17

Conclusions and Recommendations

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Introduction

Because many trade disputes of the past 10 years have involved issues of competition policy, the World Trade Organization's (WTO) multilateral trading rules should recognize their importance. That is the main premise of this volume (see chapter 1). The existing rules are ill suited to deal with these disputes, so new approaches are urgently needed. There are, however, significant problems in creating competition-policy rules to fit the WTO framework. These include substantive problems: among domestic competition agencies in the major trading nations, there is no consensus on the appropriate standards for competition policy,[1] nor do scholars who specialize in the study of the underlying economics agree on the normatively best competition policies.[2] In addition, there is no agreement on the most appropriate enforcement mechanisms.

In spite of these problems, there are many approaches to the internationalization of competition policy, not all of which center around the WTO nor even involve it. Indeed, some do not require consensus among nations on appropriate substantive and enforcement standards. Rather, nations would agree to define and enforce their own standards above some threshold and recognize the outcomes of other nations' competition

1. Fox compares US and EU competition policy in chapter 10, and Rosenthal and Matsushita compare US and Japanese competition standards in chapter 9.

2. See chapter 1.

policies. It would be a major step forward if every nation had a competition law and enforcement mechanism.[3]

Even so, the WTO might help to ensure that where competition issues are at the heart of trade disputes, the interests of all disputing nations are heard. To whatever extent possible, it could also ensure that those disputes are resolved under rules and procedures subscribed to by all member nations.[4] Later in this chapter, we spell out some specific WTO initiatives.

Meanwhile, what is competition policy's role in the multilateral trading system? That depends on how effectively competition policy can eliminate or reduce market access barriers that remain after the traditional barriers to trade tariffs, quotas, and other nontariff barriers are dismantled. We address this question next.

Competition Policy and International Market Access

Many trade disputes in recent years have centered on market access—that is, on barriers to foreign entry that are not the result of traditional trade policy instruments. Instead, these barriers result from private business practices that might be facilitated by domestic regulation or policies. Most competition-policy issues, including disputes over these international barriers, are specific to a sector and/or to a region or nation (e.g., the US-Japan auto parts dispute outlined in chapter 1). Thus, the right answer to a specific issue (or even the right approach to addressing this issue) might not be applicable in a different sector and/or a different region or nation. For example, the horizontal merger of two competing firms that each have 20 percent of a given market might not be deemed anticompetitive, whereas a merger in some other market between two firms that each have less than 20 percent market share might be. Thus, other factors might explain the apparent contradiction (e.g., conditions affecting entry of new sellers and the availability of close substitutes for the products or services). That different circumstances lead to different normative conclusions is one reason why so many areas of competition policy, even at the level of basic economic analysis, remain murky (see chapter 1). It is also why many cases are subject to rule-of-reason—specific

3. All new member nations of the European Union are required to have a competition law and enforcement mechanism.

4. To some extent, the WTO can already play this role, because under the 1960 General Agreement on Tariffs and Trade (GATT) decision on restrictive business practices (see chapter 1), where such practices lead to alleged impairment of trade, consultations can be held under the auspices of the WTO. However, this role is limited and has rarely been invoked.

business practices are often neither per se legal or illegal. Instead, the legality depends on how the practices are employed.

Thus, whether competition policy reduces market access barriers depends on the characteristics of a given market. For example, in some markets competition policy cannot effectively reach structural barriers that reduce opportunities for competition (and hence market access). Also, some markets are characterized by natural monopoly, wherein only one supplier of a good or service (or few suppliers) can operate efficiently. Natural monopoly is characterized by large and unrecoverable front-end expenditures (sunk costs) that cannot be amortized if entry and increased competition drive prices too low. Thus, the sunk cost acts as a structural barrier to entry.

Competition policy only partially answers the question of how to increase competition when the conditions for natural monopoly exist. For example, firms seeking to supply a good or service to a market characterized by natural monopoly might be periodically required to bid for the franchise to serve as this supplier. If the bidding is competitive, the bid for the franchise will equal the present value of expected future rents. Thus, the public will recover the supplier's rents. However, even this approach might not be feasible in some cases: the sunk costs associated with switching suppliers may be so great as to preclude such switching.

However, competition policy can help to ensure that unnatural monopoly (where a single supplier attempts to masquerade as a natural monopolist) does not persist. Although the provision of a service that requires a huge sunk cost might be a natural monopoly, all aspects of the sale of services need not be monopolized. For example, the fixed costs of creating a basic telecommunications network might preclude the existence of two parallel networks in any given place. However, even in the provision of basic telecommunications services, many, if not most, value-added services can be sold competitively, if all relevant service suppliers have equal access to the common good (e.g., Petrazzini 1996).

Whether competition policy can reduce market access barriers also depends on the substantive standards enforced by competition agencies. Part II of this book showed that the substantive standards of competition policies vary significantly from nation to nation (where we count the European Union as a nation). For example, under EU law and policy, the authorities tend to see certain vertical restraints as competition reducing. Where such restraints can be identified, they can be addressed by competition policy. In contrast, similar restraints in the United States might be seen as efficiency enhancing and, hence, not subject to competition policy. Consequently, EU law is generally less forgiving of vertical restraints that act as market access barriers than is US law.[5] Some argue

5. However, some sectors in Europe are subject to block exemptions, under which otherwise illegal vertical practices are specifically made legal.

that if the issues in the US-Japan auto parts dispute had been adjudicated under competition policy, the US trade representative's case would have likely done better under EU law than US law.

But what are the correct substantive standards? As has been emphasized throughout this book, there is only modest consensus on this question, even with respect to what is normatively best from an economics point of view (see chapter 1). This lack of full consensus is usually not a matter of ideology. Rather, whether a specific practice is deemed bad or good from an economics perspective often depends on the underlying economic conditions. For example, should resale price maintenance (RPM) be per se illegal?[6] If the objective of RPM regulation is to maximize overall welfare, whether this objective is attained can be conditional on the elasticity of demand of inframarginal buyers. Under some conditions, RPM might enhance overall welfare and should be legal in those cases. But under other conditions, RPM would unequivocally harm welfare and should be illegal. Thus, the correct policy may not easily flow from the underlying economics. The difficulty is not that analytic tools are lacking. Rather, the difficulty lies in correctly assessing the circumstances under which the tools must be applied.

Lack of consensus on substantive standards constitutes a major dilemma of competition policy. The murkiness of much of the underlying economics exacerbates a second, related dilemma. Not only are substantive standards different across nations, they have also been significantly revised over time within some nations. For example, in the United States under the Reagan administration (under the influence of the so-called Chicago School) competition policy became considerably less interventionist than it was during the 1960s and 1970s (see chapters 10, 7, and 11 by Fox, Fox and Pitofsky, and Rosenthal and Nicolaides, respectively).

Some scholars therefore question whether international consensus on the substantive standards for competition policy would be desirable. These scholars argue that such a consensus could lock the world into standards that seem right now but, at some time, might become discredited. They point to US efforts during the 1970s to encourage other nations to adopt US standards and argue that had this occurred and had the standards not been revised, global competition policy would now be based on standards that the United States itself no longer accepts. Because the underlying economics of competition policy are murky, such scholars argue that it is better to allow for policy competition, under which different ideas would compete in different regions, because policy would evolve parallel to what is best practice.

A third dilemma of competition policy as a means of increasing international market access is that there is often no consensus on who has standing to bring a case. In the United States, for example, there is

6. For a discussion of RPM, see Scherer and Ross (1990, 541-58).

relatively easy private right of action. US officials vigorously defend this, maintaining that without easy private right of action, many violations of competition law would go unchallenged. By contrast, EU officials argue that too easy a private right of action leads to far too many court cases, imposing costs on society.[7] In many East Asian nations, it is argued that moral persuasion can work better than overt legal action to enforce competition standards (see Liu 1996). Few competition experts in Western nations would agree, however.

The issue of resources is tied to that of private right of action. In the United States, the professional staff of the Antitrust Division of the Department of Justice numbers 500. There are 275 more employed at the Federal Trade Commission. The DGIV of the European Commission, which enforces competition policy in a market somewhat larger than that of the United States, employs a total professional staff of 450. The EU commission does not make public the exact breakdown of its staff. However, the 450 includes junior-grade staff that would probably not be classed as professional staff in other countries and includes staff whose primary mission is to investigate state aids to industry and regions. Because there are fewer resources devoted to enforcement in the European Union, it can be argued that a higher percentage of suspected violations of competition law are never investigated or prosecuted in Europe than in the United States. In particular, some legal experts allege that there are many cartels in existence that would, if prosecuted, be found in violation of Article 85 of the Treaty of Rome (see Fox's arguments in chapter 10 on US-EU competition law). In other nations, resources for enforcement are even more meager. The professional staff of the Japanese Fair Trade Commission (JFTC) numbers 250, for example. China, although it has an unfair business-practices law and is contemplating an antimonopolies law, has no enforcement agency at all (see Ma 1995).

The priority that nations place on competition is also related to the issue of resources. Many nations do not have competition laws. However, many of these nations are now contemplating them. Also, the competition laws of many nations are incomplete. Meanwhile, Mexico, Venezuela, Taiwan, and other nations have broad but largely untried competition laws.

It is alleged that competition policies often go unenforced in nations that have had such a policy for a decade or more. Thus, practices that create market access barriers and are, in principle, in violation of the law are tolerated nonetheless. Such allegations, for example, have been voiced against Japan and South Korea.

7. On this matter, however, there are advocates within Directorate General IV (DGIV) of the European Commission who argue that private right of action should be made less restrictive, on the grounds that the resources of the official agency in Brussels are too limited to handle all cases that are brought to its attention. See Fox's arguments in chapter 10 on US-EU competition law.

This issue should be distinguished from the point made above that competition-policy enforcement varies from nation to nation. The issue is whether in some nations enforcement is so slack or selective, perhaps purposefully so, that the net effect nullifies the law and policy. In these nations, however, enforcement appears to be improving (e.g., in Taiwan, where a competition law and enforcement agency has been in place since the late 1980s, but where enforcement, until quite recently, has been quite lax).

Even in those countries where competition law has historically been taken seriously, competition goals are not always paramount. In chapter 11, Rosenthal and Nicolaides argue that

> Competition law and policy in the United States, Japan, and Canada is relatively weak vis-à-vis five sets of national laws and economic policies that most directly restrict national and global competition: (1) protectionist trade measures, (2) measures intended to attract or exclude categories of foreign investors, (3) nonborder regulations that confer a competitive advantage on local products or firms, (4) industrial policies intended to promote national champions and save jobs, (5) overly broad protection of intellectual property rights in some nations, which has had the effect of discouraging innovation and competition not involving industrial pirates. . . . Because competition policy is weak nationally, it is necessarily weak in multilateral forums.

In particular, certain laws and policies pertaining to imports offset the goals of competition policy. For example, antidumping policies, as implemented by many nations, could reinforce anticompetitive practices and, hence, work against the goals of competition policy. The threat of antidumping action against an importer could give an incentive to that importer to set prices at levels sought by a domestic cartel, even if the cartel were violating competition laws. We further address the issue of antidumping later in this chapter.

Thus, competition policies seem to stop at the border. In addition to antidumping, national laws permitting domestic exporters to set up export cartels would seem to work against the goals of competition policy. Another example of trade laws that might have anticompetitive effects are those that prohibit parallel imports of branded products. Under these laws, such products bought legitimately in one national market may not be imported into another market. Such a prohibition allows the producer of the product to price discriminate in different national markets.

Other exceptions to competition policy also present problems. In some nations, certain sectors are off-limits to competition policy. For example, a sector is often set aside for a state-run monopoly. And entry into other sectors is often closely regulated, and in some cases new entry is effectively barred. Sectors falling into these categories include some of the most dynamic and important ones (e.g., natural resource extraction, telecommunications, banking, and civil aviation). In the European Union, industries can be granted block exemptions, under which otherwise illegal practices are allowed (i.e., exclusive dealing relationships in the automotive industry). Suzumura, in chapter 14, looks specifically at exceptions in Japan and argues that sometimes such exceptions are economically justified. In contrast, we argue that most exceptions are unwarranted on economic grounds and that the exceptions foster economic inefficiency, reduce buyer choice, and impede market access by firms wishing to do business across national borders.

The issue of exceptions to competition policy impinges on such WTO issues as sectoral liberalization (e.g., the recently completed telecommunications agreement and the ongoing negotiations within the WTO to liberalize financial services as part of the effort to supplement the liberalization commitments under the General Agreement on Trade in Services (GATS). This issue also impinges on whether government regulation acts as an undesirable market access barrier and to what extent deregulation is appropriate. As is often the case with competition-policy issues, the answer to the problems caused by exceptions are likely to be nation and sector specific.

Some aspects of competition may be so international in scope that they cannot be handled by national law. Certain so-called strategic alliances, for example, might have anticompetitive aspects to them, but if the alliance involves firms of multiple nationalities, it might not fall under the purview of any nation in which it operates. Arguably, there are some sectors where natural monopoly might exist on a global scale. For example, the sunk costs of creating the next generation of wide-body passenger aircraft might prove to be so great that it becomes a global natural monopoly.

Transborder mergers are a recognized area for cooperation between national officials, but more must be addressed in this area. Certain cartel-like arrangements (e.g., ocean-shipping conferences) largely escape the scrutiny of competition-policy authorities, often because these arrangements are exempt from competition policy. Other possible problems associated with international oligopoly might also escape the scrutiny of national authorities. These might include tacit collusion among firms supplying an international market, enabling the firms to act as a de facto cartel.

A Taxonomy of Trade and Investment-Related Competition Issues

Drawing from chapter 1 and the various studies in this volume, we have identified the priority trade and investment issues in international competition policies and grouped them in tables 1 and 2 (table 1 provides full details and table 2, a summary). The tables show our appraisal of whether there is enough intellectual and policy consensus on any of these issues to warrant an international agreement.

Table 1 Criteria for a global competition-policy agenda: detail

	Economic clarity	State of convergence: Toward best practice	State of convergence: Toward each other	Feasibility of further convergence[b]	Gains from further convergence[b]: Efficiency gains	Gains from further convergence[b]: Conflict reduction
Issues pertaining to market structure						
Cartelization	Clear	Low	High	Moderate	High	Moderate/high
Unwarranted horizontal restraints	Clear	Moderate	Moderate	Moderate	High	Low/moderate
Vertical arrangements						
Resale price arrangements	Murky	Controversial[a]	Low	Moderate	Low	Low
Foreclosure	Murky	Controversial[a]	Low	Low	Moderate	High
Strategic alliances	Murky	Controversial[a]	Low	Indeterminate	Moderate	Indeterminate
Mergers and acquisitions regulation	Clear minus	Moderate	Moderate	Moderate/high	Moderate	Moderate
Issues pertaining to firm conduct						
Predation	Clear minus	Controversial[a]	Moderate	Low	High	High[b]
Price fixing	Clear	High	High	High	High	Low
Price discrimination	Clear minus	Controversial[a]	Moderate	Low/moderate	Low	High
Abuse of market power	Murky	Controversial[a]	Low	Low	Indeterminate	Low
Exemptions						
Functional (e.g., for research and development)	Murky	Controversial[a]	Moderate	Moderate	Low/moderate	High
Sectorial (e.g., telecommunications)	Murky	Controversial[a]	Moderate	Low but improving	Moderate	High
Temporal (e.g., for recession cartels)	Murky	Controversial[a]	Low	Moderate	Moderate	Moderate
Efficiency defense	Murky	Controversial[a]	Low	Low	Indeterminate	Moderate

Trade policy measures raising competition concerns						
VERs, OMAs, etc.	Clear	Low	Low	Highb	High	Moderate
VIEs	Clear minus	Moderate	Low	Indeterminate	High	High
Antidumping	Clear	Low	Low but increasing	Low	High	High
National treatment issues						
For imports	Clear	High	High	In place	Low	Low
For foreign direct investors	Clear	Moderate	Moderate but decreasing	Moderate	Moderate/high	Moderate but increasing
Other related issues						
Intellectual property protection	Murky	Controversial	Moderate but becoming higher	Moderate/high[c]	Moderate	High
State aids to industry/subsidies						
Research and development	Murky	Controversial	Low	Moderate[c]	Moderate	Moderate/high
Production	Clear minus	Moderate	Low	Moderate[c]	Moderate	Moderate/high

a. Best practice is not clearly delineated or is controversial.
b. Toward each other or toward best practice.
c. Based on successes and failures in GATT negotiations during the Uruguay Round.

Table 2 Criteria for a global competition-policy agenda: summary

	Economic clarity	State of convergence: Toward best practice	State of convergence: Toward each other	Feasibility of further convergence[b]	Gains from further convergence[b]: Efficiency gains	Gains from further convergence[b]: Conflict reduction
Issues pertaining to market structure	Clear minus	Moderate	Moderate	Moderate	Moderate	Moderate
Issues pertaining to firm conduct	Clear minus	Controversial[a]	Moderate	Low	Moderate	Moderate
Exemptions	Murky	Controversial[a]	Low	Moderate	Moderate	High
Trade policy measures raising competition concerns	Clear	Low	Moderate	Moderate	High	High
Other related issues	Murky	Controversial[a]	Moderate	Moderate	Moderate	High

a. Best practice is not clearly delineated or is controversial.
b. Toward each other or toward best practice.

The first column in each table classifies the issue under market structure, exemptions, firm conduct, trade policy, or other. These issue areas are not always mutually exclusive. Nonetheless, we put substantively similar issues in separate categories if the typical regulatory process treats them separately.

The second column in each table categorizes these issues according to the criterion of economic clarity presented in chapter 1 of this volume—(i.e., whether there is strong consensus among economists on what is substantively best practice). If there is such a consensus, we label the issue clear: if there is no such consensus, we label the issue murky. On issues where there is a majority consensus but some dissention, we place the label clear minus.

If there is to be any sort of international convergence on the issues listed, the best practice with respect to the issue should be clear or, minimally, clear minus.[8] If there is no intellectual consensus on the best

8. In what follows, convergence pertains both to convergence among the laws and policies of nations (necessary if any sort of international accord is to be reached) and convergence between trade policy and competition policy positions on issues that overlap (e.g., predation and antidumping). Presumably, convergence (in both contexts) toward best practice is desired and not convergence for its own sake.

practice, international convergence would be useless or, worse yet, counterproductive (i.e., what is the point of converging on a bad practice?).

The remaining columns describe aspects of convergence with respect to each practice. The columns labeled state of convergence describe the status quo; the columns labeled feasibility of further convergence and gains from further convergence describe the feasibility and desirability of changing the status quo. Desirability is assessed with respect to reducing both inefficiency and international conflict. The second and third columns record our assessment of the state of convergence, first toward best practice (when a consensus exists) and, second, across national practices.

The fourth column indicates the feasibility of further convergence. Feasibility in this context means political feasibility (i.e., is there any consensus among policy officials and legislatures on what would be normatively better practice?). We classify issues as low feasibility if either (1) there are substantial differences among officials of different nations on desirable practice, or (2) there is a substantial difference between branches of a single government as to desirable practice.[9] If an issue is not characterized by a high or at least moderate level of feasibility in this sense, there is probably little hope at this time for reasonable convergence.

The fifth column represents an effort to judge what might be gained, in terms of economic efficiency, from moving from the present policy regime to a convergence on best practice. In areas where we judged the substantively best practice to be murky, we attempted to judge the efficiency implications of continuing practices that economists agree lead to inefficiencies. One way of looking at this judgment is to ask: If we could agree on a substantive best practice, and this agreement had economic merit, what would we gain? The final column indicates issues for which we judge that success in reaching any sort of convergence will lead to conflict resolution. Several issues are labeled at least moderate for three of the following: clarity, feasibility, efficiency, and conflict reduction. The common thread through most of them is market access, and virtually all involve barriers to the contestability of markets. Those issues are

- cartelization;
- other horizontal restraints;
- mergers and acquisitions;
- price fixing;
- voluntary export restraints (VERs), orderly marketing arrangements (OMAs), and other similar practices; and
- national treatment for foreign direct investors and services.

9. For example, trade policy officials may defend existing antidumping statutes, but competition policy officials may see these as irrational when evaluated by standards for predation or price discrimination.

Many issues do not make this list, but have high efficiency and conflict-reduction implications. These include predation or antidumping and voluntary import expansions (VIEs) (for which likely efficiency gains would be substantial if there were the political will to implement significant reform of the existing system);[10] vertical practices (for which the underlying economics remains murky);[11] intellectual property and related issues (for which the debate over the welfare tradeoff between strong intellectual property protection, and greater rivalry among innovators will likely never be fully resolved); and state aids to industry (Is there such thing as a good subsidy?). Of these issues, the last three do not make the list because the underlying economics of the issue remains murky and, hence, what is normatively best practice is difficult to determine.

This distillation provides a useful means for categorizing alternative policy recommendations. It provides the substance of a desirable agreement on Trade-Related Antitrust Measures (TRAMs), akin to the current Trade-Related Intellectual Property (TRIPs) measures and Trade-Related Investment Measures (TRIMs), and also provides an agenda for reform of some of the least efficient and least equitable aspects of current trade and investment rules.

How Might Competition Policy Be Internationalized?

In principle, there are many ways to extend competition policy beyond national borders. They include

- Creation of an international body of law and an enforcement agency to enforce competition policy on a global basis. (e.g., Scherer 1994).
- Harmonization of competition law and policy among nations, because differences in substance and enforcement among the laws and policies of different nations are among the most prominent obstacles to internationalization.
- Adoption of a WTO agreement on TRAMs and integration of competition issues into the dispute-settlement procedures of the WTO.
- Cooperative arrangements among the enforcement agencies of major nations (and the European Union).
- Aggressive unilateralism, whereby the competition laws and policies of one nation (or the European Union) are extended extraterritorially so that jurisdictions not under the sovereign control of the relevant

10. See chapter 15 by Itoh and Nagaoka and chapter 13 by Lipstein.

11. For example, there is room for reasoned debate as to whether vertical *keiretsu* in Japan are efficiency enhancing or otherwise. Sheard argues in chapter 16 that efficiency-enhancing effects dominate on balance.

government are forced to comply with the competition laws and policies of that government.

Because some border measures nullify the objectives of competition policy, a sixth alternative should be listed. This alternative could be implemented as a complement to any of the first five:

- World trade laws should be reformed so that they do not thwart the objectives of competition policy. Such laws include antidumping statutes and those permitting export cartels. Reform of these laws could be undertaken in the context of the TRAMs code or as a stand-alone exercise.

The following sections develop these alternatives in more detail.

A WTO DGIV

The most straightforward way to integrate competition policy into the world trading system would be to create an international body of law enforced by an international enforcement agency as part of the WTO. A WTO enforcement agency might be similar to the existing DGIV of the European Union, which has broad powers to deal with competition-policy issues. Just as the powers of the DGIV impinge on the sovereignty of the European member states (see chapter 8 by Nicolaïdis and Vernon), so would a WTO enforcement agency impinge on the sovereignty of WTO member nations. In Europe, the DGIV's powers have been sustained by European Court of Justice decisions and by the willingness of the member nations of the European Union to abide by these decisions, even when the effect has been to erode sovereignty. There is no worldwide equivalent to the European Court of Justice and no evident willingness of nations to allow a supranational agency to hold powers equivalent to those of DGIV. An international body of law enforced by an international agency under the aegis of the WTO would be feasible only if there were a strong and enduring consensus on the substantive principles of competition policy. These considerations suggest that a WTO version of the DGIV is not yet practical.

The lack of substantive consensus does not necessarily rule out the desirability of an international law and agency. Lack of consensus, however, would make it difficult to negotiate a workable agreement. Nonetheless, if the political will to create such a law and agency were present, the difficulties would be overcome.

But political will is also wanting. More specifically, there is no worldwide political consensus to build the institutional framework for an international law and enforcement agency. Without this framework, such a law and agency would not be able to function.

To establish an effective framework, considerable sovereign power would be sacrificed. For example, chapter 7 on the United States by Fox and Pitofsky emphasizes that US antitrust policy is ultimately determined by the courts and often by the US Supreme Court.[12] Meanwhile, if an international agency is to be effective, its decisions must be heard by an appellate body whose decision would be final. This appellate body would necessarily be international in scope, because no nation would be willing to accept the national courts of another nation as the ultimate arbiter. This would imply that, in the domain of antitrust, the appellate body's decisions could override those of US courts, including the Supreme Court. It is unlikely that the United States would allow a multilateral agency to exercise this power.

Nevertheless, we have already noted many substantive arguments in favor of such an approach. Because many important industries now compete on a global scale (see Graham 1996), it is easily argued that competition policy should also be enforced on a global scale. Also, for a variety of reasons, a national government might be reluctant to take action against a local firm. An international agency would presumably be empowered to deal with such cases that have an international dimension. Thus, although a supranational agency with powers to enforce an internationally agreed upon body of law is not feasible at this time, the possibility of such an agency in the future should not be discounted completely. In particular, if globalization continues and national borders cease to define markets, a global approach might be the only pragmatic way to implement competition policy.

Harmonization of Competition Laws and Policies

Harmonization in this context means that nations adopt nearly uniform substantive and enforcement standards by means of negotiation and agreement. Full harmonization of competition laws and policies appears impractical for the same reason that negotiation of global standards is not feasible. There is a lack of both political and intellectual consensus on what standards should be adopted, either substantively or in terms of enforcement. And, a number of key nations that currently appear unwilling to negotiate global standards also appear unwilling to change current national standards to achieve such a consensus.[13]

Nonetheless, some subsets of competition laws and policies might be harmonized. Most nations, for example, have laws prohibiting price-

12. Meanwhile, enforcement retain a major role in the determination of policy.

13. Neither the United States nor the European Union are prepared to adopt the other's substantive standards where there are substantial differences. And, without a consensus between them, there is no chance for a larger international consensus.

fixing and other cartel arrangements. The substantive provisions of these laws are not widely divergent. Thus, there could be harmonization of substantive laws on the control of cartels (see Fox 1997).

In other domains, rather than deliberate harmonization of competition law, there might occur a process of convergence, that is, uniformity achieved through cross-fertilization of ideas among experts and officials. Convergence, however, also seems unlikely to move quickly on a global scale, given the lack of consensus on normative standards.

Nonetheless, there might be some process of convergence among certain subsets of nations. In particular, members of the European Union and nonmembers seem to be achieving convergence. This is largely because members typically seek national law and policy that does not conflict with EU law and policy (see chapters 6, 3, and 4 by Hay, Jenny, and Kühn, respectively); nonmembers seeking to join the European Union must have a competition law that is compatible with EU law and policy.

It is possible to envisage that these incentives might create some sort of critical mass around the EU approach to competition policy. That is, nations neither currently members of the European Union nor contemplating becoming members might nonetheless seek to adopt EU standards so that its law and policy does not conflict with that held by so many leading nations. Thus, for example, some nations in the Asia Pacific area have looked to EU law and policy as a possible model. EU standards might very well become world standards, because a large number of nations will harmonize their own laws and policies around them.

However, it is doubtful that EU standards will become accepted on a truly global basis, because certain major nations, such as the United States and Japan, are unlikely to adopt them (see chapter 10 by Fox). Indeed, in canvassing the opinions of the US business community regarding competition policy in preparation for the 1996 WTO ministerial meeting, the Office of the US Trade Representative learned that major US firms opposed any movement in the WTO toward global recognition of certain European standards, especially those associated with Article 85 of the Treaty of Rome (abuse of a dominant market position by a firm). Thus, while much of the world might converge on EU standards, those nations not converging will be of such importance to the world economy that no claim could be made that worldwide convergence had occurred.

Integration of Competition Policy into the WTO Dispute Settlement Procedures

Many proposals that would inject elements of competition policy into the WTO have been made (e.g., Fox 1997; Graham 1995). Possibly the best thinking on this matter is that of Fox (1997), who explores a *de minimis* framework for putting competition issues into the WTO that is compatible with its dispute settlement procedures. Indeed, our main recommendation is that a variant of this proposal be adopted. However, before exploring this option, a short digression into the workings of the WTO and its dispute resolution procedures will prove useful.

The WTO's authority is embodied in a series of agreements (e.g., the General Agreement on Trade and Tariffs (GATT), the GATS, the plurilateral Agreement on Civil Aviation)[14] Each of these is a set of rules (or obligations) to which nations voluntarily agree to be bound, subject to a series of stated exceptions. Each WTO member nation is obliged to bring its national law and policy into compliance with these rules.

If a WTO member nation believes that its trading interests are adversely affected because some other member nation is not complying with an obligation, the aggrieved nation can lodge a complaint with the WTO. The dispute can then be taken to WTO dispute settlement procedures. Under these procedures, the disputants must first try to settle via good-faith consultation. Failing a resolution of the conflict by this means, the dispute is brought before a panel of experts, who hear the complaint and make recommendations with respect to (1) whether the obligation has been broached as alleged and, if so, (2) a remedy to correct the failed obligation. These recommendations are accepted by the WTO unless the decision is appealed to the WTO Appellate Body, or there is a unanimous consensus among the WTO member governments to block the recommendations.[15] If a decision is appealed, the Appellate Body must review the decision within 60 days on "issues of law covered in the panel report and legal interpretations developed by the panel" (Schott and Buurman 1994). The decision of the Appellate Body is accepted unless there is a unanimous decision among the WTO member governments not to accept it. If the panel's recommendations for a remedy are not promptly complied with by the offending nation, sanctions against that nation can be taken by the complaining nation. However, sanctions are not allowed if the complaint involves a nonviolation, (i.e., nullification and impairment under GATT Article XXIII), a point to which we shall return.

The language of GATT Article XXIII on nullification or impairment has led us to believe that the WTO dispute settlement procedure could

14. A plurilateral agreement is one to which a subset of WTO members agree to be bound. There currently are agreements on government procurement, civil aviation, dairy products, and bovine meat products.

15. These are new procedures created by the Uruguay Round agreements. Prior to 1995, a panel decision had to be accepted unanimously by the contracting parties (the member nations of the precedent GATT agreement), implying that one nation could veto the decision (this nation could have been the one against whom the original complaint was lodged). Also, prior to 1995, there was no Appellate Body.

be used to resolve some competition-policy issues (Graham 1995; Richardson 1995). Paragraph I of that article states:

> If any (member nation) should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another (member nation) to carry out its obligations under this Agreement, or (b) the application by another (member nation) of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the (aggrieved member nation) may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other (member nation or nations) which it considers to be concerned. Any (member nation) thus approached shall give sympathetic consideration to the representations or proposals made to it.

Paragraph 2 of the article indicates that if the dispute is not satisfactorily resolved by the nations involved, the issue can be brought before the WTO and resolved through the dispute settlement process.

Thus, it would appear that a private business action that blocks market access and that might be remedied by competition policy is, in the language of Article XXIII, paragraph 1, a nullification or impairment of a benefit brought on by "(c) the existence of any other situation . . ." (Graham 1995; Richardson 1995). In this case, the benefit would be increased exports, enabled by the reduced border measures brought about by GATT. Under the article, "written representations or proposals" could be made by the aggrieved nation (that which suffers reduced exports) to the putatively offending nation (that which harbors the market-access barrier). Such good-faith consultation, part of the traditional WTO dispute resolution process, would be in the spirit of so-called positive comity, a loose doctrine whereby, when administering domestic law and policy, the officials of one nation listen sympathetically to the concerns of other national governments and act accordingly.

If the aggrieved nation felt that the putatively offending nation had not acted with positive comity, a dispute could be lodged with the WTO (Graham 1995; Richardson 1995). Just as occurs in traditional trade disputes not solved by good-faith consultation, a panel of experts would be formed. In this case, the panel would be empowered to determine whether the complaint was valid and whether the government of the putatively offending nation had properly enforced its competition law to address this market-access problem. In our view, the panel would stop there. It would issue a report only indicating whether there was a problem of market access and whether competition law in the defendant nation could be (and had been) used to address this problem. The panel would not be empowered to recommend a remedy to the problem, as it does for other trade disputes.

Our earlier proposal is consistent with the Uruguay Round clarification of Article XXIII, paragraph 1(c).[16] Under that clarification, it would appear that a panel can hear any dispute involving GATT-enabled export opportunities that are nullified or impaired by "any other situation" (in this case, nonenforcement of competition law). However, the nation under scrutiny does not appear to be obligated to adopt any recommendation of the panel.

However, this approach to implementing competition policy in the context of GATT Article XXIII is open to legal questioning. In particular, a GATT working group in 1960 recommended that this article not be invoked by nations seeking to redress market-access barriers created by private business practices. The group argued that GATT contains no language on such practices and that substantive provisions that had not been explicitly agreed on by the contracting parties should not be introduced through Article XXIII. This recommendation does not have the force of law, but it does establish a precedent against use of Article XXIII for the purpose of raising and resolving competition-policy issues within the WTO.

Also, international legal experts have pointed out a further legal flaw with our approach. WTO panels do not pass judgment on the failure of member governments to enforce their national laws and policies if these laws and policies are not germane to specific WTO obligations.[17] For a panel to do so in the case of competition policy would set a precedent that member governments would undoubtedly not accept. The problems

16. The clarification states:

> Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply: (a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph; (b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters an a separate report on matters falling under this paragraph.

17. A WTO panel would consider a government's failure to enforce its own law where this law reflected a WTO obligation.

would be greatest in those nations that enforce competition law largely through judicial proceedings (e.g., the United States). WTO review of how national law is enforced would be seen as an unacceptable impingement on national sovereignty and, in particular, on the powers of the judiciary.

The WTO is much more comfortable with disputes involving putative violation (i.e., failure of a member nation to adhere to an obligation under a WTO agreement) than those involving nonviolation (i.e., nullification and impairment under Article XXIII, paragraphs 1(b) or 1(c)).

Cognizant of this and of the 1960 working group recommendation, Fox (1997) suggests that a new agreement be negotiated within the WTO, which she would label TRAMs, in the spirit of the existing agreements on TRIMs and, especially, TRIPs. Rather than negotiate a comprehensive agreement on all aspects of com-petition policy, she proposes that a new agreement focus only on those subdomains that are most relevant to issues of market access. In her judgment, these include

- cartels with boycotts;
- vertical arrangements that tend to foreclose outside vendors or block established channels of distribution to new entrants; and
- monopolistic discriminations and exclusions.

In principle, we agree with her approach. However, we disagree with the specifics. Fox acknowledges that, while agreement on the first subdomain could be relatively straightforward, the second and third are problematic. Vertical arrangements have been ubiquitous to many recent trade disputes. However, these arrangements can also be efficiency enhancing. Efficiency defenses have been used to defend the existence of so-called production *keiretsu* in Japan, which have been at the heart of many recent disputes (see chapter 16 by Sheard). It is largely for this reason that the economic consensus on vertical arrangements is, according to our taxonomy of competition issues, murky. Substantial differences also exist between US and EU doctrine toward vertical arrangements, with the United States generally accepting efficiency defenses for arrangements that might be prohibited in the European Union. Similar differences exist in US and EU policies on horizontal market power. For example, US policy, except under specific circumstances, allows monopolistic firms to refuse to deal with a customer, whereas EU policy holds that dominant firms have a duty not to discriminate among customers or refuse to deal.

These differences are sufficiently great among the three largest WTO members as to preclude them from being able to agree on a common set of standards. Also, we have discussed the unwillingness of most WTO members, including these three, to relinquish sovereign powers to rule on competition-policy issues to an international body. This is true of the European Union, even though individual member nations of the European Union relinquish such powers to an international body, the European Commission.

We suggest that Fox's general TRAMs agreement focus on contestability. Our analysis of feasibility (see tables 1 and 2) suggests a focus on five areas:

- national treatment for local affiliates of foreign firms,
- international control of cartels and cartel-like behavior,
- enlargement of WTO consultative procedures,
- mergers and acquisitions notification, and,
- more speculatively, what we call TRAMs plus.

TRAMS plus is an approach to dealing with industries in decline that demand trade protection and might qualify for escape-clause (GATT Article XIX) relief. Our proposals in each of these areas provide a positive role for the WTO but do not obligate WTO members to relinquish sovereign powers. We will examine each of these issues.

National Treatment for Local Affiliates of Foreign Firms

Firms' concern with market access often has to do with the right to establish a presence in a local market by creating (or acquiring) a local subsidiary. Such market presence is virtually a prerequisite for international trade in the fast-growing services sector. This point has been well recognized in the Uruguay Round's still unfinished GATS. Although not an absolute prerequisite in most manufacturing activities, local market presence is nonetheless desirable. These considerations suggest that a vital component of market access is that governments not discriminate against the establishment or operation of a local affiliate of a foreign firm. In other words, these affiliates should be granted full-national treatment (see Graham 1996).

National treatment for foreign-controlled enterprises is most often thought of as an international investment issue, because lack of national treatment is a major impediment to foreign direct investment (FDI). However, any impediment to FDI is also an impediment to market entry and, hence, to increased market contestability. And, given that increased market contestability is one of the major goals of competition policy, national treatment is also a competition-policy issue. Indeed, it might be the issue with the highest priority. Many trade-policy issues that concern market access would simply fade away if governments were obligated to grant national treatment to foreign-controlled firms.

Our views on how national treatment for foreign-controlled enterprises should be implemented have been published in detail elsewhere (see Graham 1996). Here, we summarize a few points. First, no government is ever likely to endorse full, unqualified national treatment for foreign-controlled enterprises. Hence, there is a practical requirement for lists of exceptions. For reasons of transparency, a list of exceptions is preferable to the so-called positive list approach of the GATS, whereby governments commit themselves to granting national treatment for foreign-controlled enterprises for only those sectors that are explicitly listed. Second, national treatment is not an isolated investment issue that can be dealt with successfully in an agreement that exists independent of the WTO agreements. Rather, it is an issue that cuts across trade and investment policy and is also highly relevant to competition policy. Hence, the Multilateral Agreement on Investment (MAI) being negotiated within the Organization for Economic Cooperation and Development (OECD) is not the correct way to place this concept into multilateral trade law, although the OECD work might yield a constructive precursor to a future WTO agreement. Implementation of a WTO agreement on national treatment for foreign-controlled enterprises will likely require some modification of WTO dispute settlement procedures. In particular some provision for enterprise-to-state dispute settlement will need to be established. On this, the North American Free Trade Agreement might provide a useful model (see Graham and Wilkie 1994).

International Control of Cartels and Cartel-Like Behavior

Virtually all competition-policy specialists agree that under most circumstances, cartels are bad. Thus, nearly all competition laws in place include anticartel provisions. Furthermore, convergence already exists. Thus, it would be relatively easy to achieve international consensus on a worldwide agreement to ban most cartels.

If many nations already have such a ban in place, why strike an international agreement? First, not all WTO member nations have competition policies, and, hence, in many nations there are no prohibitions on cartels. Under a WTO agreement, all nations would be required to bring national law into conformity. Second, even in nations with competition laws, enforcement of anticartel provisions has often been lax. A WTO agreement would step up enforcement of these laws, especially where the existence of a cartel in one nation creates tension in another nation. Third, some cartels exist purely in international markets. Many of these are legal because of various exemptions or loopholes in national laws.

In particular, many nations permit export cartels on the theory that their exporters need to have some sort of countervailing power to compete effectively with foreign rivals.[18] However, if every nation allows exporters to form cartels, any national benefit would be offset by the actions of other nations' export cartels. In the end, the cartels limit output and raise price, to the detriment of buyers of the cartelized product or service and to the benefit of no one. Therefore, a WTO agreement on cartels should include a ban on most export cartels. There are some exceptions, to be discussed below.

A WTO agreement on cartels would require some minor changes in existing dispute settlement procedures. If a panel, responding to a complaint by a member country, found cause to believe that a cartel existed in violation of the agreement, it would recommend that competition authorities in the nation where the alleged violation took place investigate the situation and, where appropriate, take remedial action. If the authorities failed to act, sanctions could be applied by the aggrieved nation (or nations) following standard WTO procedures.

What if the relevant authorities in the violating nation agreed to pursue the case, but found in favor of the defendant firm or firms? For example, if the problem were the putative existence of a producers' cartel that boycotted any distributor that handled imported products,[19] the relevant authorities might conclude that no such cartel existed, or that, if it did, its existence did not constitute a violation of national law (in principle, national law would be in conformity with the agreement). In this case, a detailed report would be transmitted to the panel indicating why the authorities reached the conclusion that they did. The panel could be empowered to review the report and accept or reject it. If it were accepted, the case would be terminated.

If it were not accepted, withdrawal of WTO concessions (sanctions in the sense used by WTO) might be authorized.[20] Grounds for nonacceptance could be procedural (e.g., the factual investigation had been impaired somehow, or due process was not followed) or substantive (the panel might determine that the relevant national standards did not conform with the WTO agreement).

However, if it were rejected, bolder alternatives than sanctions might be envisaged. For example, the panel (or some other agent) might have standing to pursue the case in the national courts (or, in the case of the European Union, the supranational courts) of the violating WTO member.

18. If national exporters can collectively exercise market power in foreign markets, they can appropriate rents from foreigners to the benefit of domestic residents.

19. Such a cartel has been alleged, for example, in the case of the flat glass industry in Japan.

20. Fox (1997) argues for fines rather than sanctions. The WTO presently cannot impose fines and would have to be given that power.

Enlargement of WTO Consultative Procedures

On trade-related issues other than cartels, there is little likelihood of international agreement on substantive rules to which the above procedures could be applied. However, there is room for new procedural rules. Particularly, existing WTO consultation procedures could be enlarged. As we have already seen, the 1960 GATT decision called for consultation between or among nations if private business practices had alleged effects of foreclosing exports. Similarly, WTO member nations could commit to enter into consultations over export or investment foreclosure. A comprehensive list of private practices, which could be the basis for member countries to request consultations, could be compiled. If the list included a private practice, that would not constitute a prescription against the practice but would indicate that consultations could be initiated. Such a list should include vertical restraints that might foreclose exports (e.g., exclusive-dealing contracts) and monopolistic discriminations as identified by Fox (1997). We would enlarge this list and make it more detailed.

Consultations could be bilateral or multilateral, as circumstances dictate. There would be no requirement to resolve the problem via consultations. And the consultations would not preclude formal dispute settlement procedures, if those procedures were applicable to a particular case. Indeed, relevant parties are required under these procedures to attempt to solve a dispute via consultation and negotiation before the dispute comes before a panel. Nonetheless, we believe that many disputes involving private practices could be resolved via consultation, especially if nations were to proceed in the spirit of positive comity.

Mergers and Acquisitions Notification

We advocate mandatory notification for mergers and acquisitions likely to have significant international effects (e.g., a merger of two firms having sales outside the home country or countries that exceed certain threshold levels). We envisage that most cross-border mergers or acquisitions would be subject to this requirement. The notification might consist of the following:

- an announcement that a certain merger or acquisition is pending,
- publication of basic information regarding the parties to the transaction (e.g., the basic income statement and balance sheet), and
- indication of whether national authorities of the home nation or nations of the parties to the transaction intend to review the merger.

Other countries with substantial interest in the transaction (i.e., the transaction, if completed, would have material effects in the domestic market of the relevant country) could request consultation with the home country's competition authorities, as per the mandatory consultation provision outlined above. The home country's competition officials would determine whether such effects were present. Such a determination would be sufficient to show that such effects were present.

Are such procedures for mandatory consultations really necessary? After all, many cases that might have been covered by this procedure (including the Boeing-McDonnell Douglas merger and the US-Japan dispute over auto parts but not including the US-Japan dispute over photographic film and paper) have in practice been resolved, apparently to everyone's satisfaction, via bilateral procedures. Nonetheless, the WTO procedures would be there when and if nations sought to use them. WTO procedures might be utilized by smaller nations more than by larger ones, especially if a bilateral resolution were to come at the expense of smaller nations. But WTO procedures might also be used to resolve disputes over merger approval among larger nations, especially if more than two nations were party to the dispute.

TRAMs Plus: A Competition-Policy Safeguard Mechanism

As globalization encompasses more regions and more issues (e.g., services), downsizing and rationalization pressures will grow as fast as opportunities for firms to expand and prosper in other sectors. Ad hoc safeguard mechanisms, such as enhanced antidumping procedures (which are new in many smaller WTO members) and creative subsidization, are already burgeoning to cope with downsizing and rationalization. But these often have high efficiency costs (see chapter 1) and are administered in ways that are at best cumbersome and at worst capricious, creating rancor and inequity.

Competition policies in Japan and parts of Europe have historically handled rationalization and downsizing better than elsewhere, though they have hardly handled them perfectly (see various chapters on Japan and Europe). They do so sometimes through functional exceptions such as rationalization cartels and sometimes through sectoral exceptions such as in European basic metals. Mergers between strong firms and weak ones are both efficient and fair, if the only other real alternative is extinction of the weak. The most important key to free entry is often rational exit (see chapter 1). In that spirit of contestability and market access, there is great potential in a competition-policy-oriented safeguard agreement that could eventually become part of the TRAMs and that would presumably use the same dispute settlement procedures.[21]

21. Messerlin (1996) sees little merit in a TRAMs agreement except to discipline ad hoc safeguard mechanisms.

We think a TRAMS agreement is even more feasible than tables 1 and 2 make it appear. First, cooperative unilateralism and multilateralism along the lines sketched above, will, if successful, build the networks, trust, and precedents for a more ambitious TRAMs agenda. Second, the inefficiencies and inequities of current ad hoc safeguard mechanisms will soon become untenable, as firms and countries that have historically gained from them become their new victims at the hands of powerful emerging rivals.

Cooperative Arrangements among Nations

WTO initiatives will work best if supported by less-formal bilateral and regional cooperation on these issues. Cooperative arrangements already exist among the competition authorities of various nations, and more such arrangements are easily visualized (see chapter 10 by Fox on US-EU arrangements, chapter 2 by Goldman, Bodrug, and Warner on Canada, and chapter 12 by Thomson on Australia-New Zealand). These could run the spectrum from informal consultation to joint legal action.

For example, the United States and the European Union already have a cooperative agreement that provides for consultation between relevant authorities in Washington and Brussels whenever a merger or acquisition comes under the scrutiny of both. In most cases, the authorities will agree on who has the most pressing interest in the case. The authorities with lesser interest will agree not to contest the findings of the authority with greater interest. Because the substantive standards for merger and acquisition differ, a merger that might not be allowed to stand on one side of the Atlantic, if allowed to stand on the other side, will not be contested. Alternatively, a merger that might be allowed to stand on one side of the Atlantic might be blocked on the other side, without objection by the authorities who would have allowed it.

The US-EU agreement does not, however, allow for detailed information sharing, because enforcement standards differ greatly. In the United States, those who violate certain antitrust laws can receive criminal penalties, whereas only civil penalties are invoked in the European Union. Thus, EU authorities have been unwilling to consider information-sharing cooperative agreements because information disclosed by DGIV to the Antitrust Division of the US Department of Justice could lead to criminal charges against European nationals for violations that would not be considered criminal in Europe. Similarly, the possibility that criminal charges might be pressed in the United States for violations that elsewhere would not be considered criminal has deterred cooperative arrangements between the United States and other nations, including Japan.

The United States also has limited joint enforcement agreements with Canada. Under these agreements, there is cooperation in fact-finding if both nations suspect a criminal violation (see chapter 2 by Goldman, Bodrug, and Warner).

There have been proposals for even bolder cooperative arrangements, including one for joint US-Japan enforcement of antitrust laws (see Bergsten and Noland 1993). The rationale for such cooperation is that, by investigating and, where appropriate, prosecuting violations jointly, the joint interests of the cooperating nations will be carried out. However, because of substantial differences in penalties and other provisions of law enforcement, there is considerable reluctance on the part of a nation to grant any discovery powers (powers to investigate in order to accumulate evidence of possible violation) to foreign authorities. In the preceding paragraph, we noted that this includes a reluctance to share information. But joint enforcement would necessarily require discovery powers that go well beyond simple information sharing. The issue of standing poses problems (i.e., would enforcement authorities of one nation be granted standing in the courts of another?).

Unilateral Enforcement of National Antitrust Laws Internationally

Competition-policy issues will not dissolve in the absence of multilateral, regional, or bilateral action. But we do not recommend the unilateralism that currently exists. As already noted, the European Union and the United States have unilaterally enforced antitrust laws extraterritorially (i.e., outside the sovereign territory of the relevant authority). The European Union has exercised its authority only in cases involving mergers of firms with significant European presence (in fact, all such cases have involved at least one firm headquartered in Europe). The United States has exercised a broader reach. US law and policy encompasses the effects doctrine, which asserts that US law can reach any foreign conduct having direct, substantial, and foreseeable effects on the US economy.[22] (In cases involving cartels, it must also be established that the intent of the cartel was to raise prices in US markets directly, substantially, and foreseeably.) US courts have admitted such cases under US law.

Practices that have alleged effects on producers (such as alleged foreclosure of US exports from foreign markets) would not, however, normally raise domestic prices or restrict output. In the short run, it seems that US domestic supply for the relevant good or service would be greater if an export restriction existed.[23] Thus, such cases do not fall under the effects doctrine.

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22. The effects doctrine was established in US law in 1911 in the case *United States versus American Tobacco*, 221 US 106.

23. But this might not be the case if the export foreclosure prevented domestic producers from achieving static or dynamic economies of scale.

US courts have held, nonetheless, that in some instances export foreclosure can be subject to US antitrust law. Specifically, the courts have identified opportunities for US exports that are hindered by practices in foreign countries that would be illegal in the United States. However, during the Reagan administration it was announced that the US Department of Justice would not pursue any extraterritorial action unless there were a demonstrated a loss to US consumer welfare because of raised prices or reduced quantities (US Department of Justice 1988, note 159). However, just four years later, Bush administration Assistant Attorney General for Antitrust, James Rill, indicated that the Antitrust Division would consider suits against foreign import cartels that limit US exports, if those cartels are illegal under the law of the country of import, and that country fails to enforce its law.

This policy shift was apparently made to give impetus to the Structural Impediments Initiative (SII), a then ongoing effort by the United States and Japan to break down structural barriers to trade between each other.[24] During the Clinton administration's early years, then-Assistant Attorney General for Antitrust, Anne Bingaman, indicated that she would pursue practices that foreclose US exports or limit the ability of US firms to invest directly in a foreign market. However, no court case based on this new doctrine was ever actually pursued, and the idea seems to have been dropped during the second Clinton administration. Thus, it is impossible to know with certainty how the courts would currently treat export foreclosure cases. However, courts have in the past ruled that such cases can fall under US jurisdiction.

The contrast between the Clinton administration's enthusiasm to prosecute cases involving export foreclosure, and its failure to bring to fruition a successful case after a three-and-a-half year effort illustrates one of the flaws in the unilateral approach. To prosecute a case under US law, evidentiary standards are very high (the case must be proven by means of hard evidence). Staff at the Antitrust Division have indicated that lack of hard evidence has impeded efforts to develop a case.

US authorities have no power of discovery outside the United States—that is, they cannot compel firms that do not have a US presence to submit company records that might (or might not) substantiate the allegations.[25] And, where cases are pursued unilaterally, foreign authorities are generally reluctant to use their powers of discovery to assist US efforts. Indeed, other nations (including Canada and the United Kingdom) have passed blocking statutes that would forbid firms operating within their jurisdictions to comply with US requests for information.

24. We say "shift in policy" to emphasize that there was no shift in US case law.

25. However, many foreign firms now have US subsidiaries, and discovery could be compelled through these subsidiaries.

Blocking statutes illustrate the major flaw with unilateral extraterritorial enforcement of competition laws: other nations typically resent such actions, even if the relevant authorities in the affected nations might have sympathy with the case on substantive grounds. Other nations have viewed the US extraterritorial application of antitrust laws as a violation of their sovereignty.

We do not see much future in unilateral enforcement of antitrust laws, especially in light of the Clinton administration's record. However, the Department of Justice did seek and identify cases where it felt that the practices involved had particularly egregious effects. But, as a practical matter, it found that it could not build successful cases because it lacked powers of discovery outside the United States. Without discovery powers, evidence of wrongdoing under US law could not be accumulated. And, had such a case been successfully undertaken, the outrage of foreign nations would likely have been great even if the substantive merits of the case had been strong.

Reform of Anticompetitive World Trade Laws

Most reform of anticompetitive world trade laws could be internalized within a TRAMS agreement. For example, such an agreement would, as noted above, deal with cartels that use boycotts to foreclose entry. Export cartels could be banned. Thus, antidumping reform could be included in the negotiation of a TRAMS agreement.

However, antidumping reform would likely be one of the most contentious issues in the negotiation of a TRAMs agreement. Many trade specialists see antidumping as a necessary safeguard in international trade law, because it protects domestic producers from imports priced below cost. However, antidumping provisions are detested by most economists, because they raise prices and reduce consumer welfare on the basis of specious price or cost tests that bear no relation to below-cost pricing. However, most economists agree that predation exists (see chapter 1). Competition law in most countries that have such a law directly or implicitly deals with predation. Thus, antidumping could be eliminated entirely, and nations could apply competition law instead.[26] This alternative is consistent with concepts of national treatment: under competition law, low-priced imports would be dealt with no differently than low-priced equivalent domestic goods or services. In the application of competition law, imports are not discriminated against, whereas antidumping law is directed solely at imports (and hence, because dumping

26. This is of course what is done inside the European Union (see chapter 8 by Nicolaïdis and Vernon) as well as between Australia and New Zealand (see chapter 12 by Thomson).

is easier to prove than is predation, imports are effectively discriminated against).[27]

There are two objections to this alternative. First, in many countries (e.g., the United States) it is difficult and costly to prove predation. Second, in those countries that apply antidumping law, the intent of the lawmakers is that it be easier to apply measures against low-priced imports than against low-priced equivalent domestic goods or services. In other words, the intent of antidumping is to create an easier standard to act as a safeguard against low-priced imports. Thus, antidumping is an internationally agreed on exception to the principle of national treatment. As Lipstein points out in chapter 13, there have been rationales for this exception (e.g., the inability of domestic producers to arbitrage international price discrimination), but these rationales lose their validity over time. Meanwhile, the divergence between predation standards and antidumping standards has widened.

Antidumping policies exist mostly because there is often a significant political constituency in favor of their continuance. Offsetting this is a growing number of internationally oriented firms that are alarmed by the widespread use of antidumping policies in recent years. Indeed, as recently as 10 years ago nations could be divided into two groups: those nations that were primarily users of antidumping (e.g., Australia, Canada, the European Union, New Zealand, and the United States) and those nations that were primarily victims of this use (the newly industrializing nations, including, at one time, Japan). Today, given the proliferation of antidumping (mostly by nations that were once victims), more of the world's trading nations are simultaneously both users and victims of antidumping.

The true victims of this proliferation of antidumping are the world's international firms. These firms have not, to date, formed an effective constituency against antidumping, but their numbers are growing (see

27. See chapter 13 by Lipstein. To recapitulate, to demonstrate that dumping occurs, it is necessary under US law to show that imports are sold at prices below those in the country of origin. To establish this, the US Department of Commerce, which makes antidumping determinations administratively, uses procedures that many analysts believe are stacked against the importer (e.g., dumping can be found even if average price in the United States is exactly equal to average price in the country of origin, because the procedures allow for certain observed values of the price to be discarded). Alternatively, the Department of Commerce can use, in place of prices in the country of origin, either prices in a third country or a "constructed cost" measure. Both are subject to similar biases. To invoke antidumping remedies (extra duties), material injury to US producers must also be shown. Lipstein notes that such harm, defined as "harm which is not inconsequential, immaterial, or important," is almost trivial to establish. It can be established if sales, profits, or employment by US producers is reduced as a result of the dumping.

Graham 1996). Thus, the call for significant reform or abolition of antidumping will grow louder in the years to come.[28]

The existing antidumping law could be reformed instead of eliminated. Lipstein argues in chapter 13 that certain provisions of the US Robinson-Patman Act would, if incorporated into antidumping law, defend exporters against charges of dumping and, on balance, tip the scales slightly in their favor. We support Lipstein's proposals, which in summary form are:[29]

- To apply antitrust principles to a definition of domestic-like products and injury determination. In particular, Lipstein advocates the use of narrower product categories (to eliminate present absurdities, such as an importer being found guilty of dumping product into the United States if no similar domestic product is even produced) and elimination of cumulation (adding together the imports of several firms or from several countries) in injury determination tests.
- To establish a "meeting the competition" defense, whereby an exporter of products to the United States would not be found guilty of dumping if it lowered prices to meet those being charged by domestic competitors. The burden of proof, however, would be on the exporter.
- To narrow the criteria for the standing of antidumping petitioners (to ensure that the petitioner represents all domestic producers of the product in question).
- To require the Department of Commerce to examine products of similar grade and quality (an antitrust concept) when determining whether dumping occurs and by what margins. The Department of Commerce under present standards can, in effect, compare apples to oranges. The Commerce Department would also be required to make its comparisons at the same level of trade (i.e., it could not compare prices charged by exporters to large scale wholesalers in the United States with those charged to small scale distributors in the home country).

Lipstein notes that elements of these proposals were incorporated in the Uruguay Round Antidumping Code (and in the US enabling legislation) and that both the existing code and the counterpart US laws are still tipped in favor of the plaintiff.

28. The Uruguay Round antidumping reforms, however, tended to make it easier for plaintiffs in antidumping cases. See Schott and Buurman (1994).

29. In chapter 13, Lipstein presents these as reforms of US law. However, it is easy to envisage equivalent reforms of international law as embodied in the GATT.

Lipstein begs the question: Should some sort of predation standard be incorporated into antidumping law? As noted, predation is notoriously difficult to define in measurable terms (how does one measure intent to monopolize?), and, under US law and policy, it is difficult to prove in a court of law.

Although antidumping might, in principle, bear some resemblance to competition law regarding predation, in practice, antidumping is often used to grant relief to sectors in which domestic producers are facing intensified international competition (i.e., sectors in which a particular nation is losing comparative advantage). Such sectors are often termed industries in decline. Given this, it has been proposed that antidumping might be replaced by policies designed to protect industries in decline for a period long enough for adjustment to occur. In this case, adjustment means that the domestic industry shrinks as a result of disinvestment and worker relocation. Such policies might resemble antidumping, in the sense that tariff rates above those bound in GATT Article II would be permitted during an adjustment period. However, these tariffs would be determined not on the basis of artificial concepts such as dumping margins. And whether an industry would be eligible for relief would not be determined by injury tests. Rather, an optimal (or at least reasonable) rate of industry contraction would be determined, and levels and duration of tariffs would be set to permit such a contraction to occur at minimal cost.

Conclusions and Recommendations

Recent cases demonstrate that competition policy, in some form, belongs in the multilateral rules for world trade. The WTO recognizes this and now has a working group in place whose mission is to explore how trade and competition policy might interact.

We recommend that an activist approach be followed. In line with the discussion in this chapter, the approach entails two elements:

- All WTO member nations should be required to have in place a law on competition and the institutional means to enforce it, and
- This requirement should be negotiated as part of a WTO agreement on TRAMs.

Our version of the TRAMs proposal is not necessarily the ultimate framework for how competition policy might be implemented at the international level. Rather, it would be a first step in the right direction. As national economies become more and more integrated with one another and business organizations become increasingly global, national governments will likely rethink whether it is in their best interests to retain full sovereignty over competition policy. At present, many policymakers realize that increasing world economic integration poses new challenges for competition policy. Nonetheless, they are unwilling to cede any national sovereignty in this domain. Thus, our TRAMs proposal is meant to be a first, modest, and experimental step toward a more international approach to competition policy. The proposal makes maximum use of existing WTO rules and procedures—substantive new rules would be needed in only two areas, but these are high priority areas where there is already some consensus of views: national treatment for foreign-owned firms and regulation of cartels. Otherwise, what we propose is that national authorities extend a practice in which they are already engaged, and consultation with one another over specific cases where the interests of more than one national authority are at stake. In addition, certain mergers and acquisitions would be formally notified to the WTO (so that basic information pertaining to these cases is available to all national authorities), and consultation among national authorities would be mandatory if at least one national authority in a specific case requests it. We believe that implementation of these proposals would neither diminish sovereignty nor transfer it to the WTO.

In short, our proposals are a modest first step in the right direction. Once this step is taken, and after some experience with the new procedures has been accumulated, nations can decide on the next step.

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