WHAT ROLE FOR COMPETITION POLICY IN THE WTO?

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I. INTRODUCTION

Competition policy and trade policy can be mutually reinforcing policy tools, working in tandem to foster markets that are contestable and competitive to the benefit of foreign and domestic interests alike. In some ways, these two policy instruments are flip sides of a coin—competition policy addresses private restraints of trade, whereas trade policy focuses on governmental restraints of trade. In the absence of effective competition policy, private restraints of trade can nullify the benefits of negotiated trade liberalization measures, reducing the benefits of the negotiated trade bargains such as tariff reductions and perhaps even public support for liberalization of trade.

Although trade and competition policy objectives are complementary along some dimensions, they are significantly different in emphasis and application. Competition policy is enforced at the national level by domestic authorities, and the history of international and especially multilateral cooperation in competition policy is limited. Much of the international cooperation and discussion that has taken place has occurred in bilateral settings. In contrast, while nations pursue their own trade policies, a defining development in trade policy in the postwar period has been the gradual expansion of multilateral trade laws, embodied in the rules of the General Agreement on Tariffs and Trade (GATT) and now the World Trade Organization (WTO). Even aside from level of application, the substantive features of trade and competition policy have both areas of overlap and divergence. Under U.S. antitrust law, for example, the legal tests for injury and the pricing standards differ greatly from those found under trade remedies.  

At various points since the 1940s, experts and governments have considered how competition policy could be globalized. Although international consideration of competition policy is thus not new, the spread of competition law and policy around the world is. Over the last decade many countries have

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1 This discussion uses the term competition policy to encompass those national laws (such as U.S. antitrust laws) and policies designed to promote competition in the marketplace and to deter and punish restrictive or abusive business practices. The main concern of competition law and policy is therefore private firm actions.

2 The antidumping laws require a showing that the dumping contributed to material injury, which is defined as harm that is not “inconsequential, immaterial or unimportant.” 19 U.S.C. Section 1677 (7)(A) (2001). US antitrust laws, however, have a higher standard of injury and causation and tend to require a showing of a substantial lessening of competition or unreasonable restraint of trade. Moreover, price discrimination in the context of the Robinson Patman Act provides certain defenses which are unavailable in the antidumping context, such as meeting competition. For an excellent comparison of antitrust and trade remedies and standards, see Harvey M. Applebaum, The Interface of the Trade Laws and the Antitrust laws, 6 Geo. Mason L. Rev 479 (1998).
shown a growing interest in using competition policies as a means of bolstering the role of market-based competition in their economies. Since 1980 many developing countries and economies in transition have enacted new antimonopoly laws or strengthened existing laws and policies to facilitate the transition from planning to markets.

Multilateral consideration of the relationship between competition and trade policy moved a significant step forward in December 1996 when the world’s trade ministers agreed at the WTO’s Singapore Ministerial meeting to establish a working group to study and discuss the relationship between trade and competition policies. It was agreed from the outset that the initiation of the working group did not mean that international negotiations in the area of competition policy were a foregone conclusion. The Ministerial Declaration stated plainly that the work undertaken in the competition policy arena (and other areas) “. . . shall not prejudge whether negotiations will be initiated in the future . . .”\(^3\) Now, nearly seven years later, and particularly in the aftermath of the Doha Trade Summit of 2001, there is serious debate as to whether competition policy should come under WTO rules in some fashion and what such global rules or principles should encompass.

This chapter starts by examining the function of the competition and trade policy tools and some possible links and tensions. It then briefly considers the postwar efforts to expand international discussion and cooperation on competition policy matters. The chapter then examines the Uruguay Round Agreements and evaluates those features that contain some fragmentary competition policy elements as well as recent efforts by governments and private groups to consider a role for the WTO. Finally, the chapter evaluates arguments for and against formal linkage of competition policy under the aegis of the WTO.

II. WHY IS COMPETITION POLICY RELEVANT TO TRADE POLICY?

Competition law and policy is centrally concerned with the exclusionary conduct of corporations that restrict the operation of markets and raise costs to consumers. Trade policy, in contrast, is centrally concerned with measures taken by governments that restrict foreign access to markets and discriminate against foreign market participants. The effect of these two types of problems however are the same—less competition and higher costs for consumers.

Firms, governments, or some combination of the two, can impose anticompetitive or exclusionary restraints on trade. Exclusionary practices on the part of private firms can adversely affect competition in a relevant market and raise costs not only for domestic consumers, but also for foreign firms and consumers as well. Such arrangements may be between local firms, or they may be transnational in nature, taking the form of market allocation agreements, cartels with boycott arrangements, and other restrictive business arrangements across national boundaries.

Government policies or practices can support exclusionary business practices in many ways. Governments can act affirmatively to distort the operation of private markets and provide advantages

\(^3\) See, Para 20, WT/MIN (96) Dec.
to local firms. Examples include discriminatory enforcement of competition policy; government-authorized exemptions to national competition laws; the use of competition laws to advance industrial policy objectives, such as national champions; or trade policy measures that directly affect cross-border sales, such as anti-dumping measures and voluntary export restraint arrangements.

Alternatively, government practices can affect competition through acts of omission, by tolerating anticompetitive arrangements, for example, or failing to enforce competition laws if such laws are in place. Further, markets can be formally liberalized by privatizing monopolies, but privatization might not augur any change in access for new entrants, foreign or domestic, in the absence of a functioning competition policy regime. Both of these prototypes—exclusionary or anticompetitive business practices, and government practices that affirmatively or through inaction undermine competition among firms—have been largely outside the reach of international trade or antitrust rules.

Trade and competition policies are two methods of addressing such problems. Traditionally, enforcement of competition policy has been considered primarily the responsibility of national competition authorities concerned about anticompetitive effects on markets and consumers on their soil. In addition, some jurisdictions, notably the United States, have at times applied their antitrust laws (or at least asserted their willingness to apply their law) extraterritorially in an attempt to remedy such practices.

Some nations also have provisions whereby domestic trade laws are applied extraterritorially to reach certain market access restraints. For example, U.S. trade law, under section 301 of the Trade Act, as amended, can apply to some offshore anticompetitive business practices that are affirmatively supported or tolerated by a national government.4

Trade and competition policies are designed to look at restraints that come from different sources. Nondiscrimination, transparency, most-favored-nation, and national treatment have all been central pillars of the liberal trading system and the GATT. Government actions that undermine these principles present broader and different concerns than the more technical analysis of competition in a market and market entry barriers, which are typically the focus of competition authorities. Each set of policy tools also has its

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4 In Section 2411(d)(3)(B)(i)(IV) of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S. C. Section 2901 (1988). Congress clarified that the “toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market” constitutes an “unreasonable” practice, actionable under Section 301 of the Trade Act of 1974, 19 U.S.C. §2411-2420. The Senate Finance Committee Report describes the inclusion of this “toleration” claim as stemming from the “growing conviction...that anti-competitive, market-restrictive behavior on the part of private firms, when coupled with the failure of a foreign government to intervene to eliminate such behavior, can act as a barrier to market access, which is as great as any formal government act, policy or practice alone.” See, S. Report No. 167, 100th Cong., 1st Sess. 85 (1987). Section 301 of the Trade Act of 1974, as amended, is the statutory basis by which the U.S. government initiates a trade case vis-à-vis a foreign government for possible violation of a trade agreement (e.g., a GATT or WTO commitment) or with respect to foreign governmental practices that are deemed unreasonable or discriminatory and that burden or restrict US commerce. This provision also provides the legal framework by which private parties, such as corporations, can petition the US government to investigate, and if necessary, take trade action against such governmental practices.
limitations in the international context.

To highlight some differences in focus and application of the two sets of policy tools, consider three examples that illustrate the internationalization of competition problems.

First, international enforcement of competition policy has long presented problems. History shows that international cartels and other abuses of international markets do occur and that these can be longstanding anticompetitive arrangements, detrimental to firms and consumers in multiple markets, whether located in developed or developing countries, across many different industries. The recent record of U.S. international cartel cases demonstrates that sizable volumes of commerce are affected by international cartels. Some investigations have involved more than one billion dollars a year of trade in the United States alone, and in more than half of the recent criminal investigations, the volume of affected commerce has exceeded $100 million.

Uncovering such abuses is itself difficult. Additionally, enforcement or litigation of international cases often raises substantial procedural and evidentiary challenges, particularly when evidence and parties are located in multiple jurisdictions. Unilateral competition policy enforcement actions occur against a backdrop of longstanding tensions surrounding extraterritorial application of national competition (or antitrust) laws. U.S. actions have been especially controversial in this regard. U.S. case law at the turn of the century suggested that the reach of U.S. antitrust law extended no further than the water's edge. By the mid-1940s, however, U.S. case law had established that the Sherman Act applied to conduct occurring abroad when the participants intentionally and adversely affected U.S. commerce and the effects were deemed to be more than minor. This came to be called the “effects” test.

Currently there is little dispute that U.S. antitrust laws reach foreign business practices perceived as having adverse consumer effects in the United States. What distinguishes U.S. antitrust law from competition law in many countries, however, is that it carries both civil and criminal penalties, high fines, and private rights of action, which permit the award of treble damages. In years past, several countries introduced so-called “blocking” and “claw-back” statutes, their specific raison d’être being to thwart U.S. discovery practices and to ameliorate the effects of treble damages. While the US was once the only OECD country to apply some form of the effects test, now most industrialized countries apply some form of effects test.


6 There have been a number of major international cartel cases prosecuted by the Antitrust Division, Department of Justice in the lysine, citric acid, vitamins and graphite electrodes industries. There are also numerous historical examples, such as in the heavy electrical machinery sector, For addition details see International Competition Policy Advisory Committee (“ICPAC”), FINAL REPORT, March 2000, U.S. Department of Justice, at 168. (“ICPAC Final Report”).

7 See, United States v. Aluminum Co. of America. (Alcoa), 148 F.2d, 416, 443 (2d. Cir. 1945).

More recently, the locus of controversy has been the reach and application of U.S. antitrust laws with respect to foreign private practices seen as limiting U.S. exports and hence principally harming U.S. producers as distinct from U.S. consumers. In such “market access” cases, the competitive harm is experienced by consumers in the foreign market as well as by the would-be entrant to the foreign market. To date, few U.S. antitrust cases have been brought under this theory. Nonetheless, officials from several governments have expressed their strong objections to the application of U.S. antitrust laws to offshore competitive harm. As a result, this policy tool appears to be one that could result in political or trade friction.

A second example of the internationalization of competition issues stems from trade tensions arising from perceptions that nations are not enforcing their competition laws, are enforcing them in a discriminatory fashion, or are otherwise tolerating private, exclusionary practices by domestic businesses to the detriment of foreign market entrants. This type of barrier to market access is often cited as one example of the way a host government may foster private restraints of trade.

Private restraints of trade that restrict market access and in which governments have been implicated have created trade and economic tensions among several countries. The suspect practices include non-enforcement of rules prohibiting vertical distribution restraints, the governmental use of industrial policies that have the effect of blocking access, overly broad governmental exemptions or immunities from national competition laws, and discriminatory regulatory practices, among other measures. Allegations of trade-restrictive private restraints have clouded U.S.-Japan trade and economic relations for much of the 1980s and 1990s. Those two governments entered into several bilateral trade accords that included some undertakings by the Government of Japan to enforce its competition laws (called the Anti-Monopoly Act) in a more vigorous fashion. Many of the challenged business practices focused on distribution (or vertical) business practices, where U.S. and other firms alleged that unilateral and joint activities of Japanese producers foreclosed foreign firms and other new entrants from using existing or developing new distribution channels.

9 The International Competition Policy Advisory Committee, ICPAC, which this author directed, was able to find only five cases since 1978 that involved export restraint allegations. The most recent case, United States v. Pilkington PLC, is the only case involving export restraint allegations since the Department of Justice eliminated footnote 159 of its enforcement guidelines that had suggested that the Department would not make it a priority to pursue export restraint cases. In this 1994 case, the DOJ charged the UK firm Pilkington with entering into unreasonably restrictive patent and know-how licensing agreements with its likely competitors for the manufacture of flat glass using a proprietary process. The Department alleged that the territorial and use limitations in the agreements precluded Pilkington’s licensees in the United States from competing for business to design, build or operate flat glass plants in other countries. For additional examples and discussion of the same, See, ICPAC Final Report, Annex 5-A.

10 This is the type of problem that the feature of Section 301 of the 1974 Trade Act discussed in note 4, above, was designed to reach.


12 For a period of time during the late 1980s and early 1990s, a particular set of problems was thought to be presented by the Japanese keiretsu, groups of companies with cross-ownership of shares and established patterns of doing business with other members of the group. As discussed in the section the follows, a major US-Japan trade dispute involving allegations of discriminatory access to distribution channels was the US Film case, often referred to as
A third source of international economic tension emanates from those legal conflicts that have arisen in the context of multijurisdictional review of mergers. Large international mergers typically require review by competition authorities in several different countries. Disclosure requirements, timetables, and legal standards differ a great deal, depending on the jurisdiction. The proposed merger of McDonnell Douglas and Boeing in 1997 made these points in a dramatic fashion. In that case the U.S. Federal Trade Commission decided to approve Boeing's proposed acquisition of McDonnell Douglas, concluding after an investigation that the acquisition would neither substantially lessen competition nor tend to create a monopoly in either the defense or the commercial aircraft markets. \(^{13}\) The European Commission took issue with the merger, raised concerns about the effect of the merger on Boeing's dominance, and threatened to reject the merger and impose large fines unless some specified adjustments were made by Boeing. Boeing made the requested adjustments. \(^{14}\)

Although neither of the two merging firms had production assets within the European Union, few competition law experts took issue with the EU’s assertion of authority to review the proposed merger, given the global commercial aircraft market. Instead, the issue involved the different legal conclusions reached by U.S. and European authorities. This case generated a great deal of political heat on both sides of the Atlantic, with both sides charging that the other side’s competition authorities were informed, not so much by competition law, as by national champions and trade policies hiding behind competition law.

This case demonstrated that in a global economy, two or more nations can lay jurisdictional claim to the same business transaction. It also showed that major competition authorities could come to sharply different substantive legal conclusions, even when they had the same transaction before them. Moreover, the European Union demonstrated that, like the United States, it is fully prepared to apply its own laws when a foreign transaction is thought to affect its interests.

Some of these same lessons arose in the 2001 GE/Honeywell merger case, which was cleared by U.S. authorities but prohibited by the EU. And, unlike the Boeing/McDonnell Douglas transaction, the parties in GE/Honeywell were unable or unwilling to make the necessary adjustments in the transaction to obtain EU clearance. Hence, this transaction represents one of the few instances of direct conflict in substantive law between the United States and the EU, resulting in the termination of a major U.S. merger. \(^{15}\)

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Kodak-Fuji since it was first brought to the attention of the U.S. government by Kodak Photo Film Company.


\(^{15}\) See, Press Release, July 3, 2001 Department of Justice, Antitrust Division. In this press release, Assistant Attorney General Charles James states that the Antitrust Division reached “a firm conclusion that the merger...would have been pro-competitive and beneficial to consumers. Our conclusion was based on findings, confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either could offer individually...the EU however apparently concluded that a more diversified, and thus more competitive, GE could
Current trade and antitrust policy tools do not provide complete solutions to the international tensions that emanate from global competition problems or those problems that reflect a mix of governmental and private restraints. And no internationally agreed-upon set of competition or trade rules directly addresses business practices. For some, this situation is a call to create new multilateral rules and consultation mechanisms in the WTO. Others see the WTO as ill suited for that purpose and call instead for expanded competition initiatives outside the WTO. This chapter examines both sides of that debate. Wherever one lands on the question of the appropriate policy response for the WTO, it is certainly the case that the reduction of governmental trade barriers has brought into sharper relief the negative effects of internal practices, both public and private, on competition and access to markets. Concerns about access to markets are now almost universal – even countries with large domestic markets have come to rely on international trade sources as major sources of economic growth.

III. COVERAGE OF PRIVATE RESTRAINTS AND COMPETITION ISSUES UNDER INTERNATIONAL TRADE ORGANIZATION REGIMES

Before turning to the pros and cons of possible approaches to international competition policy, let us review multilateral and other experiences with this issue.

A. The International Trade Organization and Other Early Efforts

Some of the early U.S. and U.K. architects of the International Trade Organization (ITO) were concerned about the pernicious effects that international cartels and other private restraints of trade could have upon the world trading system. As a result, the draft Havana Charter included a chapter on restrictive business practices. Ironically, while it was U.S. negotiators that had sought to identify and proscribe certain business practices within the ITO charter, these provisions generated considerable opposition within the United States and contributed to the quiet demise of the ITO.16 There was considerable suspicion in the United States that other countries were more tolerant of cartels and other industrial agreements and therefore competition law and policy provisions would result in external scrutiny of U.S. practices without serious enforcement of anticompetitive practices within the home jurisdictions of the other ITO members.17

After the ITO charter failed, the United Nations Economic and Social Council (ECOSOC) in 1953 endorsed a draft convention that would have established a new international agency to receive and investigate complaints of restrictive business practices.18 The United States rejected the draft convention,

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16 See, Clair Wilcox, A CHARTER FOR WORLD TRADE 105, (Macmillan 1949). See also, Chapter _ of this book.


18 The draft convention included the same list of restrictive practices as the Havana Charter, with one exception relating to technology agreements. See Diane P. Wood, The Impossible Dream: Real International Antitrust, U. CHI.
arguing that differences in national policies and practices were so large they would make the new international organization ineffective. Concerns were also expressed that the one nation, one vote provision would allow nations hostile to the United States to instigate harassing complaints.

B. GATT Deliberations and Rule Coverage

The issue of multilateral coverage of private anticompetitive business practices did not die with the ITO. In the late 1950s, a group of twelve experts was convened at the GATT to take another look at this question, but was unable to reach a consensus opinion. The majority opinion recommended that business practices be left outside of dispute settlement (in particular, GATT Article XXIII) and advised that parties in competition disputes should enter into bilateral consultations. The majority contended that the absence of consensus and experience in this policy area made it unrealistic to try to arrive at any multilateral agreement concerning the control of international restrictive business practices. One way of remedying this deficiency, they argued, would be to develop a supranational body vested with broad powers of investigation, but this option was seen as unrealistic since many countries had not yet addressed the problem at the domestic level through a domestic enforcement agency.

In contrast, the minority view argued that Article XXIII of the GATT should be an available tool and that it was imperative that some measures be taken to counteract restrictive business practices having harmful effects upon international trade.

One consequence of this expert report was a 1960 GATT resolution calling for the GATT to provide a forum in which contracting parties could consult as to restrictive business practices, on an ad hoc basis and upon request. This provision was invoked only once, in 1996.

In practice, litigation of disputes in the GATT/WTO centering on private business practices restricting access to markets that are supported by governments has been rare and difficult. Some experts have argued that GATT rules can apply to claims based on competition policy; however, the complaint would have to be based upon some measure applied by a government in contravention of an existing GATT obligation regarding national treatment, or a quantitative restriction. For example, if a government measure affirmatively created conditions by which business interests discriminated against foreign goods and services, such a set of facts could give rise to a violation claim.

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LEGAL F. 277, 284 (1992). For details of the draft convention, see F. M. Scherer, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 39 (1994).

19 Wood, supra note 17, at 284-85.


21 Specifically the recommendation states that “...the party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory consultations, and if it agrees that such harmful effects are present it should take such measures as it deems appropriate”. See, GATT BISD 9S/28 (1961). This resolution existed in relative obscurity until it was invoked in 1996 by the United States in the context of a film dispute with Japan. See discussion later in this section.
GATT’s nonviolation provisions provide some scope for a complaint of competitive foreclosure of a market, if for example, non-application of national antitrust or competition laws were adjudged to be a “government measure”. Still, at least two other conditions would have to be satisfied: the measure would need to have altered the competitive conditions established by other GATT undertakings, and the government measure taken would have to be one that could not reasonably have been anticipated at the time that the tariff or other concession was made. Each of these conditions is a high hurdle that has rarely been brought to the test.

Two GATT/WTO cases have considered actions of governments that were alleged to affirmatively promote exclusionary conduct on the part of private firms.

Semiconductors: In a 1988 case involving the Japanese semiconductor industry, a GATT panel held that even nonbinding administrative guidance by the Government of Japan could constitute a “government measure” if certain criteria were met. In that case, which involved restraints on exports of semiconductors by the Government of Japan, the specific criteria identified by the panel included (1) that reasonable grounds exist for believing that the government measures created sufficient incentives to persuade private parties to conform their conduct to the nonmandatory measures, and (2) that the effectiveness of the private conduct was “essentially dependent” on the nonmandatory actions taken by the government.

Film: In 1995 Eastman Kodak Company filed a Section 301 petition with the United States Trade Representative (“USTR”) alleging private and government barriers to the sale and distribution of consumer photographic film in the Japanese market. It based an important part of its initial legal argument on the provision of Section 301 prohibiting governments from tolerating private restraints of trade. This was the first petition accepted by the USTR that was based primarily on the “toleration of systematic anticompetitive practices” feature of Section 301. In summary, it was argued in the original petition that

22 The GATT provided legal remedies for government actions that had the effect of nullifying and impairing the benefits that another GATT member received as part of the market access it was promised in its quid pro quo for the market access that it provided. The GATT also recognized there could be measures or developments that were not a direct violation of agreed-upon commitments but which nevertheless had the effect of nullifying or impairing the intended benefits of the liberalization measures. For additional discussion of this subject see, Bernard M. Hoekman and Petros C. Mavroidis, “Competition, Competition Policy and the GATT” in 17 THE WORLD ECONOMY 141 (1994).


24 The Japanese Government had restrained exports of semiconductors at below-cost prices in order to settle a trade dispute with the United States.


26 See supra, note 4. One earlier petition, which involved amorphous metal transformers, had focused on this
as formal barriers to imports and investment were gradually removed, the Government of Japan implemented “liberalization countermeasures” that were designed to and did create a market structure in Japan that blocked Kodak’s sales and market presence and whose structure continues to act as an effective barrier to Kodak’s access to that market. The Japanese Government refused an U.S. request to hold formal bilateral trade consultations, even after a finding of unfairness by the USTR. Instead, the Japanese Government insisted that the proper forum in which to air the governmental aspects of the complaint was the WTO and that the issue of allegedly anticompetitive business practices fell solely within the jurisdiction of Japan’s Fair Trade Commission (JFTC). For its part, the JFTC surveyed conditions in the consumer photographic film sector and found no violations of domestic law.

The United States took the case to the WTO, focusing on those aspects of the complaint that implicated Japanese government policies, and argued that Japan’s actions violated GATT provisions regarding nullification and impairment (Article XXIII), national treatment (Article III), and transparency (Article X), as well as the General Agreement on Trade in Services (GATS). In addition, the United States called for consultations on restrictive business practices under the little-used 1960 GATT decision, but these never got off the ground. The WTO panel held against the United States on the facts of that case, both with respect to the non-violation and violation claims. On the general question of actionable government measures, however, the panel built upon the semiconductor case to argue that analysis of alleged “measures” must “proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors.”

27 See, Dewey Ballantine, supra note 24. This paper also argues that an anticompetitive market structure operated in Japan in violation of Japan’s Antimonopoly Act, and that the Japan Fair Trade Commission had acted indirectly to support it, allegedly by suppressing promotional activity in the consumer photographic film and paper industry through the Government of Japan’s laws against premiums and other marketing restraints.


29 The reasons for this are not entirely clear, but it appears that the Japanese Government insisted that if the United States was intending to focus on Japanese government practices that it believed were responsible for facilitating private anticompetitive conduct, the Japanese Government should be at liberty to raise issues regarding U.S. Government practice.

30 The US argued that certain distribution-related measures, restrictions on large stores and promotional measures resulted in a GATT Article XXIII:1(b) non-violation nullification or impairment of benefits accruing to the United States based on tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds. The Panel rejected these claims, relying in part on the fact that many of the challenged measures were relatively old, and that the causality between the measure and the distribution system was not well established. The Panel also rejected the U.S. violation claims, which included an argument that the JFTC and certain fair trade council’s failure to publish certain enforcement actions were a violation of GATT Article X: 1. See, Report of the Panel, Japan-Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (31 March 1998) at para.10.390-393.

31 Id., para. 10.389. The Panel found that “government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner can potentially have adverse effects on competitive conditions of market access.” Id. at para. 10.389-90. [check]
for the proposition that, “where administrative guidance creates incentives or disincentives largely
dependent upon government action for private parties to act in a particular manner, it may be considered a
government measure.”

Whatever the legal possibility of such mixed public-private claims under GATT rules, the record shows that
the GATT did not serve as a forum either for the negotiation of common rules pertaining to business
practices or for the resolution of disputes that arose out of some mix of private and governmental practices.
In other words, the GATT was used neither as a sword to reach private anticompetitive business practices,
nor as a shield to protect private restraints from the unilateral reach of foreign competition laws.

C. UNCTAD

In 1973, at the instigation of the developing nations, negotiations on restrictive business practices were
initiated in the United Nations Conference on Trade and Development (UNCTAD). In 1980 the U.N.
General Assembly adopted UNCTAD’s Set of Multilaterally Agreed Principles and Rules for the Control
of Restrictive Business Practices. The rules are nonbinding, however, and they have not become a source
of international law. Although UNCTAD has an extremely broad membership base, it has not evolved
into a dynamic organization for the consideration of competition policy issues.

D. OECD

Although no binding multilateral agreements on competition policy have been adopted, a variety of
consultative mechanisms have been established, most notably at the Organization for Economic
Cooperation and Development (“OECD). At the forefront of efforts to consider the international
dimensions of competition policy, the OECD has served as an important consultative body for countries
with competition regimes as well as a source of technical assistance to many jurisdictions introducing
competition laws and policies. Two different OECD bodies have engaged in serious work on competition
policy: the Competition Law and Policy Committee (“CLP”); and the Joint Group on Trade and
Competition. The CLP is a venue where enforcers can meet and discuss competition issues, and its work
has encouraged greater substantive and procedural convergence among participating countries. More
formally, the OECD has produced non-binding recommendations, including a 1998 recommendation
condemning hard-core cartels and a 1995 recommendation on international cooperation among

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32 Id., 10.43-46
33 For a more complete discussion of this potential application of GATT rules, see also: Merit E. Janow, “Competition
34 This voluntary code contained several provisions calling for special concern to the problems facing developing
nations. The code’s substantive provisions condemn collusive anticompetitive actions such as price-fixing, collusive
tendering, market or customer allocations, sales, or production quotas and various kinds of concerted refusals to
deal. The Code also condemns abuses of dominant position such as predatory behavior, discriminatory commercial
terms and anticompetitive mergers. Wood, supra note 17, at 286.
35 Wood, supra note 17, at 287., See also, GLOBAL FORUM ON COMPETITION AND TRADE POLICY,
competition authorities. The OECD’s Joint Group on Trade and Competition has also pursued a work program to increase members’ understanding of issues relevant to the interface of trade and competition policy. Presently, the OECD has established a new series of international conferences on competition policy in a global economy, called the Global Competition Forum, which includes representatives from both developed and developing nations.

E. Bilateral Cooperation Arrangements and Experiences

International cooperation in competition policy, to the extent that it has occurred and been formalized, has tended to occur mostly on a bilateral basis. Over more than two decades, the United States has developed and entered into several generations of international antitrust arrangements. The early competition undertakings were contained within bilateral Friendship, Commerce and Navigation treaties. Later, the United States entered into several types of bilateral antitrust cooperation agreements. These agreements have become more detailed and comprehensive over time.

The first generation of cooperation agreements essentially provided that each party notify the other of a pending enforcement action that could impact upon important interests of the other party; the notification procedure implied a willingness to take the views of the other party into account. The 1995 Canadian-U.S. mutual legal assistance treaty (MLAT) goes substantially further, in that it permits the use of formal investigative powers in criminal matters if requested by the MLAT partner.

In 1991, the United States and the European Union entered into an agreement that facilitates discovery and implements the notion of “positive comity.” In competition cases where both parties believe themselves to have an interest in pursuing enforcement actions, the agreement identifies comity factors to be considered in any effort to accommodate the claims of rival interests. The notion of positive comity not only seeks to ease or at least to manage tensions with respect to extraterritorial enforcement efforts, but also raises cooperation to a new level. A main contribution of the U.S.-E.U. agreement is the identification of a set of positive and negative comity principles that can guide both parties as they decide whether or not to exercise or to forgo jurisdiction over a case.

Another milestone in international cooperation occurred in 1994 when the U.S. Congress passed a statute authorizing U.S. antitrust enforcement agencies to share confidential information and evidence, on a reciprocal basis, with foreign enforcement authorities. In 1997 the United States concluded its first comprehensive bilateral accord under this statute with Australia; the accord covers both civil and criminal


37 This agreement contained six comity principles that would be considered by the parties in seeking an appropriate accommodation of the competing interests. These include factors such as the relative importance of the activities involved within the enforcing party’s territory; the presence or absence of a purpose to affect consumers, suppliers or competitors within the enforcing Party’s territory; the relative significant of the effects of the anticompetitive activities on the enforcing jurisdiction; the existence or absence of expectations that would be furthered or defeated; the degree of conflict or consistency between the enforcement activities and the other party’s laws; and the extent to which the enforcement activities of one party would impact the other jurisdiction. For addition detail see, Agreement, supra note 35, Article VI.

In sum, the United States and a number of other competition agencies (e.g., the EC and some member states, Canada, Australia, Japan, Mexico, Israel, Brazil, among others) are developing closer working relations and a measure of mutual confidence that appears to be yielding more cooperation on actual cases. Although still at an early stage, recent bilateral accords represent a further step toward making the compulsory process of one jurisdiction available for use by another requesting jurisdiction. These accords do not seek to achieve substantive legal harmonization, nor do they contain binding dispute settlement mechanisms. As a result, policy conflicts stemming from differing legal standards and national competition policy priorities are not necessarily resolved by virtue of such accords. This reality was demonstrated by the 2001 proposed GE/Honeywell merger, which the United States cleared but the EU did not. The contribution of bilateral accords in structuring communication and to some degree managing tension is also limited by the fact that only a small number of countries have such bilateral arrangements in place.  

**F. Regional Arrangements**

Over the past two decades, regional organizations have become actively engaged on issues of competition law and policy. The resulting arrangements range from formal cooperation agreements, such as that introduced between Australia and New Zealand as part of its treaty to establish closer economic relations; to more informal and *ad hoc* consultative mechanisms, such as those efforts undertaken by the organization for Asia-Pacific Economic Cooperation ("APEC"). Cooperation in competition policy is now under active consideration in the context of the Free Trade Agreement of the Americas involving the United States and the nations of Latin America. And indeed, many of the bilateral free trade agreements now under negotiation by Japan, the United States and the European Union include some consultation mechanism on competition policy matters.

**IV. The Uruguay Round Agreements and the WTO**

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40 For a more detailed assessment of bilateral antitrust cooperation agreements, see: Merit E. Janow, supra note, 13 and "Transatlantic Cooperation on Competition Policy" in ANTITRUST GOES GLOBAL (Brookings Institution, 2000). Semin J. Evenett, Alexander Lehman and Benn Steil, editors.
41 A brief elaboration of several examples may be helpful. Australia and New Zealand entered into a comprehensive cooperation agreement in 1994 that requires the two competition agencies to exchange and provide information in relation to investigations and research; speeches, compliance education programs; amendments to relevant legislation; and human resources. The agreement allows information in the files of one agency to be requested by another agency. It also provides for the coordination of enforcement activities when the Agencies agree that this would be beneficial in a particular case. A far more limited instrument is Chapter Fifteen of the North American Free Trade Agreement, which establishes a Working Party and contains certain general undertakings. The provisions do not attempt to harmonize procedural or substantive rules, to provide for the exchange of confidential information, or to articulate general standards. Work on competition policy in the APEC context has taken the form of a series of annual workshops on competition policy and deregulation issues held under the aegis of the Committee on Trade and Investment. At their meeting in September 1999, APEC Leaders endorsed a set of nonbinding principles developed by this workshop that are intended to act as "benchmarks" for member economies in their efforts to design and implement competitive markets.
As noted above, very few cases in the GATT/WTO dispute settlement system have considered whether and to what degree governments should be held accountable for fostering or tolerating anticompetitive private restraints of trade. This did not change fundamentally with the expansion of commitments that came as part of the Uruguay Round, and which led to the establishment of GATT’s successor organization, the World Trade Organization, in 1995. However, in a limited fashion, a few provisions of the WTO agreements implicate private practices that are seen as trade-restricting and hold governments responsible to some degree for those practices. And, quite apart from coverage in specific agreements, core GATT provisions are supportive of an effective competition policy regime. A few examples are illustrative:

- The WTO’s basic nondiscrimination principles of national treatment, most-favored-nation treatment, and transparency, which form the foundation of the WTO, are also essential features of an impartial competition policy regime. The national treatment requirement of Article III of the GATT has long been used to challenge not only border barriers but internal practices as well—indeed one of the first GATT cases of de jure discrimination involved a domestic credit scheme that applied only to purchasers of domestically produced tractors. Determining whether a measure is discriminatory can turn on whether the affected products are “like,” and analytically, the question of determining “likeness” of products can resemble the product and geographic market definition that is central to a competition analysis. Moreover, there is a tendency now in some WTO Article III:2 national treatment/nondiscrimination cases to consider whether products are directly competitive or substitutable. This approach also reflects the influence of economic analysis, which has had an even greater influence on competition policy analysis, especially in the United States.

- The WTO Basic Telecommunications Services Agreement, officially known as the “Fourth Protocol to the General Agreement on Services”, requires countries to liberalize market access and national treatment restrictions and to implement regulatory principles intended to guide domestic regulatory practices. These principles are not intended to serve as a comprehensive competition policy code for the telecommunications sector. They are selective, yet bespeak a recognition that telecommunications remains a heavily regulated sector and that in many jurisdictions regulatory authorities are not independent of telecom providers. Domestic suppliers usually are dominant suppliers, whether they are private or public entities, and if left free to make decisions about how to treat other suppliers, these suppliers would be capable of thwarting the market access and national treatment commitments made by governments. The principles seek to support competition in the telecommunications sector by means of competitive safeguards designed to prevent major suppliers from engaging in anticompetitive practices.

- The General Agreement on Trade in Services also contains several provisions that implicate anticompetitive practices as exercised by domestic service providers. For example, the GATS

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42 See, Italian Agricultural Machinery L/833,7S/60
43 See, for example, the discussion of these concepts in Korea- Taxes on Alcoholic Beverages, para 10-95-10.97 and 10.44 - 10.45.
44 See, for example, the discussion of these concepts in Korea- Taxes on Alcoholic Beverages, paras. 10-95-10.97 and 10.44 - 10.45.
provides that monopoly service suppliers must not act in a fashion inconsistent with the most-favored-nation obligation under the agreement or with their scheduled commitments.\(^{46}\) Further, the GATS requires WTO member governments to ensure that domestic monopolists do not abuse their monopoly positions.\(^{47}\) The accord requires mandatory consultation on alleged restrictive business practices, if requested by another WTO member.\(^{48}\)

- Competition policy arises indirectly in Article 9 of the *Agreement on Trade-Related Investment Measures (TRIMS)*, which requires the Council for Trade in Goods to review the operation of the agreement and to propose necessary amendments to it by the end of 1999.\(^{49}\) The Council was directed *in Article 9* to consider whether those amendments should include provisions on competition policy.

Two additional WTO agreements are notable in that they both suggest alternative “architecture” for competition policy provisions under the WTO. The TRIPS accord probably offers the closest existing model for competition rules. Historically, the GATT focused on limiting distortions introduced by governments; these limits informed governments what they *could not do* rather than setting out a set of affirmative obligations that they were required to undertake. The TRIPS accord introduced an entirely different construct by obliging countries to introduce intellectual property laws that contained specified minimum levels of protection to intellectual property rights. The TRIPS agreement requires nondiscriminatory treatment, and it also requires member countries to introduce effective national enforcement systems, the precise structure and design of which are left in the hands of national authorities but which must provide effective measures for both private and governmental enforcement.

The WTO has also attempted to develop various “framework” agreements that serve as non-binding guidance to members on matters of domestic regulation or oversight. This too, could offer an architecture or template for linking competition policy to the WTO. For example, in December 1998 the WTO Council on Trade in Services adopted the WTO Disciplines on Domestic Regulation in the Accountancy Sector. These are nonbinding principles that WTO members are exhorted to follow.\(^{50}\)

Finally, the Singapore Ministerial Meeting in 1996 set up the WTO Working Group on the Interaction of Trade and Competition Policies. This Working Group has considered a very broad set of issues, such as the relationships among the objectives, principles, scope, and instruments of trade and competition policy; the types and effectiveness of existing instruments, standards, and activities used or undertaken by trade and competition policy; the relationship between competition policies and industrial policies; and the interaction between trade and competition policy.\(^{51}\) It has held numerous formal meetings and received

\(^{46}\) See, Article VIII:1 of the GATS.
\(^{47}\) See, Article VIII:1 of the GATS.

\(^{48}\) See, Article IX(2) of the GATS.
\(^{49}\) As of this writing, no comprehensive set of recommendations has been released.
\(^{50}\) See WTO, Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector, S/WPS/4 (December 10, 1998).

hundreds of written contributions from a multitude of sources, including developing and transition countries and international organizations. The Working Group has issued detailed reports that chronicle not only a very broad range of issues examined, but many areas where WTO members disagreed.

V. Competition Policy and the Next Round of Multilateral Trade Negotiations

Little, if any, substantive discussion of competition policy occurred among WTO ministers at the failed December 1999 Trade Summit in Seattle. The issue was actively considered at the Doha Ministerial in Qatar on November 9-14, 2001, and WTO members agreed that “negotiations will take place after the Fifth Session of the Ministerial Conference…on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.” The Doha Declaration states that in the period before the Fifth Session, 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.”

There appears to have been some controversy as to whether this language in the Ministerial Declaration reflects an expectation that negotiations will commence following the Fifth Session of the Ministerial Conference, or whether that is the point in time when WTO members will decide whether or not to commence negotiations. This was clarified, to some degree, by the Chairman of the Conference, in a statement that the requirement for explicit consensus on the modalities for negotiations “gave each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join an explicit consensus.”

While this fundamental issue of whether a formal negotiation will commence remains somewhat unsettled, the Working Group is actively engaged in further consultations, seminars and other preparatory activities on the specific procedural and substantive areas outlined in the Declaration. The most intensive debate at the government level about the role of the WTO in the area of competition policy has taken place between U.S. and EU officials. Let us briefly outline the main arguments that each government has advanced, recognizing that even official positions continue to evolve and change.

A. European Union

EU officials have been forceful advocates of expanded multilateral rules on competition policy, including at the WTO. While stressing the importance of effective bilateral cooperation as a foundation, the last two Commissioners for the Competition Directorate, Sir Leon Brittan and Karel Van Miert, along with the current Commissioner Mario Monti, have each called for expanded WTO rules on competition

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52 Former U.S. Trade Representative Charlene Barshefsky suggested that the EU was virtually alone in its interest in global negotiations on competition policy. See, 17 INSIDE U.S. TRADE, No. 51, at 3 (December 24, 1999). This appears to be less the case today than when that statement was made.

53 World Trade Organization, Ministerial Declaration (Fourth Session of the Ministerial Conference, Doha, WT/MIN(01)/DEC/1, November 9-14, 2001, paragraphs 23-25.

The EU proposal has gone through some modifications from that first advanced by Sir Leon Brittan in the mid-1990s. Initially, the EU seemed to support the negotiation of substantive competition rules and suggested it was willing to have actual domestic competition or antitrust cases subject to review and challenge under the rules of the Dispute Settlement Body of the WTO. Since then the EU appears to have scaled back its expectations on coverage and on panel review. At one point, for example, the Commission argued that negotiated rules should be subject to dispute settlement only for alleged “patterns of failure to enforce competition law in cases affecting the trade and investment of other WTO members”. Individual cases would not be examined, according to this position.\(^5\)

As of this writing, the EU is arguing in support of a multilateral framework on competition policy in the WTO that would include core principles comprising transparency, non-discrimination and procedural fairness in the application of competition law and/or policy, and the taking of measures against hardcore cartels; the development of modalities for cooperation; and enhanced support for technical assistance and institution building.\(^6\) The current EC proposal does not definitively answer whether the framework must be part of the WTO and a requirement of all of its members, or a separate plurilateral agreement signed by interested nations.\(^7\) These points will doubtless be among the central matters under negotiation.

The EU position appears to have some support from several other governments including the governments of Canada, Japan, Korea and several of the Latin American countries.

B. The U.S. Government

The U.S. Government, while actively supporting the deliberations of the WTO Working Group, has taken a cautious tone regarding the WTO's role as a forum for the negotiation of rules governing competition policy. This was particularly the case during the Clinton Administration. Former Assistant Attorney-General for Antitrust Joel Klein often argued that he saw greater practical value in bilateral cooperation arrangements, such as those the United States has entered with Australia, Canada, and the European Union, than in negotiating general competition rules at the WTO. This network of bilateral arrangements, coupled with technical assistance to new regimes and dialogue at the OECD, WTO, regional groupings,


\(^6\) See, Communication from the European Community and its Member States WT/WGTCP/W/152).

\(^7\) At a regional WTO workshop in Capetown, South Africa, an EU official clarified that the EU thought there was significant interest around the world in entering into a multilateral agreement at the WTO. However, if at the conclusion of negotiations, there were still developing countries that were hesitant and not convinced that such an agreement was in their interest, they should have the possibility to opt out of it. See, "Informal Report on Workshop Proceedings" WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System, organized by the WTO Secretariat in Cooperation with the Governments of South Africa and the United Kingdom (February 22-24, 2001).
and other international forums, have been the core policy elements of U.S. international antitrust policy.\textsuperscript{58}

In the Bush Administration, U.S. Trade Representative Robert Zoellick has indicated somewhat greater receptivity to some WTO treatment of competition policy than his predecessor.\textsuperscript{60}

U.S. antitrust officials routinely raise several different types of concerns about the WTO venturing into the terrain of competition policy.\textsuperscript{55} WTO oversight of antitrust actions taken by governments could, in Joel Klein's words, "involve the WTO in second-guessing prosecutorial decision-making in complex evidentiary contexts in which the WTO has no experience and for which it is not suited," and would inevitably politicize international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making. He further argues that the global community does not yet fully know what key trade and competition questions may benefit from binding international agreements, let alone whether there is any possibility of developing a consensus on these issues.\textsuperscript{56}

C. Other Views

There is no unified position on competition policy among developing countries although several developing countries have expressed some doubts about the value of negotiations on competition policy. For example, Kenya, on behalf of the African Group, has noted that only a limited number of African countries have domestic legislation on competition policy and even fewer African countries have effective enforcement agencies. At one point in 1999, the African Group advocated continuation of the educational, exploratory, and analytical work of the Working Group on the Interaction between Trade and Competition Policy with increased technical assistance to developing countries.\textsuperscript{57} At one point, South Africa proposed a thorough educational process that would take place before any negotiations commence and would span several years and take into account the huge analytical demands on developing countries related to the preparation of the next round.\textsuperscript{58}

\textsuperscript{58} See, e.g., Joel Klein, \textit{A Note of Caution with Respect to a WTO Agenda on Competition Policy} (Remarks to the Royal Institute of International Affairs, Chatham House, November 1996).

\textsuperscript{60} See, “USTR Zoellick outlines US efforts to promote growth and development by launching new trade round; US-EU effort directed at expanding and strengthening global trading system,” \texttt{http://www.ustr.gov/releases/2001/07/01-54.pdf}. This statement contains the following language, “The United States can see merit in adherence to core principles of transparency, non-discrimination and procedural fairness. We can also support consultative and capacity building efforts to help countries develop modern competition policy that promotes efficient, effective and dynamic markets.”

\textsuperscript{56} See Joel Klein, \textit{"A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust."} Address before the OECD Conference on Trade and Competition. (Paris, June 30, 1999).


\textsuperscript{58} See Communication from the Republic of South Africa, WT/WGTCP/W/138, October 11, 1999, pp. 2, 4. In recent years, South Africa has introduced an active competition law and policy regime. Perhaps as a result, South African trade and competition officials have indicated a certain receptivity to some WTO rules in this policy area.
Apart from official governmental discussion, the debate in the private sector and among experts on what role the WTO should have with respect to competition policy is robust and diverse. Let us mention several different approaches that have surfaced.

The most ambitious proposal, which appears to have a very limited following, calls for the establishment of some kind of supranational antitrust authority with agreed-upon substantive rules. In 1993 a private group of twelve scholars and other experts meeting in Munich (the so-called “Munich Group”) proposed an International Antitrust Code, which would set out minimum standards to be incorporated into the WTO. It proposed that those standards in turn would be enforceable in domestic jurisdictions by national enforcement agencies. Disputes would be adjudicated by a permanent international antitrust panel, operating as part of the WTO’s dispute settlement regime.\(^6\)

A second approach is the call to develop a set of competition principles. For example, a former Deputy Secretary-General of the OECD, Joanna Shelton, suggested that the WTO could develop a set of core principles, both procedural and substantive, upon which there could be broad agreement.\(^6\) Parties would bind themselves to abide by the core principles, but the specific rules that they adopt for doing so would not be subject to dispute settlement. The multilateral approach should provide some non-binding suggestions about possible common approaches to aid nations in designing and enforcing substantive criteria such as the tests to assess the legality of core competition problems such as horizontal agreements, vertical restraints, abuse of dominance and proposed mergers. This second approach has more of a following and there are a variety of proposals under debate with different specific principles included in the mix. Structurally, this approach attempts to integrate antitrust into a larger market access framework rather than trying to maintain a strict boundary between private and public restraints.

There have also been two influential reports, one in Europe and one in the United States, that have served to underpin the respective official approaches of their nations on the subject. A group of leading European experts issued an influential report in 1995 supporting the EU approach and called for movement on two fronts: first, a further deepening of existing forms of bilateral cooperation; and second, the gradual construction of a plurilateral agreement that includes a dispute settlement procedure based on a set of jointly determined competition rules.\(^5\) The group argued in favor of establishing minimum rules and then gradually expanding the number of countries signing on to those rules. It suggested using common principles in some instances, such as the prohibition of cartels (building from the OECD recommendation in this area), and the rule of reason in other instances (such as vertical restraints). The report argued for harmonization of procedures in the merger field to give authorities sufficient time to consult each other. It also recommended that state trading enterprises be subject to the same competition rules as commercial enterprises. At the international level, the group suggested that the WTO serve as a forum for analyzing and possibly extending the principles, registering anticompetitive

\(^{6a}\) For a reprint of the Code developed by the Munich Group, see: 64 Antitrust & Trade Reg. Rep (BNA) August 19, 1993.


practices, and providing for dispute settlement procedures.

In the United States, the International Competition Policy Advisory Committee (ICPAC) to the Attorney-General and Assistant-Attorney General for Antitrust undertook an extensive outreach effort over a two-year period to solicit private sector and official views on international competition law and policy matters and issued a major report of its findings and recommendations in March, 2000. ICPAC was charged with focusing on global competition policy matters generally--including multijurisdictional merger review, international enforcement cooperation vis-a-vis cartels, and the interface of competition and trade policy. As part of that effort, it sought views on the possible future role for the WTO as a forum for the negotiation of global competition rules subject to dispute settlement.\(^{65}\)

The majority of ICPAC members recommended in the Final Report that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. The report argued that the WTO had a constructive role to play regarding competition policy, but that this role should be to support capacity building and cooperation between authorities, rather than the negotiation of procedural or substantive rules.\(^{61}\)

The ICPAC Final Report identified no influential U.S. business group that was in favor of WTO rules on competition policy. For example, the Business Roundtable has consistently held that competition policy negotiations at the WTO are both “unnecessary and potentially counterproductive.”\(^{62}\) The Roundtable has argued that negotiations should not proceed in the absence of an international consensus on competition policy, uncertainty about the WTO’s institutional competence on competition policy matters, and the possibility that developing countries might use the negotiations to “disturb the carefully crafted multilateral balance embodied in the WTO Antidumping Code.”\(^{66}\) Similarly, both the U.S. Council for International Business (U.S.CIB) and the International Chamber of Commerce believe that a basis has not yet been established for international agreement in the WTO on competition principles or rules.\(^{67}\)

VI. IS THERE A NEED FOR A NEW GLOBAL COMPETITION FORUM?

Quite apart from a role for the WTO, the last several years have also seen active consideration of the merits of establishing an altogether new forum to consider global competition matters. The concept of establishing a new forum, initially dubbed the Global Competition Initiative, was proposed by ICPAC in its Final Report. The rationale for establishing a separate forum devoted to international competition matters hinged on the view that in a world of expanding global markets, a widening array of competition policy problems are unlikely to be resolved through national legal responses alone. Addressing international


\(^{66}\) Id. 268

\(^{67}\) Id. 268.
competition policy problems requires more cooperation between competition authorities, more international
discussion of problems with transborder consequences, and new and expanded international arrangements.
Competition policy problems with a global or transnational nature were not limited to matters implicating
access to markets and international trade. For this reason, ICPAC urged that a new inclusive forum be
established that would routinely include representatives from developed and developing economies,
government officials, and other experts.

The concept received a first boost when Former Assistant Attorney General Klein said in September 2000
that he thought that the Global Competition Initiative warranted serious consideration whatever happens on
antitrust at the WTO. Subsequently, the EC Competition Commissioner Mario Monti has repeatedly
indicated his strong support for such an initiative and advanced a number of specific details for organizing
such a forum. This idea was bolstered when in February 2001, at a meeting organized by the International
Bar Association, a group of 43 senior competition law officials and professionals gathered at Ditchley Park
in England to discuss the possible design and activities for the proposed Initiative or Forum. 68 This was the
first “brainstorming” session on this proposed global forum among leading figures in the competition law
and policy community worldwide.

Several months later, in the fall of 2001, the formation of the International Competition Network
(ICN) was officially announced. Now, more than forty jurisdictions have joined this informal
network. The ICN is designed as an informal, project oriented network of antitrust agencies from
developed and developing countries. The purpose of the network is to consider antitrust
enforcement and policy issues of common interest and to “formulate proposals for procedural and
substantive convergence through a results-oriented agenda and structure”. 70 The ICN distinguishes
itself from the WTO by virtue of its project-orientation, diverse membership (including the
participation of experts and non-governmental representatives), specific work program and
governance structure. At this early stage, the ICN has established working groups on multi-
jurisdictional merger review and competition advocacy. 71

VII. SUMMARY AND PERSPECTIVE OF KEY ISSUES FOR THE WTO

This last section considers most directly the pros and cons of linking competition policy to the WTO: What

68 See, Merit E. Janow, The Initiative for a Global Competition Forum: A Report on a meeting Convened and Hosted
70 See, Memorandum on the Establishment and Operation of the International Competition Network, available at:
71 The Merger Review Working Group is developing some best practice recommendations regarding three aspects of
the process for reviewing multijurisdictional mergers: procedures; analytical frameworks and investigative
techniques. The Advocacy Working Group is collecting, analyzing and distributing information on competition
advocacy for discussion by members of the ICN. The purpose of this effort is also to develop possible
would it mean to have competition policy integrated, in some fashion, into the World Trade Organization? What are the principal arguments in support of and in opposition to moving in this direction?

Let us start with arguments in favor of an expanded international arrangement at the WTO. As outlined at the start of this chapter, private restraints of trade can impose strains on the international trading system and frictions between nations and firms. So far, disputes have been handled in an ad hoc fashion. Many nations do not have effective remedies to address impediments to offshore market access or more traditional competition problems under national laws. Moreover, there are no meaningful international rules or institutions that deal with these problems. This lack of an international context for resolving international competition problems with market access implications can fall disproportionately on developing nations that do not have the expertise, resources, and established forms of bilateral cooperation to address competition problems that are occurring offshore. But such transborder enforcement problems are felt by many nations across the development spectrum.

As formal governmental barriers to trade and investment have been reduced or eliminated, policymakers around the world have begun to focus their attention and concern on internal practices of nations that impact global trade and investment. And, since many more countries now have a degree of experience with competition policy, the time has come to develop ways of addressing internal business practices that thwart the free flow of commerce. Failure to address such underlying restraints of trade and investment could erode public confidence in the international trading system. And, in this period where there is considerable antipathy to globalization, every effort should be made to instill greater confidence in the world trading system.

Why turn to the WTO? The core nondiscrimination principles of the GATT and now the WTO are compatible with competition policy objectives, and the development of principles or rules at the WTO holds at least the potential of containing the intergovernmental and commercial frictions that result from the absence, ineffectiveness, and perhaps heterogeneity of national competition rules with adverse transnational consequences. Moreover, for some countries, international rules can help to support the development of domestic policy systems. Developing countries and economies in transition are increasingly interested in establishing more open and contestable markets. Competition policy can help in this pursuit, and international agreements can sometimes be used to complement or reinforce domestic policies.

Further, the WTO has shown itself capable of addressing trade-restricting and discriminatory government practices and of serving as a forum for negotiating the reduction and elimination of such trade distortions. With its wide membership, including both developed and developing economies, enhanced dispute settlement capabilities since the creation of the WTO itself, and broad coverage of issues, the WTO is becoming a credible institution for considering and solving difficult problems in international commerce.

The precise architecture within the WTO is, of course, another important consideration. The TRIPS agreement is probably the most directly analogous model, in that it sets forth a set of affirmative core requirements (countries must have a domestic intellectual property protection scheme, it must be enforced, etc.) This model could be adapted for competition policy, with room for varying degrees of generality or specificity, depending on where consensus can be reached. Of course, the WTO members could also chose to develop a looser less binding “framework” agreement of some kind.
These positive arguments notwithstanding, the integration of competition policy into the WTO gives rise to certain questions. While the benefits of formal harmonization of competition laws have long been debated, neither the need for that step nor the requisite trust to undertake that step has shown itself to be evident. The reasons for this are various: competition laws and policies are not uniform across countries and embed different analytical approaches, values and procedural characteristics. If such harmonization is unlikely, one must ask whether it is possible (or desirable) to have general rules or principles in the absence of agreement on underlying law? The considerable variation that exists among even facially similar national competition laws is likely to mean that a new overarching set of binding rules might have to be drafted at such a level of generality as to make the effort of questionable value. For example, there may be broad agreement in many OECD jurisdictions regarding the impermissibility of horizontal agreements among competitors to fix prices, engage in group boycotts, and allocate markets. And yet, once outside the narrow area of hardcore offenses, differences in national standards as to permissible business practices become substantial. As recent merger disputes have illustrated, in some key areas of law (such as abuse of dominance and monopolization matters) U.S. and EU laws diverge. Hence, although some degree of “soft harmonization” is occurring as a result of increased interaction between firms and legal regimes, formal harmonization, especially by means of a set of international rules, seems problematic and unlikely to be productive.

The case for an international body reviewing international merger cases under binding dispute settlement procedures raises other problems. The concerns raised by the majority opinion in the 1960 GATT expert study group remain alive today: there is likely to be considerable objection in some countries to the idea of an international body attempting to sit in judgement of the fact-specific decisions rendered by national competition authorities and courts.

If competition policy disputes were to become subject to WTO dispute settlement, what standard of review would be applied by a dispute settlement panel? Some argue that a WTO panel could apply the law of the jurisdictions whose practices are at issue. This step, while logical, goes far beyond current WTO practice, which limits panels to simply reviewing the consistency of national measures with established WTO rules. Surely, a number of areas that could potentially be integrated into the WTO's agenda would involve an expansion of international rules into areas of national policy. Hence, although this question of standard of review is not confined to competition policy, it is particularly critical for competition policy given the evolving legal doctrine in the field. In the competition policy context, this bespeaks a need to accord a high degree of deference to the decisions of national authorities. (This point of view has been stressed in the EU expert report and emphasized in the earlier 1960 GATT expert committee report).

Furthermore, the WTO itself as an institution has some obvious limitations. As noted earlier, the goals of competition and trade policy are not identical, and it is not clear whether the negotiation of competition rules within the context of a multilateral trade negotiation will result in the codification of the most politically feasible as opposed to the economically most efficient or the most consumer welfare-enhancing outcomes. See Remarks by Assistant Attorney-General Joel I. Klein, Antitrust Division, Department of Justice, Presented at Fordham Law Institute, 24th Annual Conference on International Antitrust Law and Policy (New York, October 16, 1997). It is possible that multilateral negotiations could, over time, ratchet up an improved appreciation for competition policy and its enforcement, but this is uncertain.
VIII. FINAL OBSERVATIONS

This complex landscape suggests to this author the following: first, that the next steps at the WTO are likely to be fairly modest. The more general and less binding the framework, the more support there appears to be for it. Indeed, in this sense the discussion of competition policy and the WTO is somewhat akin to the curious paradox occurring in other areas of domestic economic regulation. For example, countries around the world have unilaterally liberalized their investment regimes to attract foreign capital and much of the antipathy to foreign investment that characterized the 1960s and 1970s appears to have vanished. At the same time, many countries have been willing to do far more by way of liberalization of their domestic investment regimes than they have been willing to commit to in binding international agreements. Similarly, many countries have introduced competition laws in the last decade. Both mature systems, such as the United States, and some new systems are worried about the potentially intrusive consequences of WTO rules in this policy area. For a number of developing countries, there appears to be concern that the introduction of WTO competition principles or rules will constrain developing countries in their ability to utilize infant industry policies, social policies, or other development tools. This anxiety also translates into a call for long-phase ins or other ways of giving developing countries the equivalent of special and differential treatment should some new rules or principles be developed.

Second, if this first somewhat cautious assessment of the next steps proves accurate, it may suggest that the more general the framework, the less useful it is likely to prove with respect to particular disputes between nations. For example, transparency and nondiscrimination are useful and important underpinnings to a competition policy regime, but one is still left asking whether embedding procedural screens of that sort at the WTO are likely to be truly useful in the competition policy context? Do market access tensions stem from facially discriminatory competition policies? One suspects the numbers are limited. Moreover, there are situations where the legal and institutional competition policy infrastructure are in place, largely transparent, and reasonably well funded, but the end result is not a well-functioning or effective enforcement regime. Is this a problem that could be challenged effectively at the WTO? Importantly, are WTO members prepared to take additional steps, in the form of supporting capacity building in this policy area, and use the WTO as a forum for supporting the development of sound competition policy regimes around the world? If so, then the consequences of general undertakings on competition policy could, over time, prove useful.

Currently, there is no agreement that the WTO should become an instrument for full market integration. Instead, the WTO is only tugging gently, and with no shortage of opposition, in that direction. Its main focus remains on trade-distorting governmental practice – which in the competition policy context would be a narrow slice of global competition policy challenges.

How issues are linked will also prove important. For example, some may favor the inclusion of competition policy into the WTO as a way of limiting, over time, the scope for antidumping measures. But in this author’s view, the linkage of competition policy commitments to antidumping reform has only served to chill and further politicize multilateral discussion of competition policy.

Third, and more positively, even if one has some skepticism about the practical utility of WTO rules on competition policy, for the foreseeable future there is both a need and apparently some international interest
in further developing effective competition laws, policies, and enforcement capabilities at the national level. For some countries, bilateral cooperation agreements are realistic next steps, and an expanding web of these arrangements seems to hold few, if any, dangers to the international trading system. Additional bilateral or even regional cooperation agreements may be constructive incremental steps for addressing practical enforcement problems and building a degree of trust across agencies.

Fourth, a host of global competition issues are not trade issues, but are perceived as costly and burdensome to firms involved with international commerce. It seems unlikely that the WTO can do much to advance procedural harmonization of merger practices, but these soft convergence and best practices efforts are now underway in multiple fora such as the ICN and the OECD. A soft convergence framework does not necessarily mean talk without progress. 73

As the recent record suggests, an active and public dialogue about the general internationalization of competition law and policy is now well under way. This degree of international engagement on the subject is both new and in my view, constructive. Improvements in competition rules and their enforcement may be a necessary but insufficient condition for effective market access; many areas will require additional initiatives in terms of trade liberalization and regulatory reform. While all roads may not lead to the World Trade Organization as a forum for settlement of competition-related disputes, in the view of this author, the WTO still has a useful role to play in strengthening international engagement on competition issues. Indeed, a main benefit of WTO competition principles could be to embed expectations of cooperation and consultation between competition authorities and perhaps to reinforce sound practices in competition policy regimes around the world. Some experts argue that it is important for the WTO to create new rules and institutional frameworks that allow for democratic experimentalism at the domestic level with new institutional structures and approaches at the international level. This viewpoint suggests that any resulting arrangements at the WTO may not be rules-based but could, for example, be an analytical exercise, plurilateral in membership, subject to opt-in provisions, and so forth. 74 This conceptualization of a possible architecture for integrating competition policy into the WTO is in fact a systemic question for the WTO itself, and it will surely be an important part of the post-Doha Agenda.

73See, Robert Howse, “From Politics to Technology—and Back Again: The Fate of the Multilateral Trading Regime” 96 AJIL at 94.