VI. COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The European Community presented a position paper,²³ in which it clarified its view on whether competition policy should be introduced into the WTO and, if so, the form of such an agreement on competition policy in the WTO should take. It proposed a binding WTO framework agreement on competition policy.²⁴ The EC's position paper states that international co-operation is essential for:

the facilitation of consultations and exchanges of information among competition authorities in order to better address anti-competitive practices of common concern; the management of jurisdictional conflicts (or trade conflicts) through consultations and the application of comity principles; the reinforcement of the capacity of newly established (or small) competition authorities both through general technical assistance and enforcement cooperation; and the reduction of unnecessary costs to international business transactions through better coordination of investigations and remedies.²⁵

The EC proposed that WTO negotiations focus on three key issues:

- core principles on domestic competition law and policy;
- cooperation modalities, including both case-specific cooperation and more general exchanges of experiences; and
- support for the reinforcement of competition institutions in developing countries, including through a more coherent and

23. WTO, *Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Members*, WT/WGTCP/W/152 (Sept. 25, 2000).

24. *Id.*

25. *Id.*

enhanced approach to technical assistance for capacity building.²⁶

Another proposal is to establish a Competition Policy Committee within the WTO which “would provide a forum for examining whether greater convergence can be promoted on competition policy questions of importance for the trading system.”²⁷

In the EC’s proposal, the key elements of a multilateral framework on competition policy should consist of the following:

- Core principles of competition law and policy:
 - “Agreement to have a competition authority endowed with sufficient enforcement powers;”
 - “Competition law should be based on the principle of non-discrimination on grounds of the nationality of firms.” The EC explains that this is to suggest” a binding core principle on the need to avoid any *de jure* discrimination as regards the domestic competition law framework;”
 - “Transparency as regards the legislative framework, including as regards any sectorial exclusions;”
 - “Guarantees of due process; “and
 - “Agreement to treat “hard-core” cartels as a serious breach of competition law; hard-core cartels are defined as, among others, “agreements among . . . competitors involving price fixing, bid rigging, output restrictions or customer allocation and market divisions.”
- Cooperation modalities:
 - Case-specific co-operation. This includes exchanges of case-related information and evidence, and consultations and exchanges of views on cases affecting the important interests of other WTO Members. The inclusion of “negative comity” is also suggested; and

26. *Id.*

27. *Id.*

- “general exchange of information and experience and joint analysis” and the establishment of a Competition Committee to perform this function.
- Technical and enforcement assistance for competition institutions in developing countries.

It is not entirely clear which part of the above EC proposals are binding rather than hortatory. It seems that the part dealing with core principles of competition law and policy is recommended as binding. Therefore, this proposed agreement can be characterized as partly binding and partly non-binding.

VII. THE ICPAC REPORT

In 1997, the U.S. government organized the International Competition Policy Advisory Committee (the “ICPAC Committee”) and commissioned it to study international competition issues and submit a report with recommendations regarding possible measures for U.S. government consideration. The Committee submitted its Report²⁸ in 1999 and recommended proposals for international cooperation in competition policy matters. The recommendations cover wide issues, including:

- Multi-jurisdictional mergers;
- Strategies for facilitating substantive convergence and minimizing conflict;
- Rationalizing the merger review process through targeted reform;
- International anti-cartel enforcement and inter-agency enforcement co-operation;
- Where trade and competition intersect; and
- Preparing for the future.²⁹

The Report is skeptical about introducing a comprehensive agreement on competition policy within the WTO. This skepticism stems from the

28. U.S. Department of Justice, Antitrust Division, *Final Report, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust*, Washington, D.C., 2000, available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited Dec. 19, 2003).

29. *Id.* tbl. of contents.

concern that a hasty introduction of a comprehensive competition agreement into the WTO may bring about, *inter alia*:

- The possible distortion of competition standards through the *quid pro quo* nature of WTO negotiations;
- The potential intrusion of WTO dispute settlement panels into domestic regulatory practices; and
- The inappropriateness of obliging countries to adopt competition laws.³⁰

In the view of the ICPAC Committee, “national authorities are best suited to address anti-competitive practices of private firms that are occurring on their territory.”³¹

The Report places heavy emphasis on positive comity through which a trading nation requests that another trading nation take steps under its own domestic law to deal with anti-competitive conduct that occurs in the latter’s territory but adversely affects competition in the former’s territory. It recognizes, however, that there is a limit to the effectiveness of positive comity. The Report does not rule out the possibility of extraterritorial application of domestic competition laws to deal with anti-competitive conduct that occurs outside the territory but brings about adverse impacts inside the territory of a nation.³²

The Report recommends that there should be a “Global Competition Initiative” toward a “greater convergence of competition law and analysis, common understandings and common culture.”³³ To accomplish this purpose, such a Global Competition Initiative should include:

- Multilateralized and deepened positive comity;
- Agreement on developing consensus principles in the practices for merger control laws;
- Considering the scope of governmental exemptions and immunities;
- Considering approaches to multinational merger control;

30. *Id.* (Executive Summary).

31. *Id.*

32. *Id.* ch. 5.

33. *Id.* ch. 6.

- Considering frontier subjects such as e-commerce and competition;
- Undertaking collaborative analysis of such issues as global cartels; and
- Possible mediation of dispute and technical assistance.³⁴

The Report emphasizes that a “Global Competition Initiative does not require a new international bureaucracy or substantial funding.”³⁵ It can be accomplished by informal understandings among the trading nations after the model of the Group of Seven (“G-7”).

In essence, the Report proposes that there should be a “soft” convergence of competition policy and law among trading nations and no formal organization or institution is necessary. Also, there should be no mandatory requirements with which trading nations must comply. It can be accomplished through exchange of views among them and the experiences of working together.

Based on the recommendations of the ICPAC Report, the U.S. government initiated “The International Competitive Network” (“ICN”), in which enforcement agencies of governments informally meet and discuss competition-policy-related matters of their mutual concern and cooperate with each other without creating any formal international organization. Many governments have joined this program.³⁶

VIII. COMPETITION POLICY IN THE DOHA MINISTERIAL DECLARATION

The Declaration adopted by the Ministerial Conference held in Doha, Qatar in November 2001 contains three paragraphs on competition policy for future negotiations. The relevant paragraphs are Paragraphs 23, 24 and 25.³⁷

Paragraph 23 states:

Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in Paragraph 24, we

34. *Id.*

35. *Id.*

36. According to the Website of the ICN, about sixty governments have decided to join the ICN. Website of the ICN, at <http://www.internationalcompetitionnetwork.org> (last visited Dec. 19, 2003).

37. Ministerial Declaration, WT/MIN(01)/DEC/1, *adopted* Nov. 14, 2001.

agree that negotiations will take place after the Fifth Session of the Ministerial Conference [which must be held within two years of the Doha Conference] on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

Paragraph 24 states:

We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels to provide strengthened and adequately resourced assistance to respond to these needs.

Paragraph 25 states:

In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

At the time of writing this Article, it is not clear whether an international negotiation will take place in the WTO with regard to competition policy. As Paragraph 23 states, whether or not a negotiation starts will depend on whether or not negotiating parties can agree on “modalities” of negotiation. The meaning of modalities is not defined and, if defined broadly, it may include the substance of negotiations, such as the type of international agreement (whether plurilateral or multilateral) to be negotiated, or the substance of any such agreement, such as what kinds of cartels should be categorized as being prohibited. If so, there may be divergent views and it may be difficult to reach consensus.

Paragraph 24 emphasizes the importance of considering the needs of developing and less-developed countries. Technical assistance and capacity building in competition policy matters are regarded as central to

any competition policy framework which may be included within the WTO framework. If any framework for competition policy is introduced into the WTO, technical assistance and capacity building certainly will be incorporated as an important component.

Paragraph 25 declares that the Working Group should discuss core principles, including transparency, non-discrimination, procedural fairness, hardcore cartels and other related matters. One issue in this regard may be whether to include in the category of hardcore cartels only international cartels, export cartels, and import cartels that directly affect international trade, or purely domestic cartels as well. These issues are left to future consideration.

IX. OPTIONS FOR COMPETITION POLICY IN THE WTO

After considering the Working Group reports, the ICPAC Report, and the views expressed by Members of the WTO regarding this matter, the following tentative options are offered for consideration.

Option 1: A Declaration that Competition Policy is an Integral Part of the WTO Regime

This option is merely to suggest that the WTO declares, in the form of a Ministerial Declaration, that competition policy is an integral part of the WTO regime. A Ministerial Declaration would state that, through the trade negotiations conducted under the auspices of the GATT, governmental trade barriers have been reduced; that there are still considerable governmental trade barriers; that in due course, such barriers will be further reduced; and that as governmental barriers are reduced, private barriers are recognized as becoming more serious impediments to trade. It would further state that, under these circumstances, it is important for the WTO to establish principles of competition policy within the framework of the WTO in order to deal with both governmental and private trade barriers. It would state that non-discriminatory conditions of competition are a basic objective of WTO law and that competition policy should become an integral part of the WTO legal framework.

Option 2: A Plurilateral Agreement

I recommend a plurilateral agreement on competition policy within the framework of the WTO with a two-stage implementation. In the first stage, there would be binding rules, which would prohibit such private anti-competitive conduct that directly injures the objectives of the WTO,

such as international cartels, import cartels, and export cartels. In the second stage, the WTO would consider the introduction of an international agreement on competition policy which would cover a wider area, including vertical restraints and mergers and acquisitions.

Such a plurilateral agreement on competition policy might be called the "Plurilateral Agreement on Competition and Trade" ("PACT"). The PACT would contain rules regarding transparency, objectivity, and due process of law, as well as the principles of most-favoured-nation treatment and national treatment in the application and enforcement of the Members' competition laws.

In its initial stage, the PACT should incorporate rules that deal with matters directly affecting trade between Members of the WTO, such as international cartels and export/import cartels. The rules should state that public and private measures which restrict trade among Members are contrary to the purpose of the WTO and can undermine the benefits of liberal trade achieved through trade negotiations.

The WTO might consider the possibility of introducing rules of competition regarding conduct such as mergers and acquisitions, the regulation of which primarily belongs to the realm of domestic policies. In such consideration, the WTO should take into account whether rules of competition policy on such matters will enhance the objectives of the WTO and promote the effectiveness of the WTO system.

The WTO should formulate additional rules regarding the implementation of Article 40 of the TRIPs Agreement in order to give more guidance to Members seeking to introduce legislation on restrictive business practices involved in the licensing of technology. The WTO should clarify the requirements contained in other provisions of the WTO Agreements which are related to competition policy, such as Article 8 of the TBT Agreement, Article VII of the GATT 1994, Article 9 of the TRIMs Agreement, Articles VIII and IX of the GATS and Article 11(b) of the Agreement of Safeguards, in order to assist Members to implement such provisions.

The WTO should consider whether some principles of competition policy may be incorporated into agreements regarding trade remedies, such as the Anti-Dumping Agreement and the SCM Agreement.

The WTO should consider the establishment of a Competition Committee, a permanent group of experts on competition and trade (such as the Permanent Group of Experts on Subsidies and Trade Relations provided for in Article 24 of the SCM Agreement), which would advise WTO bodies on competition policy matters.

Option 3: A Non-binding Multilateral Framework for Cooperation in Competition Policy

This option is aimed at establishing a multilateral framework for cooperation in competition policy among Members of the WTO. The provisions in this agreement would be hortatory or exhortative rather than binding, as opposed to “the Covered Agreements” that are binding on WTO Members. This agreement would not be legally binding; thus, a violation of its provisions would not be met with action based on the DSU or with economic retaliation determined by the DSB. It would not be a part of the Covered Agreements that could be invoked by one Member of the WTO against another Member. Instead, it would provide for a notification of legal action taken under the competition laws of a Member when such an action provokes international implications; a scheme for exchange of information regarding competition policy and the enforcement of law; a mechanism for co-operation among the enforcement agencies of the competition policies and laws of members in coordination of policies; mutual assistance in investigation and enforcement of law, including “positive comity”; and a mechanism for technical assistance, education, and dissemination of information regarding the competition laws and policies of Members.

Option 3 is modeled after bilateral agreements on competition policy that have been signed by a number of countries such as, among others, the United States, the European Communities and some of its Members, Canada, Japan, Australia and New Zealand. In spite of the narrow coverage, bilateral agreements have worked well in building co-operation and promoting competition policies among participants. One of the reasons for success may have been their informal and non-binding nature. Although some may argue that this type of multilateral agreement has no “teeth,” it is probably the most realistic approach for today. A non-binding agreement such as this is unusual for the WTO, which is essentially a rule-enforcement mechanism. However, there is no reason that the WTO must reject an agreement simply because it is non-binding.

Option 4: A Partly Binding Multilateral Framework on Competition Law and Policy

This is modeled after the proposal made by the European Community in its Communication dated September 25, 2000.³⁸ In this proposal, there would be three parts in the framework. The first part would contain the core principles, such as those of non-discrimination, transparency, and the due process of law, as well as the prohibition of hardcore cartels. This part would be binding and Members would be obligated to observe its provisions. The second part would consist of arrangements for exchange of information, including case-specific and general information. The third part would consist of technical assistance to developing countries in their efforts to establish competition laws and enforcement agencies as well as capacity building with regard to enforcement of competition law and promotion of competition policy.

X. WHERE DO WE GO FROM HERE?

A quick glance at views expressed in various reports and the Doha Ministerial Declaration may lead one to proceed with caution and avoid a hasty conclusion. One may think that the establishment of a comprehensive and binding international agreement on competition policy in the WTO or elsewhere is still premature. It seems realistic to construct a more informal and non-binding scheme for co-operation among trading nations with respect to competition policy. A good starting point may be bilateral agreements. There are already some bilateral agreements in existence, such as the United States/European Union Agreement,³⁹ the United States/Canada Agreement⁴⁰ and the United States/Japan Agreement.⁴¹ All are non-binding and all contain provisions for exchange

38. See WTO, *supra* note 23.

39. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Agreement signed at Washington, D.C., Sept. 23, 1991, in JOSEPH U.P. GRIFFIN, U.S. International Antitrust Enforcement, A Practical Guide to the Agencies' 1995 Guidelines, B-1402-1406 (The Bureau of National Affairs, Inc. 1996).

40. Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 1 and 3, 1995, 2028 U.N.T.S. 135, 35 I.L.M. 309 (1996), in GRIFFIN, *supra* note 39.

41. *Agreement Between the Government of Japan and the Government of the United States Concerning Co-operation on Anticompetitive Activities*, Oct. 7, 1999, in NICHIBEI DOKKIN KYORYOKU KYOTEI [U.S./JAPAN CO-OPERATION AGREEMENT ON ANTI-MONOPOLY MATTER], North America Bureau, Ministry of Foreign Affairs (2000), available at <http://www.usdoj.gov/atr/public/international/docs/3740.pdf> (last visited Dec. 19, 2003).

of information, notification of actions that one of the parties takes under its domestic competition laws which affects the other, and positive and negative comity.

As the ICPAC Report suggest, provisions incorporated in bilateral agreements on competition policy can be made into a multilateral agreement. Although provisions in such bilateral agreements are not compulsory and not enforceable through a dispute settlement process such as that incorporated in the WTO system, many bilateral agreements have contributed much toward the promotion of the spirit of international cooperation.

One possibility may be to introduce an informal and non-binding agreement on a multilateral basis into the WTO system. Currently, all of the WTO Agreements are binding, and non-compliance with any of them is subject to the WTO's dispute settlement procedure. This proposed agreement on international competition policy would be non-binding, and non-compliance with its provisions would not be subject to the WTO's dispute settlement process. Although an introduction of such a non-binding agreement into the WTO system may at first seem to be incongruous with the other WTO Agreements, there is no reason that the WTO should object to introduction of such an agreement. Although it would be outside the scope of dispute settlement in the WTO, in so far as promotes free and open markets and the common objectives, such an agreement and the WTO would complement and reinforce each other.