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## Competition Policy and Antidumping Reform: An Exercise in Transition

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The late 1980s witnessed a new interest in a competition-oriented approach in the General Agreement on Tariffs and Trade (GATT) following a decade of almost complete oblivion for the two key instruments designed to address competition policy issues—namely, chapter V of the Havana Charter, on “restrictive business practices,” and the recommendations of the Organization for Economic Cooperation and Development (OECD) and the UN Conference on Trade and Development (UNCTAD) on international aspects of competition policy.<sup>1</sup> This renewed interest was driven by growing sentiment that antidumping was becoming a back door for protectionism, that it therefore had to be reformed, and that competition policy was the appropriate venue for reform. During the early 1990s, this demand for international competition policy spread to other Uruguay Round agreements—on safeguards, services, intellectual property rights, trade-related investment measures—and to the plurilateral agreement on government procurement. Though diverse, all these agreements have a close, if indirect, link with antidumping: they keep referring to the notion of “fair” competition.

This brief history suggests that the world trade system is beginning a new phase in its evolution, which, for reasons examined in this chapter,

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1. The turning point was Rodney Grey's 1986 paper for the OECD, which, however, was never adopted by the OECD ad hoc committee.

is unlikely to be completed for a long time. At the end of this long process, antidumping is likely to be abandoned because it neither ensures free functioning of the markets nor provides an acceptable safety valve for domestic firms facing sudden, intense pressure from imports. The first aspect was the *raison d'être* of the GATT and continues to be that of its successor, the World Trade Organization (WTO): clearly, competition law and policy is better able to achieve the most efficient allocation of world resources. The second aspect flows from the fact that WTO members are states—sovereign but quick to bow to domestic pressures: GATT Article XIX on safeguards addresses this issue, not Article VI on dumping. In sum, in the long run, trade problems currently managed by antidumping actions will be handled by competition policy and by safeguard measures.

Keeping this long-term perspective in mind, this chapter has a precise goal: to consider what can be done in the next 10 years, starting with the Singapore ministerial conference in December 1996. Two questions will be raised.

First, what would happen if competition law were introduced in the WTO in an attempt to counterbalance *current* antidumping regulations? This chapter argues that such a move would lead to an even more schizophrenic policy: one instrument would exactly contradict the other; hence one instrument (probably competition policy) would be misused. Indeed, one already observes symptoms of such schizophrenia in the limited EU and US experiences of mixing competition policy and antidumping.

Second, are there broader arguments in favor of WTO competition rules that would justify their *immediate* introduction, despite the problems raised by coexistence with antidumping rules? This chapter argues that the case is not strong: the substitution of private for public barriers will remain marginal at the current level of globalization, and the regulatory reforms required by the future domestic and international liberalization of services will have to be decoupled from competition law in the WTO.

These two conclusions paint an uncomfortable scenario: antidumping is out of control, competition policy is out of immediate sight, and safeguard policy is out of use. But maintaining the status quo would greatly erode GATT disciplines: estimated correctly, antidumping measures cover a substantial portion of trade—easily reaching 5 percent of total manufacturing trade in the EU case and more in terms of bilateral trade (Hindley and Messerlin 1996).

Reform of antidumping cannot wait for the introduction of competition rules in the WTO. Consequently, this chapter suggests the following approach: to keep untouched the text of the existing agreement and to instill “quantitative thresholds” in key agreement provisions for eliminating the most anticompetitive aspects of current antidumping enforcement.

Although that is not the complete reform of antidumping one would like, such an approach has many advantages. First, it leaves intact the

current Uruguay Round antidumping text, and it avoids the trench warfare to be expected with a renegotiation, as well as avoiding a race between tightening the agreement in Geneva and circumventing it in national capital cities.<sup>2</sup> Second, it can be launched *rapidly*: it could be on the agenda of the antidumping review scheduled for 1998. Competition policy could then be given the time it needs for an economically sound introduction into the WTO. Third, this proposal is the equivalent of “tariffication,” fitting well into the WTO negotiating process and driving it in the direction of trade liberalization: it is flexible enough to permit incremental reforms and to escape the current deadlock of a binary choice between fully enforcing antidumping regulations or rejecting them totally. Fourth, this approach prepares for a progressive shift from antidumping measures to safeguards, a move that seems desirable according to the GATT logic. Last but not least, it allows for unilateral enforcement—a powerful force for multilateral liberalization (indeed, reforming current antidumping enforcement would amount to serious trade liberalization).

## Trust Antitrust for Dumping Antidumping?

Antidumping is flourishing (table 1).<sup>3</sup> Between January 1994 and July 1995, the 160 new antidumping cases notified by 19 WTO members have led to 238 provisional or definitive antidumping measures (antidumping measures can be firm-specific, so that several measures may be thought necessary to end a case against one country). In June 1995, 805 antidumping measures related to cases initiated before 1994 were enforced.

More importantly, antidumping offices are growing in number. Since the late 1980s, the four major users of antidumping measures (Australia, Canada, the European Community, and the United States) have been joined by a dozen others (e.g., Argentina, Brazil, India, Mexico, and South Africa). Another wave of new users is expected in the Uruguay Round’s aftermath: as of mid-1996, there are 49 WTO members with notified antidumping regulations, and many more countries are busy preparing such regulations.

Antidumping is rapidly spreading: the four major OECD users represented 82 percent of the antidumping measures enforced in July 1995 but only 51 percent of the cases initiated in 1994-95. Less visible but closely related to antidumping are the many and varied safeguard measures

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2. The “translation” of the Uruguay Round antidumping agreement into national regulations illustrates how easily legal sophistication can be circumvented (Palmer 1995).

3. Table 1 covers all the cases initiated against other WTO members, but it may not cover all the cases initiated against non-WTO members, such as China and Russia.

**Table 1 Antidumping cases and measures by initiating country, January 1994-July 1995**

Initiating countries	New cases	Provisional measures <sup>a</sup>	Definitive duties	Price undertakings <sup>a</sup>	Measures in force <sup>b</sup>
Four major users					
Australia	6	5	2	1	86
Canada	9	2	13	1	91
European Union	37	15	21	1	178
United States	30	44	48	3	305
Total	82	66	84	6	660
Newcomers					
Argentina	6	6	6	2	3
Brazil	12	2	0	0	18
Chile	2	2	3	0	2
Colombia	1	0	1	0	6
Korea	3	7	3	0	6
India	9	3	0	0	5
Japan	0	0	0	0	2
Mexico	18	19	15	0	42
New Zealand	9	0	1	0	22
Peru	4	1	0	0	n.a.
South Africa	9	0	1	n.a.	n.a.
Singapore	2	2	0	0	0
Thailand	0	0	1	0	1
Turkey	2	0	11	0	38
Venezuela	1	2	2	0	n.a.
Total	78	44	44	2	145
Total, all countries listed	160	110	128	8	805
Four major users' share of total	51.3	60.0	65.6	75.0	82.0

n.a. = not available

a. The sum of this column can be larger than the figure in the new cases column because measures can be firm-specific. Cases against non-WTO members are not reported.

b. As of 30 June 1995.

Source: WTO Secretariat, *Focus*, 1995, No. 7, December, p. 10.

taken under provisions included in "hub and spokes" preferential trade agreements, provisions that are much looser than Article XIX conditions.<sup>4</sup>

This situation suggests conducting the following test of relevance: what would have been the impact of a GATT competition policy on the antidumping cases initiated between 1980 and 1989? Examining the EC and US case load provides two lessons: competition law would have considered acceptable almost all the dumping cases the antidumping offices investigated. In sharp contrast, it would have considered unacceptable almost all the antidumping measures taken during the period of observation because of their anticompetitive or even blatantly pro-cartel content.

4. For instance, the agreements between the European Community and the Central European countries introduce the concept of "serious disturbance" (which has no correspondent in the WTO framework) as a possible motive for taking safeguard measures.

In sum, the test of relevance suggests that the coexistence of competition law and current antidumping regulations would lead to conflicts, with the almost certain risk that one policy instrument would contradict the other.

### **Past Dumping: Few Competition Issues at Stake**

Economists believe there may be a case for antidumping in two circumstances: predatory pricing and strategic dumping.<sup>5</sup> A foreign predatory firm cuts its export prices in order to eliminate domestic competitors in the importing market, and once competitors have disappeared it recoups its losses by increasing its prices to some monopolistic level. In the case of strategic dumping, foreign firms use the closedness of their home markets to fully reap scale economies that enable them to sell at low prices in export markets. This “sanctuary” strategy puts domestic import-competing firms in a difficult situation: they can reach scale economies less easily (because the home markets of the foreign exporters are closed), and their capacity to compete with foreign firms in their own home markets may be endangered because they have to charge full-cost prices. In both cases, competition or trade policies of the exporter’s home country are the best instruments for action. In their absence, antidumping measures are at best (and only to the extent that they succeed in modifying the exporters’ home policy) a second-best instrument.

Do past dumping cases investigated by antidumping offices show signs of predatory pricing or of strategic dumping? In an overwhelmingly large number of cases, the answer is no.

Concerning predation, one must examine whether the alleged predators have met the minimum conditions that would qualify them as credible predators. Table 2 summarizes the results of two studies (Shin 1992; Bourgeois and Messerlin 1993) that have estimated the possibility of credible predation in EC and US dumping cases by using four criteria drawn from competition law enforcement:

- Were foreign exporters enjoying individual market shares large enough to make them potential predators in the importing market?
- Were domestic producers’ market shares small enough to prevent them from resisting foreign predators?
- Was the observed growth rate of import penetration large enough to suggest, when extrapolated for one or more years, a possible dominant position of the alleged dumping firm in the importing country, leading to possible predation?

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5. Deardorff (1989) and Willig (1991) provide excellent surveys of the literature on the economic theory of dumping and antidumping from the point of view of trade and industrial economists, respectively.

**Table 2 European Community and United States: antidumping cases exhibiting possibility of predation or strategic dumping, 1980-89<sup>a</sup>**

	European Community	United States
Predatory pricing		
Percentage of possible cases	2.5	5.7
Total number of cases with available information	281	282
Strategic dumping <sup>b</sup>		
Percentage of possible cases	9.4	12.6
Total number of cases with available information	385	451

a. All percentages are computed with respect to the corresponding total number of cases considered.

b. Cases involving countries accused of dumping and having a GDP equaling more than 15 percent of the GDP of the country using antidumping measures.

Sources: Shin (1992) for U.S. predation figures; Bourgeois and Messerlin (1993) for EC predation figures; author's computations.

- Was the number of alleged dumping foreign firms or of their origin countries large enough to exclude the risk of a collusion between these firms or these countries in the importing market?

Based on these criteria, the two studies have ruled out the possibility of predation in roughly 95 percent of the EC or US antidumping cases initiated during the 1980s. In other words, there was a mere *possibility* of predation for at most 6 percent of US antidumping cases and 2.5 percent of EC cases.

Determining the occurrence of strategic dumping also requires a minimum condition: import-competing firms should be sufficiently “disadvantaged,” in terms of both the relative size of accessible markets and scale economies, with respect to foreign dumpers operating from their sanctuary markets. This may take many forms; thus it is not possible to present a global test for the existence of strategic dumping, as was done for predation. However, for the sake of illustration, strategic dumping would seem unlikely if the exporter’s sanctuary market is small relative to the importing market. In this perspective, a crude test is to eliminate all antidumping cases where the exporters operate from a country (suspected to be a sanctuary) with a GDP equal to 15 percent or less of the importing country’s GDP.<sup>6</sup> As illustrated in table 2 (which assumes that the EC and the US antidumping offices did not see the US and EC markets, respectively, as sanctuaries in the 1980s), this crude criterion eliminates

6. This test is crude because it approximates the relative size of a product market by relative GDP size. As a counterexample, the Chinese beach slipper market (an EC antidumping case) may be large relative to that of the EC market. However, the list of products subject to EC and US antidumping cases suggests that such counterexamples are rare.

roughly 90 percent of the EC and US antidumping cases as possible cases of strategic dumping. In fact, this criterion leaves Japan as the sole country where there *might* be strategic dumping.

Going further requires a detailed analysis of specific antidumping cases. The studies that have done such analysis have shown no sign of strategic dumping in steel (Crandall 1993), semiconductors (Irwin 1995), or consumer electronics (Messerlin and Noguchi 1993). For instance, the last study examines antidumping cases on television sets, compact disc players, and photocopiers and shows that (1) Japanese firms were excluded from foreign markets to the same extent that US or EC firms were excluded from the Japanese market—implying that no groups of firms were disadvantaged in relative terms, (2) concentration ratios in terms of production were low in Japan—indeed, often lower than in the United States and much lower than in the European Community, and (3) EC or US complainants often owned subsidiaries in Japan—implying that these firms have an “effective” market access to this market.

### **Past Antidumping Measures: Profoundly Anticompetitive**

The last 20 years of enforcement have revealed how often antidumping regulations and measures have been intrinsically and deeply biased against competition and how often they have been used as devices for raising foreign rivals’ costs.

Examples abound, first in terms of antidumping provisions per se. For instance, an antidumping complaint can be initiated only if complainants represent a “major proportion of the domestic industry.” In an integrated world economy with global firms, “domestic” is a meaningless concept that antidumping offices have interpreted in totally opposite ways.

At one extreme, this concept has favored tiny firms to the detriment of large domestic firms following their comparative advantage, as best illustrated by the US 1990 flat-panel display (FPD) case. In this case, the petitioners were seven tiny firms, the last remaining US FPD producers, because the 15 largest US firms closed or sold their FPD plants during the 1980s for economically sound reasons. Antidumping duties imposed on FPDs generated high costs for US producers of laptops, to the point where some of them were induced to shift production capacities offshore.

At the other end of the spectrum, the “domestic” concept has nurtured highly discriminatory treatment of multinational firms. In the EC photocopier case, Xerox was considered an EC firm and Canon was not, although at the time of the complaint, both had their headquarters outside Europe (in the United States and in Japan, respectively), both were the major EC producers (with the same number of plants and almost the same output level, together accounting for 80 percent of the total EC production), and both were importing a large number of copiers from their Japanese subsidiaries.

Even more damaging, antidumping measures are heavily biased toward anticompetitive, or even pro-cartel, outcomes.<sup>7</sup> Undertakings (in the EU jargon) or withdrawals (in the US jargon) are private agreements on prices or quantities: up until the late 1980s, they had been used in 40 and 25 percent of the EC and US cases, respectively. Since the 1990s, two other instruments have taken the lead in eliminating competition: specific duties and a prohibition against absorbing antidumping duties. High specific duties act as minimum prices because they impose huge decreases in the exporter's home-market prices as a prerequisite for lowering prices in the importing market. Prohibiting the absorption of antidumping duties has a similar effect because it is conditioned on the absence of a complaint by domestic plaintiffs (thus, the alleged "dumpers" may absorb the antidumping duty only if no domestic plaintiff makes a complaint, a condition that allows an implicit price collusion led by domestic firms).

### Schizophrenic Symptoms

This evidence about past antidumping cases can lead to only one conclusion: antidumping regulations and measures create or sustain anticompetitive behavior that competition rules aim to destroy.

Indeed, this policy schizophrenia has created some interesting situations. In the late 1970s, the US Justice Department tried to stop antidumping measures in eight cases on competition grounds (Applebaum and Grace 1987). However, the best illustration is the 1986 case, *Matsushita vs. Zenith*. Zenith, a complainant in an antidumping case against televisions from Japan, lodged an antitrust complaint in an effort to use US competition law on predation as a substitute for antidumping regulations. The attempt failed, and the US Supreme Court ruling supported the contention, made above, that it is difficult to show that predation occurred using a competition law standard.

More recently, the emerging recognition of the profoundly anticompetitive aspects of antidumping measures has led to increased scrutiny of antidumping enforcement. In 1994 the US Federal Trade Commission (one of the US institutions in charge of competition issues) released a study by Morkre and Kelly showing that injury was small or negligible in a vast majority of antidumping cases, suggesting that antidumping measures were not appropriate.<sup>8</sup>

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7. Antidumping can be more than a pro-cartel device for domestic firms. There are cases where complainants and defendants in an initial antidumping case join forces against new entrants in subsequent antidumping cases. Scherer (1996) reports another possibility: that a mere threat of antidumping measures may generate a formal export (thus a *foreign*) cartel, as in the US antidumping case against Canadian exporters of potash.

8. In its own study (1995, 5.3), the US International Trade Commission (one of the two US authorities involved in the antidumping procedure) did not hesitate to mention the shift

In the European Union, the existence of “twin” antidumping and competition cases dealing with similar products and EU firms shows that in the few cases in which the Commission Directorate General in charge of competition has intervened (mostly in the chemical industry), competition decisions have aimed at undoing what antidumping cases have done—though with years of delay and huge difficulties in enforcing the decisions (Messerlin 1990). In all antidumping cases but one going to the courts, the European Court of Justice and its junior body, the Court of First Instance, have ruled on mere errors of law or fact in antidumping investigations.

The most recent example is the 1995 ball bearings case, which was repealed by the Court of First Instance because of factual errors, particularly in the crucial computations of market shares made by the EU antidumping office. Though these rulings can be bypassed by additional work of the antidumping office, they denote the Court’s increasing concerns about the negative aspects of antidumping enforcement and the emerging desire for increased scrutiny.

The one case where the Court of Justice ruling deals with the *substance* of competition and antidumping issues is the calcium metal case. In 1988 Péchiney, the French state-owned firm and the sole EC producer of calcium metal (and therefore considered as representing “a major proportion of the industry”), complained that imports from Russia and China were dumped, to the advantage of a small French firm, Extramet, which imported this calcium metal for producing goods used in the steel industry and which is Péchiney’s strongest competitor in these downstream markets. In March 1989 preliminary antidumping duties of 10.7 percent were imposed, and in September 1989 definitive antidumping duties of roughly 22 percent were imposed on imports from China and Russia.

At that time, Extramet had already brought the case to the French Competition Council on the grounds that Péchiney was refusing to sell. In March 1992, after a thorough investigation, the council concluded that Extramet was obliged to buy calcium metal from Russia and China because Péchiney refused to sell its own calcium metal to Extramet (Décision 92-D-26, 31 March 1992). The Appeals Court of Paris confirmed this conclusion in February 1993. In June 1992 the European Court of Justice repealed the antidumping duties on the grounds that the EC antidumping office did not perform the injury test correctly because it did not investigate whether Péchiney could have contributed to its own injury by refusing to sell to Extramet (Case C-358/89, ruling of 11 June 1992).<sup>9</sup>

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of attention “away from why foreign exporters engage in dumping to why US domestic industries seek enforcement in current US antidumping laws.”

9. Incidentally, refusal to sell is allowed in US antitrust laws except under specific circumstances. That is but one example of diverging competition laws, a point to be further examined below.

In November 1992, five months after the Court's ruling, the antidumping case was reopened. Despite Péchiney's admission (*Les Echos*, 29 November 1994) that since 1992 it had been "unable" to deliver the standard calcium metal Extramet needed (and that Chinese or Russian firms were readily able to produce and to deliver), the second antidumping case terminated in introduction of specific duties. These specific duties are so high (their *ad valorem* equivalent is 60 percent—six times the preliminary duties of the initial case) that they de facto allow Péchiney to set prices that would undoubtedly lead to an almost complete elimination of competition in EU calcium metal market and its downstream derivatives.

A year ago, following imposition of these antidumping measures, Extramet (now called IPS) lodged a new competition complaint in the EU Directorate General for Competition and a complaint against the current antidumping measures in the European Court of Justice. Both cases are pending. Meanwhile, the antidumping duties have been imposed. Taking into account Péchiney's huge market share in the calcium metal market and its downstream derivatives, one wonders whether, in its review of the case, the EU antidumping office will dare to maintain that competition in these markets is improving. Such a statement would amount to turning a blind eye to the 1992 ruling of the Court of Justice, which required an investigation of whether Péchiney's behavior contributed to its own injury.

## A Useful Lesson from History

One may argue that there is a counterexample to this schizophrenia: the Treaty of Rome is often said to have allowed the use of competition policy for solving dumping conflicts in the context of intra-EC trade during the transition period (1958-69).<sup>10</sup> This statement is not correct: Article 91, on intra-EC dumping, is included in the treaty chapter devoted to competition rules, but it never refers to Articles 85 and 86, the core of EU competition rules.<sup>11</sup> Indeed, Article 91:1 is based on GATT antidumping notions, including the fact that dumping could lead to injury and protective measures. Its remarkable conciseness (eight lines) makes Article 91:1 even more ambiguous than the GATT text: it defines none of the crucial terms it uses.

Why, then, was Article 91 invoked only 26 times between 1958 and 1969 (EC Commission 1972)? Why was dumping found in only 60 percent of these cases (a ratio lower than the one observed in extra-EC antidump-

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10. For a detailed review of the relationships between antidumping and competition issues in free trade agreements, see Marceau (1994).

11. It is most useful to remember that the Preamble of the Treaty of Rome referred to "balanced trade" and "fair competition" as goals of the Community.

ing)? Why did the dumping cease “voluntarily” as soon as the parties were informed that a finding of dumping had been made?<sup>12</sup> And why were almost all the many antidumping measures enforced against non-EC countries immediately repealed when these countries joined the European Community (and benefited from provisions similar to Article 91)? There are three possible answers to these questions—none of them related to competition policy.

First, Article 91:2 specifies the so-called “boomerang” provision: all goods exported from one member state to another shall be reimported by the origin member state “free of all duties, quantitative restrictions or measures having equivalent effect.” That is the well-known economic condition for eroding price discrimination: if price differences between two markets flow from a lack of arbitrage, one should ensure that this lack has not been generated by the exporting firms or country. Second, Article 91:1 perceives the EC Commission almost as a WTO dispute settlement panel: the Commission shall determine the conditions and details of the antidumping measures, but “it *shall* authorize the injured Member State to take protective measures.” The difference is that the Commission was requested to look at all cases and to look at them before antidumping measures are instituted, whereas WTO panels may look only at specific cases and only after measures have been taken (i.e., under greater public pressure). Last but not least, the pressure for taking intra-EU antidumping measures may have been reduced by the possibility of taking protectionist measures against *non*-EU firms. Intra-EU antidumping measures may simply have been less attractive to EU producers than extra-EU protection, which grants relief to the uncompetitive EU firms and rents to the competitive EU firms.

None of these points is directly related to competition policy: the “boomerang” provision is a pure trade device, mirroring the free movement of goods, labor, and capital underlying the European construction; the Commission’s role is WTO-consistent; and, of course, resorting to extra-EU protection is a mere matter of “protection deflection.”

It could be argued that by focusing on these aspects one risks missing the main points: that the same Directorate General in charge of intra-EU dumping is also in charge of competition and that it has adopted a competition-minded approach when solving intra-EU dumping cases. However, these points do not demonstrate the need for competition rules per se to address trade issues. Rather, they suggest that a competition-

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12. For details, see the EC Commission’s First Report on Competition (1972). Unfortunately, there is no public information on all these intra-EC cases, not even on the goods involved, making it impossible to check whether the intra-EC escape clause (Article 115) has been invoked after the “voluntary” stop of dumping. Ironically, the EC report explains the “voluntariness” of cessations of dumping by “moral suasion,” an argument often used today by East Asian countries but dismissed by US and EC officials.

friendly approach to dumping cases could well be channeled by appropriate trade measures.

## **Other Urgent Reasons for Introducing Competition Policy in the WTO? “TRAMS” Go Slow**

Demand for a WTO agreement on “trade-related antitrust measures” (TRAMs) does not stop at antidumping reform considerations. It is also based on arguments for two other reforms: the substitution of private for public barriers and regulatory reforms in services in the context of market opening. This section shows that these arguments are not robust. Private barriers are not likely to replace public barriers any time soon, and if they were in place, competition policy likely would look upon them more favorably than trade policy would, hence exacerbating the risk of a schizophrenic legal system. Regulatory reforms in services are by nature different from competition law, and confusing the former with the latter is likely to generate obstacles to market liberalization rather than facilitate it.

The rest of this section thus turns from the demands for TRAMs to ways to institute TRAMs provisions. It examines the possible content of a WTO agreement on TRAMs—only to find that it is likely to be almost empty, at least in the short to medium run—except, ironically, about antidumping.

### **Substitution between Private and Public Barriers: A Marginal Phenomenon for Some Time to Come**

It is often argued that, as tariffs are progressively reduced and nontariff barriers removed, global firms will substitute private barriers for the declining public trade barriers (see, e.g., Bourgeois and Matsushita 1995). Competition policy would thus be necessary to force foreign firms to lift their private barriers. The argument is attractive, but it is not as strong as it looks.

First, this argument overstates the role of private barriers because it exaggerates the extent of current liberalization and globalization. That the average tariff rate is low—3 to 4 percent on manufactured imports by OECD countries in the year 2000—is almost meaningless, for three reasons.

First, this figure is a severe underestimate because it is based on trade weights (high tariffs are weighted by low imports) and it ignores the existence of public nontariff barriers (border barriers, such as rules of origin, or nonborder barriers, such as domestic subsidies). Better estimates (based on nonweighted averages of tariffs, antidumping measures, and tariff equivalents of voluntary export restraints, or VERs) give a different

picture of the current protection level—close to 13 percent for the European Union.

Second, an *average* tariff misses the true nature of protection, which is to favor domestic industries behind high tariffs to the detriment of the other *domestic* industries, which get low or zero tariffs: by nature, protection is fundamentally a matter of dispersion rather than average.

Last but not least, erecting private barriers tends to be more costly for firms than public barriers because the latter are less open to cheating and are enforced by state power and tax money. That firms will always prefer new public barriers is easy to illustrate: the last two decades have witnessed shifts from tariffs to VERs, from VERs to antidumping, from antidumping to anticircumvention and local content, and from local content to distribution regulations. All these changes consist in substitutions of public barriers for other public barriers. Ironically, one of the best examples of such a chain of substitutions in Europe involves competition law: the block exemption to EU competition rules granted to the automobile distribution sector has been shown to be a potential substitute for declining trade barriers (Mattoo and Mavroidis 1995).

The second weakness of the argument is that it ignores the fact that the word “barriers” has different meanings for trade and competition policies—simply because these two policies have distinct goals and logic. Even if private barriers were important, competition policy is unlikely to treat them the same as trade policy does. Trade policy focuses on “official-made” barriers, on building or eliminating them. By contrast, competition policy looks at the impact of firms’ behavior on consumers: barriers are acceptable when needed for undertaking socially profitable activities. As a result, an open trade policy may not need to be coupled with a strict competition policy. Indeed, it may be combined with a lax competition policy, such as in the case of differentiated goods. In such a case, an open trade policy may generate sufficient competition between domestic and foreign firms that produce the different varieties of a given product, whereas a lax competition policy (favoring joint ventures, exclusive dealerships, etc.) may induce each firm to specialize in one variety or a subset of varieties in order to reap the necessary economies of scale.

In sum, differences between competition and trade policies about what constitutes a barrier are likely to be an endless source of disillusion and frustration.

## **Regulatory Reforms and Competition Policy: To Be Decoupled**

Trade liberalization in services faces a difficult challenge: the last 80 years of tight national regulations have left a web of intricate regulations tailor-made for domestic monopolists or oligopolists. It is thus necessary to define new rules favoring both the emergence and the survival of new competitors.

Proponents of TRAMs perceive these new rules as competition rules. But these reforms are different from competition rules in three ways: they are sector-specific, often generating ad hoc competition bodies and rules; they are transitory and likely to last only during the transition period necessary for shifting from the “state planned” situation to full competition; and they can be extremely intrusive, limiting competition from incumbents in order to protect earlier entrants, sometimes for a long period, as is best illustrated by many activities in the aviation or telecommunications sectors.<sup>13</sup>

In the long run, regulatory reforms should be dismantled and replaced by the perennial and horizontal approach of competition law, with its general procedures and rules. A deep, lengthy confusion between regulatory reforms and competition law will weaken both competition policy and the WTO: sectoral competition regulations and bodies will be detrimental to fostering a unifying role for central competition law and authorities, and they will be inconsistent with the implicit WTO approach of nondiscrimination among economic activities.

The April 1996 WTO draft for telecommunications offers an excellent illustration of these issues, with its competition-friendly wording, which may be used as window dressing for managed trade.<sup>14</sup> The draft refers to a notion of “major” supplier that does not correspond to any concept of competition policy (monopolizing or dominant firm). It defines major supplier as one with the “ability to materially affect the terms of participation (having regard to price and supply)” in the market of telecommunications services as a result of “control over essential facilities” or “use of its position in the market.” This definition is so lax that it could easily be used as a launching point for protectionism. The word “position” is neither defined (is it a market share or some technological advantage?) nor qualified (by “dominant” or “monopolizing”). Thus, any firm can be accused of affecting price and supply.

In addition, the draft contains “competitive safeguards” (a nicely ambiguous expression) against anticompetitive practices that could include engaging in “anticompetitive cross-subsidization” (without any reference to some critical level of subsidization, nor to injury and causal relationship), “using information obtained from competitors with anticompetitive results” (without defining “results”), and “not making available to other suppliers on a timely basis technical information about essential facilities and commercially relevant information” (without

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13. Moreover, there are strong differences among regulatory approaches, even between countries having allegedly the same views, such as the United States and Britain. For details, see Stelzer (1991).

14. What follows is based on the summary of the draft published by *Inside U.S. Trade* (26 April 1996). Similar conclusions are reached by Hoekman, Low, and Mavroidis (1996).

defining “timely”). Far from being competition rules, most of these points are traditional elements of market-access agreements (e.g., including language on subsidies and nondiscriminatory access to information) immersed in the notion of “fair” competition, with a strong risk of triggering safeguard measures.

## **TRAMs: Almost Devoid of Content, Except about Antidumping**

Turning to the supply side of the TRAMs question, one may ask what could be the points of convergence on competition policy among WTO members that do implement such a policy.<sup>15</sup> The OECD experience in these matters shows that there are few points of easy convergence. In many areas, only a sometimes uneasy cooperation between relevant authorities can be envisaged.

Why are there so many deep differences? The reasons are twofold. National competition laws have often been written under political pressures—they are often of a populist nature—and they are embedded in different economic, political, and philosophical backgrounds. And there is no strong consensus among economists about the net impact of many business practices on a market—in sharp contrast with the wide consensus about the net gains from freer trade.

Unresolved disagreements between OECD countries on competition matters begin with the coverage of competition law. For instance, EU competition laws deal with restrictive practices, dominant position, and mergers, just as US antitrust law does. But they also cover state monopolies and subsidies (state aids), while US antitrust law does not.

There are major differences among OECD countries concerning the substantive principles of competition policy, including within the European Union. Convergence can be deep in some domains, such as cartels, horizontal agreements, or vertical resale price maintenance. But it is far from being reached in other domains, such as monopolies, abuse of dominant position or prohibition of dominance principles, some aspects of merger review, or nonprice vertical restraints. Difficulties in competition law convergence are especially strong in domains crucial for assessing dumping: abuse or prohibition of dominance, mergers, and nonprice vertical restraints (a point related to the use of relationships between producers and distributors as a tool of strategic dumping for closing domestic markets).

Ironically, the two domains where there is a convergence in terms of competition provisions—cartel behavior and market definition—concern antidumping rather than dumping. In sum, antidumping as an industrial policy (Hindley and Messerlin 1996) raises no difficult problems from a

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15. This section draws on Messerlin (1996).

competition point of view; antidumping measures are clearly condemned in these few areas.

No wonder, then, that there are so many ways to conceive of the “internationalization” of competition policies—from the creation of a world competition authority to mere cooperative arrangements through “comity” principles, from harmonization of competition laws to the use of the WTO dispute settlement procedure under GATT Article XXIII (Scherer 1994; Hoekman and Mavroidis 1996; Graham and Richardson 1997).

This brief survey does not exhaust the list of questions to be solved before introducing TRAMs in the WTO. There are at least three other questions that deserve attention. First, competition cases often involve courts (in the United States, 90 percent of competition issues are dealt with by courts). Is it conceivable to subject rulings by the US Supreme Court or by the European Court of Justice to a WTO panel or Appellate Body review?

Second, will competition issues be a multilateral or a plurilateral matter? In the former case, every WTO member would have to introduce national competition laws and create competition authorities. It is hard to see the rationale of such a solution for small economies, for which the best competition policy possible is likely to be open trade *and* investment policies.<sup>16</sup> In the latter case, the most natural plurilateral framework could be provided by a trans-Atlantic free trade agenda extended to Japan—or by an APEC approach extended to the European Union.

Lastly, would competition law, procedures, and authorities run the risk of being ensnared in trade conflicts? (One should not forget that antidumping regulations are an offspring of competition laws of the late 19th century.) During the last decades, almost all competition officials have carefully resisted serious involvement in trade battles at the international or national level. But a few recent precedents may raise concerns. For instance, the 1995 US international antitrust enforcement guidelines spell out that the Department of Justice can take action against foreign anticompetitive practices that harm US exports, one among several worrisome “ambiguities” in the guidelines that could favor protectionist actions (Griffin 1994).

The latest Fuji-Kodak dispute also nurtures such worries. In May 1995 US producer Kodak lodged a complaint under section 301 of the US 1974 Trade Act challenging the Japanese competition authority’s rulings on vertical relations between Fuji (the largest Japanese producer of photographic goods, such as film and photographic paper) and its distributors. This case deserves two remarks here.

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16. For instance, see the thorough work done by the Hong Kong Consumer Council on supermarkets, domestic water heating, cooling fuel, or depositors (financial services), despite the absence of competition authorities “*stricto sensu*.”

First, there have been two antidumping cases against imports of color photo paper from Japan, both involving Kodak as a domestic complainant (de facto or de jure) and Fuji as a defendant: an EC case in 1983 and a US case 10 years later. The EC antidumping case ended with a price undertaking (a blatantly anticompetitive price alignment) imposed on Fuji, and the US case brought about record-high antidumping duties of 321 to 360 percent. As a result, the last decade of public (antidumping) barriers against Fuji's exports gave Kodak unimpeded access to the EC and US markets (roughly 900 million units of film products sold per year) and left Fuji with unimpeded access to the Japanese market (365 million units of film products sold per year): one wonders which firm is enjoying the largest and most protected "sanctuary" market.

The second remark concerns Fuji's vertical relations with its distributors in the Japanese market—the focus of the Fuji-Kodak dispute. From the outset, it should be remembered that "neither *keiretsu* generally, nor maintenance of traditional supplier patterns in the US or Japan, is likely to provide a basis for prosecution under US antitrust law" (Davidow 1994).<sup>17</sup> Keeping this in mind, the Fuji-Kodak case raises two questions: Could country A require that country B enforce its competition law, even if country A's competition rules are laxer than country B's rules? Could WTO panels oblige a country to enforce its own laws if they are neither discriminatory nor subject to WTO binding commitments? (So far, the answer to this last question is no, but a WTO move to "deeper" integration could possibly change it.) A positive answer to these two questions would have a host of perverse effects: regarding the first question, it would induce all countries to relax their competition laws; for the second, it would open wide the doors to disputes not only about "weak" competition enforcement, but also about "excessive" competition enforcement.

## A Conclusion for the Coming Decade

All this leads to an essential conclusion: for a long time to come, competition will be better enhanced by other economic instruments than by the introduction of competition law per se.

Two instruments are prime candidates for such a task. First, the 1996 Singapore ministerial conference should not be diverted from dealing with the hard core of remaining border protection—high tariffs and quantitative restrictions of all kinds. This task is essential, especially as it will help to erode or dismantle nonborder barriers. For instance, subsidies without the backing of tariffs are unlikely to constitute strong barriers

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17. In fact, the Fuji-Kodak case focuses more on wholesalers (*tokuyakuten*) than on retailers. Kubo (1995) presents interesting views on these complex issues of exclusive distribution in Japan.

because they are too expensive.<sup>18</sup> Second, as documented and analyzed by economic theory, private barriers are often based on investment strategies: investing in physical or human capital or in clientele can be a tool for deterring the entry of new competitors. Consequently, the most efficient instrument to enhance competition is a WTO agreement on investment.

## Reforming Antidumping

Reforming antidumping without waiting for the introduction of competition law in the WTO seems thus the least damaging solution for the decade to come. However, such a reform has an obvious first goal: to instill competition-friendly elements in antidumping enforcement, if only for testing how serious WTO members are when they talk about the prospect of global competition policy.

This reform may have a second goal: to ensure a progressive shift from antidumping measures to safeguards. This second goal is more debatable, and there may be difficulties with implementing it in national regulations. But the fact remains that current antidumping enforcement often works *de facto* as a safeguard procedure and that there will be a need for a safeguard clause for a long time to come: the WTO is not a supranational body but an institution where members are sovereign states, quick to bow to domestic interests facing import pressures.

These goals cannot be achieved by rewording the existing WTO antidumping agreement. Already, the legal community can almost instantaneously exploit the smallest bit of ambiguity of any word of it. A new wording is likely to be deflected from its initial purpose as soon as it is introduced. And it will not address the problem of a shift to safeguards (if there is a consensus on this point)—with language that is too loose, a new antidumping draft will simply mean maintaining the status quo; too strict, and it will trigger a rush of vested interests toward the safeguard instrument (which, at this stage, is unprepared to face such a tidal wave).

These goals cannot be achieved by the use of the “national interest” clause either. This clause makes it possible to take into account the interests of the domestic consumers in addition to those of the domestic producers, so that antidumping offices can terminate antidumping cases without invoking any measure if it is in the interest of the whole country. However, this clause has a poor record where it exists at all, as in the European Union, and this failure is easy to explain. More important, its ineffectiveness is intrinsic to the provision itself: the clause has to be loosely defined because it would otherwise stop all antidumping cases. Consequently,

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18. For instance, in the European Union, subsidies are highly correlated with high border barriers: they are concentrated in agriculture, services, and a very few manufacturing sectors, such as cars or textiles (Messerlin 1995).

the clause can be easily used in a protectionist way—for instance, as a justification of the “protection of the last domestic firm in the interest of domestic consumers.” Moreover, the clause comes too late in the antidumping procedure: it can only be invoked at the end of the investigation—after the existence of dumping margins and injuries has been shown and after antidumping measures have been proposed—that is, when protectionist pressures are at their peak. By the same token, the WTO dispute settlement procedure can offer only limited guarantees against antidumping misuse (Komuro 1995).

## **Quantitative Thresholds: the Key to Incremental Reforms**

An alternative approach is to reform antidumping by adding quantitative thresholds based on competition-oriented criteria to key provisions of the existing agreement. Such an approach is not unknown in the Uruguay Round antidumping agreement, nor in competition enforcement.<sup>19</sup> For instance, Article V:5 of the current agreement imposes a minimum limit on the “major proportion of the industry” by stating that “no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 percent of total production of the like product produced by the domestic industry.”

The advantages of an approach based on pro-competitive thresholds are manifold. First, it can be implemented rapidly because it does not require negotiations on a new text. It could be on the agenda of the antidumping review scheduled by the Uruguay Round for 1998.

Second, pro-competitive quantitative thresholds are, by their nature, equivalent to a “tariffication” process. They represent a concrete measurement of the level of protection that the country is ready to provide through antidumping enforcement. As they are easy to progressively modify, they fit well with the WTO negotiating process. Countries can start with lenient thresholds and make them stricter through successive negotiations. That allows the GATT machine to once again work toward freer trade—and not in the direction of more complex regulations, which always favor vested interests, as the previous GATT rounds on antidumping did.

Third, a threshold-based approach is very flexible. For instance, reaching the threshold of what would be considered the highest acceptable level of monopolization in the domestic industry could lead to two possible outcomes. Either the antidumping case could be automatically terminated,

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19. For instance, dominant position in EU competition enforcement is often assessed through a preliminary threshold of the firm’s market share: is its share larger than 40 percent? In US antitrust law, a “relevant market” is tested for by examining the estimated impact of successive small (5 percent) price increases of a firm’s product on the products of its competitors, a point mentioned below when examining possible thresholds for the concept of “like product.”

on the grounds that in such circumstances any antidumping measure would be the final blow to competition in the domestic market, or the case may proceed, but subject to stricter conditions or leading to measures more strictly defined. For instance, an option would be to use the system of stricter measures defined by the Uruguay Round safeguard agreement: measures should last only four years, be degressive, and be renewable only once.

Lastly, this approach is entirely based on thresholds to be implemented by the importing country (there is no requirement on the exporting country, except through WTO negotiations). That makes such an approach well-adapted to unilateral efforts: countries eager to make their own antidumping enforcement less protectionist could unilaterally introduce pro-competitive thresholds.

In sum, pro-competitive thresholds have the power to extract the antidumping issue from its current impasse. Today, a country faces the dilemma of fully enforcing the WTO antidumping code or not enforcing it at all. This binary choice induces most countries to implement it. And it makes reform of the code almost impossible. Quantitative thresholds introduce additional choices and make incremental reforms possible. The rest of the section illustrates this point by looking at possible thresholds for two crucial elements of antidumping enforcement—the major proportion of the domestic industry and the level of injury—and by estimating their effects on EC and US antidumping cases initiated between 1980 and 1989.<sup>20</sup>

### **Major Proportion of the Domestic Industry: Concentration Does Matter**

The notion of “major proportion of the domestic industry” should echo the concept of concentration in competition policy. But this is not now the case: a firm that is able to monopolize or abuse its dominant position is also eligible to be considered as constituting the major proportion of the industry. Almost 8 percent of the EC and US antidumping cases initiated during the 1980s have been lodged by the sole domestic producer of the product in question. Antidumping measures are likely to transform these sole producers into effective monopolists. Moreover, 2 to 4 percent of the EC and US cases involve one domestic firm and one foreign firm for the whole rest of the world—opening the possibility that antidumping measures are being used to monopolize entire world markets. And there are even more extreme cases—such as Rhône-Poulenc, the sole EC producer of coumarin, which almost simultaneously lodged antidumping complaints in Europe and in the United States against China.

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20. Because the following tests are based on official data, they are subject to the many biases against foreign producers embodied in antidumping procedures. That makes even more striking the results obtained.

With a competition-friendly approach, it makes sense to impose a maximum limit on what constitutes a major proportion of the industry: “major proportion” should not be synonymous with “entire industry.” That can be done by using one or several of the many alternative criteria available. What follows will focus on the criterion of global market share held by both the complainants and the defendants, simply because the data necessary for estimating the impact of this criterion on the EC and US cases initiated during the 1980s are available.<sup>21</sup> A few words and more limited tests are devoted to two alternative criteria.

Table 3 presents the estimated impact of the global market share criterion. Three thresholds are tested: that the global market share of the complainants and defendants is less than 95, 90, or 85 percent of the total domestic consumption of the importing country.

The impact of such thresholds on the EC and US antidumping cases would have been considerable. Only two-thirds (68.9 and 67.6 percent) of the EC and US cases initiated during the period would have passed the test of a global market share lower than 95 percent—a confirmation of the amazingly large anticompetitive bias of current antidumping enforcement. Only about 55 and 43 percent of the cases would have passed the threshold of 90 or 85 percent, respectively.

Any threshold raises two essential problems. First, it can be circumvented. For instance, domestic firms could delegate one of them to lodge the antidumping complaint, reducing ipso facto the global market share (although that would not have been possible in the 8 percent of cases initiated by sole domestic producers). However, one could find definitions that would be less easy to circumvent. For instance, global share could be calculated to include the domestic industry (complainants and noncomplainants) and defendants: such a definition makes sense because an

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21. EC data are based on official proceedings (with market shares always expressed in quantity terms). US data are provided by Morkre and Kelly (1994), with market shares expressed in quantities or in values. For data expressed in quantities, calculations are based on the assumption that dumped and domestic prices are equal. Most of the EC cases are “cumulated” (one case can deal with several countries): the 61 cases examined correspond to 168 noncumulated cases (cases on a country basis). In the US data set, most of the cases are on a country basis: there are 105 cases, corresponding to 150 noncumulated cases. Revenue losses are a function of the dumping margin and of the market shares of “dumping” firms (market shares are those observed before dumping is alleged to occur). As a result, the numbers in table 3 tend to overestimate the revenue losses of domestic firms in both countries because of the assumption of equal prices. This is even more true in the European Community because of the large portion of cumulated cases, in which all the alleged dumping countries are considered as one country. In other words, differences in information may explain most of the differences of magnitude between the EC and US injury tests presented in this chapter: in fact, US results are likely to be the closest to what computations based on full information would provide. A last remark: the differences between the total number of cases used in tables 2 and 3 are only due to the fact that the necessary information is not available for all 385 EC and all 451 US cases initiated between 1980 and 1989.

**Table 3 Estimated impact of quantitative thresholds in EC and US antidumping cases, 1980-89**  
(percentage of cases passing various thresholds of concentration and injury)<sup>a</sup>

Level of concentration: major proportion of the domestic industry	No threshold in terms of injury		Level of injury <sup>b</sup> based on set I <sup>c</sup> of elasticities				Level of injury <sup>b</sup> based on set II <sup>c</sup> of elasticities			
	EC	US	>5% EC	>5% US	>10% EC	>10% US	>5% EC	>5% US	>10% EC	>10% US
	No threshold imposed in terms of concentration	100.0	100.0	55.7	41.9	41.0	23.8	31.1	20.0	16.4
Thresholds expressed in terms of global market share of complainants and defendants										
share <95%	68.9	67.6	36.1	21.9	26.2	10.5	21.3	6.7	13.1	3.8
share <90%	55.7	55.2	29.5	16.2	19.7	6.7	14.8	3.8	8.2	1.9
share <85%	44.3	42.9	19.7	11.4	16.4	5.7	11.5	2.9	4.9	1.0
Thresholds expressed in terms of Hirschman- Herfindahl index of complainants and defendants										
index <0.27	90.2	84.8	49.2	33.3	37.7	19.0	29.5	15.2	16.4	8.6
index <0.18	77.0	69.5	45.9	21.9	36.1	12.4	27.9	10.5	14.8	6.7

a. For information on actual numbers of cases used to compute these percentages, see note 21.

b. Measured as revenue losses by domestic firms, in percent of their total revenues.

c. See text for the summary of the differences in terms of elasticities between the sets.

Sources: Morkre and Kelly (1994); EC Official Journal; COMPAS model; author's computations.

antidumping measure would protect all the domestic producers, independent of whether they have been plaintiffs or not. The global market share criterion could also be circumvented by a firm's lodging a complaint for each alleged dumping country. Imposing a time constraint—for example, requesting that the global market share be based on all the countries involved in cases dealing with the product in question and initiated during the last five years—would almost completely solve this problem. In sum, the extent to which a threshold can be circumvented largely reflects the countries' willingness to control antidumping.

The second problem with thresholds is the "competition content" of the criterion to be chosen. For instance, it can be argued that the global market share criterion has a limited content in terms of competition: if there are many firms and countries involved, antidumping measures might not be so detrimental to competition. Indeed, it would probably be better to base threshold criteria on individual firms' parameters. A first option would be a threshold on the market share of the largest firm(s) or complainant(s)—for instance, by imposing stricter constraints on antidumping cases where a plaintiff has a dominant position. Another option would be a threshold on the degree of concentration (measured by the Hirschman-Herfindahl index) of the whole market in question.

Data available in the official proceedings allow a test of the threshold only in terms of concentration—although, as data are incomplete, the tests presented are biased toward systematic underestimates.<sup>22</sup> Two alternatives are tested in table 3: the Hirschman-Herfindahl index, based on the total domestic consumption of the importing country, should be smaller than 0.18 (a frequent benchmark in competition enforcement), or it should be smaller than 0.27 (though merely 50 percent higher than the previous one, this threshold may generate a welfare loss 250 percent higher than the loss associated with the 0.18 threshold). Despite the biases due to available data, 10 to 15 percent of the cases do not pass the test of the 0.27 threshold, and 23 to 30 percent of the cases do not pass the test of the 0.18 threshold.

## **Injury: Preparing a Shift from Antidumping to Safeguards**

Another crucial element in antidumping enforcement is injury. As discussed above, injury can be seen as arising strictly from predation or

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22. The Hirschman-Herfindahl index has been estimated by the following formula:  $HI = (PHx) + (PHd) + (PHw)$ , where  $HI$  is the Herfindahl index shown in table 3,  $PHx$  the square of the average market share of the sales of the allegedly dumping firms times the number of these firms,  $PHd$  is the square of the average market share of the sales of the domestic firms times the number of these firms, and  $PHw$  is the Herfindahl index for the foreign nondumping firms. Table 3 results assume that  $PHw$  is equal to 0 (its lowest possible value)—hence, all the three proxies are systematic underestimates.

strategic monopolizing. The studies summarized in table 2 are based on pro-competitive thresholds: very few antidumping cases would have passed them.

The injury test could have another dimension—probably more important in the real world: antidumping works *de facto* as a safeguard, despite the fact that it cannot fulfill this role correctly. This is because it dodges the issue of a transitory loss of competitive edge behind the charge of “unfair” competition. Also, it looks narrowly at prices and costs instead of providing the broad perspective required by an economically sound and politically acceptable safeguard provision. As a result, it is likely to protect the wrong firms. And the anticompetitive nature of many antidumping measures eliminates the hope of restoring the competitive edge of domestic firms once they have been protected.

There are thus several reasons to favor a shift from antidumping measures to safeguards. That should be done in a progressive way because antidumping and safeguards are substitutable instruments in the same “hydraulic” system of WTO-based contingent protection (Schott 1994). There would be no point in reinforcing disciplines on antidumping while shifting to looser safeguard disciplines. This problem is serious, especially because the Uruguay Round safeguard agreement has weakened Article XIX with respect to conditions for initiating cases, even though it may have strengthened disciplines in terms of measures to be taken. In sum, a complete shift from antidumping to safeguards will require more discussions among WTO members—first in order to reach a consensus, then to do a thorough review of the existing safeguard agreement. These issues are beyond the scope of this chapter.

Leaving aside these systemic WTO problems, it makes sense to introduce into current antidumping enforcement a threshold criterion that echoes safeguard concerns—namely, the revenue losses of domestic firms facing a surge of “dumped” imports. Indeed, such a criterion has been used by the US International Trade Commission and by the FTC in its study on US antidumping enforcement (Morkre and Kelly 1994).

Table 3 presents the estimated revenue losses of the domestic firms involved in the 1980-89 EC and US antidumping cases. These estimates are based on two alternative sets of elasticities of demand, supply, and substitution between foreign and domestic goods. Set I tends to amplify the revenue losses of domestic firms, whereas set II reflects what economists would consider as more plausible losses for these firms.<sup>23</sup> For each set of elasticities, two alternative thresholds have been envisaged: injury was deemed to exist if revenue losses were higher than 5 percent of initial revenues or if they were higher than 10 percent. The first threshold could

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23. All the estimates have been obtained with the COMPAS model (Francois and Hall 1993). In the US cases, COMPAS-based results are very close to those provided by table 4.2 of Morkre and Kelly’s paper, which uses a more refined approach.

be seen as reflecting the antidumping notion of “material” injury, whereas the second threshold would be more reflective of the safeguard notion of “serious” injury.

What is interesting in table 3 is the general perspective rather than the detailed results. A good sense of this perspective can be obtained by reading the table from upper left to lower right. With no threshold in terms of concentration, stricter injury tests would eliminate more antidumping cases or at least subject them to stricter procedures or to more limited measures—from 44 percent to almost 90 percent. Combining the level of injury thresholds with those for global market share extends the elimination of cases from one-third to almost all of them. Similar results are obtained when the concentration threshold is expressed in terms of Hirschman-Herfindahl (despite the poorer quality of available data).

In sum, combining concentration and injury thresholds would permit an almost perfect progressivity for reining in antidumping enforcement. That pro-competitive thresholds allow a *continuum* of solutions to the problems raised by antidumping enforcement is crucial because it makes such an approach well adapted to WTO deals.

### Limits of the Approach

Other quantitative thresholds could easily be envisaged.<sup>24</sup> The most obvious candidate from a competition point of view is the “like-product” notion, which should echo the key concept of relevant market used by competition authorities. However, the “fast track” nature of antidumping (compared with antitrust) and of the international (hence very conflictual) environment complicates the issue.

One option would be for antidumping offices to adopt the definition of the like product used in current antitrust cases (a substantial number of antidumping cases deal with products that have been subject to antitrust enforcement). Another option would be to adopt crude thresholds aimed at eliminating the most outrageous cases: for instance, products with price differences of more than a factor of five could not be considered as alike. (In the EC photocopier case, such a criterion would have made the definition of like product in the antidumping case very similar to the definition used in the competition case.)

However, multiplying thresholds reveals the limits of the approach suggested. First, too many thresholds raise the possibility of perverse interactions. For instance, a concentration threshold may induce antidumping offices to adopt laxer definitions of like product in order to escape the concentration constraint. However, interactions may be complex enough

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24. For an extensive list of other competition-friendly changes, see Scherer (1994) or Wood (1996). However, most of these changes would require modifications in the current antidumping code.

so that their net effect may often be small: for example, plaintiffs may not be interested in pushing for a case if the like-product definition is too lax because that may also limit the benefits they expect from protection (protecting pocket lighters *and* matches will provide fewer benefits from protection to the producer of lighters than the protection of lighters alone).

Second, defining many thresholds can lead to the very thing one aimed at avoiding: rewriting the antidumping agreement. For instance, various thresholds on the proportion-of-industry criterion could be sensitive to the definition of the domestic industry and require a new definition of this concept. (Ideally, the domestic industry should be defined as including *all* the plants located in the investigating country: that would eliminate cases in which domestic but foreign-owned producers have been deliberately excluded from antidumping investigations for making the initiation of the case possible, as illustrated above by the photocopier case.)

There is no way to once and for all stop vested interests from recapturing antidumping regulations by circumventing imposed thresholds. The main riposte is likely to be in the fact that quantitative thresholds could be subject to progressive tightening through regular reviews and the WTO liberalization negotiating machine in future rounds.

## **Conclusion: More Unilateralism Is Needed**

This paper examines what could be done in the field of competition and antidumping in the coming decade. It argues that the world could be made much more competition-friendly in the years to come by dismantling still-substantial trade barriers, by adopting WTO rules on investment, and by favoring transitory regulatory reforms making market access easier in services than it would by introducing competition law and policy *per se* in the WTO. The costs of a premature introduction of competition law in the WTO are high, especially if this introduction is based on the “trading words” approach that has often characterized recent WTO negotiations.

This conclusion does not mean that nothing should be done. On the contrary, the chapter shows an urgent need to begin reform of antidumping. The fact that trade coverage of antidumping is much larger than is often thought would make the status quo deadly for the WTO. For reforming antidumping, the chapter suggests an approach based on pro-competitive quantitative thresholds that has two main merits: it can be implemented rapidly, and it is flexible enough to allow incremental antidumping reform. In the WTO context, this incremental aspect is key: it opens the door to negotiated trade-offs between progressive reductions of trade barriers by alleged “dumpers” and a progressive recontrol of antidumping enforcement by “antidumpers.”

There is also work to be done on the competition side in order to prepare for the introduction of competition law and policy in world trade

in the long run. At the international level, an excellent and rapid start would be to implement a suggestion made by Scherer (1996): establish a plurilateral committee of competition (not trade) officials that would publish informative reports on alleged border-spanning restrictive practices. The two qualifications of plurilateral and informative are essential. The plurilateral limit is the logical consequence of the fact that, for reasons evoked here, the WTO is not the best place for such a committee. The informative limit reflects a need for the freedom to obtain correct assessments of the issues at stake and of their magnitudes.

The intrinsic limits of the reforms proposed suggest adding two initiatives based on unilateral actions. First, the powers of the national competition authorities could be extended, in particular by eliminating, *de facto* then *de jure*, pro-cartel provisions in *national* competition law, where they exist, as in the US Webb-Pomerene Act on export cartels.

Second, current antidumping procedures are not a judicial process—only because of too-short time constraints. A *national* appeals procedure for antidumping cases raising clear competition issues could instill this judicial aspect, which is at the heart of competition policy. The EC calcium metal case suggests that antidumping cases repealed by a national supreme court (in this case, the European Court of Justice) should at a minimum be reinvestigated by an agency other than the antidumping office. There are several options for such an appeals agency: it could be an *ad hoc* structure appointed by the executive (the Council of Ministers in the European Union), or a designated court, or the national competition authority itself.

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# Comment

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Geza Feketekuty

Richard Snape and Patrick Messerlin have made an important contribution to the debate on some long-term issues facing the WTO. Before making specific comments on their papers, let me make some general comments on both the long-term challenges facing the global trading system and the more immediate challenges facing ministers at the WTO ministerial meeting in December 1996. These comments will both add another dimension to a discussion of the two authors' work and put my more specific comments into a broader context.

## Challenge of Regional Free Trade Agreements

One of the important challenges facing ministers is the need for a long-term vision to ensure that the WTO remains a vital, dynamic organization. It is often observed that the Uruguay Round was a major undertaking and that the important results from these negotiations will require a continuing, major implementation effort that is likely to absorb much of the available staff resources in trade ministries. Some observers therefore argue that the WTO should focus more on implementation than on the immediate future and that ministers should also focus largely on implementation issues and leave new challenges aside for the time being. But this point of view fails to take into account either the political dynamics of trade policy or the growing pull of regional free trade agreements, which have benefited from daring visions and aggressive agendas cover-

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ing a broad range of issues with which business groups and nongovernmental organizations were concerned.

Much concern has been expressed in recent years about the growing importance of regional free trade agreements. These agreements need not have a negative impact on the global system and the WTO, and indeed they could provide a major boost for the WTO and global trade liberalization, provided the WTO is prepared to build on the challenging visions and work programs being hammered out in the regions.

Understanding why regional agreements have grown so popular will be crucial in shaping a long-term strategy for the WTO. If the WTO remains focused on implementation, which is largely regarded as a technical issue, and the regional agreements embark on challenging negotiations based on history-shaping visions, the WTO will find that political capital and human resources will increasingly migrate to the regional level.

The popularity of regional agreements represents a major shift toward negotiations organized around a free trade paradigm. In such negotiations, reciprocity is measured in terms of the time over which barriers are to be phased out rather than in terms of percentage cuts from existing levels. Negotiations of rules under this new paradigm focus first and foremost on what is necessary to support trade among countries in the absence of trade barriers and only secondarily on rules for the transition period and the pace at which individual countries can migrate to the free trade-oriented rules.

This paradigm contradicts conventional political wisdom, which says that it is better to challenge entrenched interests on the basis of incremental negotiations than to confront them with the prospective elimination of all protection. The political advantage of the new approach is that it reduces the free-rider and reciprocity problem by committing all participating countries to the ultimate achievement of a level playing field based on zero tariffs and a common set of rules. The free-rider and reciprocity issues thus become issues of transition rather than substance that concern the time required to implement common commitments rather than issues over the legitimacy of different tariff levels and rules. Moreover, the new paradigm gives enterprises more information about the future and encourages them to make the necessary adjustments. This new paradigm is also more popular with many enterprises because it has proved easier to inject new issues into negotiations organized around a free trade paradigm.

It has generally been assumed that the broader reach of regional negotiations has been due to the more limited number of participants and the greater homogeneity of such countries. This is undoubtedly one reason for the broader reach of regional negotiations but does not explain the equally broad scope of negotiations among more heterogeneous countries. Indeed, many countries that have objected vigorously to the discussion

of new issues in the WTO have agreed to do so in a regional context. This leads to the inevitable conclusion that the crucial difference is the economic and political importance of the total package.

## Looking Beyond Barriers at the Frontier

It has become increasingly obvious that the WTO needs a new, overarching principle for evaluating and guiding negotiations carried out under its aegis. For some time, negotiations carried out in the GATT have gone beyond the elimination of barriers at the border and have focused on such nontariff issues as government procurement rules, standards, subsidies, intellectual property, and investment and other regulations in services. All such negotiations, however, have been justified as efforts to reduce or eliminate nontariff barriers or distortions of trade and have been limited to the “trade” aspects of the issue.

It has become increasingly clear that this exclusive focus on trade barriers is inadequate and ultimately does not provide a satisfactory standard for evaluating the contribution such negotiations can make to the functioning of more globally integrated markets. In a globalized economy, the distinctions between trade and investment, between domestic and external economic instruments, and between domestic and foreign actors are increasingly difficult to make. Even where these distinctions can be still be made in an operationally meaningful way, they no longer serve the policy goal of enhancing economic growth and efficiency, nor the business goal of achieving a more efficient and effective global distribution of production activities.

Robert Lawrence proposed that the overarching goal of trade negotiations in the future should be to ensure the global contestability of national markets. In a subsequent report to the OECD trade ministers, the OECD Trade Committee proposed that future negotiations in the WTO seek to make national markets more open to global competition. In the appendix of its report, the committee tied this recommendation to the global contestability concept.

Adoption of “global contestability” or “global competition” as a guiding principle for future negotiations in the WTO would have major implications with respect to the four issues Snape and Messerlin cover: trade in services, investment, competition policies, and antidumping remedies. These implications will be addressed in more detail below.

At this stage, it should be noted that adoption of these concepts as overarching goals would put competition policy at the heart of future trade policy debates and negotiations. Instead of asking whether a particular practice distorts trade, policymakers would have to ask whether such a practice distorts global competitive access to a national market or the global contestability of that market.

Despite this link with competition policy, it is important to note likely differences between domestic competition policies and global negotiations. Global talks are aimed at opening national markets to global competition. Domestic competition policy takes the policy environment as given and seeks to curb anticompetitive business practices that would harm consumers. Under the doctrine of “sovereign compulsion,” domestic competition policy defers to domestic regulatory and industrial policies, which may limit competition. Such policies, as well as those that fail to curb anticompetitive practices, would become the principal targets of an international negotiation.

Adoption of a “global competition” or “global contestability” goal would inevitably broaden the range of issues to be negotiated in the WTO. This would meet an increasingly important business community objective—namely, one-stop shopping for policies affecting the global operations of their firms. Many global business managers are increasingly seeking greater coherence in the policies that affect their businesses. As one businessperson has said repeatedly, “After governments have taken our business apart through uncoordinated policy interventions and international negotiations, we have the difficult job of putting a coherent business together again.”

## **Domestic Regulatory Reform and Trade Liberalization**

Many, if not most, trade disputes in recent years have focused on domestic regulatory issues. It has become increasingly clear that domestic regulation has a major impact on the openness of national markets to global competition, as well as on the ability of an economy to adjust and grow. Domestic regulatory reform has therefore become a crucial issue in trade liberalization efforts.

In recognition of the importance of domestic regulatory reform to both domestic growth and trade relations, the Japanese government in 1996 proposed that the OECD study regulatory reform and its relationship to both domestic growth and the openness of a market to global competition. The Japanese government suggested that the OECD explore the feasibility of distilling principles to guide members’ internal efforts to bring their regulations in line with global economic and technological changes. OECD ministers earlier this year agreed to the Japanese recommendations and launched a coordinated effort involving many of its policy committees.

A few observations can be made with respect to this initiative. First, developing a set of principles for domestic regulation would fit into and support negotiations carried out under a new “global competition” or “global contestability” standard. Second, any progress in developing an international consensus on the characteristics of economically efficient reg-

ulation could inform and facilitate GATS negotiations on telecommunications, financial services, maritime transportation, and professional services.

## **The WTO Ministerial in Singapore**

Trade ministers will convene in December 1996 in Singapore for the first WTO ministerial meeting. Both the priority given to Uruguay Round implementation issues and the short time remaining preclude major decisions on a long-term vision for the global trading system or on the content and direction of future negotiations. Nevertheless, the ministers need to make decisions on services negotiations that are left over from the Uruguay Round and on a work program leading to future decisions on a long-term vision and negotiating program.

The immediate tasks facing ministers at Singapore in the four areas Snape and Messerlin cover are services, investment, competition policy, and antidumping rules.

### **Services**

In services, ministers will have to decide how to complete the unfinished negotiations in financial services, telecommunications, maritime transport, and labor mobility. There is likely to be a great deal of hand wringing about the failure to complete the negotiations and the need to set new target dates for their completion. What ministers should do is recognize, first, that each of these negotiations in effect is about the creation of a global regulatory regime in a key policy area that cannot be accomplished overnight and, second, that the application of MFN makes it difficult to carry out the necessary regulatory reforms piecemeal.

The unconditional application of MFN to trade in services was a mistake based on an inadequate understanding of the difference between a tariff and regulations that determine a market structure. An MFN obligation to treat enterprises from all countries alike makes sense only to the extent that the countries involved agree on whether the market should be structured as a competitive market, as a set of bilateral arrangements between national monopolies, or as a form of controlled competition under a common set of rules. In an ideal world, ministers would recognize that they had made a mistake and either decide to stick to MFN and provide for the time necessary to negotiate a universally applicable, global regulatory regime for each services sector or decide to adopt a conditional form of MFN that would require countries to give MFN status only to countries that accept a common market structure in their regulations.

### **Investment**

In investment, the ministers should initiate a work program on investment that moves the WTO from the purely trade-related investment issues

covered in the Uruguay Round's TRIMs agreement to a broader discussion of all aspects of international investment. The TRIMs agreement calls for such broader discussions in three years. Ministers should decide to start the process now and thus provide a global venue for discussing investment issues while the OECD and regional negotiating forums are hammering out new regimes in this area.

## **Competition Policy**

In competition policy, the task is to decide how to resume global discussions. This important topic is not really a new issue but was the subject of extended treatment in the original ITO Charter, extended discussions in the early history of the GATT, and negotiations in the UN Conference on Trade and Development (UNCTAD). In essence, the US decision to raise a number of issues related to the Fuji film case in the WTO has already injected the issue into the WTO. This should be followed by a more general discussion of policy issues that have been at the heart of many recent trade disputes.

## **Antidumping**

In antidumping, the question is whether a basis can be found for reopening a discussion on a subject that was one of the more sensitive and hotly contested in the Uruguay Round.

## **Comments on "Advancing Services Negotiations"**

It follows from the discussion above that I do not share Richard Snape's surprise that the services negotiations could not be completed within the tight deadlines provided, nor do I agree that countries' ability to take exceptions from the MFN obligation was a key problem. On the contrary, given their scope, the failure to complete the negotiations should have been expected, and the problem with respect to the MFN provision is not that it allowed for exceptions but rather that it did not provide for conditional MFN among countries that were willing to subscribe to a compatible regulatory regime. Most countries that have attempted to reform their domestic regulations in the areas covered by the negotiations took more than 10 years to accomplish that feat, and they should certainly not be surprised that the global process will take more than 18 months. That process would be much simpler if the GATS provisions allowed for a conditional MFN agreement among countries not belonging to a regional

free trade area; this would allow countries that now share a compatible regulatory regime to open up competition more widely with each other.

When evaluating the results and prospects of negotiations on trade in services, it is always important to remember that services negotiations are all about domestic regulations, and negotiations about domestic regulations are bound to be more difficult than negotiations on tariffs. Second, services negotiations are inevitably about regulations governing domestic competition in a particular sector as well as about trade, and the two issues cannot be divorced. The challenge is to determine which regulations need to be changed in order to provide a coherent and rational basis for international competition, and that is bound to be no less difficult than passing domestic legislation regulating key sectors of the economy.

### **Comments on “Competition Policy and Antidumping Reform”**

Patrick Messerlin is right in saying that negotiation on competition policy issues will be difficult, but he seriously underestimates the importance of the issue, both as a key source of major trade disputes and as a fundamental architectural issue for the coherence and legitimacy of global trade rules. What good are negotiations to remove trade barriers if countries let their firms substitute private barriers for the public barriers that are removed?

Messerlin’s proposals with respect to the reform of the Antidumping Code would be more credible if he were willing to recognize the two-sided nature of the problem. Moreover, a detached analysis of both sides of the issue would provide a more promising basis for developing the political consensus necessary for reform. In most cases, dumping presupposes some form of protection in the exporting firm’s home market because in the absence of such barriers the dumped goods could be dumped back into the exporter’s home market. One needs to ask, if the exporting country is globally competitive, why should it hang on to its protection? Is it economically efficient and welfare-enhancing from a global point of view to allow exporting firms in such countries to collect rents? There is no doubt that the existing antidumping rules allow the imposition of abusive remedies, but at the same time current trade rules allow exporting countries to protect their markets long after it is no longer economically justifiable. One reform of the code could be to disallow antidumping duties where the dumped products can be dumped back into the home market.

# Comment

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Taeho Bark

I would like to focus my comments on the papers by Graham and by Snape and Bosworth, which are quite closely related. Let me begin with the Snape and Bosworth paper on services negotiations. My comments on this topic are in two parts, starting with general comments and proceeding to a few specific ones.

First, it is important to note that, in addition to the poor liberalization performance resulting from the services negotiations, implementation of notification requirements in the services area did not make much progress either. In fact, according to WTO reports, notifications of both existing recognition measures and new or revised laws, regulations, or administrative guidelines had not been received by a single member as of the end of 1995. Furthermore, not many members had established inquiry points to provide specific information concerning services trade, as required by GATS Article III. This inaction indicates that there are serious problems in providing transparency in the services trade area, and this will make future negotiations more difficult.

Second, a number of horizontal disciplines are currently absent in the GATS. Namely, the GATS does not extend its obligations to government procurement of services. The GATS also does not impose general discipline on subsidy practices. Furthermore, Article X of the GATS, which allows for possible industry-specific safeguard actions, contains almost nothing calling for further negotiations on this subject. This implies that more work will have to be done to broaden the coverage of the GATS in both sectors and disciplines.

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Let me now turn to a point that, as pointed out by the authors, seems to be the most serious problem in the structure of the GATS. Within the GATS, national treatment and market access are not general but rather specific obligations to be negotiated with respect to all scheduled services and all forms of barriers. Furthermore, the GATS takes a hybrid approach to scheduling commitments, combining positive and negative lists. The authors argued that a purely negative list specifying sectors exempt from specific commitments, as was adopted for MFN exemptions, would have increased transparency and facilitated future liberalization. However, the authors did not explain why this hybrid approach had been adopted in the first place.

There were serious disputes regarding this issue between developing and developed countries during the Uruguay Round negotiations. I myself had opportunities to observe the actual debate when I was visiting Geneva to participate in the negotiating group on services from late 1989 into the early 1990s. The initial draft of the general agreement clarified both market access and national treatment as being basic obligations. But later, they were changed to specific commitments. Developing countries argued that trade in services was a new concept, and therefore they could not accept the principles of market access and national treatment as basic obligations.

In any event, based on the Uruguay Round experience, we cannot guarantee that a negative-list approach can be applied to these principles in the future. One can continue to expect severe resistance from developing countries, particularly because they don't believe they have comparative advantages in many service sectors.

I wish the authors had addressed in more detail ways to overcome difficulties in sectoral trade-offs in the services negotiations. It would have been useful to emphasize that services are often used as production inputs in manufacturing as well as other sectors. To improve the efficiency of the whole economy, particularly of developing countries, it is important to enhance international competitiveness of various services sectors. In this regard, simultaneous negotiations in all services sectors, coupled with talks in manufacturing sectors, would provide a better opportunity for developing-country participation as well as sectoral trade-offs in the services negotiations.

I agree that it would be a good idea to focus a services agreement solely on cross-border trade, with separate negotiations and agreements on investment, movement of natural persons, and most aspects of competition policy. Snape pointed out that a similar approach can be found in the NAFTA and the Australia-New Zealand CER. However, we can also find a similar approach to trade liberalization in the OECD's Invisibles Code, which mainly covers cross-border services trade, while foreign direct investment is covered by the Capital Movements Code.

Let me add a few words on the movement of natural persons. Talks on this topic should be divided into two categories: movement of individu-

als as cross-border service suppliers and movement of people who are associated with a commercial presence, such as foreign direct investment. The first category of labor movement could be included in the services agreement on cross-border trade, while the second category of labor movement should belong to the agreement on investment. I will come back to this point later.

Regarding the role of regional arrangements in promoting services liberalization, I am less optimistic than the authors about progress in the APEC region. Judging by the individual action plans recently submitted by APEC members, not much in the way of substantive commitments have been made in the services area. Furthermore, an empirical exercise done by Hoekman and Primo Braga found that East Asian developing countries did not significantly differentiate themselves from the rest of the developing world in services liberalization. At this stage, we simply cannot tell how much it is reasonable to expect out of APEC in facilitating multilateral liberalization of services trade.

Finally, I have a few specific questions for the authors. What do they have in mind when they mention trade-restricting measures in the services trade that go beyond individual sectors? And why do the authors suggest a plurilateral instead of a multilateral agreement on investment in the WTO when cross-border trade and commercial presence are to be separated in the services area?

If the Multilateral Agreement on Investment (MAI) under negotiation in the OECD is completed in 1997, there are bound to be immediate conflicts between the services aspects of the MAI and the investment aspects of the GATS. In particular, commitments to the MFN principle mean that in specific service sectors, non-MAI member countries could be eligible to receive the same treatment as MAI signatories. This may cause OECD negotiators to seek conditional MFN in the MAI to prevent free riding. I would have liked the authors to address what should be done in this situation.

My comments on Graham's paper on investment negotiations will be very brief since I share most of the views presented there. Let me start with the idea of the plurilateral agreement on investment at the WTO. I would ask, which type of agreement is preferable: a multilateral agreement on investment in the WTO, with some flexibility regarding rights and obligations but broad membership, or a plurilateral agreement with higher standards but more limited membership? Based on the flaws of the OECD's MAI pointed out by Graham, I find it difficult to judge which approach is better for strengthening the multilateral system.

The two questions raised above are again pertinent. Should movement of natural persons be dealt with in an agreement on investment? And what should be done to overcome conflicts that might occur between the services aspects of the OECD MAI and the investment aspects of the WTO GATS?

My next comment concerns the behavior of multinational enterprises: this must be dealt with in order to encourage key developing countries to participate in the investment negotiations. The question is whether codes of conduct, which developed countries would strongly oppose, can legally be incorporated.

I would like to reiterate my own suggestion on the investment negotiations at the WTO, which is slightly different from what Graham proposes. WTO members should pursue an Agreement on Direct Investment (ADI), but only under the following conditions: that the commercial presence and movement of those associated with direct investment in the GATS and TRIMs be merged with the ADI.

A few words on the "new issues": one must question whether the nascent WTO can manage a large agenda of new issues and whether it has the necessary expertise and resources to cover them. The WTO is primarily a negotiating body. However, extensive analytical research is a prerequisite to negotiations on these issues, and the WTO is not equipped to perform it. The members have to take this limitation into account and set realistic priorities at the Singapore ministerial.

# Comment

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R. Michael Gadbaw

When I first started studying the GATT in Geneva under Olivier Long, I came across the fact that the United States signed the GATT on my birthday in 1947. This obscure fact is relevant here because it has always given me a point of reference. As the GATT saw the ripe age of 50 coming over the horizon, it had a perfectly understandable mid-life crisis and did what any self-respecting institution would do in such circumstances and decided to reinvent itself. This image of the GATT puts the services and investment negotiations in an appropriate context—namely, it is quite understandable that a fortysomething might find that its reach had exceeded its grasp. Rather than being overly critical, we should show some perspective and give this remarkable institution a little more time to chew and digest what it has bitten off.

Richard Snape's chapter on services demonstrates to us that timing is everything in life, and this is as true of international agreements as it is of life.

Consider the NAFTA negotiations on financial services and market access. These negotiations were as excruciating as they were unproductive. They did establish an ultimate goal of liberalization, but only after considerable delays and subject to severe restrictions. Only a few years later, Mexico is now ready to set aside the NAFTA limits and welcome foreign investment into its financial sector. Granted, Asia has not extended the same warm reception, but it is clear that in Asia as well, the driver for services liberalization will be those countries' need to mobilize capital and resources to address critical infrastructure needs and continue their growth policies—whether they be Indonesia, Malaysia, or Thailand.

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A real issue in this respect is whether the WTO has the right model for mobilizing this dynamic. In this regard, I am very taken with Fred Bergsten's analysis of APEC, in which he argues that the consensual model for negotiations may have something over the more confrontational GATT/WTO style. This question of the right negotiating model has important implications for US policy and deserves more attention than it has been given. (The United States even has its own version of this yin-yang in the different approaches of the Commerce Department and the Office of the US Trade Representative.)

On competition policy, let us say that the WTO needs to perfect its grasp of the items already on its plate before it can take on an issue as complex and subtle as competition policy.

Monty Graham reminds us what a great time it is to work for a global enterprise. From my perspective at General Electric, I can certainly see that there has never been a time in modern times when the challenge to appreciate the scope of opportunities and the impact of change on our business strategies has been greater. Graham's comments on the Helms-Burton law prove both the value of a multilateral investment agreement and the long odds against seeing it anytime soon. I also found his comments on the advisability of staging the initial negotiations for such an agreement in the OECD very sobering and would support his view that we revisit this approach in light of the potentially negative impact on participation by important players in the emerging-market world.

Patrick Messerlin's chapter on antidumping prompts me to speculate that the reason the fights in this arena are so intense is that the stakes are so low. I would only observe that for General Electric, a net contributor to the US balance of trade of \$5.4 billion, antidumping is an issue it spends very little time worrying about. Given the decline in the number of antidumping cases, we should be a little more sympathetic toward all the antitrust lawyers who became antidumping lawyers and remember that many of them were once government trade negotiators as well.

I would be remiss if I failed to raise one issue: government procurement, the hardest core of the hard-core trade policy issues. Government procurement is to trade policy what the sound barrier has been to commercial air travel—the barrier has proved too difficult to master. Recall that the problem stems from the GATT agreement of 1947, which left procurement out of the national-treatment article (Article III, paragraph 8). The 1979 Agreement on Procurement left out key sectors and, more importantly, most of the GATT members. And the WTO left procurement out of the basic rules to which all countries must adhere. There are other such agreements for which this is also true, but the Bovine Meat Accord does not seem to me to be appropriate company for such an important agreement as the Government Procurement Agreement (GPA). But at least this issue will not be neglected in this volume, and it should not be, because it very much qualifies as one of the major challenges of the trading system.

Government procurement is a bigger deal than we give it credit for being. One only has to consider how much of global GDP takes place in a public procurement environment, especially as the formerly Soviet state-controlled economies and China enter the global economy. Of this universe, look at the sector controlled by state-owned enterprises that are engaged in otherwise commercial activities—what Martin Wolf referred to as the “flying dodos.” A World Bank study (1996) does a very nice job of analyzing the impact of such enterprises in the developing world and concludes that such entities dominate some 10 to 20 percent of GDP. My point is that a great deal of global commerce is taking place in an environment that is simply not covered by the basic rules of the trading system—and this is too big a problem to ignore.

Without being unduly unkind to the efforts of many well-intentioned negotiators, we need to face the fact that the Government Procurement Agreement has been a failure—there are simply too few signatories, with too little coverage, and inadequate enforcement of the rules even when they do apply.

The reasons for this are understandable. Unlike the basic GATT approach toward negotiating tariffs, the GPA took an all-or-nothing approach. A country either signs and gives an equivalent of a zero tariff binding for all the entities covered or it takes a pass. This free-trade-or-nothing approach has proved too big a leap for most countries.

WTO members seem to have finally come around to a recognition that an interim approach is necessary—one that brings procurement into the basic system while allowing countries to negotiate away their buy-national preferences. Unlike the excessively regulatory approach of the GPA, this approach is relatively simple:

- identify a set of rules that ensure transparency in the procurement process and include these in the WTO basic agreement to which all countries are subject;
- require countries to quantify their buy-national preferences by entity and put those margins of preference in a schedule the same way they do their tariffs on imported products;
- negotiate away the preferences, just as the members did with tariffs.

Before we tax the typically short attention span people generally have for listening to any ideas on this subject, let me identify some policy arguments in support of this approach that I hope you find compelling.

First, the approach would support the direction in which most countries—developing and developed alike—are trying to move—namely, to get bureaucrats out of business. The basic idea is to take the fun out of being government-owned; this is a decision that can be made on a political rather than a commercial basis.

Second, this approach would complement the privatization efforts of many countries. By focusing on those entities that are being prepared for privatization, the WTO would be pushing on an open door and providing a very useful tool for preparing the ground for privatization.

Third, this approach should prove easier to enforce. It is clear from the record of the GPA and the EU efforts to enforce its government procurement directives that countries have great difficulty incorporating details into domestic procurement rules that in themselves seem excessively complex, and this thereby weakens the political support for an agreement. When a country as important as Germany can openly flout a decision of its own national court, an Article 179 enforcement proceeding of the European Union, and a Title VII enforcement initiative of the United States, there is something seriously wrong. (I am referring here to Germany's refusal to implement its international obligations under the 1993 US-EU bilateral agreement on procurement of heavy electrical equipment, the Government Procurement Agreement, and the EU directives on procurement, including the remedies directive.) If there were a way to restrike the balance of concessions, as would happen if Germany were to breach a tariff obligation, German companies and interests that depend so much on the integrity of the international system would almost certainly gain more respect for the procurement rules.

Finally, this reform initiative provides a sound, low-key approach to addressing the problem of corruption, which has come to be recognized as one of the most important policy issues of our time. Procurement reform is the right area for the trading system to work on, and progress in this arena could lay the groundwork for more ambitious projects.

Timing is everything, and it is high time we did something about government procurement.

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