

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**EXCLUSIONARY ANTI-COMPETITIVE PRACTICES,
THEIR EFFECTS ON COMPETITION AND DEVELOPMENT,
AND ANALYTICAL AND REMEDIAL MECHANISMS***



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NOTE

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Acronyms

ABA	American Bar Association
BDE	Barrier to Domestic Entry
BFE	Barrier to Foreign Entry
COT	Coalition for Open Trade
DG - Comp	European Commission Directorate General for Competition
DG - Trade	European Commission Directorate General for Trade
DOJ	United States Department of Justice (Antitrust Division)
<i>DSU</i>	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
EC	European Commission
ECJ	European Court of Justice
EU	European Union, also European Communities and their Member States
FTC	United States Federal Trade Commission
<i>GATS</i>	<i>General Agreement on Trade and Services</i>
<i>GATT 1947</i>	<i>General Agreement on Tariffs and Trade 1947</i>
<i>GATT 1994</i>	<i>General Agreement on Tariffs and Trade 1994</i>
ICC	International Chamber of Commerce
ICPAC	International Competition Policy Advisory Committee
<i>NAFTA</i>	<i>North American Free Trade Agreement</i>
OECD	Organization for Economic Cooperation and Development
SLC	Substantial Lessening of Competition
<i>TRIPS</i>	<i>Agreement on Trade-related Aspects of Intellectual Property Rights</i>
UNCTAD	United Nations Committee on Trade and Development
USTR	Office of the United States Trade Representative
WTO	World Trade Organization

Synopsis

This report identifies the harm that exclusionary anti-competitive practices can have on competition and development; the degree to which such harms remain unaddressed by existing domestic, bilateral and multilateral cooperation on Competition Policy; and the prospect for further initiatives and instruments, at the domestic, bilateral and/or multilateral level to address such harms.

Executive Summary and Conclusions

For decades there have been concerns about the trade-restrictive effects of exclusionary anti-competitive practices. Exporters and investors have complained about private and public impediments to their aspirations to enter or to expand their operations in foreign markets. At times, such complainants have called into question the rigour of competition law enforcement in such markets, and called for new trade remedies, and/or new international standards by which competition law enforcement can be judged.

Much of the existing and proposed rule making at the World Trade Organization (WTO) and other fora is based on a desire to ensure that trade barriers that have been removed in tariff and non-tariff negotiations are not being replaced by private exclusionary anti-competitive practices. To a large extent, the proposed rules do not appear to address what appear to be some of the most problematic practices. This inadequacy applies in particular to recent proposals for multilateral commitments by governments to prohibit 'hard-core cartels' and discriminatory competition laws. Such commitments may be beneficial and, may help to rid the world of some cartels and discriminatory laws. However, they will obviously not address other anti-competitive practices (i.e. practices beyond the narrow subset of whatever is determined by international consensus to constitute a prohibited 'hard-core cartel' or, what provisions in a competition law

provide less favourable treatment to foreign enterprises than what is provided to 'like' domestic enterprises. The main trade frictions that have arisen in past years in relation to trade-restrictive practices have concerned practices that would neither constitute a cartel, nor be discriminatory. This is particularly so for the exclusive purchasing and supply arrangements involved in *Japan-Photographic Film* (the 'Kodak/Fuji' case)¹ and *Boeing/McDonnell Douglas*², the bundling arrangements in *GE/Honeywell*³ and, the finding of denial of access and anti-competitive practices in *Mexico – Telecommunications* (the 'Telmex' case)⁴.

Section I of this report expands on these arguments to explain why the proposed WTO rules and commitments to prohibit hard-core cartels and, to provide *de jure*

¹*Japan - Measures Affecting Consumer Photographic Film and Paper: First Submission of the United States of America*, WT/DS44 (20 February 1997) (hereinafter 'Kodak-Fuji').

²*Boeing/McDonnell Douglas*, EC Case No. IV/M.877 (30 July, 1997); *The Boeing Co., et al.*, Joint Statement closing investigation of the proposed merger, FTC file No. 971-0051 (1 July, 1997), reported at 5 Trade Reg. Rep. (CCH) 24,295.

³*GE/Honeywell*, Case Comp/M2220, (3 July 2001).

⁴Mexico, "Measures affecting telecommunications services," WT/DS204/R 2 April 2004 (available at www.wto.org)

national treatment, have only a very limited applicability to exclusionary anti-competitive practices and, why there is still therefore a potential problem in search of a solution. The majority of the report focuses on identifying the extent of that problem and possible solutions.

The proposed rules and commitments on hard-core cartels and *de jure* national treatment can be seen as baby-steps on the road to what would be more relevant commitments. International understanding and consensus about the effects of the above practices has been delayed and prevented due to a strong difference of opinion about the effect such practices have on trade and on competition. Many trade experts assume that practices that foreclose entry in some manner are necessarily trade-restrictive and should be banned. However, many competition experts note that as such practices can provide important efficiency benefits their prohibition should be dependant on a finding of net anti-competitive harm.

This debate may rage forever unless something more is done to engage experts from both 'camps' in a forward-looking and inclusive work programme to analyse the practices and to develop a common approach to them. In the meantime, the continuing perception that the world lacks a remedy with which to address such practices allows various 'trade hawks' to mandate unilateral government action against trading partners who may be assumed to be tolerating such practices inappropriately.

Thus there is an urgent need to try to find some way to address trade frictions about such practices and, the practices themselves if they are indeed trade-restrictive and anti-competitive. It is also the case that many of these practices could only have such a trade-restrictive and/or anti-competitive effect if they involved firms with market power. It is no coincidence that those developing countries which are somewhat interested in pursuing a Multilateral Framework Agreement on Competition are most

interested in rules that might help to discipline multinationals with market power, particularly those who use their power to exclude rivals, or extract supra-competitive rents from downstream consumers. A concern with abuses by dominant firms relates most directly to one of the other rationales for improved international mechanisms and perhaps rules relating to competition policy: the concern to ensure that markets operate efficiently and equitably, and are not subject to the whims (and abusive conduct) of a few large economic actors.

A study is long-overdue to identify the main anti-competitive practices that cause trade-restrictive effects and, to propose some form of analytical framework by which the trade and competition policy communities can work together to forge some consensus on how such practices should be analysed and treated.

This report attempts to provide the groundwork for that study.

Section II compiles case studies of recent major allegations of trade-restrictive and anti-competitive effects of exclusionary practices from the official reports of competition authorities, trade representatives and associations, international studies, business representatives and economic literature.⁵

Relevant practices focused on include:

- import cartels;
- abuse of dominance;
- abuse of intellectual property rights;
- exclusive purchasing agreements;
- exclusive supply agreements;
- mergers.

⁵The compilation is by no means a complete global study. Despite attempts to extract information from all jurisdictions, such information was not available in many instances. As such, the report calls for more national studies to be made of exclusionary practices.

Section I concludes with an examination of the similarities among these practices to aid further analysis of the issues the practices raise.

Section III reviews how such practices affect trade and competition and attempts to identify the net harm if any, to markets, competitors and consumers, in addition to any positive benefits (e.g. efficiencies) they may offer. It does so by reference to the most complicated of such practices, exclusivity restraints on distribution channels, where the most detailed examination of their effects is necessary. Section IV examines the extent to which advanced domestic and bilateral enforcement initiatives and instruments, and multilateral commitments are able to address the possible trade-restrictive and anti-competitive effects of exclusionary practices.

Section V draws conclusions on:

- the trade- and competition- related harms that remain from such practices;
- the degree to which such harms remain unaddressed by existing domestic, bilateral and multilateral commitments
- the prospect for further initiatives and instruments, at the domestic, bilateral and multilateral levels to address remaining harms.

Main conclusions:

Import cartels, abuses of a dominant position, denials of access, and other forms of vertical impediments exert a considerable exclusionary effect on competition within markets, and effective access to markets. Exclusionary anti-competitive practices thus remain a major problem in international trade.

Existing unilateral, bilateral and multilateral instruments and mechanisms go some way towards addressing this problem although much of it has still not been addressed.

In particular, and no matter what their form may take, non-discriminatory, non-horizontal exclusionary anti-competitive practices can exclude both domestic and

foreign rivals, and order the market for remaining enterprises, whether on efficiency or other grounds.

New multilateral commitments to ban cartels and to provide *de jure* National Treatment would not help address the remaining problem of non-discriminatory, non-horizontal exclusionary anti-competitive practices.

Depending on the practice, competition officials may disagree on the net harm of the practice. Trade officials and thwarted exporters take a very dim view of exclusionary anti-competitive practices, and of the toleration of some such practices by some competition authorities. This divergence and disagreement is inhibiting international efforts to develop a coherent approach to such practices.

Within the competition policy community, the different approaches that the authorities and courts in the United States and the EU take to exclusive purchasing arrangements and exclusionary aspects of mergers is indicative of the extent of the divergence.

European competition law prohibits arrangements that may significantly restrict competitors' access to a market. United States antitrust law requires actual evidence that competition itself is likely to be substantially lessened. The American approach also requires that the substantiality of any lessening of competition be characterized by either an absence of offsetting efficiency benefits or, what can amount to the same thing, proof of actual harm to efficiency, e.g. through a net reduction in output.

Due to the importance of these anti-competitive practices, and the serious allegations that have been made about the harm that they can do to trade and to competition, this is not some arcane problem specific only to competition policy. Indeed, when thwarted exporters make trade complaints, the issue moves as far from the academic realm as is

imaginable, and can become the subject of trade disputes.

When trade representatives add their analysis and voices to that of the complainants, matters can rapidly move to a search for a quick and readily negotiable solution to the problem, rather than a more objective and examination of both the factual basis of the complaint itself, and the economic evidence of trade and/or competition harm. Such unilateral and bilateral ‘solutions’ may be harmful to market efficiency.

Governments should strive to seek multilateral solutions to the problem, no matter how analytically difficult it may be.

However, multilateral commitments to cooperate in enforcement, in particular

with respect to ‘positive comity’, may have only limited results, while multilateral commitments to prohibit exclusionary anti-competitive practices may be harmful. This is particularly the case if such prohibitions were *per se*, or based only on an analysis of the exclusionary effects that such practices had on foreign rivals, ignoring the actual impact such practices actually had on competition in the relevant market.

The report recommends the development of a multilateral ‘guideline’ whereby governments would undertake to prohibit those business arrangements that substantially impede access to their markets and, which are thereby likely to lessen competition substantially in the relevant market for the products at issue.

Section I: Rationale for focusing on exclusionary anti-competitive practices

A key problem in trade and competition is going unaddressed.

There has been much talk in the past few years about the need to find an international mechanism to address anti-competitive practices that restrict trade. Much of the proposed rule making at the World Trade Organization (WTO) and other fora has been based primarily on a desire to ensure that such practices do not re-erect public barriers that have been removed in tariff and non-tariff negotiations.

The European Community (EU) has long admitted that one of its 'main reasons' for recommending 'the adoption of international rules on competition' has been 'as part of the Community's strategy on market access: anti-competitive practices are keeping our firms out of third country markets but they cannot, in the absence of proper enforcement measures in those third markets, be tackled effectively without international rules'.⁶ The Commission has noted that European companies were not doing as well overseas as their foreign competitors were doing in Europe.⁷ Some attributed this to the fact that the EU's prohibition of exclusionary anti-competitive practices was sterner relative to the enforcement approach of its trading partners: in particular, EU Competition Commissioner Karel van Miert pointed out:

⁶Communication to the Council, submitted by Sir Leon Brittan and Karel Van Miert, 'Towards an International Framework of Competition Rules', COM (96) 296 final (18 June 1996), Annex at 2.

⁷European Commission, *The Global Challenge of International Trade: A Market Access Strategy for the European Union* (Com (96) 53 final, 14.02.96) at 57

"[our] strict competition policy guarantees companies from third countries that access to the Community market will not be compromised as a result of restrictive practices by European companies seeking to protect their traditional markets.

But this guarantee calls for reciprocity. If other countries are less vigilant than we are with regard to the anti-competitive behaviour of their companies, access to their markets for Community products will be blocked."⁸

However, in pursuit of this goal, the EU did not ask for its trading partners to adopt as stern an approach as it applies to exclusionary practices. Instead, it proposed that WTO Members agree to a Multilateral Framework Agreement on Competition. This Agreement would include commitments to have a competition law or measure that:

did not *prima facie* discriminate against foreign companies (i.e. in WTO parlance, that the law provided *de jure* National Treatment);

contained a ban on hard-core cartels;

provided for voluntary enforcement cooperation with other WTO Members and,

was applied in a transparent manner, and in accordance with generally accepted principles of procedural fairness.⁹

⁸European Commission, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*. Report of the Group of Experts, (Luxembourg: OPEC, July 1995) at 3 (hereinafter 'Van Miert Report') (emphasis added).

⁹Communication from the European Communities, 'A Multilateral Framework Agreement on Competition Policy'

This report will not analyse the relative merits of these proposals vis-à-vis the stated problem.¹⁰ It is sufficient perhaps, to note briefly that these proposed commitments take an indirect and partial route to addressing exclusionary anti-competitive practices. The proposals themselves can be seen as baby-steps on the road to commitments that may address these practices more directly. While this may be self-evident, the remainder of this Introduction sets out:

the extent to which the problem of exclusionary anti-competitive practices has been identified as a key problem in international trade;

how previous multilateral agreements on trade and competition have tried to address the problem;

what new commitments to ban cartels and to provide *de jure* National Treatment may do to help address exclusionary anti-competitive practices and, what they can not do.

This preliminary discussion is to underscore the need for the type of detailed examination of exclusionary practices that this report attempts to go some way towards providing.

1. Exclusionary anti-competitive practices are a major problem in international trade

In 1998, the United States Government formed an International Competition Policy Advisory Committee (ICPAC) to embark on a detailed study of 'trade and

competition'.¹¹ In its final report, the ICPAC reserved a separate chapter to describe in detail 'Where Trade and Competition Intersect'. A specific section headed 'Not All Competition Problems are Trade Problems', explained that 'not all restraints are anti-competitive and, not all competition problems that are global in nature are by definition matters of relevance for international trade policy'.¹² The ICPAC concluded that 'the intersection of trade and competition policy ... focus[es] ... on anti-competitive or exclusionary restraints on trade and investment ... that hamper the ability of firms to gain access to or compete in foreign markets'.¹³

The Chairman of a WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP), Dr Frederic Jenny, made a similar finding. He distinguished between two types of international problem.

The first type are practices originating in one country but having an anti-competitive effect abroad. These include export cartels, transnational mergers or cross border abuses of dominant positions. These practices may not create a trade barrier but they may rob some countries which have liberalized their trade of the benefits of trade liberalization. Because these practices do not create a market access problem they tend to fall outside the scope of multilateral trade agreements. In addition, because these practices create a competition problem in foreign countries, competition laws and policies of the countries in which they take place are usually

WT/WGTCP/W/152 25 September 2000 (hereinafter 'EU Communication 152')

¹⁰ For such an examination, see P Marsden, *A Competition Policy for the WTO* (Cameron May: London, 2003)

¹¹ International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report (Washington: 2000) (hereinafter 'ICPAC Report') (www.usdoj.gov/atr/icpac).

¹² ICPAC Report, at 210.

¹³ ICPAC Report, at 201 (emphasis added).

powerless to curb them. The jurisdiction of domestic competition authorities is usually limited to practices which affect competition in their own country. We should also include in this category international cartels which seem to be quite frequent and to affect a number of countries but, can be difficult to prove because the evidence is scattered across a number of jurisdictions.

The second type are transitional private anti-competitive practices having a market-foreclosure effect. These include import cartels, restrictive vertical agreements, standards set by professional organizations or domestic abuses of dominant positions (including by state-owned enterprises). Because trade liberalization or deregulation measures have in the past been exclusively concerned with governmental barriers to trade and to competition, they are not completely useful to eliminate these practices. As they tend to reduce competition in the country of import, they could conceivably be eliminated by domestic competition law if such a law exists in the importing country and, if domestic competition authorities were under pressure to eliminate them. However, to ensure that competition law enforcement is consistent with trade liberalization, there would have to be a mechanism ensuring that such anti-competitive practices having a market access dimension are in fact eliminated and, that the competition authorities of the country in which market access is denied do not condone or turn a blind eye to these practices.¹⁴

Dr Jenny set out how those two types of practices might be best addressed.

Bilateral instruments are particularly useful for trading countries which have committed themselves to having a competition law and find it in their

¹⁴F. Jenny, 'Globalization, Competition and Trade Policy: Issues and Challenges' in R Zach (ed) *Towards WTO Competition Rules* (Berne: Kluwer, 1999) at 14-15 (emphasis added).

mutual interest to eliminate Type I anti-competitive practices. A multilateral agreement could be particularly useful for trading countries to eliminate Type II anti-competitive practices which create a market access problem even if the (importing) country has not committed itself to [having] a full fledged competition law and/or, is reluctant to open its market (barring its international obligations).¹⁵

The EU has concurred with Jenny that a multilateral agreement is appropriate for exclusionary arrangements. While the EU is interested in devising multilateral rules to address 'those anti-competitive practices which have a significant international dimension' it has admitted that '[t]his would *primarily* be the case when an anti-competitive practice significantly raises barriers to *entry* into a market (i.e. *foreclosure effect*)'.¹⁶ The EU has even gone so far as to agree that 'from the point of view of the multilateral trading system, the *essential* concern relates to those practices which limit effective competition from *foreign* producers and therefore limit *market access* and have a significant international dimension'.¹⁷

The reason for the trade policy concern about exclusionary practices is obvious. The competition policy concern with them has also been noted: 'the anti-competitive practices tolerated by one competition authority sometimes result in access to the market concerned being

¹⁵F. Jenny, Remarks at Competition and Trade Policy, ICC Forum, Paris (21 February 1998) (emphasis added).

¹⁶Communication by the European Community and its Member States, 'Impact of Anti-competitive Practices on Trade' WT/WGTCP/W/62 (5 March 1998) (hereinafter 'EU Communication 62'), at 12-13 (emphasis added).

¹⁷Communication by the European Community and its Member States WT/WGTCP/W/45 (24 November 1997) (hereinafter, 'EU Communication 45') at 4-5 (emphasis added).

closed, even though foreign firms could provide additional competition which would be beneficial to the consumers of that country'.¹⁸ The EU thus told the WTO Working Group that '[a] practice which has a foreclosure effect would negatively affect consumer welfare in the country where the practice is being implemented and, at the same time, affect the legitimate interests of the country whose producers are being denied equality of competitive opportunities. This is both a market access and a competition law problem'.¹⁹ International business has concurred.

Firms increasingly need meaningful access to markets in order to compete. Market access issues are extending beyond the historical focus of reducing tariff barriers to entry, primarily due to increasing globalization and the resulting competitive disciplines. The focus of many in the international business community is now on both governmental and private non-tariff barriers to trade, which are increasingly being viewed by many as a potential significant restriction on international trade.

"...the objective of market access is *the key linkage* between trade and competition policy."²⁰

Academics and jurists have similar views on where trade and competition policy interact. Professor Daniel Tarullo, a noted expert on international law and economic relations, and former United States Assistant Secretary of State for Economic and Business Affairs and, Assistant to the President for International Economic Policy, has noted that '[c]ompetition policy intersects with trade policy *when anti-competitive conduct excludes a foreign company* from a national market

¹⁸Van Miert Report at 10.

¹⁹EU Communication 62 at 12-13.

²⁰ICC draft report at 7 (emphasis added).

as effectively as a high tariff would, and when the competition authorities of the country have failed to provide a remedy for that conduct'.²¹ Professor Eleanor Fox, a noted expert on the subject of trade and competition law and regulation, has agreed: '[t]he most pressing trade and competition problem today is *the problem of market access* blocked by anti-competitive restraints. Within this area, the most pressing concern is not the absence of national competition law, but the non-enforcement of national competition law'.²² Douglas Rosenthal, a leading trade and antitrust attorney, has stated: 'I would place market access principles at the top of a world competition agenda'.²³ Exclusionary arrangements - rather than cartels per se - figure foremost in the list of 'trade and competition' concerns.

Despite the breadth of their original mandate and the focus of their Doha Agenda, Members of the WTO Working Group have been very precise about the nature of the 'problem' as they see it.

The most common complaint by WTO Members is about vertical restraints, arrangements between vertically related entities (e.g. manufacturers, wholesalers, and retailers) *that exclude competitors*. Some regard the use of vertical restraints

²¹D Tarullo 'Norms and Institutions in Global Competition' 94 Am. J of Intl Law (2000) 478 at 483 (emphasis added).

²²E. Fox, 'Should Competition join the WTO?' in J Bhagwati (ed) *The Next Trade Negotiating Round: Examining the Agenda for Seattle* (www.Columbia.edu/~jb38/seattle.pdf) at 121.

²³D. Rosenthal, 'Equipping the Multilateral Trading System with a Style and Principles to Increase Market Access' (1998) 6/3 Geo. Mason L. Rev 543 at 563 (emphasis added). See also, P Marsden, 'Dealing with International Exclusion: The Right Focus for the WTO Working Group on Trade and Competition Policy' 21/2 World Competition 91 (December 1997).

by domestic firms to exclude foreign competitors as an impediment to international trade. A further concern is that governments may contribute to the *exclusion of foreign suppliers* through lax or discriminatory application of competition law.²⁴

The issue of exclusive arrangements between suppliers and distributors should have a special resonance for any supposed 'development agenda'. A previous communication from UNCTAD to the working party has already noted 'that vertical restraints can be especially important in developing countries, whose markets are often small and where subsidiaries of foreign multinationals easily attain a dominant position'.²⁵

Section 1 of this report examines detailed evidence of the exclusionary anti-competitive practices alluded to above. Even at this early stage it is relevant to ask: given these concerns, and their importance, what have governments been doing about them?

2. Existing multilateral agreements on trade and competition do not address the problem of exclusionary anti-competitive practices

It is trite (but no less true) to point out that governments have been looking at the key interaction between trade and competition policy for over a century.²⁶ In part, the first competition laws were enacted to prevent companies from acting

²⁴R. Ludema, 'A WTO Agreement on Competition Policy: Prospects and Pitfalls', *International Economic Review* (March/April 2002) 11 at 12 (emphasis added).

²⁵Communication from UNCTAD, 'Closer Multilateral Cooperation on Competition Policy: the Development Dimension' WT/WGTCP/W/197 (15 August 2002) at 12.

²⁶This section builds on P Marsden, 'Antitrust at the WTO' 13/1 *Antitrust* 78 (Autumn 1998).

anti-competitively in their home markets when tariffs and quotas protected them from the competitive discipline of imports.²⁷ Such government barriers, for example, could provide a shield behind which cartels could operate and raise prices even further. When multilateral negotiations began lowering these tariff and other barriers after World War II, the American and British Governments pressed for international competition rules to ensure that businesses did not use exclusionary practices to privatize the protection to which they had grown accustomed.²⁸ The resulting draft *Havana Charter for an International Trade Organization of 1949* provided new trade liberalization commitments, and protected them by setting out detailed prohibitions of anti-competitive conduct as well as an intergovernmental mechanism to review domestic enforcement activities.²⁹

The *Havana Charter's* 'general policy towards restrictive anti-competitive practices' required that:

"... each Member shall take appropriate measures and shall cooperate with the Organization to prevent, on the part of private or public commercial enterprises, anti-competitive practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control whenever such

²⁷E. Fox, 'Antitrust, Trade and the Twenty-First Century - Rounding the Circle' (1994) *The Record* 535 at 539.

²⁸J. Davidow, 'The Seeking of a World Competition Code: Quixotic Quest?' in O Schachter and R Hellawell, eds., *Competition in International Business* (New York: Columbia University Press, 1981); W Wells, *Antitrust: the Formation of the Postwar World* (New York: Columbia University Press, 2002).

²⁹*Havana Charter for an International Trade Organization*, 24 March, 1948, U.N. Doc. E/C. 2/78, reprinted in Dep't St., Pub. No. 3206, *Commercial Policy Series* 114, 86-87 (1948) (hereinafter, '*Havana Charter*').

practices have harmful effects on the expansion of production or trade.’³⁰

The practices targeted by the *Havana Charter* included:

- fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;
- excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
- discriminating against particular enterprises [and] limiting production or fixing production quotas.³¹

The first proposed multilateral framework agreement on competition thus included a ban on cartelization, on discrimination by enterprises against other enterprises (as opposed to a *de jure* commitment on the part of a government), and an express prohibition of exclusionary practices. There are a number of reasons why the competition section of the *Havana Charter* was not ratified in full, including its comprehensive mechanisms on consultations and enforcement and its prohibitions.³²

However, the urge to find some solution to the problem of exclusionary anti-competitive practices did not go away.

A 1960 *GATT Decision* noted that the Contracting Parties ‘recognized that international cooperation is needed to deal effectively with harmful restrictive practices in international trade’ but, they ‘considered that in the then prevailing circumstances it would not be practicable for them to undertake any form of control

³⁰*Havana Charter*, Article 46.

³¹*Havana Charter*, Article 46.

³²See D. Wood, ‘Remarks on Regulatory Cooperation for Effectiveness and Compliance: Joint Action among Securities, Banking and Antitrust Regulators’, 91 *American Society of International Law Proc.* 223, at 228.

of such practices nor to provide for investigations’.³³ The *Decision* therefore, recommended only that:

‘at the request of any Contracting Party, a Contracting Party should enter into consultations on harmful restrictive practices in international trade on a bilateral or multilateral basis as appropriate. The party addressed should accord sympathetic consideration to, and should afford adequate opportunity for, consultations with the requesting party, with a view to reaching mutually satisfactory conclusions and, if it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects.’³⁴

Guiding procedures for cooperation actually being enforced were developed first by Members of the Organisation for Economic Cooperation and Development (‘OECD’) through a series of non-binding recommendations in 1967, 1973, 1979, 1986 and 1995.³⁵ The most recent OECD Recommendation states that:

‘member countries should cooperate in the implementation of their respective national legislation in order to combat the harmful effects of restrictive anti-competitive practices...[C]loser cooperation between Member countries in the form of notification, exchange of information, coordination of action,

³³Decision on Restrictive anti-competitive Practices: Arrangements for Consultations, (18 November 1960), *GATT*, 9 *BISD* 28 (1961) (hereinafter ‘1960 *GATT Decision*’).

³⁴Preceding note.

³⁵OECD, *Recommendation of the Council* of 5 October 1967 [c (567) 53 [Final]]; OECD, *Recommendation of the Council* of 3rd July 1973 [C (73) 99 (Final)]; OECD, *Recommendation of the Council* of 25th September 1979 [C (79) 154 (Final)]; OECD, *Recommendation of the Council* of 21st May of 1986 [C (86) 44 (Final)]; OECD, *Recommendation of the Council* of 27th and 28th July of 1995 [C (95) 130 (Final)].

consultation and conciliation, on a fully voluntary basis, should be encouraged.³⁶

The Recommendation's purpose is to improve enforcement cooperation rather than to increase national enforcement itself. By communicating differences and similarities in their respective national enforcement priorities and methods, Members hoped to avoid conflict and thereby enable further cooperation. Once again members had not been able to bring themselves to agree on a formal prohibition of exclusionary anti-competitive practices.

In 1980, the United Nations Conference on Trade and Development (UNCTAD) adopted a non-binding set of rules for the control of restrictive anti-competitive practices.³⁷ While the *UNCTAD Set* was motivated by an express concern for developing countries, its primary focus is not enforcement co-operation among developed and developing Members, but increased law enforcement within individual countries *to remove private barriers to their markets*.³⁸ The *UNCTAD Set* thus recommends that 'appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive anti-

competitive practices'.³⁹ The *UNCTAD Set* also recommends to business that 'enterprises ... should refrain from [restrictive anti-competitive] practices when ... *they limit access to markets* or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade'.⁴⁰

While the *UNCTAD Set* is the most detailed official multilateral agreement on anti-competitive practices, it does not bind its signatories. More recent developments on the global stage have focused on devising international mechanisms that companies and governments can actually rely on to ensure that competition authorities are not allowing anti-competitive practices to impede market access.

The OECD Recommendations and the *UNCTAD Set* have contributed immeasurably to the greater understanding and acceptance of the need for governments to have competition laws that address such practices, and to cooperate in that regard. The fact that they are non-binding does not detract from the value of their contribution. Indeed, it can be argued that their lack of binding force has allowed for them to be more comprehensive and detailed, and thus of greater benefit to those who negotiated them and, to other countries seeking guidance on how they can ensure that their policies conform to the international *acquis*. Indeed, the problems with attaining compliance with supposedly binding rules at the EU and WTO levels reveals that 'bindingness' itself is no guarantee that a government will adhere to its commitments.⁴¹

³⁶OECD, *Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anti-Competitive Practices Affecting International Trade* (21 September 1995) c (95)130/Final, Preamble (hereinafter '1995 OECD Recommendation').

³⁷UNCTAD, *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive anti-competitive Practices*, TD/RBP/CONF/10/REV.1 (Geneva: UNCTAD, 1980) (hereinafter '*UNCTAD Set*').

³⁸The *UNCTAD Set* recognizes that 'restrictive anti-competitive practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries' (preamble) (emphasis added)

³⁹*UNCTAD Set*, Section C, (1) (emphasis added)

⁴⁰*UNCTAD Set*, Section D, (1) and (2).

⁴¹K. Alter, 'Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System,' *International Affairs*, 79/4 (2003). C-D Ehlermann, 'The Effectiveness of WTO Dispute Settlement to Resolve Market

But what of the commitments that the EU has proposed for becoming WTO commitments in the future? To what extent will they be able to address exclusionary anti-competitive practices?

3. New multilateral commitments to ban Hard Core Cartels

New multilateral commitments to ban cartels and to provide *de jure* National Treatment may not help address exclusionary anti-competitive practices

Given all of the above concerns and 'demand' for action, it is significant that Members of the WTO Working Group have not made the study of exclusionary arrangements their top priority. Nevertheless, they have received a proposal from the EU to address two very serious problems from a competition perspective, the problem of hard-core cartels and, from the trade perspective, the problem of discriminatory laws.

Commitments to ban these problems may have positive results and, may help to rid the world of some cartels and some discriminatory laws. However, their negotiation in a forum of so many members, within the context of a 'binding' dispute settlement, may result in very limited commitments. To date no agreement has been possible on either of these two very important issues.

3.1 A multilateral ban on cartels

Matters of substance

Cartels function through an agreement to restrict supply, raise prices and not 'chisel' - or cheat on the deal - by temporarily lowering prices. Conspirators need

Access Issues,' speech to the Symposium 'A New Century of Advances in Market Integration: The European Union's Market Access Strategy,' Brussels, 27 February (2003).

to monitor each other's behaviour, as they all have a natural incentive to increase their sales by cheating on the agreement. However, cartels can only be sustained if their members deter the entry of competing sellers who are also attracted by the opportunity to undercut the cartel's higher prices. Therefore, setting up and enforcing entry barriers is the *sine qua non* of the effective cartel agreement.⁴² Conspirators have to prevent the entry of firms who compete with the cartel in proximate product markets and adjacent or - in this increasingly international economy - far-flung geographic markets.

Cartel members may already receive some degree of protection from regulatory barriers to entry. Domestic competition law may be able to address the anti-competitive arrangement itself, but that arrangement is not impeding foreign entry. If the regulatory barriers are to be addressed, it cannot be by competition law. That would require foreign pressure in trade talks, and eventual market access commitments. The respective concerns and respective jurisdictions of competition authorities and trade representatives, are thus clearly demarcated. However, this is not the case with the barriers that cartel members erect over and above pre-existing regulatory barriers. These private barriers are the proper concern of both trade and competition policy. As anti-competitive practices their review remains within the jurisdiction of competition authorities. As

⁴²As the EU explained to the WTO Working Group: 'Abuses of market power, by which firms charge abnormally high prices, are normally associated with additional barriers to entry which isolate markets. Otherwise, such practices would normally attract entry'. Communication by the European Community and its Member States 'Impact of Anti-competitive Practices on Trade' 5 March 1998, WT/WGTCPW/62 at 3. See W Viscusi, J Vernon and J Harrington, Jr, *Economics of Regulation and Antitrust* (3 ed) (Cambridge: MIT Press, 2000) at 121: 'Unless there is some factor that prevents entry, one would expect collusion to attract entrants.'

this review itself may allow the practices to continue to impede entry, it has attracted the attention of those seeking trade disciplines on competition law and enforcement. The question is how does the fact that exclusionary practices may protect a cartel justify, or even relate at all, to global commitments to ban cartels. Moreover, how would such commitments impact at all on the exclusionary practices at issue?

To protect themselves, cartel members need to remove either the incentive for competitors to enter their market or their opportunity to do so. The incentive to enter may be reduced or removed by temporary but well-targeted price cuts. The opportunity to enter may be reduced or removed by starving the market of the basic requirements that an entrant would need to survive and prosper. Since almost all of today's commerce relies on the distribution sector to help channel supply and demand, the best foreclosure strategies aim at inducing distributors and other downstream players not to carry a new entrant's products or, put positively, to carry 'ours' to the exclusion of those 'others'.⁴³ Exclusivity agreements that contain a mix of rewards and threatened punishments can overcome almost any temptation a distributor might have to provide a prospective entrant with a way into the market. If these are not effective, more pressure on the distributor may be required, including not-so-subtle displays of a supplier's ability to affect the distributor's survival by toying with or terminating supply.⁴⁴ If all else fails, the

⁴³European Commission, *Green Paper on vertical restraints in EC competition policy*, COM (96) 721, at paragraph 7.

⁴⁴F. M. Scherer, 'Retail Distribution Channel Barriers to International Trade' 67/1 *Antitrust Law Journal* (1999) 67, at 90: '[M]anufacturers [have] means more subtle than explicit contractual restrictions for maintaining the exclusivity of their dealers. The dealer who stray[s] too far from the fold [is] likely to have difficulty securing timely delivery of the models it sought'.

distributor may simply be bought out and shut down or, made one with the supplier's operations.

The European Commission's interest in getting WTO Members to agree to ban cartels is readily understandable. By prohibiting the cartel, its need for a support structure of barriers to entry should evaporate. To the extent that these barriers excluded foreign competitors, all trade-restrictive effects would appear to be able to be removed with one stern blow of competition law. Unfortunately however, this is not necessarily so. Cartels do not have a monopoly on the use of exclusivity arrangements, abuses of a dominant position or other entry-detering strategies. Cartels may not be able to function without them, but these barriers to entry can operate without the need for an overarching cartel agreement. If sufficiently determined, ex-cartel members could use their respective parts of a cartel defence structure of exclusionary arrangements to protect their own individual market positions. Individual companies that have never been part of a cartel can do the same. A multilateral agreement to prohibit hard-core cartels would not help governments to address such exclusionary conduct, nor would a rule against horizontal anti-competitive practices. It would certainly do nothing to help resolve the most famous *Kodak-Fuji* 'competition' case that reached the WTO in 1998. *Kodak-Fuji* was the archetype 'trade and competition' complaint. Kodak alleged that the largest Japanese incumbent and its vertically related distributors had erected an elaborate set of barriers to foreclose the entry of foreign competitors and that these barriers were tolerated by the Japanese competition

authority.⁴⁵ Kodak did not allege that there was a cartel. That would have meant proving that thousands of Japanese distributors had all agreed to keep Kodak film off their shelves. Such was not even credible. The issue, commercially and in terms of competition law, was whether Fuji had pressured the distributors to agree individually and separately to buy exclusively or predominantly Fuji film. Such deals were also at the heart of an EU/United States dispute about the effects of the *Boeing/McDonnell Douglas* merger.⁴⁶ Did the merging parties benefit from long-term exclusive purchasing arrangements with various American airlines, and did these deals operate to exclude the European competitor, Airbus? These cases caused serious international trade friction. They have also been used to justify WTO rules on competition policy.⁴⁷ However, no activity that could be the subject of a cartel prohibition was alleged, or was even capable of being alleged, in either case. Therefore, developing international cartel rules would not help the WTO address these pressing and contentious problems. Such rules would neither satisfy the demand for measures to address exclusionary practices nor, accord with the WTO's ability

⁴⁵ Eastman Kodak Company, *Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper* (May 1995), 1 vol.; and *Japanese Market Barriers in Consumer Photographic Film and Paper* (November 1995), 2 vols, Memoranda in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974, as Amended. [http://www.dbtrade.com/film_in_japan/priv_protection/i.htm].

⁴⁶ *Boeing/McDonnell Douglas*, EC Case No. IV/M.877 (30 July, 1997); *The Boeing Co., et al.*, Joint Statement Closing investigation of the proposed merger, FTC file No. 971-0051 (1 July, 1997), reported at 5 Trade Reg. Rep. (CCH) 24,295.

⁴⁷ Dow Jones News Service, 'Kodak-Fuji Ruling Shows WTO Needs Competition Facet-E.U.', (8 December, 1997) (ALLNEWS PLUS 12/8/97).

and core competence in addressing market access barriers.

Practical problems

Recent experience indicates how difficult it has been for countries with developed competition law regimes to agree on what a hard-core cartel actually *is*, let alone how to prohibit it.⁴⁸

It is true that after many years of discussions, governments eventually agreed that 'a "hard-core cartel" is an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce'.⁴⁹ However, they allowed themselves plenty of room to manoeuvre. They expressly stated that their definition of hard-core cartels did not include 'agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization of cost-reduction or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws'.⁵⁰ Moreover, none of them agreed to subject their anti-cartel enforcement to international rules, review or dispute settlement. They simply recommended that 'Member countries should ensure that their competition laws effectively halt and deter hard-core cartels'.⁵¹

⁴⁸ OECD, *Recommendation Concerning Effective Action Against Hard-Core Cartels*, C(98) 35/FINAL (hereinafter, 'OECD Hard-Core Cartel Recommendation').

⁴⁹ OECD *Hard-Core Cartel Recommendation*, Articles A.2.a.

⁵⁰ OECD *Hard-Core Cartel Recommendation*, Articles A.2.b.

⁵¹ OECD *Hard-Core Cartel Recommendation*, Article 1.

Governments differ in the manner and severity with which they prohibit horizontal anti-competitive practices under their own legislation.⁵² Some apply a *per se* prohibition; others a quasi 'rule of reason' approach, which requires that evidence of net anti-competitive effects has to be provided in order to prove the offence. Still others allow some horizontal agreements and alliances to evade prohibition if their contribution to efficiency offsets their anti-competitive effects. Meanwhile, the prohibition itself, the standard of review, and the applicable penalties may be criminal, civil, some mixture of the two, or even be administrative in nature. As these differences arise through the legitimate exercise by governments of their discretion and priorities with respect to their economic policy and their legal system as a whole, they are unlikely to converge simply through some international negotiation. As such, governments could only recommend that their laws should provide for:

- effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels and;
- enforcement procedures and institutions with powers adequate to detect and remedy hard-core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.⁵³

Moreover, with respect to enforcement cooperation itself, they could note that 'the common interest in preventing hard-core cartels generally warrants cooperation' in enforcement, but still made their cooperation subject to safeguards to protect commercially sensitive and other confidential information. They also provided that cooperation was only to be

⁵²OECD Convergence Report, at paragraphs 39-46, which the text that follows summarises.

⁵³OECD *Hard-Core Cartel Recommendation*, Article 1.

made available to an extent consistent with Members' laws, regulations, and important interests and, that even then it could be denied 'on any other grounds'.⁵⁴

Trade negotiators who have plied away national differences during previous global negotiating Rounds may view the task of finding common approaches on competition law as being simply a function of effort over time. The experience with the *Hard-Core Cartel Recommendation* clearly gives good reason to challenge this belief.⁵⁵

The European Commission has argued that it should at least be possible to identify a minimum level of prohibition that all regimes share.⁵⁶ This is not such a challenge. As the description of the different regimes above reveals, a bare minimum 'common standard' would be a civil prohibition of horizontal anti-competitive practices whose proven ill-effect on competition is not offset by their efficiencies. However, that lowest common denominator is not 'best practice'. Some governments clearly view a criminal prohibition as being necessary for adequate punishment and deterrence. As criminalizing cartel laws in all countries is clearly not likely either, an even more general approach might be to agree a non-binding statement of principle: Members could commit to prohibit horizontal anti-competitive activity *severely*, and be left to their own

⁵⁴OECD *Hard-Core Cartel Recommendation*, Article B.2.c.

⁵⁵Note though that in August 2002, the United States Government proposed that any WTO work on hard-core cartels at least begin with the OECD definition, so as not to repeat in Geneva too much of what had already been agreed in Paris. It remains to be seen whether non-OECD WTO Members will find this to be acceptable. Communication from the United States, 'Provisions on Hard Core Cartels' WT/WGTCPW/203 (15 August 2002).

⁵⁶Commission Communication at 7.

devices as to the means at hand.⁵⁷ Considering the many hortatory recommendations that already exist however, it is difficult to see what such a statement of principle would add to the status quo.

In contrast, the level of detail of the *Hard-Core Cartel Recommendation* is likely to have exceptions added to it several times over. While it might be possible for WTO Members without competition laws to at least agree that a competition law *should* prohibit cartels, that would not necessarily result in their enacting a competition law or, any other measure that actually did prohibit such arrangements. Moreover, at a WTO negotiation, the problem in getting Members to agree to any commitment is not just one of planing away differences between their positions. The motivation for agreeing WTO commitments is to make them binding. Hanging over the trade and competition negotiations therefore, is the prospect that any compromise that Members might reach will subject domestic competition law enforcement to WTO dispute settlement. This still exerts a chilling effect, and effectively freezes out any possibility of a meaningful agreement. When asked to include competition commitments in otherwise binding trade agreements, even Members with well-developed competition laws have only been able to agree to vague and general exhortations on competition policy. The three NAFTA Parties, for example, only agreed to enforce their competition laws and cooperate in such efforts.⁵⁸ Despite the banality of this approach - little more than a statement of the status quo - they expressly provided that '[n]o Party may have recourse to dispute settlement under

⁵⁷E. Fox, 'Towards World Antitrust and Market Access' (1997) 91 Am. J of Intl Law 1 at 23-24.

⁵⁸*North American Free Trade Agreement (NAFTA)* Article 1501.

this Agreement for any matter arising under this Article'.⁵⁹

However, simply making generally-worded commitments binding can prove to be unhelpful. Allowing Members to 'litigate' on the basis of ill-defined commitments provides them with a wide scope with which to challenge each other's enforcement activities. If some of the challenges do turn out to be specious, then this will make international tension more likely and, in turn, international cooperation less likely.⁶⁰ Moreover, vague standards would not provide Members with any *ex ante* guidance on how anti-competitive practices should be prohibited. Nor would they provide a dispute settlement panel with much of the legal framework that it would need in order to opine on the effectiveness of enforcement. As Joel Klein pointed out, if challenged in dispute settlement proceedings, Members may be able to use the multilateral lowest common denominator to justify any lax enforcement decisions.⁶¹ If they legitimized 'worst practice', general words of principle would do more harm than good.

Perhaps it might be argued that a binding agreement on general principles would strengthen competition authorities around the world, enabling them to implement a higher level of enforcement. In any event,

⁵⁹*NAFTA* Article 1501.3.

⁶⁰This is not unlikely. The United States did not require any international competition rule at all to launch its complaint against Japan's alleged toleration of the alleged anti-competitive activity of Fuji Film. *Japan - Measures Affecting Consumer Photographic Film and Paper: First Submission of the United States of America*, WT/DS44 (20 February 1997) (hereinafter '*Kodak-Fuji*').

⁶¹J. Klein, 'A Note of Caution with respect to a WTO Agenda on Competition Policy', presented at the Royal Institute of International Affairs, Chatham House, London (18 November 1996) at 14.

countries are developing and improving their competition law regimes without express WTO commitments. Every government has a natural self-interest in adopting a severe stance against horizontal anti-competitive activity. Allowing WTO Members to select the standard and enforcement regime that best suits their legal system and their current economic priorities would accord more with the international comity of nations. A country may have decided to address anti-competitive practices by resorting to methods other than a competition law. It may even have decided not to address them at all. So long as this does not harm the commerce of other nations, this sovereign decision should presumably be something that is respected. For example, 'Hong Kong, ... and Singapore ... have been regarded, for years, as being among the most competitive markets in the world, despite the fact that neither of these countries currently has a comprehensive competition law'.⁶²

To summarize, WTO Members have a natural incentive both to ban cartels, and to cooperate in gathering evidence and prosecuting cartels. They do not need a WTO commitment to spur them on to get involved. Equally, if Members are not so naturally inclined, seeking a binding WTO commitment is not going to be of any use. They will either not sign up to the commitment or, will make sure that it is full of exceptions and opt-outs.

3.2 A multilateral ban on discriminatory competition laws

A prohibition of discriminatory competition policy measures has been suggested as a way to prevent allegedly inappropriate toleration of private market access barriers, ever since competition

⁶²WTO Secretariat, 'Core principles, including Transparency, Non Discrimination and Procedural Fairness' WT/WGTCP/W/209 at 11 (19 September 2002).

issues caught the attention of international trade negotiators. The prohibitions of certain anti-competitive practices in the *Havana Charter* were designed to 'further the enjoyment by all countries, *on equal terms*, of access to markets, products and productive facilities' and to promote 'the elimination of discriminatory treatment in international commerce'.⁶³ A Draft International Antitrust Code suggested by a group of academics in 1993 recommended that Vertical Restraints or Distribution Strategies 'discriminating against goods or services of non-nationals' be made presumptively illegal.⁶⁴ This section examines the recent proposals that the EU has made for a binding commitment of non-discriminatory competition law. These proposals have placed National Treatment firmly on the Doha Development Agenda, with WTO Members considering its propriety as a 'core principle' for competition policy.

In 1999, the EU pointed out to the WTO Working Group that '[n]on-discrimination ... is the cornerstone of the multilateral trading system. It is reflected not only in one basic *GATT* provision, but throughout the different WTO agreements...It applies generally both to *de jure* discrimination

⁶³United Nations Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, Articles 1.3, 1.4 and Chapter 5 (emphasis added) (hereinafter, 'Havana Charter').

⁶⁴International Antitrust Code Working Group, Max Planck Institute, Munich, Germany, 'Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement', vol. 64/1628 Antitrust and Trade Reg. Rep., Special Supplement, BNA, Washington, D.C. (19 August 1993), Article 5.

and to *de facto* discrimination'.⁶⁵ The EU added 'there is a close connexion between the WTO principle of non-discrimination and the basic objectives of competition law. Indeed, an effective competition law regime is essential to combat anti-competitive practices which deny to foreign producers effective equality of competitive opportunities, thereby undermining WTO market-opening commitments'.⁶⁶ The EU recognized that if inappropriate laxity in enforcement was being alleged, a mere commitment that the text of the law was not discriminatory was not enough.⁶⁷ A commitment to prohibit *de facto* discrimination was required. Thus the 1999 EU proposal was for Members to 'confirm' that the WTO's all-encompassing non-discrimination commitment applied to the enforcement

of competition laws as well as to their public face.⁶⁸

Although the EU was purporting to merely confirm the status quo, it beat a hasty retreat the following year. For some time there had been resistance to the idea of WTO Panels reviewing its Members' domestic competition law enforcement decisions.⁶⁹ The EU's first response to this was to say that Panels would not review individual decisions, but would only review a Member's *de facto* record based on complaints of 'patterns' of non-enforcement.⁷⁰ The obvious objection was quickly made that reviewing such patterns would necessarily involve examining the

⁶⁵Communication from the European Community and its Member States, 'The relevance of fundamental WTO principles of National Treatment, Transparency and Most Favoured Nation Treatment to Competition Policy and vice versa' WT/WGTCP/W/115 (25 May 1999) (hereinafter 'EU Communication 115') at 3. Also, at 1, the EU noted that its three key concerns were:

Whether there are provisions under the competition law regime of WTO Members, including both substantive law and procedures, which imply *formal discrimination* vis-à-vis foreign enterprises;

Whether the competition law regime of a WTO Member is effectively equipped so as to address anti-competitive practices which deny to imported products (or to foreign firms established in the market) effective equality of competitive opportunities; and

Whether in the *actual application and enforcement* of competition law, there may be instances in which *de facto* less favourable treatment is applied to cases involving foreign interests vis-à-vis similar cases which essentially involve domestic interests'.

⁶⁶EU Communication 115, at 1.

⁶⁷EU Communication 115, at 1.

⁶⁸EU Communication 115, at 12: 'Adoption of a Comprehensive Competition Law: A commitment could be undertaken to apply a comprehensive competition law... The principle of non-discrimination, including both *de jure* and *de facto* discrimination, could be confirmed'.

⁶⁹J. Klein, 'A Note of Caution with respect to a WTO Agenda on Competition Policy'. Address at Chatham House, 18 November 1996 at 5: 'This problem of dispute settlement highlights the difference between competition law and other areas covered by the WTO... [I]f dispute settlement were extended to individual decisions taken by domestic competition authorities, this could interfere with national sovereignty concerning prosecutorial discretion and judicial decision-making, and could also involve WTO panels in inappropriate reviews of case specific, highly confidential business information'.

⁷⁰K. Mehta, 'The Role of Competition in a Globalized Trade Environment', Speech before the 3rd WTO Symposium on Competition Policy and the Multilateral Trading System, Geneva (17 April 1999): suggesting that dispute settlement might be appropriate for 'patterns of failure to enforce competition law in cases affecting the trade and investment of other WTO members'.

individual cases within them.⁷¹ In the face of this logic, the EU's only response was retreat. In September 2000, it told the WTO Working Group:

"In order to avoid misunderstandings, it is important to stress ... that we are only suggesting to define a binding core principle on the need to avoid any de jure discrimination as regards the domestic competition law framework. We are not suggesting, therefore, to apply in a competition agreement the concept of de facto discrimination. The reason is that in a competition context, such a concept raises complex questions about the enforcement policies followed by competition authorities, including how competition law is being applied to individual cases.

Moreover, the intention is to define *de jure* discrimination exclusively in relation to the domestic competition law regime. We are not proposing that a competition agreement should seek to introduce an *absolute* standard of national treatment as applying to any form of government law or regulation."⁷²

However, in WTO negotiations and in law, you cannot offer less than the status quo. Applying the National Treatment standard only to *de jure* measures – and, stating that even this is not absolute, is inconsistent with, and therefore undercuts, the broad and absolute standard that already exists in the *GATT*. Such a lesser 'commitment' would therefore be likely to raise systemic problems for the stability of the National

⁷¹I don't know what it means to say, as the EU does, that individual cases will not be reviewed but that a 'pattern' may be; a pattern is a series of individual cases, and even if the whole were greater than the sum of its parts, any meaningful dispute resolution powers in this field could not ignore the parts.' (J Klein, 'A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust' (OECD, Paris, 29-30 June 1999) at 3.

⁷²EU Communication 152 at 6 (emphasis added).

Treatment commitment at the WTO generally. With respect to competition law specifically, a commitment that does not attach to enforcement can have only limited value. A competition law that discriminates on its face would be difficult to find these days. Even then, such discrimination would be likely to be limited to a narrow sectoral exception, justified through some other policy objective.⁷³ Moreover, toleration of discrimination-in-fact through lax enforcement has always been the far more pressing allegation.

The EU's 'trade and competition' negotiators, Stefan Amarasingha and Ignacio Garcia Bercero, have offered this explanation for why they limited their proposal to *de jure* non-discrimination:

"Of course, it can be argued that legal discrimination, as such, is rare and that a greater risk is that competition law will be '*de facto*' applied in a less-favourable manner to foreign firms. The problem is that in order to determine any such instances of '*de facto* discrimination',

⁷³The WTO Secretariat has noted that with respect to 'special legislative regimes or regimes that allowed for special consideration of small and medium-sized businesses, it seemed plausible that those kinds of rules could be based on sales thresholds that could *de facto* eliminate their application to foreign entities so that perhaps the only firms that would be able to avail themselves of that regime would, in fact, be domestic firms. A second example involved special consideration in cases where international competitiveness was sought to be promoted. While it might make sense in a domestic context to promote the ability of domestic firms to compete more effectively internationally, such provision might, as a practical matter, be unavailable to non-domestic firms since, by definition, they were already doing business cross-border and were, therefore, already competitive internationally, or at least presumptively so. Consideration need[s] to be given as to whether those kinds of regimes could ultimately be squared with the principle of national treatment'. Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the General Council WT/WGTCP/5 (8 October 2001), at paragraph 27.

there would be a need to undertake a complex review of how competition law has been applied in different cases... such an inquiry would exceed what should rightly be the competence of WTO panels in the competition area.

The EU therefore considers that a binding commitment on non-discrimination should be *limited to the legislative framework*. This does not mean however, that a WTO agreement should not contribute towards the goal of promoting an active and non-discriminatory enforcement policy. *Apart from the importance of entrenching the principle of non-discrimination in the legal system, provisions on transparency, due process and on the review of Member's enforcement policies would make it more difficult for countries to apply a lax or discriminatory enforcement policy.*⁷⁴

Therefore, what could not be imposed directly, was to be provided through other means. A transparency exercise, possibly involving a form of peer review among WTO Members under a 'Competition Policy Review Mechanism' ('CPRM') was considered at the WTO Working Group.⁷⁵ Combining a *de jure* commitment with a CPRM could allow Members to test the justifications used for any truly discriminatory legal provisions and make it more difficult to engage in overtly discriminatory enforcement.

The commitment to provide National Treatment

What is 'discrimination'? What does it mean to say that you will provide foreign products or their suppliers with National Treatment? How does this commitment

⁷⁴S. Amarasingha and I Garcia Bercero, 'Moving the Trade and Competition Debate Forward' 4(3) J of Int Eco Law 481 (2001) (hereinafter 'Amarasingha and Garcia Bercero') 494 (emphasis added).

⁷⁵WTO Secretariat Report (2000) of the WTO Working Group to the General Council WT/WGTCP/4 (30 November 2000) at paragraph 90.

operate to open markets? Finally, what does this all mean for competition policy?

The key to understanding the concept of 'discrimination' rests on the fact that differential treatment is not always forbidden, nor is equal treatment always sought; the aim is to treat 'likes' the same way and 'unlikes' in accordance with their differences. The very heart of this 'formula' is the 'golden rule' of competition: one's treatment, including one's reward, should be merited. Differential treatment occurs all the time. It may be on any ground - gender, nationality, age - the criterion itself is not important. What makes differential treatment 'discriminatory' is the impropriety of the criterion used. What makes the criterion improper is how it subverts what should matter, i.e. the merit of the relevant person, product or activity. Essentially, the underlying 'right' is not to equal treatment *per se* but to an equal opportunity to compete, rise and fall and even fail, on merit. That is the *fundamental* reason why the term 'discrimination' is so obviously pejorative. The negative connotation, unfairness and even the injustice of discrimination all arise because mismatched criteria are subverting merit-based competition.

Merit is the only criterion that should matter in a competition. All true competitions have one fundamental rule: 'may the best one win'. If that rule does not operate -or, if it is distorted in some way for whatever reason, then what you are playing at is not a competition. A 'right' to non-discriminatory treatment is simply the right to an equal opportunity to display one's *inequality*, based on one's skill or effort. In a market, no central authority determines which product, characteristic, or person is most or least deserving. Competition on merit sees to that. To have a true competition, irrelevant criteria have to be prevented from playing a decisive role. In their own ways, competition policy and WTO rules try to remove inappropriate criteria from the competitive process.

What is discrimination in world trade?

In world trade, governments have agreed that nationality is an inappropriate criterion. If there is to be a true competition between products, then their nationality should be irrelevant. Nationality distracts from what matters, namely the product's characteristics and its qualities relative to other products. Guaranteeing National Treatment is not about providing equality *per se*. Nor in fact, is it even about removing all differentiation based on nationality. What is at work, and what is supposed to be at work, is competition on the merits of products that are different in terms of being better or worse than one another.

In international trade, there is more opportunity for governments to intervene and distort the competitive interplay of such differences. Increasing foreign competition increases the pressure on governments to turn this opportunity into reality. To counter a State's 'natural' inclination to promote and to protect its own products and producers and, the latter's lobbying attempts to this very end, international trade rules thus oblige governments to open their markets, and in doing so, to provide foreign products or suppliers with National Treatment.

As the next subsection shows, all of the commitments that governments make to open their markets only come about because of the promise of National Treatment.

The relationship between National Treatment and Market Access

The two primary WTO instruments for liberalizing world trade are the Market Access commitment to substantially lower barriers to the entry of foreign products or their producers and, the National Treatment commitment to

eliminate discrimination against foreign products or producers once they have entered the market.⁷⁶ In terms of process, the Market Access commitments appear to come first. Trade negotiators try to substantially lower the tariff and non-tariff barriers of other WTO Members to improve the market access of their own economy's exports. The commitment of National Treatment supports such market-opening. As introduced in Section II above, the provision most commonly associated with the National Treatment commitment is Article III:4 of the *GATT*. This provides that:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Technically, in terms of enforcement, the National Treatment commitment 'kicks in' after tariffs have been lowered, and the products have crossed the border, so as to ensure that protectionism does not creep in through 'less favourable treatment'.

However, in many ways the commitment to provide National Treatment is more important than the tariff and non-tariff negotiations. Indeed, it is a prerequisite for them happening at all. No government would agree to lower its tariffs without some assurance that the promises of its trading partners were going to be honoured. The National Treatment commitment provides that assurance. Governments that open their markets through tariff reductions cannot close them again through less favourable treatment. The importance of the National Treatment commitment is also evident in the fact that WTO Members have agreed that unjustifiable discrimination should be

⁷⁶See *WTO, Preamble and GATT 1947, Preamble*, for example.

'eliminated', and yet market access barriers should only be 'substantially reduced'.⁷⁷ Discrimination is so obviously a barrier to market access that it has been singled out for *per se* prohibition. No proof of harm to exports is required.⁷⁸ Furthermore, any measure that allows less favourable treatment of some products based on the nationality of their origin is so inimical to world trade and, to the operation of the competitive process itself, that exceptions from this prohibition have to be clearly and narrowly defined.⁷⁹ Finally, the commitment to provide National Treatment is directly related to the underlying rationale for trade liberalization. The commitment removes an important non-merit-based difference - nationality - from the competition that should exist among like products, so that the principle of comparative advantage can operate more freely.

National Treatment: a proxy for Market Access

If a measure discriminates against foreign suppliers or supply, then it also, by

⁷⁷WTO, Preamble; GATT 1947, Preamble. Indeed, three experts rank non-discrimination as the primary method of trade liberalization: 'The first method by which GATT attempts to achieve its objective of increasing international trade and economic well being is to eliminate discrimination in world trade...(Davey at 22); 'The General Agreement attempts to realize its second goal - the reduction of barriers to international trade - by limiting the use of tariffs and quotas'. (W. Davey, P. Pescatore and A. Lowenfeld, *Handbook of WTO/GATT Dispute Settlement* (New York: Transnational Publishers, 1991) at 35).

⁷⁸All that is required is proof of the less favourable treatment; the existence or effect of an actual barrier to market access is then assumed.

⁷⁹Article XX GATT 1994 allows discriminatory measures that are necessary to protect public morals, life or health and conservation, among other general exceptions.

definition, protects domestic production. However, the reverse is not true. Not all protectionist conduct is discriminatory. No doubt because of the close inter-relationship between protection and discrimination the two concepts are often muddled. National Treatment is about eliminating only discriminatory measures that restrict trade. Market Access is about substantially reducing obstacles to foreign entry, whether they are discriminatory or not.

A purely protectionist measure which does not discriminate against imports protects the domestic market against something (for example, hormone-treated beef), but not because it is foreign or harms domestic production. There is some other protective reason, such as health or national security, that the Member has deemed to be more important than trade liberalization. The fact that a protectionist measure impedes foreign products is incidental to the ban itself. All products face the same barrier: BFE = BDE, (where BFE is a Barrier to Foreign Entry and BDE is a Barrier to Domestic Entry). Non-tariff barriers such as quotas for example, restrict supply within the market, but not the nationality of the competitors or the products within it. As such, quotas are more likely to be protectionist without being discriminatory.

On the other hand, a discriminatory measure has a different goal and a different means. First, it is not designed to protect a market but to protect domestic suppliers in that market from their foreign competitors. A tariff's extra charge to foreign products is far from incidental. It is its primary aim and effect. Second, and most importantly, a discriminatory measure raises a barrier to foreign entry that is higher than any barrier that may apply to domestic production: BFE > BDE. Again, only foreign products pay a tariff. Discriminatory treatment is so obviously a barrier to foreign entry that no evidence of an actual impediment to market access is required to prove a National Treatment violation under WTO law. Simple proof

of the less favourable treatment of foreign products will suffice.⁸⁰ Similarly, it is no defence to say, or even to prove, that despite the less favourable treatment, 'like' foreign products in fact have access to the market.⁸¹ In a discrimination case, the question is simply whether BFE > BDE (i.e. whether the foreign products are having a harder time of it once they are in the market than are the domestic equivalents).

The test for discrimination: less favourable treatment in fact

What must be proved to establish a violation of the National Treatment commitment? Different, or even equal treatment on the face of the laws is not necessarily conclusive. There must be less favourable treatment in fact. The relevant question is whether the measures have a more negative impact on imports than on like domestic products. As a 1989 GATT Panel confirmed, 'the mere fact that imported products are subject... to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable, do or do not accord to imported products less favourable

treatment'.⁸² The test is even more rigorous if there is no evidence of discrimination in the texts of the challenged laws themselves. The Panel in *Kodak-Fuji* recognized that:

'in the absence of *de jure* discrimination (measures which on their face discriminate as to origin), it may be possible for [a complaining party] to show *de facto* discrimination (measures which have a disparate impact on imports). However, in such circumstances, the complaining party is called upon to make a *detailed showing of any claimed disproportionate impact on imports resulting from the origin-neutral measure*.'⁸³

Applying National Treatment commitments to competition law

In its proposals to the WTO Working Group, the EU said that it is particularly concerned about those private barriers to market access which are also discriminatory. 'The primary concern in the WTO is that a domestic competition law regime be adequately equipped to address those anti-competitive practices which have a significant impact on the interests of other WTO Members, in particular practices which foreclose access to a market *and thereby deny effective equality of competitive opportunities*.'⁸⁴ These are anti-competitive practices that so impede

⁸⁰Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products': *Japan - Taxes on Alcoholic Beverages II*. WT/DS8/AB/R at 27, adopted on 1 November 1996.

⁸¹Article III is designed to 'protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties'; it serves 'to protect current trade but also to create the predictability needed to plan future trade'. *United States - Taxes on Petroleum* paragraph 5.1.9, BISD 34S/136, L/6175 adopted on 17 June 1995.

⁸²*United States - Section 337 of the Tariff Act 1930*, paragraph 5.11, BISD 36S/345, L/6439, adopted on 7 November 1989 and *United States - Standards for Reformulated and Conventional Gasoline*, paragraph 6.25, WT/DS2/R.

⁸³*Japan - Measures affecting Consumer Photographic Film and Paper* (hereinafter, '*Kodak-Fuji*') paragraph 10.85 WT/DSAA/R (emphasis added).

⁸⁴EU Communication 115 at 3 (emphasis added).

market access (BFE) that they amount to discrimination (BFE>BDE).⁸⁵

The EU seeks to address such practices by having Members confirm that their competition measures provide National Treatment to foreign companies. Confirmation is all that is sought because competition 'laws would fall within the scope of the National Treatment rule of Article III:4 to the extent that they affect the internal sale, offering for sale, purchase, transportation, distribution or use of goods'.⁸⁶ Moreover, the WTO Secretariat has found that the obligation to provide National Treatment already extends beyond the statute books of a Member: 'GATT jurisprudence... makes it clear that enforcement procedures as well as substantive laws and regulations are subject to the requirements of Article III'.⁸⁷ The Secretariat has also reported that among WTO Members there is a 'general recognition that the fundamental principles of the WTO are already applicable... to the field of competition law and policy'.⁸⁸

Some trade experts, such as Bernard Hoekman and Petros Mavroidis concur:

National competition law is covered by National Treatment insofar as its enforcement is a 'requirement affecting' trade. GATT case law makes it clear that WTO members are required to provide

⁸⁵According to its statement, the EU is not concerned about non-discriminatory practices which nevertheless impede market access (BFE = BDE).

⁸⁶WTO, Annual Report 1997, 'Special Topic: Trade and Competition', Geneva 1997 (hereinafter, 'WTO Special Report') at 69.

⁸⁷WTO Special Report at 77 citing *United States - Section 337 of the Tariff Act of 1930*, adopted 7 November 1989 (BISD 365/345).

⁸⁸WTO Secretariat, 'Core principles, including Transparency, Non-Discrimination and Procedural Fairness' WT/WGTCPW/209 (19 September 2002) (hereinafter 'WTO Secretariat, Core Principles') at 7.

products of foreign origin with opportunities equal to those available to domestic products as regards access to distribution channels... The 1997 *Kodak-Fuji* case made it clear that competition laws are covered by the National Treatment obligation, explicitly by subjecting Japanese competition law to the national treatment obligation and implicitly by accepting that the term 'affecting' extends to national competition laws.⁸⁹

In considering one of Karel Van Miert's early proposals for a non-discrimination commitment for competition policy, Mavroidis noted: 'He [Van Miert] said, 'We have to have common competition laws,' and by this what does he mean? He means first everybody should apply competition laws in a non-discriminatory manner. My response to this is, [it] is already taken care of because of Article III: 4 of the GATT. Article III:4 of the GATT covers antitrust laws. And Article III: 4 says that I have to apply antitrust laws in a non-discriminatory manner'.⁹⁰

Since competition laws and their enforcement are clearly already subject to National Treatment, it is legitimate to question the value of negotiating another commitment or, of confirming the existing one.⁹¹

⁸⁹B. Hoekman and P. Mavroidis, 'Economic Development, Competition Policy and the WTO'. Paper presented at the Roundtable 'Informing the Doha Process: New Trade Research for Developing Countries', Cairo (20-21 May 2002) at 15 (hereinafter, 'Hoekman and Mavroidis').

⁹⁰Testimony of P. Mavroidis, ICPAC Hearings (4 November 1998)

⁹¹P. Marsden, 'Tune in to the International Competition Network - not the WTO - for Practical Advances in International Antitrust', In *Competition* (December 2001) at 3. The position of the author is obviously that introducing a weakened National Treatment commitment would harm the WTO system. Merely confirming an existing commitment would have a negative net result of a different sort, when one factors in the resources required to negotiate such a redundant provision among 144 Members.

Forms of National Treatment

Some proponents of global competition rules have responded that the existing commitment in *GATT* Article III: 4 is not sufficient because it is not specific enough to capture the types of discriminatory treatment that could arise from exclusionary anti-competitive practices. The EU has noted that different ‘forms’ of National Treatment were negotiated in the various WTO agreements in response to the differences between goods and services.

“Although the overall aim of non-discrimination will generally be the same under the various WTO agreements, namely that of ensuring a level playing field between domestic and foreign operators (and their goods and services) as well as between all foreign operators, *the manifestation of discriminatory treatment takes widely differing forms such as the discriminatory use of internal taxation and other measures under the GATT*, cf. *GATT* Article III. Consequently, we believe there is a need for the inclusion of the principle of *non-discrimination in a WTO framework agreement on competition by way of a separate, specific provision, which would take into account the particularities of competition law and policy*”.⁹²

The particularities in question presumably would include the fact that a competition authority may ‘tolerate’ a trade-restrictive anti-competitive practice through inaction, as opposed to formally exempting or approving it. For example, one of its markets may have gradually filled up with exclusive distribution arrangements, while the authority ‘sat idly by’ or, even examined them but decided not to act.

⁹²Communication from the European Community and its Member States WT/WGTCP/W/160 (14 March 2001) (hereinafter, ‘EU Communication 160’) at 2 (emphasis added).

Such toleration would not be subject to the National Treatment commitment because it is not viewed under *GATT* law to be a ‘measure’, law or ‘requirement’.⁹³

To test the validity of the arguments that National Treatment commitments would be relevant to such situations, this section examines both how the negotiators coped with the ‘widely differing forms’ of discrimination alleged above and how the EU has suggested addressing the ‘particularities’ of competition policy.

Goods and Services

As the National Treatment obligation in *GATT* Article III supports and defends tariff concessions, it prohibits those measures which - like tariffs - impede the competitive entry of foreign goods across a border.⁹⁴ The National Treatment obligation under the *GATS* has a slightly different application. Article XVII of the *GATS* contains a more complete description of the National Treatment commitment. It reads:

“In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the

⁹³As Hoekman and Mavroidis explain, ‘the terms “laws”, “regulations”, and “requirements” in Art. III.4 denote some form of positive action by governments. Mere *tolerance* of RBPs is not enough - there must be some positive action (say, a “comfort” letter)... For economists, inaction also reflects a regulatory choice. Not so for lawyers. One cannot exclude that the Appellate Body might adopt an “imaginative” interpretation of one of the three terms in the future. However, the *Kodak-Fuji* panel adopted a restrictive interpretation of the term “measure”.’ (Hoekman and Mavroidis at 15 and n.18).

⁹⁴WTO Secretariat, ‘Background Note: The Fundamental WTO Principles of National Treatment, Most-Favoured National Treatment and Transparency’ WT/WGTCP/W/114 (April 1999) (hereinafter ‘WTO Background Note 114’) at paragraph 14 and 18.

supply of services, *treatment no less favourable* than that it accords to its own like services and service suppliers.

A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, *either formally identical treatment or formally different treatment* to that it accords to its own like services and service suppliers.

Formally identical or formally different treatment shall be considered to be less favourable *if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member*".

For the most part, this additional detail merely enshrines the case law considering the National Treatment commitment in the *GATT*.⁹⁵ The main substantive difference between the *GATT* and the *GATS*, of course, is that services are not tangible commodities. As there would be no competition in services without the foreign supplier having some presence in the 'export' market, or an ability to access that market, the *GATS* National Treatment commitment focuses on the producer, rather than its product. As such, there is less emphasis on the border across which the supply must travel than there is in the case of tangible goods. After all, in most cases a supplier, such as a telecommunications network or a bank for example, does not first want to supply a market from the other side of a border; it wants to supply domestically from within the foreign country itself. Being on the inside may even be the only way it can supply its product, and will almost certainly be a more effective way of building customer relationships and market share. Therefore, what is important in services trade is not just getting the product across a border - as

⁹⁵See text accompanying following footnote.

with the *GATT*. – but, in getting the supplier itself into the market in question.

However, these differences between the scope and the application of the National Treatment commitment in the two treaties do not alter the 'essence' of the commitment itself. In both the *GATT* and the *GATS*, the obligation is the same: to provide an equality of opportunities'. This has been made crystal clear. There has been extensive interpretation of the no less favourable treatment standard as reflected in Article III: 4 of the *GATT*. This interpretation has revolved around the concept that Article III: 4 prohibits measures that might adversely affect the conditions of competition facing imported products relative to domestically produced products on the internal market. In the case of the *GATS*, the interpretation of the no less favourable treatment standard as one of ensuring no less favourable conditions of competition is built into the national treatment provision of the Agreement itself.⁹⁶

According to the Secretariat, whether in the *GATT* or in the *GATS*, '[t]he *essence* of the principle of national treatment is to require that a WTO Member does not put the goods or services or persons of other WTO Members at a competitive disadvantage vis-à-vis its own goods or services or nationals'.⁹⁷ Therefore, it is not true to say that the *GATS* experience offers a precedent for how the principle of National Treatment had to be, and can be 'adapted', to take account of certain particularities of the services trade. The principle itself was not adapted at all. Its scope and application were simply

⁹⁶WTO Background Note 114 at paragraph 30 (emphasis added).

⁹⁷WTO Background Note 114 at paragraph 13 (emphasis added). This has recently been confirmed by the OECD, 'Applying Core Principles of a Multilateral Framework on Competition' COM/DAFFE/TD (2002) 48 (16 May 2002) at 3 (hereinafter 'OECD Joint Group 48').

expanded. It is therefore difficult to see why any adaptation or amendment would be needed to make the National Treatment commitment encompass competition measures, whether they affect trade in goods or trade in services. National Treatment's core focus is the same for trade in services as it is for trade in goods. This unavoidable fact also tends to undercut the EU's argument that discrimination itself is so multifaceted that 'a separate, specific provision' is required.⁹⁸

Moreover, the most 'specific' of the EU's own proposals does not make any effort to 'take into account the particularities of competition policy'.⁹⁹ The EU has not proposed a bespoke National Treatment commitment for competition law or for its enforcement. The EU could have proposed a broader approach than that 'Members' statute books should not contain discriminatory competition laws.' Instead, it has asked that Members confirm one element of the status quo. Their most detailed suggestions for *de jure* National Treatment state simply: 'Competition law is to be based on the principle of non-discrimination on grounds of nationality of firms'; or that '[t]he application of the principle of non-discrimination, within the context of competition law and policy would mean an obligation not to formally discriminate against firms on the basis of their corporate nationality.'¹⁰⁰ In only asking that Members' laws not be discriminatory, the EU proposals are less specific and particular than the existing National Treatment commitments.

If accepted, the EU proposals would not add much to the existing multilateral framework. Moreover, restricting WTO review to only the face of legal measures

would *protect* competition law decisions from being reviewed. The EU proposals would thereby take much away from existing WTO commitments of National Treatment¹⁰¹ and would likely lead to inconsistent jurisprudence: 'with respect to non-discrimination, it is not proposed that the principle would be binding in regard to *how* a competition law is applied, as opposed to the *content* of the relevant statutes'.¹⁰²

There is another weakness in the EU's proposal for addressing competition policy toleration of exclusive arrangements with a National Treatment commitment. A National Treatment commitment will only ever apply to address situations where foreign products or suppliers have been put at a competitive disadvantage (BFE > BDE). On this subject, the OECD Joint Group on Trade and Competition has opined: "The most difficult issue associated with the application of the non-discrimination principle to competition law enforcement relates to the fact that competition cases are fact-specific and tend to be judged according to the 'rule of reason'. *In any given case a foreign firm may be treated differently from a domestic one. This could be the result of discrimination, but on the other hand it may only reflect the fact that the firms are situated differently within the case at hand.* While determining what are 'like' products in the context of evaluating discrimination in a trade context can be difficult, it becomes even more difficult, if not impossible, to talk about 'like' cases in competition enforcement. Identifying discrimination that arises implicitly during a legal or administrative process, sometimes called '*de facto* discrimination', is therefore extremely difficult ..."¹⁰³

⁹⁸EU Communication 160 at 2.

⁹⁹Preceding note.

¹⁰⁰Preceding note.

¹⁰¹Albeit as yet unapplied to competition law itself.

¹⁰²WTO Secretariat, 'Core principles' at 10.

¹⁰³OECD Joint Group 48 at 3 (emphasis added).

Nevertheless, it is precisely what must be attempted to be identified if the ban on discrimination is to catch the encouragement or toleration of discriminatory anti-competitive practices at all. A ban on de jure discrimination simply will not suffice.

As the above two sub-sections revealed, neither of these commitments can help address exclusionary anti-competitive practices beyond the narrow subset of whatever constitutes a ‘hard-core cartel’ or, what results in less favourable treatment to ‘like’ foreign goods, services and firms. In terms of demand, the main trade frictions that have arisen in past years in relation to trade-restrictive practices have concerned practices that would neither constitute a cartel, nor be discriminatory. This is particularly so for the allegations of exclusionary business arrangements in the *Japan-Photographic Film* (the ‘Kodak/Fuji’ case) and *Boeing/McDonnell Douglas*, the bundling arrangements in *GE/Honeywell* and, the finding of denial of access and anti-competitive practices in *Mexico – Telecommunications* (the ‘Telmex’ case).¹⁰⁴

4. Exclusionary anti-competitive practices

Given all of the above concerns and ‘demand’ for action, it is significant that Members of the WTO Working Group have not made the study of exclusionary arrangements their top priority. As this Section will explain competition authorities disagree about how exclusionary arrangements should be analysed and addressed. These differences of approach undoubtedly affect the *feasibility* of forging multilateral agreement. However, they do not lessen the

need for the development of a coherent approach to exclusionary arrangements. This is particularly the case when the different views on how such arrangements should be addressed are already causing much international friction.

It is one thing to argue that WTO Members should focus their attention on exclusionary business arrangements. It is quite another to be able to set out a meaningful ‘common approach’ on how governments should analyse and address such practices. Many exclusive arrangements have competitively ambiguous effects that are almost impossible to assess, let alone predict. Richard Posner has spoken of the ‘exquisitely difficult case of a practice that is at once exclusionary and efficient’.¹⁰⁵ He has opined that ‘[b]alancing the costs and benefits of an exclusionary practice that also has efficiency characteristics may well be beyond the capacity of the courts’.¹⁰⁶ Yet competition authorities and courts make decisions on whether to allow or ban such arrangements all the time. Is it really conceivable that nearly 150 governments could agree on how they should treat exclusionary arrangements? Karel Van Miert understated matters when he said that multilateral ‘work in [these] areas... may take longer’ than forging an agreement on banning cartels.¹⁰⁷ However, this was all the more reason, he submitted, for WTO Members to begin such work immediately.

Beginning work on commitments to address such practices was not possible,

¹⁰⁵R. Posner, *Antitrust Law* (2nd ed.), (Chicago: University of Chicago Press, 2001) at 253.

¹⁰⁶Posner, at 253.

¹⁰⁷K. Van Miert, ‘The WTO and Competition Policy: the Need to consider Negotiations’ Address before Ambassadors to the WTO, Geneva, (21 April 1999) at 1 (<http://europa.eu.int/com/competition/speeches>).

¹⁰⁴Mexico, “Measures affecting telecommunications services,” *WT/DS204/R* 2 April 2004 (available at www.wto.org)

however. WTO Members had enough difficulty agreeing amongst themselves to consider rules on cartels and discrimination, and felt that work on further rules on more complicated subjects should be postponed. Although noting that they had spent much time and effort devising 'common guidelines' on exclusive agreements, vertical restraints and abuse of dominance, EU negotiators have admitted that '[t]he complexity of the issue ... makes it clear that there is no reasonable prospect that such 'common guidelines' could be agreed *within the context of a short round of trade negotiations*. This is the reason why the EU has suggested that a negotiating mandate for a competition negotiation in the WTO should not go beyond the negotiation of core principles and co-operation modalities'.¹⁰⁸ A focus on exclusionary practices thus fell off the WTO agenda. Further work on commitments to address such practices was not ruled out, but would have to await a commitment to rules on cartels and non-discrimination.¹⁰⁹

It is not surprising that further international understanding and consensus about the effects of the above practices has been delayed. There is a stark difference of opinion between trade and competition experts, and indeed within the competition policy community, about the effect such practices have on trade and competition. Many trade experts assume that practices that foreclose entry in some manner are necessarily trade-

¹⁰⁸S. Amarasingha and I. Garcia Bercero, 'Moving the Trade and Competition Debate Forward' 4(3) *J of Int Eco Law* 481 (2001) (hereinafter 'Amarasingha and Garcia Bercero') at 495-496 (emphasis added).

¹⁰⁹Communication from the European Community and its Member States, A WTO Competition Agreement and Development, WT/WGTCP/W/175, 26 July 2001, Communication from the European Community and its Member States, Core Principles, 19 November 2002, WT/WGTCP/W/222

restrictive and should be banned. However, many competition experts see important efficiency benefits that such practices provide, and thus wish to make their prohibition dependant on a finding of anti-competitive harm. This debate may rage forever unless something more is done to engage experts from both 'camps' in a forward-looking and inclusive work programme to analyse the practices and develop a common approach to them. In the meantime, the continuing perception that the world lacks a remedy with which to address such practices allows various 'trade hawks' to mandate unilateral government action against trading partners who may be assumed to be tolerating such practices inappropriately.¹¹⁰

This tension and delay is preventing work on a coherent approach. Thus, there is an urgent need to try to find some way to address trade frictions about such practices, and the practices themselves if they are indeed trade-restrictive and anti-competitive. It is also the case that many of these practices could only have such a trade-restrictive and/or anti-competitive effect if they involved firms with market power.

It is no coincidence that those developing countries who are somewhat interested in pursuing a Multilateral Competition Framework are most interested in rules that might help to discipline multinationals with market power, particularly those who use their power to exclude rivals, or extract supra-competitive rents from downstream consumers. A concern with abuses of dominant firms relates most directly to one of the other rationales for improved international mechanisms relating to competition

¹¹⁰R. Cunningham, 'Evaluating ICPAC and the ABA: An International Trade Lawyer's Perspective', Remarks at 2000 Annual ABA Meeting at 7-8; Wolff A., 'Unanswered Questions: The Place of Trade and Competition Policy in the 'Seattle Round'', paper delivered at OECD Conference on Trade and Competition, Paris, (30 June 1999)

policy: this is the concern to ensure that markets operate efficiently and equitably, and are not subject to the whims (and abusive conduct) of a few large economic actors.¹¹¹

5. Conclusion

The tour d'horizon in this first Section cannot do justice to the very many complexities and controversies associated with the selection of a focus on exclusionary anti-competitive practices, rather than commitments on cartels and discrimination that are supposedly (but apparently not) more 'deliverable'. Nevertheless, it has hopefully provided a clear rationale for doing so, and in particular for the need to forge some form of analytical framework to address exclusionary practices that truly do harm trade and competition.

¹¹¹Communication from UNCTAD, Closer Multilateral Cooperation on Competition Policy: The Development Dimension, Consolidated Report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy held between 21 March and 26 April 2002, WT/WGTCPW/197 15 August 2002

Section II: Compilation of case studies of exclusionary anti-competitive practices

1. Recent major allegations of exclusionary anti-competitive practices

This section of the report outlines allegations of various exclusionary anti-competitive practices, including:

- cartels;
- abuse of dominance, through refusal to deal;
- abuse of intellectual property rights, through refusal to license;
- exclusive purchasing agreements;
- exclusive supply agreements;
- mergers.

It does so first by examining anecdotal evidence compiled from formal submissions, and then moves on to list recent specific cases, drawn from the official reports of competition authorities, trade representatives, international studies, the media and economic literature. Finally some conclusions will be drawn with respect to common elements that are particularly relevant to the development of a coherent analytical approach to such practices.

Discussion of exclusionary anti-competitive practices has not been absent from multilateral fora. The WTO Working Group on the Interaction between Trade and Competition Policy notes in the minutes of its meetings that:

“With regard to ... practices affecting market access for imports, the specific examples cited by Members in the discussion included *actual cases of domestic import cartels, international cartels that allocated national markets among participating firms, the unreasonable obstruction of parallel imports, control over importation facilities, exclusionary abuses of a dominant position and vertical market restraints that foreclosed markets to competitors, certain private standard-setting activities*

*and other anti-competitive practices involving industry associations.*¹¹²

The same types of exclusionary practices are repeated by other officials from other international organizations.

The observers from UNCTAD, the OECD and the World Bank referred to additional examples of practices affecting access to markets. Specifically, the observer from UNCTAD referred to *import cartels, vertical market restraints and exclusionary abuses of a dominant position* as examples of practices that could have such effects in developing countries. These practices were also mentioned by the observer from the OECD. The observer from the World Bank mentioned “*vertical integration by local manufacturers into distribution; contractual arrangements that mimicked the effects of vertical integration, such as exclusive dealing and sole distribution rights; cartels involving local producers; anti-competitive agreements involving both local and offshore producers; possible instances of predatory pricing; and private standard-setting activities as examples of such practices.*”¹¹³

Observers from intergovernmental organizations also referred to examples of practices that had come to light in their work, including “*vertical integration by local manufacturers into distribution; contractual arrangements that mimicked the effects of vertical integration, such as exclusive dealing and sole distribution rights; cartels involving local producers; anti-competitive agreements involving both local and offshore producers; possible instances of predatory pricing; and private standard-setting activities in addition to import cartels, vertical market*

¹¹²WT/WGTCP/M/4, paragraphs 23-24

¹¹³WT/WGTCP/M/4, paragraphs 23-24

*restraints and more general exclusionary abuses of a dominant position”.*¹¹⁴

The concern with exclusionary practices is clear. Another major theme is the importance of purely private exclusionary anti-competitive practices. This is not to undermine the importance of government or hybrid public/private barriers but, merely to note that in a great many instances there were complaints about purely private practices and, that in many cases, discussants submitted that such practices were more of a problem than those involving public (i.e. state) action or involvement.

For example, the American Bar Association has noted in a special ‘Market Access’ report that in a poll of member companies conducted by the American Electronics Association preparatory to its initiative seeking United States-Japan sectoral negotiations, *private access-denying practices were named far more frequently than governmental practices as being serious barriers to exports to Japan.* Similarly, in testimony to Congress in 1989, the National Association of Manufacturers stated that *private barriers to market access were the most serious problem in United States-Japan trade.*^{115/} Such complaints by major exporting groups have led to increasing pressure on governments to address private and hybrid restraints that nullify or impair the benefits of free trade that nations reasonably had expected to enjoy as a

¹¹⁴Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/2 at 28 (Dec. 8, 1998), at 28 para. 84. The Report went on to discuss the access-denying effects of private anticompetitive practices in Argentina and Peru. Preceding note. at 28 para. 85.

^{115/}Testimony of R. J. Morris, National Association of Manufacturers, before the Subcommittee on Trade of the Senate Finance Committee, (Nov. 6, 1989).

result of multilateral, regional and bilateral trade agreements.¹¹⁶

The report went on to give more examples of the types of practices it was concerned about.

”Substantial anecdotal evidence has been presented that competition in the international arena is significantly impeded by private anticompetitive conduct. Examples of private conduct that can impede access by foreign firms include *agreements among local firms to refrain from purchasing or distributing products imported by or from foreign firms, agreements to withhold from foreign entrants materials, supplies or other necessary inputs, predatory pricing designed to drive out new entrants, industry-created standards that discriminate against foreign sellers' products or services, exclusionary distribution systems, and exclusive purchasing agreements with domestic suppliers by a company or companies representing a major portion of domestic demand.*”

Practices of this nature may operate to deny foreign firms a reasonable opportunity to compete in markets clouded by this conduct, even though the governments of these countries have reduced or even eliminated governmental barriers to market access through trade negotiations.¹¹⁷

In a special report of its own, the United States Council on Trade, a body made up primarily United States-based multinationals and exporters, stated its view of the problem such practices caused:

“Anti-competitive practices are private activities that restrict commerce and alter

¹¹⁶BA, Section of International Law and Practice, Report to the House of Delegates, ‘Using Antitrust Laws to Enhance Access of U.S. Firms to Foreign Markets’ 29 International Lawyer 945 (1995) (hereinafter, ‘ABA, Market Access Report’) at 25

¹¹⁷ABA, Market Access report, at 8-12

market outcomes. Anti-competitive practices distort the domestic economy in which they occur and frequently, international commerce. There are several categories, including "horizontal" practices (e.g. among fellow producers of the same type of good), "vertical" practices (e.g. between producers and distributors), and monopolization or abuse of a dominant market position."¹¹⁸

The COT also stated its view on the importance of the problem, and the relevance of competition policy to it.

"Anti-competitive practices significantly affect international trade. Indeed, of all the policy domains once considered to be exclusively domestic, but now increasingly raised in trade negotiations, competition policy has perhaps the most direct impact on market access and trade flows. In many cases, anti-competitive practices completely close a country's markets to inbound trade and investment. Governments, despite having agreed to eliminate official trade protections, can "privatize" protection by tolerating anti-competitive practices and allowing favoured domestic companies to block out competing foreign goods or services. This strategy can wholly or partially nullify the benefits of negotiated trade concessions."¹¹⁹

The COT then listed the problems that its members had identified as being particularly problematic.

For example, the flexibility of manufacturers to engage in the following types of activity varies sharply from jurisdiction to jurisdiction:

- *buying smaller local competitors and their production facilities;*

¹¹⁸Council for Open Trade, Addressing Private Restraints of Trade: Industries and Governments Search for Answers Regarding Trade and Competition Policy (1997) (hereinafter 'COT'), at 8-10

¹¹⁹COT, at 8-10

- *integrating vertically, forging ownership links "upstream" with input suppliers and "downstream" with wholesalers and retailers;*
- *threatening, either alone or in concert with fellow domestic manufacturers,- to cut off supplies to distributors who cut prices too aggressively or traffic too extensively in imported goods;*
- *monopolizing essential port facilities or distribution networks in a manner that denies foreign suppliers access and thereby effectively keeps them out of the market;*
- *entering into reciprocal "non-aggression" (territorial exclusivity) agreements with certain like-minded foreign competitors.¹²⁰*

The Business and Industry Advisory Committee (BIAC) has also published the results of its own Survey of Business Competition Law Concerns.¹²¹ In the course of this survey, BIAC received 60 responses from companies with different types of businesses and from a number of different jurisdictions, including Belgium, Canada, Finland, France, Germany, the Netherlands, New Zealand, the Republic of Korea, Turkey and the United States. Nearly half (46 per cent) of those members who responded agreed, or strongly agreed, that anti-competitive practices significantly limited their ability to enter new export markets.¹²²

¹²⁰COT, at 8-10

¹²¹BIAC Report on the Survey of Business Competition Law Concerns, presented before the OECD Conference on Trade and Competition, Paris, France (June 29, 1999) [hereinafter BIAC Report].

¹²²The BIAC survey also asked its members to identify the relative importance of anti-competitive practices in a respondent's ability to expand or enter markets in both primary export markets and new export markets. Fourteen respondents listed anti-competitive practices as one of the top three factors in

Another body, the American Business Roundtable, surveyed their own CEOs. Of the 54 respondents, 30 per cent indicated that they had encountered market access barriers attributable to private anti-competitive practices abroad.⁽⁷⁴⁾ The United States Council for International Business has also urged continued analysis in areas such as market access and contestability.¹²³

Business bodies with a broader international base of membership have concurred. The International Chamber of Commerce described United States business concerns about the potential for private anti-competitive restraints to impede market access.¹²⁴ The Transatlantic Business Dialogue (TABD) has also urged all countries to make market access a priority in applying competition laws and regulations.¹²⁵

inhibiting growth in export markets. Trade policy was listed as one of the top three factors in 32 different survey responses, particularly in those surveys that listed Australia, China, and the United States as their primary export markets. One-fourth of the respondents agreed or strongly agreed that competition law enforcement is ineffective in their primary export markets. In addition, 44 per cent of the respondents agreed or strongly agreed that the enforcement of competition laws by governments in new export markets is unpredictable, too costly or too burdensome. For primary export markets, 27 per cent agreed or strongly agreed that this was a problem. BIAC Report and ICPAC report, ch.5, n. 72

¹²³Submission by the United States Council for International Business (USCIB), ICPAC Hearings (Apr. 22, 1999) at 2

¹²⁴International Chamber of Commerce, Competition and Trade in the Global Arena: An International Business Perspective, Draft Report of the ICC Joint Working Party on Competition and International Trade, February 12, 1998, p 1. citing ICC Programme of Action, 1996

¹²⁵Transatlantic Business Dialogue (TABD) Overall Conclusions, Seville, Spain (Nov. 11, 1995) [hereinafter TABD Overall Conclusions]. See also TABD Berlin Communiqué (Oct. 30, 1999) at 50.

In sum, there is a broad congruence between the problems that business and governments have identified with respect to exclusionary anti-competitive practices. What cases have so far arisen, and how have they been handled?

2. Specific cases¹²⁶

2.1 Collective refusal to deal / Import Cartels

As mentioned above, cartels are clearly a major problem in international trade and, can only function by erecting barriers to competitive entry that would otherwise destabilize the cartel itself. As has been noted, there are several examples of international cartels that had allocated national markets among participating firms. An American representative at the WGTCP has noted that:

“a recurring pattern in these cases involved United States firms committing themselves not to supply European markets, and European firms undertaking to stay out of the United States' market. A prominent example was the American Tobacco case, in which United States and British firms had allocated markets amongst themselves. This had had an

¹²⁶The cases that follow have been selected as being representative of many of the allegations that have been made in the preceding sub-section, by business associations, government representatives and international organizations. The list is by no means exhaustive. Indeed, in any jurisdiction with a functioning competition law enforcement regime will likely have reports of cases similar to those referred to here. Early on in the study however, it was noted that many of these cases were not reported, or if so it was not readily apparent that the complainant was foreign. The exclusionary practice complained about would likely also apply to foreign rivals, but listing all cases around the world that evidenced some degree of or, allegation of exclusionary practices would be unmanageable and, of questionable value. It was therefore decided to select cases that clearly involved some exclusion of foreign rivals, and were representative of the types of allegations already referred to. Obviously not all jurisdictions have been reported on; nevertheless, this was not from want of trying. Try as we might to gain case reports and allegations from all countries, particularly in the developing world, such was often simply not available. This gap will likely continue to inhibit further research and analysis. As a result, this report calls for a series of national studies of exclusionary business practices to supplement those in this report.

obvious, direct effect in limiting trade as well as competition.”¹²⁷

Within Europe, the problem of cartels has arisen as a major problem and barrier to market integration intended by the Treaties. European cement producers and their trade associations coordinated their market conduct from 1983 onwards in a whole series of multi- and bilateral market-partitioning, market-protection and market-regulation arrangements. For instance, the members of the European Cement Association decided not to tranship into other members' markets and to regulate sales from one member's state to another. Moreover, a coalition was formed to deal with the threat of Greek cement exports to a number of Member States.¹²⁸

In addition, the following cartel arrangements in Europe have been prohibited.

European carton board producers formed a cartel to fix prices and regulate their market. European producers of steel beams agreed to preserve their traditional pattern of trade and agreed on price increases in various Member States. The European Commission (EC) has also challenged an organization (SCK) that hires out mobile cranes in the Dutch market. SCK established a certification system to guarantee the quality of cranes used in the crane hire business. SCK members, most of whom are Dutch firms, refused to certify these cranes from non-affiliated firms, which in effect prevented foreign firms from entering the market.¹²⁹

Individual countries have also identified anti-competitive practices that they allege inhibit access to EU markets. For example, in 1995 the French antitrust

¹²⁷WT/WGTCP/W/66

¹²⁸Com CE Dec. 94/815, 1994 O.J.(L 343), TPI, T-25/95

¹²⁹Com CE Dec. 94/601, 1994 O.J. (L 243), TPI, T-295/94; CFI 22 Oct. 1997. "Dutch Cranes" (T 213/95 and T-18/96)

authority condemned 31 private civil engineering firms for sharing the construction markets on the Train à Grande Vitesse (TGV) high-speed rail project in northern France. One objective of the cartel was to prevent foreign companies from entering the market.⁽⁶⁵⁾

The *Sabre/Amadeus* case is considered later on in the report in relation to abuse of dominance. However, at bottom it involved a collective refusal in the services industry to allow a foreign competitor the inputs it needed in order to make a competing offer. Sabre, owned by American Airlines, is the leading computer reservation systems (CRS) provider in the United States. It had sought to establish and expand its presence in European markets for more than a decade. It claimed that its entry into these markets had been inhibited by the anti-competitive conduct of the three large European airline owners of Amadeus, the leading European CRS. The Amadeus CRS is owned by Lufthansa Commercial Holdings GmbH, Compagnie Nationale Air France and Iberia Airlines, the national flag carriers in Germany, France and Spain, respectively, and by Continental Airlines.

Sabre contended that these airline owners, together with their affiliated travel providers, refused to provide Sabre with the same complete, timely and accurate fare data routinely provided to Amadeus, and also denied Sabre the ability to perform numerous booking and ticketing functions made available to Amadeus. The United States Department of Justice concluded that the inputs allegedly denied by the European travel providers to Sabre were "critical" to the ability of a CRS to compete effectively and requested that the European Communities investigate these practices under the United States-EU positive comity agreement.¹³⁰

^{130/} See United States Department of Justice Press Release, Justice Department Asks European Communities to Investigate Possible Anti-competitive Conduct Affecting

The Canadian Competition Bureau prosecuted a horizontal agreement in the market for ductile iron pipe, which had provided for the withdrawal of a United States firm from the Canadian market.¹³¹

An import cartel has been in force in the soda ash industry in Japan and there have been several examples of the unreasonable obstruction of parallel imports and, (on a hypothetical basis), the forcing of import boycotts by international manufacturers.¹³² The anti-competitive practices in the Japanese soda ash industry have been a particular point of contention in relations with the United States. As ICPAC¹³³ reported;

"[i]n 1973 four Japanese soda ash producers agreed to regulate the flow of imported soda ash through joint ownership of the Tokyo Terminal, Japan's sole facility for importing soda ash. The producers also pressured Japanese soda ash consumers not to purchase imported soda ash. In 1983 the JFTC found that the producers had formed an illegal cartel and ordered it to cease its activities. A second investigation by the JFTC in 1987 expressed concern that Japanese customers routinely requested permission from their domestic supplier before purchasing foreign soda ash. According to one observer, the cartel overreached when its company presidents called on the president of the Sumitomo sales company and asked him not to disturb the market. The JFTC reacted with a warning, and the Japanese market for soda ash is said to be open."¹³⁴

United States Airlines' Computer Reservations Systems (Apr. 28, 1997).

¹³¹ WT/WGTCP/W/70

¹³² WT/WGTCP/W/68

¹³³ These, and other allegations of exclusionary anti-competitive practices, are drawn from ICPAC, ch. 5, at 211-226

¹³⁴ A. Wolff, Unanswered Questions: The Place of Trade and Competition Policy in the Seattle Round, Paper delivered at the OECD

Further evidence of cartels that restrict trade flows comes from Latin America.

World Bank economists have described several examples of anti-competitive practices they learned of during their extensive consulting work in Latin American countries. In Colombia, for example, the leading brewer allegedly has geographic market-sharing agreements with existing and potential competitors in neighbouring countries. It also owns the sole bottle manufacturing plant and has exclusive-dealing clauses with the great majority of distributors.

In Ecuador, government enterprises and private sector firms are alleged to engage in price and market-sharing agreements in cement and steel. In addition, the industry associations for domestic oil and pharmaceuticals have persuaded the Government to limit entry and to allow the coordination and increase of prices. Moreover, the distribution of automobiles remains the exclusive area of government-owned or -appointed dealers.¹³⁵

2.2 Abuse of dominance

A report has offered examples of abuse of dominance in an international context:

Discrimination by dominant firms can possibly have international anti-competitive effects. For example, pursuant to a positive comity request from the United States, the European Commission has opened proceedings against Air France because of allegations that it and certain other European carriers discriminated against a rival computer reservation system, Sabre (owned by American Airlines), in order to assist

Amadeus, its partly owned reservation system.

There is also an interesting case in Argentina where, following market opening liberalization, the main customer of a leading, quasi-monopolistic firm successfully negotiated prices corresponding to what it would have to pay for imports from a certain Mercosur country. The firm responded by charging the "import parity" price to this buyer, and a higher price to other companies whose purchases were too small to make imports a realistic possibility for them. Although this practice clearly had an impact on trade, it is not clear on the facts described whether the price discrimination was anti-competitive.¹³⁶

While the subject of loyalty discounts and other vertical restraints will be discussed separately, under many competition laws such practices can also be reviewed under abuse of dominance provisions. In Norway, for example, loyalty discounts are viewed as being a form of price discrimination which, when practised by a dominant firm, can negatively affect both competition and market access. A good example arose after [Norway] removed various technical barriers to trade in artificial fertilizers, a reform urged on several occasions by the Norwegian Competition Authority (NCA). The sole producer in Norway, Norsk Hydro, accounted for 90 per cent of domestic sales. It enjoyed a reputation for high quality, but apparently decided that was not enough to retain its market share given the threat of increased imports. Its response was to adopt a loyalty discount scheme for sales to wholesalers, i.e. the greater their annual purchases the greater the discount received. Although the maximum average discount amounted to only 2.9 per cent of ordinary prices, a competing firm would have to undercut the Hydro prices by 20-30 per cent in

Conference on Trade and Competition, Paris (June 30, 1999) at 15-16

¹³⁵R. S. Khemani and R. Schöne, *International Competition Conflict Resolution: A Road Map for the WTO* 10, PSD Occasional Paper No. 33 (The World Bank, Private Sector Development Department), Oct. 1998

¹³⁶OECD, Competition and Trade Effects of Abuse of Dominance, COM/DAFFE/CLP/TD(2000)21/FINAL

order to be competitive for marginal supplies to a large wholesaler. This discount scheme could have partly been a reaction by Norsk Hydro to a reduction in barriers to trade in artificial fertilizers. A more powerful motivating factor was new competition from Eastern Europe and overcapacity in Western European markets.¹³⁷

Tied selling (making the sale of one product conditional on the simultaneous purchase of another product) can also cause problems for competition and market access. The difficulties entailed in assessing tying, even when practised by a dominant firm, are illustrated with a controversial case brought against IBM for, *inter alia*, refusing to sell its System/370 central processing units without a main memory capacity included in the price. That case was eventually dropped by the United States Department of Justice but, the European Commission insisted on certain undertakings which were continued for close to ten years.¹³⁸ The difference in approach, and level of concern, reflected, among other things, the complicated nature of these practices which can have both exclusionary and efficiency-enhancing effects, a theme that will be repeated throughout these cases.

A tied selling case which had both trade and competition effects, and which benefited from bilateral cooperation between three governments was that concerning the A.C. Nielsen case. This involved vertical market restraints that had had exclusionary effects on a foreign competitor, and the case focused on whether Nielsen offered customers more favourable terms in countries where it had market power if those customers simultaneously purchased Nielsen's services in countries where the company faced significant competition. While the complaint arose in the United States, the conduct complained about occurred in

other markets. Notwithstanding the significant trade liberalization which had taken place between Canada and the United States, competition law measures were still necessary in Canada to address the problem.¹³⁹ The European Commission's DG IV also investigated, since most of the conduct occurred in Europe and had a direct impact on European consumers. There was close contact between the staffs of the agencies in the United States and Europe. After it became apparent that the Commission would take action to remedy the situation, the Department of Justice suspended its investigation and let the Commission take the lead. The Department of Justice later closed its investigation when Nielsen signed an appropriate undertaking with the Commission.¹⁴⁰

The European Commission has been particularly active against abuses of a dominant position. One case of the many that are of interest in this area concerns an abuse of a dominant position in international transport – CEWAL.¹⁴¹ The EU has reported that the Court of First Instance of the European Union had recently heavily condemned a case of "fighting ships". This is a practice by which a group of shipping companies with a dominant position resort to a very low price on a particular shipping line (in this case, between Northern Europe and the Republic of Congo) in order to eliminate a competitor.

This example shows how an abuse of a dominant position or, several firms having a collective dominant position on international markets, can affect the interests of developing countries:

- they can affect their imports: once the competitor has been eliminated, these practices result in higher transport costs,

¹³⁷Preceding note.

¹³⁸Preceding note.

¹³⁹Canada (Director of Investigation and Research) v. the D & B Companies of Canada Ltd. (1996), 64 C.P.R. (3d), 216, April 1994

¹⁴⁰WT/WGTCP/M/4

¹⁴¹TPI T-24/93, 8 October 1996

which will affect the price of the products bought by their consumers. The final outcome is therefore a transfer of wealth from the developing countries to the owners of foreign firms;

- they can affect their exports: higher transport prices make the products exported by the developing countries more expensive, and therefore affect their competitiveness.

The EU also has challenged the exclusive, or preferential supply contracts of Roche, the world's leading vitamin manufacturer, concluding that the contracts improperly tied the most important buyers of bulk vitamins to Roche and prevented its chief competitors from supplying these products.¹⁴²

As the ICPAC has reported,¹⁴³ “[i]ndividual countries have also identified anti-competitive practices that they allege inhibit access to EU markets”. In 1988 the French authorities fined Lilly France for granting substantial rebates to hospitals on an antibiotic patented and manufactured by Lilly France when the customers also purchased a heart disease drug that the pharmaceutical company made. The French authority concluded that this practice prevented hospitals from turning to more competitive providers of the heart disease drug, including foreign competitors.

In its submission to the WTO, Canada identified anti-competitive practices within its borders that have an impact on international trade.¹⁴⁴ In one example, the Interac case, a company was alleged to have abused its dominant position in the

¹⁴²Com CE, 9.6.76, O.J. (L 223), CICE 13.2.79, n 85/76, Rec. 1979, P: 461

¹⁴³ICPAC, ch. 5

¹⁴⁴Submission from Canada, The Impact of Anti-competitive Practices of Enterprises and Associations on International Trade, Working Group on the Interaction Between Trade and Competition Policy, World Trade Organization, March 11, 1998

supply of shared electronic network services in Canada, by leveraging the control of demand deposits and automated banking machines, through membership and participation restrictions in the Interac network. The Canadian competition tribunal approved a consent order designed to improve competition in the market.

The ICPAC also noted that United States firms have also been alleged to use anti-competitive restraints to prevent foreign companies from entering the United States market. In one example, the Justice Department recently filed a complaint against Dentsply, an American manufacturer of artificial teeth, alleging that the firm engaged in exclusionary conduct to deny rival tooth manufacturers access to the primary distribution channels for artificial teeth in the United States. According to the United States complaint, Dentsply, using its monopoly position in the United States market, threatened to terminate its relationship with dealers that sold teeth produced by Dentsply's competitors, including two foreign manufacturers.¹⁴⁵

In Argentina, an important case concerned an oil company's abuse of its dominant position in the liquid gas market. The company was punished with a US\$109.644.000 fine and was ordered to end its price discrimination practice between national and foreign buyers.¹⁴⁶

The Competition and Tariff Commission (CTC) of Zimbabwe charged the Zisco Medical Benefit Society (ZMBS), a domestic company, with restrictive practices in the retail pharmaceutical services sector over the past three years.¹⁴⁷ The CTC said it had reached a

¹⁴⁵Complaint by the United States, United States v. Dentsply International, Inc., Civil Action No. 99-005, (D.Del), January 5, 1999

¹⁴⁶CNDC vs. YPF S.A. (Argentina 1999)

¹⁴⁷See UNCTAD, Recent Important Competition Cases (TD/B/COM.2/CLP/38) 2003

conclusion based on its own investigations, that ZMBS had engaged in anti-competitive practices in the course of conducting business in the Kwekwe and Redcliff areas. The Commission concluded that ZMBS abused its dominant position in the health delivery sector in the Kwekwe/Redcliff area through the highly exclusionary conduct of arbitrarily closing its accounts with most community pharmacies in the area and, directing its members to use pharmacies owned by a company called Jenita Pharmaceuticals (Pvt) Limited, when purchasing prescribed medicines. Evidence gathered during the investigation showed that ZMBS entered into anti-competitive agreements, in addition to violating merger control regulations.

A number of remedial orders have since been passed on the identified restrictive practices. In the light of the law infringements by ZMBS, the Commission ordered ZMBS not to direct its members to use community pharmacies owned by Jenita Pharmaceuticals, or any other particular or specific pharmacies as a condition for membership. ZMBS was also ordered to amend its rules by deleting the restrictive provisions that made it compulsory for all employees of the Zimbabwe Iron and Steel Company and its associate companies to join the society. To enhance competition and ensure that competition law in the health delivery services sector would not be violated in future, the Commission also recommended that the Medical Control Authority of Zimbabwe and the Ministry of Health and Child Welfare, ensure the full enforcement of the regulations.

2.3 Abuse of Intellectual property rights

One of the most famous cases involving this form of abuse, and which benefited from international enforcement action concerns the United States Department of Justice's civil action against the British glass manufacturer Pilkington plc for using exclusive technology licences that it

granted to United States companies to prohibit the entry of those companies into certain foreign markets that Pilkington wished to keep for itself. Although the conduct of Pilkington that the Division challenged was essentially conduct that was intimately tied to the United States (i.e. the execution of restrictive licensing agreements with United States firms), among the net effects was the effective foreclosure of markets outside the United States.¹⁴⁸

This kind of issue has been of concern to developing countries in particular. At a meeting of the WTO Working Group on Trade and Competition Policy in December 1998, the representative of a small developing country raised a concern regarding the impact on trade and competition of provisions incorporated in concession or licensing agreements limiting firms to manufacture or distribute products in a particular country or countries.¹⁴⁹

The Fair Trade Commission (FTC) of Taiwan, Province of China, charged Royal Phillips Electronics (The Netherlands), Sony Corporation (Japan) and Taiyo Yuden Co., Ltd. (Japan) with violations of Articles 14, 10-2, and 10 of the Fair Trade Law.¹⁵⁰ A complaint was filed against the way in which Philips, Sony, and Taiyo Yuden licensed a number of patents relating to CD-R specifications. To facilitate patent licensing to CD-R manufacturers around the world, the companies adopted a package licensing arrangement, whereby Sony and Taiyo Yuden first licensed their patent rights to Philips, and Philips then bundled the rights together for licensing

¹⁴⁸United States v. Pilkington plc, 1994-2 Trade Cas.(CCH) ¶ 70,842 (1994)(consent decree).

¹⁴⁹WTO Secretariat, Report of the WTO Working Group to the General Council (WT/WGTCP/4) (30 November 2000)

¹⁵⁰See UNCTAD, Recent Important Competition Cases (TD/B/COM.2/CLP/38) 2003

to other companies. Under the three firms' joint licensing arrangement with respect to the patented CD-R technology, Philips represented Sony and Taiyo Yuden in acting as the exclusive licensor and signing the contested licensing agreements forms with the licensed manufacturers. In negotiating the royalty arrangements, Philips took advantage of its dominant position in the CD-R technology patent licensing market and of Sony's and Taiyo Yuden's names. It demanded that the licensees sign the contested licensing agreement and sought payment of royalties outright while at the same time refusing to provide the licensees with important trading information such as the specific content, scopes, or valid periods of the patents.

The FTC found that Philips was relying on its advantageous market position to compel the licensees to accept the licensing agreement and its actions were considered an abuse of its position in the market for patent licensing of the technology at issue. The practices called into question by the complaint were as follows: (1) joint licensing and package licensing by the respondents; (2) the method by which the respondents set royalties; (3) blanket licensing under which the terms of some of the patents were shorter than the contractual period; (4) alleged improper tie- in sale of various patents under the blanket licensing; (5) refusal to disclose important trading information, such as details of the licensing arrangement.

In its investigation, the FTC determined that the respondents' acts of joint and package licensing, methods of setting royalties and, refusal to disclose important trading information (such as details of the licensing arrangement) violated several provisions of the Fair Trade Law. The FTC found that the respondents' arrangement constituted horizontal concerted action among enterprises at the same stage of production and/or marketing, affecting the market

functions of production, trade in goods, or supply and demand of services. In the CD-R technology patent licensing market, Philips, Sony, and Taiyo Yuden were found to constitute a monopoly as defined in the Fair Trade Law of Taiwan, Province of China.

After taking into consideration the impact of the unlawful acts on the functioning of market mechanisms in the markets for the technology patent licensing and associated products at issue, as well as the respondents' motives for the violation, the benefits obtained thereby, and considerable business sales and prominent market standing, the FTC imposed administrative fines of NT\$8 million (approximately US\$231,000) on Philips, NT\$4million (approximately US\$ 115,500) on Sony, and NT\$2 million (approximately US\$ 58,000) on Taiyo Yuden, and ordered the companies to immediately cease the illegal practices. Philips, Sony, and Taiyo Yuden failed to apply to the FTC for such an exemption, and were found to have violated the prohibition of Article 14 against concerted action.

2.4 Exclusive purchasing agreements

Whether associated with a dominant firm, or a collection of firms, vertical distribution practices can also prevent a foreign entrant (as well as a domestic firm) from developing the distribution networks necessary to penetrate a market. The A.C. Nielsen case referred to above is a prime example of this, though there are many other such cases. The report spotlights a few of the more notable ones.

*A.C. Nielsen*¹⁵¹

The A.C. Nielsen case involved conduct by a Canadian subsidiary of a United States firm that was alleged to have impeded entry by potential competitors. It happened that a foreign firm, Information Resources Incorporated (IRI), was affected by such conduct. The case involved allegations that Nielsen had entered, renewed and maintained contracts with all the major Canadian grocery retail chains to acquire their Universal Product Code scanned data on a long-term, exclusive basis, precluding any potential competitors from acquiring such data. It was also alleged that Nielsen reinforced its dominant position in the market by staggering contract renewals, and by entering into long-term contracts with manufacturers of consumer packaged goods to provide market tracking services.

In its decision, the Canadian Competition Tribunal held that the unquestionable effect of the standard exclusivity provisions was to exclude all potential competitors from obtaining the retailer scanner data and that Nielsen withheld data and adopted a strategy of signing long-term customer contracts generally, and with United States customers of IRI specifically, as a means of preventing entry.

The Tribunal's remedial order prohibited Nielsen from entering into any future contracts which restrict or preclude a retailer from supplying data necessary for the provision of a scanner-based market tracking service to someone other than Nielsen and, from offering a retailer inducements to restrict or preclude access in that way. The Tribunal also prohibited Nielsen from entering into contracts containing what has been referred to as a "most-favoured-nation" ("MFN") provision. Nielsen's MFN clause amounted to a retailer agreeing not to provide its data to a third party on terms more favourable than those granted to Nielsen. The Tribunal's order was clearly intended to make it easier for IRI and other firms to enter the market and compete with Nielsen.

*Langnese and Schöller cases*¹⁵²

Vertical restraints can be used as instruments of foreclosure. In 1992, the European Commission took a negative decision against Langnese and Schöller, which were in a duopolistic position on the German impulse ice cream market. The Commission acted against "sales outlet exclusivity" arrangements, under which a retailer undertakes to sell only the products of the manufacturer with whom he has a contract. The Commission decided that the cumulative effect of the agreements in question amounted to an appreciable restriction of competition by Langnese and Schöller.¹⁵³ A key element of these cases was the fact that each of the two producers provided freezer cabinets, which made access to the market more difficult. Any new competitor entering the market had to either persuade the retailer to exchange the freezer cabinet installed by the applicant for another, which involved giving up the turnover in the products from the previous supplier or, had to persuade the retailer to install an additional freezer cabinet, which might have proved impossible, particularly because of lack of space in small sales outlets. Moreover, if the new competitor would have been able to offer only a limited range of products, it might have proved difficult for it to persuade the retailer to terminate its agreement with the previous supplier.¹⁵⁴

¹⁵¹OECD, Competition and Trade Effects of Abuse of Dominance, COM/DAFFE/CLP/TD(2000)21/FINAL

¹⁵²Communication by the European Community and its Member States 'Impact of Anti-competitive Practices on International Trade' WT/WGTCP/W/62 (5 March 1998)

¹⁵³CFI 8 June 1995, case T-7/93 Langnese-Iglo GmbH c. Commission (1995) ECR II - 1533 and case T/9/93 Schöller Lebensmittel GmbH c. Commission (1995) ECR II-1611

¹⁵⁴CFI 8 June 1995, case T-7/93 Langnese-Iglo GmbH c. Commission (1995) ECR II-1533, pt. 10

The ICPAC has also noted that the majority of United States complaints about practices of Japanese firms 'have tended to centre on vertical distribution practices seen as thwarting access to the Japanese market.'¹⁵⁵ In that regard, it reported the following complaints in particular.

The United States automotive industry argued that Japanese auto manufacturers had established exclusive distribution networks and had made it explicitly or implicitly known to their distributors that *they would not welcome sales of foreign automobiles*. The United States industry also complained that United States auto parts suppliers were foreclosed from Japanese repair shops through a combination of government certification requirements and pressure on authorized facilities from Japanese manufacturers. The Japanese Government and industry denied all of these, and other allegations.

In the highly concentrated Japanese flat glass market, the United States Government (and industry) argued that the major Japanese manufacturers had tied up the distribution system and were using a variety of inducements and coercive methods to *ensure that distributors did not handle imported products*. Apparently, there has been no successful entry into the market by foreign competitors since the 1960s, and market shares for incumbent manufacturers have remained essentially constant over most of that period. Furthermore, this alleged cartel is said to control the Japanese market through a variety of collusive and exclusionary practices including refusals to deal, exclusive distribution arrangements, and economic coercion over domestic distributors and potential purchasers of foreign glass.

A representative from the United States Forest and Paper Association made similar allegations about the Japanese paper industry. According to this witness,

anti-competitive practices in Japan that deter paper imports include a complex and largely closed distribution system; interlocking relationships among manufacturers, agents, wholesalers, trading companies, printers, publishers and other end users and, financial institutions that restrict the entry of new suppliers; financial ties between manufacturers and distributors; preferential bank financing of even uncompetitive domestic companies; a lack of transparency in corporate purchasing practices and, inadequate enforcement of Japan's anti-monopoly laws.

The Advisory Committee also heard testimony from a representative from the Eastman Kodak Co. concerning its complaints about distribution practices in the Japanese film market and the resulting United States trade case. Specifically, Kodak alleged that anti-competitive practices in Japan had effectively blocked Kodak's ability to sell film and other consumer products in that market. According to Kodak, these barriers consisted of unlawful private restraints at the manufacturing, distribution, and retail levels that were condoned and encouraged by the Japanese Government. Despite substantial investments to penetrate the Japanese film market, Kodak's market share there has been slightly less than 10 per cent for the last 25 years.

In 1995 Kodak filed a petition with the USTR alleging that the Japanese Government's toleration of systematic anti-competitive practices by Fuji Photo Film in Japan's consumer photographic paper and colour film market were a violation of Section 301 of the United States trade laws. In 1996 the USTR made a determination of unreasonable practices by the Japanese Government in the sale and distribution of consumer photographic materials in Japan. The United States initiated dispute settlement procedures against Japan in the WTO, alleging that the Japanese Government built, supported, and tolerated a market structure that impeded United States

¹⁵⁵ICPAC, ch. 5

exports of consumer photographic materials to Japan, and in which restrictive anti-competitive practices occurred that also obstructed exports of these products to Japan. The United States challenged Japan's practices under Articles III (national treatment), X (transparency) as well as Article XXIII (under a claim of nullification and impairment). The United States Government pointed to policy statements and administrative guidance by the Japanese Government and statements by advisory committees, industry associations, and others, which recommended actions that the Japanese industry should undertake to respond to foreign competition. The Large Scale Retail Store Law and the JFTC's approval of industry fair competition codes were also challenged by the United States Government as measures by the Government of Japan designed to impede access to the market. In its final report, issued on January 30, 1998, the WTO panel on film ruled that it was not convinced that the evidence demonstrated that the Japanese government measures violated its General Agreement on Tariffs and Trade (GATT) obligations.

In another example, an attempt by a United States biscuit manufacturer to enter the Colombian market was stymied by the exclusive distribution clauses between the dominant manufacturer and leading retailers. Instead, the United States manufacturer was required to enter into licensing and joint marketing agreements with the dominant firm.

Exclusive purchasing practices in America have also come under criticism, however.

Economists William Comanor and Patrick Rey have noted that 'potential entrants into many markets are often foreign producers. Where imports are concerned, a foreign manufacturer is a non-integrated supplier who seeks to use the distribution system of the host country. When he is impeded from doing so, and when this result occurs because of vertical restraints... then the failure of

competition policy authorities to move against these restraints can have protectionist effects'.¹⁵⁶

To support this argument, Comanor and Rey referred to a particular historic example, where the vigorous enforcement of competition policy towards vertical restraints, not only promoted competition but, also stimulated the flow of international trade, concerns the United States automobile industry in the years immediately following the Second World War. In this era, the leading manufacturers used exclusive dealing arrangements such that dealers were effectively limited to selling the cars of a single manufacturer.¹⁵⁷

Comanor and Rey found that:

"...in many small cities and rural areas, demand was not sufficient to support a number of independent dealers. It was thereby difficult for single brand dealers to achieve full distribution economies so that dealerships were not common. As a result, smaller manufacturers and new entrants were placed at a substantial disadvantage since prospective buyers had to travel longer distances to find full-service dealers ...[T]his disadvantage would not exist if dealers could sell more than a single brand of automobile. The culprit was a system that limited dealers to a single brand of automobile".

While this distribution system persisted into the 1960s, it incurred various attacks before it was finally dissolved. An important blow to the dissolution of exclusive distribution was the Standard Stations case of 1949 where exclusive contracts by sellers with large market shares were deemed in violation of the

¹⁵⁶W Comanor and P Rey, 'Competition Policy Towards Vertical Foreclosure in a Global Economy' 23/10 International Business Lawyer (November 1995) 465 at 468 (hereinafter, 'Comanor and Rey') (emphasis added).

¹⁵⁷Comanor and Rey at 466.

antitrust laws. That decision directly called into question the legality of the exclusive dealing arrangements employed in the automobile industry.

Eventually, exclusive dealing in automobiles dissolved, although the process did not occur until the 1970s, some 20 years after the original court decision. Various foreign manufacturers entered the United States market through distributors who often sold American cars as well as other foreign makes. By the 1990s, the United States market had become much more competitive.¹⁵⁸

Just as the stern antitrust approach of American courts of the 1960s opened the market to foreign competition, so too - it has been argued - does the more tolerant approach to exclusive arrangements that developed afterwards impeded foreign entry, and continues to do so today.¹⁵⁹ Comanor and Rey concluded that '[a] tolerant attitude towards these restraints can therefore discriminate against foreign producers and in favour of domestic ones. On the other hand, a vigorous policy against these restraints can promote international trade'.¹⁶⁰

Comanor and Rey's conclusion is not the only thing that militates towards some form of 'trade-related' rule on competition policy. As the last chapter explained, the differences of opinion within competition policy itself about

¹⁵⁸Comanor and Rey at 467 (emphasis added).

¹⁵⁹Ostry has argued that '[i]n that respect, the relaxed policies towards these restraints in both the United States and Japan may have artificially raised entry barriers between the two countries' and presumably acted to exclude European competitors from both. (S Ostry, 'New Dimensions of Market Access: Challenges for the Trading System', in OECD, *New Dimensions of Market Access in a Globalising World Economy* (Paris: OECD, 1995) at 29-30).

¹⁶⁰Comanor and Rey at 468 (emphasis added).

how exclusive agreements should be addressed, means that an international 'compromise' is difficult. At the same time, trade policy pressure to do something to prevent the toleration of exclusionary arrangements is increasing. An in-depth study of what trade rules against 'discrimination' or 'protectionism' in competition policy would accomplish is more than timely. The EU has expressly proposed that competition laws should not discriminate against foreign products or suppliers.

Comanor and Rey had a suggestion about how to solve the problem that '[a] tolerant attitude towards [exclusive arrangements] can... discriminate against foreign producers'.¹⁶¹ Their solution cut right to the heart of the matter: governments should prohibit more exclusive arrangements. Even though he has admitted that this will sometimes lead to 'improper results',¹⁶² Comanor has long argued for greater prohibition of exclusive arrangements in the United States on competition grounds alone. With Rey, he adds the market access rationale, submitting that 'a vigorous policy against these restraints can promote international trade'.¹⁶³

¹⁶¹Preceding note.

¹⁶²W. Comanor, 'Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy' (1985) 98 Harv. L Rev 983 at 1001-2: 'Because vertical restraints can either enhance or diminish consumer welfare, depending upon the situation, it is tempting to apply the rule of reason on a case-by-case basis... Yet it is no easy task to determine whether particular restraints increase or decrease groups of consumers. In the interests of judicial economy, therefore, *it may be more expeditious to set general policy standards, even though they will sometimes lead to improper results. In this context, stringent antitrust standards should be applied to vertical price and non-price restraints alike. This approach could take the form either of a direct per se prohibition, or of a modified rule of reason analysis under which the defendant would be required to demonstrate that the restraints have benefited consumers in general.*' (emphasis added).

¹⁶³Comanor and Rey at 468.

2.5 Exclusive supply agreements

Exclusivity restrictions have also attracted competition scrutiny in supply agreements. In essence, the restraint at issue is similar in intent and effect.

The EU has adopted as strict approach to these sorts of restraints as it does to exclusivity generally, and particularly by dominant firms.

*Hoffmann-La Roche Case*¹⁶⁴

Roche, a multinational group with its headquarters in Switzerland and the world's leading vitamin manufacturer, had entered into exclusive or preferential supply contracts with a number of major bulk vitamin users who incorporated the vitamins into their own medicines, foods and feeding stuffs.

Whether to compensate for the exclusivity or to encourage a preferential link, the contracts provided for fidelity rebates based not on differences in costs related to the quantities supplied by Roche but, on the proportion of the customer's requirements covered.

Furthermore, the rebates were not calculated separately for each group of vitamins but were aggregated across all purchases from Roche, so that Roche was able to benefit from fidelity arrangement even in respect of those vitamins for which it does not hold a dominant position on the market.

The Commission considered that Roche was abusing its dominant position by concluding the contracts, since their effect was to tie the most important buyers of bulk vitamins and to prevent its chief competitors from supplying these products.

¹⁶⁴Com CE Dec. 9.6.76, OJ L223, CICE 13.2.79, n° 85/76, Rec. 1979, P; 461

A less direct means of foreclosure was featured in a complaint considered by the European Commission. The complainant, a Belgian company named IRE, alleged that its principal competitor, a Canadian company named Nordion, had effectively shut it out of the market by concluding exclusive, long-term supply agreements with important world-wide customers. The Commission sent Nordion a "Statement of Objections" alleging it had abused its dominant position. Nordion subsequently decided not to require exclusive purchasing arrangements in contracts with its European customers. The same result was recommended by the Japanese Fair Trade Commission at the end of an enquiry into Nordion's dealings in Japan.

2.6 Standard setting

There have been a number of complaints about private sector participation and influence over standard-setting activities with the alleged effect of the foreclosure of foreign competitors.

Airbus Industrie has been alleged to engage in numerous practices with its European suppliers that artificially preclude or limit the extent to which non-European suppliers of avionics and other components can sell products for use on Airbus planes. These practices include the development and use of standards that discriminate against foreign suppliers, joint proposals by Airbus and a domestic component supplier to induce an airline to specify use of the European company's components, and, conditioning non-European firms' participation in Airbus-related research and product development, on agreements to relinquish proprietary technology without compensation.

Other complaints of discriminatory practices in Europe concern the potentially anti-competitive telecommunications standards being established by the European Telecommunications Standards Institute (ETSI), which could

act as a hybrid restraint to market access. According to economists who have studied the issue, non-European firms that make telecommunications equipment do not have an equal voice in setting European telecommunications standards. The European firms use their influence inside ETSI to choose standards that have been developed by European firms and disadvantage technologies developed by non-European firms. In another European matter, a representative from a United States business complained to the Advisory Committee about anti-competitive cross-subsidization by the German post office of its package delivery subsidiary.¹⁶⁵

2.7 Mergers

Mergers, particularly those that integrate players along a distribution channel are of obvious potential competition concern, as they are the ultimate vertical restraint. They irrevocably bind the parties together and eliminate the opportunity for competing suppliers, for example, to supply the downstream merging entity. If those competing suppliers are foreign, then a trade concern is also added. For example, many competition authorities are relatively relaxed about vertical mergers, since their harm to competition if any, is indirect, and not of as much concern as horizontal mergers. That does not mean that they are of no less concern to the rivals that are no longer able to 'compete for the contract' of a formerly independent company.

A good example of some of the trade and competition tensions that can arise through a horizontal merger also involves so-called vertical issues. The European Commission's 1997 decision on the merger of Boeing and McDonnell Douglas offers a clear example of its concern with the exclusionary effects of exclusive purchasing arrangements that the merging parties had been able to

¹⁶⁵ICPAC, ch. 5

secure with their customers, the airlines.¹⁶⁶ In the global market for the supply of commercial aircraft, McDonnell Douglas's manufacturing wing was flailing, if not failing.¹⁶⁷ As such, the United States Federal Trade Commission (FTC) found that combining McDonnell Douglas with Boeing's operations would not harm competition.¹⁶⁸ The European Commission was also reviewing the transaction. In the early part of its review, it did not appear to have any serious objections either; nor did Airbus, Boeing's only competitor. Things changed dramatically, however, when Airbus and the Commission learned that Boeing had recently signed arrangements to supply three key American airlines exclusively for twenty years.¹⁶⁹ The FTC had also become aware of these arrangements but, noted that they involved 'only about 11 per cent' of global sales of commercial aircraft. The FTC admitted that the exclusivity deals were 'potentially troubling' because by locking-in sales to these particular

¹⁶⁶ *Boeing/McDonnell Douglas*, Case No. IV/M. 877, (30 July 1997).

¹⁶⁷ Kovacic, *TransAtlantic Turbulence* at 824.

¹⁶⁸ *The Boeing Co., et al.*, Joint Statement closing investigation of the proposed merger and separate statement of Commissioner Mary L. Azcuenaga, FTC File No. 971-0051 (July 1, 1997), *reported at* 5 Trade Reg. Rep. (CCH) 24,295.

¹⁶⁹ 'Boeing signed the first of these agreements with American Airlines in November 1996. Deals with Delta and Continental followed in March 1997 and June 1997, respectively.' (Kovacic, *TransAtlantic Turbulence* at 820) Boeing's advisers believe Airbus opposed the merger only to unravel the exclusive deal: 'For the first thirty days after this transaction was announced, every Airbus official who addressed it stated that he didn't care in the least. It made no difference; Douglas wouldn't change competition one bit. We suspect that it was only the exclusive contracts, announced during the pendency of the merger, that caused them to shift gears dramatically and come out opposing the thing.' (Kovacic, *Transatlantic Turbulence* at 834).

airlines, Boeing would be reasonably assured not only of the repeat business provided for in the contracts, but also of the ability to launch future related aircraft through these customers. As the FTC did not view this to be a significant competitive threat, it cleared the merger, saying only that it intended to 'monitor the potential anti-competitive effects of these, and any future, long-term exclusive contracts'.¹⁷⁰

In Europe there was much more concern about the exclusive arrangements. If Airbus lost the opportunity to bid for 11 per cent of sales for 20 years and, the attendant launch opportunities such sales allowed, it might not be able to survive in a global competition with the combined Boeing/McDonnell Douglas companies. The Commission therefore threatened to block the merger unless the exclusive arrangements were cancelled or modified.¹⁷¹

A transatlantic policy battle commenced between the authorities. High-level American competition officials travelled to Brussels specifically to discuss the merger with the Commission, a relatively rare occurrence.¹⁷² The stakes and tensions were high. If Boeing tried to consummate the deal in the face of the Commission's objections, then Boeing aircraft might be seized at European airports to satisfy possible fines. President Clinton took a very dim view of the European position instructing USTR to begin preparing to challenge any such

¹⁷⁰ Kovacic, *TransAtlantic Turbulence* at 830.

¹⁷¹ Kovacic, *Trans atlantic Turbulence* at 834.

¹⁷² Kovacic, *Transatlantic Turbulence* at 826 - 827.

confiscation or fines at the WTO.¹⁷³ The dispute was resolved at the last minute, however, when Boeing capitulated and gave up the exclusivity agreements it had agreed with the three airlines.¹⁷⁴

The case provides an obvious example of how the European Commission is far more troubled than its American counterparts about how exclusive arrangements might exclude competitors. Perhaps one of its oddest points was the fact that mighty Boeing had not pressured the airlines into agreeing to the twenty-year deals. It had been the airlines that had approached Boeing and requested the exclusive arrangements in the first place. This could not be out of some desire to exclude Airbus from bidding for their custom. That would prevent it from keeping Boeing on its toes. The airlines wanted the agreements because their duration would allow them significant benefits from long-term fleet planning.¹⁷⁵ The Commission's demands meant that the airlines were denied these benefits. As Kovacic points out, these efficiencies would likely have allowed the American

¹⁷³*The Economist*, (25 July 1997), at 65-66, and (2 August, 1997) at 5. Kovacic, *Transatlantic Turbulence* at 826-827. A House of Representatives resolution said the EU was 'apparently determined to disapprove the merger to gain an unfair competitive advantage for Airbus Industries' and warned that the dispute over the merger 'could threaten to disrupt the overall relationship between the EU and the United States which had a two-way trade of goods and services of approximately \$366 billion in 1996.' H.R. Res. 191, *Supra* note 61.

¹⁷⁴Kovacic, *Transatlantic Turbulence* at 838.

¹⁷⁵[T]hese were not contracts that Boeing imposed on unwilling airlines. These were contracts that were desired and suggested by the airlines and had a great deal of benefit to the airlines in terms of fleet planning and prices and all sorts of other things. It was the airlines that wanted those contracts; it was not Boeing imposing those contracts.' Kovacic, *Transatlantic Turbulence* at 854 citing Thomas Boeder, counsel for Boeing.

authorities to clear the deal even if the 'foreclosed' sales were over 30 per cent.¹⁷⁶ Forty other aircraft buyers also supported the merger and were not bothered by the exclusive arrangements.¹⁷⁷

In its *GE/Honeywell* decision in 2001, the European Commission also took a strongly different view from that of its United States counterparts, and this time drew a line that the parties could not cross.¹⁷⁸

This was a merger of companies producing essentially complementary products.¹⁷⁹ It combined the production of GE's jet engines, for example, with Honeywell's in-flight avionics and both of the parties' respective maintenance and repair operations. GE's financial arms could fund R&D - thereby stimulating supply - and offer loans and discounts to airlines to help them buy aircraft, thereby

¹⁷⁶Kovacic, *Transatlantic Turbulence* at 854: 'Even if the actual foreclosure exceeded 30 per cent, United States doctrine would permit Boeing to justify the exclusive contracts by showing that the practices increased efficiency. Boeing might have proved that exclusivity cut its customers' costs by reducing pilot training and aircraft maintenance costs or enabling Boeing to achieve scale and scope economies by increasing production runs. The airlines' role in initiating discussions with Boeing about exclusive supply arrangements ordinarily would suggest that the pursuit of efficiency inspired the agreements.'

¹⁷⁷Kovacic, *Transatlantic Turbulence* at 843.

¹⁷⁸*General Electric/Honeywell*, Case COMP/M.2220, Article 8(3) decision (3 July 2001).

¹⁷⁹While *World Com/MCI* and *Vodafone/Mannesmann* involved network industries, where the more customers that join a network, the more valuable and attractive it becomes, a snowball effect is feasible. Exclusion however, does not necessarily result. In contrast, *GE/Honeywell* involved no network industry, and yet the Commission still perceived both a snowball effect and exclusion.

stimulating demand. With GE combined with Honeywell, the Commission found that ‘the merged entity will be able to offer a package of products that has never been put together on the market prior to the merger and that cannot be challenged by any other competitor on its own’.¹⁸⁰ No competitor could offer such a bundle of goods and services, let alone with such financial incentives. The ‘Commission’s market investigation indicated that both airframe manufacturers and airlines are price-sensitive customers and that they would be likely to switch to buying *exclusively* from *GE/Honeywell*’.¹⁸¹ With respect to many of the goods alone, the Commission found that ‘the merged entity can also be expected to... make its products available only as an integrated system that is incompatible with competing individual components. This can potentially reduce the profitability of competitors... and thus increase the likelihood of market foreclosure’.¹⁸² The Commission thus stated that ‘[c]ompetitors are expected to lose market shares and see their profits shrink, in some cases, significantly. In the medium term, competitors will have to take decisions as to whether, in view of their anticipated reduced market share and profitability, they are able and willing to continue competing in the markets where the merged entity is active’.¹⁸³ If customers increasingly turned exclusively to the merging parties, the Commission found that the only possible result was that all competitors would exit the relevant market. It disagreed with the parties’ response that the merger itself would spur competitors on to innovate, provide similar or better packages of goods and services, allowing them the opportunity to

¹⁸⁰ *GE/Honeywell*, at paragraph 350.

¹⁸¹ *GE/Honeywell* at paragraph 353 (emphasis added).

¹⁸² *GE/Honeywell* at 354.

¹⁸³ *GE/Honeywell* at 354.

leapfrog them at some point.¹⁸⁴ As competitors exited, competition would be eliminated, leaving *GE/Honeywell* with an unassailable dominant position.¹⁸⁵

In stark contrast, the United States Justice Department did not have any of these concerns. It had cleared the merger after asking for only minor divestments in the helicopter sector. However the parties were not able to reach any such accommodation with the Commission. As a result, the entire deal was off. In its aftermath, the EU’s position created the deepest rift yet in transatlantic antitrust relations. As soon as the decision was released, Charles James, the head of the Antitrust Division at the Department of Justice, stated: ‘The combined firm could offer better products and services at more attractive prices than either firm could offer individually. That, in our view, is the essence of competition. United States antitrust laws protect competition, not competitors. Today’s EU decision reflects a significant point of divergence’.¹⁸⁶

In response, Mario Monti, the European Competition Commissioner reiterated the Commission’s concerns that the bundled offer was unmatchable, and, that in response, competitors would have no

¹⁸⁴ *GE/Honeywell* at 384: ‘One of the effects of the proposed merger will be to foreclose competitors, thus making it increasingly difficult, if not impossible, for them to win new platforms and so preventing them from generating sufficient revenues to engage in leapfrogging.’

¹⁸⁵ *GE/Honeywell* at 354: ‘Because of their lack of ability to match the bundle offer, these component suppliers will lose market shares to the benefit of the merged entity and experience immediate damaging profit shrinkage. As a result, the merger *is likely to lead to market foreclosure on those existing aircraft platforms and subsequently to the elimination of competition in these areas*’. (emphasis added.)

¹⁸⁶ ‘*GE/Honeywell Decision Brings Discord*’, Associated Press (3 July 2001).

choice but to exit the market.¹⁸⁷ However, Monti added a point that had not been made in the Commission's final decision. He stated that the merger would mean 'ultimately affecting adversely product quality, service and *consumers' prices*'.¹⁸⁸ For good measure, Monti added that 'European merger control is not about protecting competitors but about ensuring that markets remain sufficiently competitive in the long run so that consumers benefit from sufficient choice, innovation and competitive prices'.¹⁸⁹

Debate on this issue is likely to continue for some time in official circles, the conference circuit, and academic journals. At the very least, this will serve to more clearly demarcate the differences of position and their analytical foundations. In so many of the practices considered in this report so far, the European Commission has focussed on the exclusionary aspects of exclusivity. If evidence of exclusion is absent, the Commission will assume it. It will also assume that exclusion will harm competition enough to justify prohibition, unless merging parties can come up with undertakings that help their purportedly excluded competitors. This is the case whether the exclusion results from formal exclusive agreements as in *Boeing/McDonnell Douglas* or, incentives to exclusivity as in *GE/Honeywell* and other cases. The Commission appears to see efficient offers as something that can strengthen or even create a dominant position by allowing a firm to pull so far ahead of its competitors that they are effectively foreclosed from any real competition. As Hawk has noted: 'The majority of Commission decisions fail adequately to consider whether the restraint at issue harms competition in the welfare sense of

¹⁸⁷European Commission, Press Release IP/01/939 (3 July 2001) (emphasis added).

¹⁸⁸Preceding note.

¹⁸⁹Preceding note.

economics, i.e. effect on price or output.'¹⁹⁰

3. Summary and interim conclusions

As can be seen from the list of anecdotes and many of the individual cases referred to above, the problem of exclusionary anti-competitive practices is significant.

However, no matter their particular form all of the above practices can be exclusionary, both of domestic and foreign rivals and, they can be used to order the market for the remaining enterprises, whether on grounds of efficiency or on a more nefarious basis.

It is readily apparent that thwarted exporters when faced with such exclusion take a radically different view of the problem than do the perpetrators. Cartelists, particularly those involved with import cartels, would doubtless argue that they are merely trying to control foreign entry in order to stabilize the market and make it more orderly.

While such arguments are usually given short shrift by most competition authorities, defences for other practices are far more difficult to assess. The difference in approach between the United States and the EU with respect to exclusive purchasing arrangements and exclusionary aspects emanating from mergers is indicative of the extent of the problem.

European competition law prohibits arrangements that may significantly restrict competitors' access to a market. United States antitrust law requires actual evidence that competition itself is likely to be substantially lessened. The American approach also requires that the substantiality of any lessening of competition be characterized by either an absence of offsetting efficiency benefits,

¹⁹⁰Hawk, *System Failure* at 975.

or - what can amount to the same thing - proof of actual harm to efficiency - e.g. through a net reduction in output.

Comanor and Rey have argued that the United States approach is too tolerant of a range of practices that exclude rivals. Nevertheless, the description of the different approaches across the Atlantic to the analysis of exclusive purchasing commitments in the context of the *Boeing/McDonnell Douglas* merger and, of the exclusionary effects of the *GE/Honeywell* merger, reveals a divide that is unlikely ever to be bridged without significant movement from either 'side'.

Due to the importance of these anti-competitive practices and, the serious allegations that have been made about the harm that they can do to trade and to competition, this is not some arcane problem specific only to competition policy. Indeed, when thwarted exporters make trade complaints, the issue moves as far from the academic realm as is imaginable, and can become the subject of trade disputes.

Some of these aspects will be examined in the next Section.

The ambit of this study does not allow a detailed examination of the effects on trade and on competition of each and every specific allegation and case mentioned above. That is unfortunate, but it is by no means obvious that such an examination would be helpful. Firstly, there are already some obvious elements that all of the practices share:

- they can be used to exclude rivals, and some may argue may provide efficiencies, if not to the market as a whole, then at least to the parties involved;
- in most cases the form of exclusion is based on some form of denial of access to a particular distribution channel, which is controlled by one or more enterprises that individually or collectively have market power;

- a complaint about such practices may result in enforcement action, but where it does not, this may be due to differing analytical approaches taken by the relevant authorities; in particular, some competition authorities may tolerate a particular arrangement because they cannot find sufficient evidence of harm to competition.

These elements are all brought into sharpest relief in the case of exclusive purchasing and supply arrangements. Obviously, different policy goals may arise in the particular consideration of other practices. For example, most competition laws would condemn import cartels and collective refusal to deal, without any detailed examination of the market. Nevertheless, for the most part, such a *per se* approach is based on the recognition that it is now so generally accepted that such practices are harmful to competition in the market that a detailed examination should not be necessary and, may itself be the wrong enforcement approach to adopt, leaving the accused some room to manoeuvre that their conduct does not merit. A generally accepted assumption that cartels are harmful negates the need to prove evidence of that harm in individual cases, but this is only because the assumption itself is based on long experience and evidence of the harmful nature of the cartels themselves. Where experience and evidence is less certain, a study of economic effects is needed. Of all the exclusionary anti-competitive practices listed above, the most controversial from both a trade and competition standpoint are clearly those restraints along a vertical distribution channel that stem from exclusive purchasing and supply agreements. A detailed examination of

such restraints would provide the most evidence about the respective exclusionary and potentially efficiency-enhancing effects of such practices. This in turn would aid in an understanding of other practices which have the same sorts of effects, but about which there may be less controversy.

Section III: Review of the effects of exclusionary anti-competitive practices on trade (entry into a market) and competition (within a market)

A review of the effect on trade and on competition of restraints along a distribution channel can often be distorted by one's place or role on the policy spectrum.

As the ICPAC has noted; "consideration of a vertical restraint from a trade perspective versus a competition policy perspective can lead to quite different conclusions regarding the effects of a restraint. If the restraint is examined under United States antitrust law, it will consider the effects on efficiency and consumer welfare. On the other hand, viewed from the perspective of trade policy, the restraint may be seen as adversely impacting trade flows and access to markets if the foreign producer is being kept out of a market by virtue of the restraint, even if the restraint may arguably have efficiency-enhancing properties for the participants in the local market".¹⁹¹

This section attempts to report only on the objective effects that have been identified, whether to trade or to competition. It then concludes with some findings that have been made by a joint 'trade and competition' working group, that attempts to reach a consensus about the effects of these practices.

1. Exclusionary Effects on trade

A recent report has specifically identified the following trade-restrictive (and trade-promotional) effects that can arise from vertical distribution restraints:

2. Negative effects on trade

The dynamic effects of vertical restraints on markets take on particular significance where a restraint such as exclusive dealing may impede or alternatively facilitate market access. For instance, new entry by a foreign firm may be considerably more difficult if non-price vertical restraints tie up existing domestic distribution systems, especially if these are reinforced by laws and regulations or other barriers to entry inhibiting foreign firms from setting up alternative distribution channels. This difficulty is increased if the restraints will run for many years but, would be decreased if the market is expanding or alternative distribution systems are being created.

3. Positive effects on trade

On the other hand, new entry might be facilitated by vertical restraints if a new entrant needs to offer an exclusive arrangement to induce a distributor to efficiently promote a new product. Accordingly, the effects of vertical restraints on trade are likely to depend on, amongst other things, the type of restraint, the collective market share of firms practising the restraint, the nature of the market, the duration of the restraint, and whether restraint renewal/expiration dates are staggered or grouped together.¹⁹²

The same study outlined a similarly nuanced analysis of the harms (and benefits) that such restraints can have on competition. As these are many and

¹⁹¹ICPAC, ch. 5

¹⁹²OECD Joint Group on Trade and Competition, 'Competition and Trade Effects of Vertical Restraints', COM/DAFFE/CLP/TD(99) (26 May 1999), para 13

various, it is worth setting out the findings in full.

4. Negative effects on Competition

“It is ... possible to strategically use vertical restrictions to dampen competition. For example, if exclusive dealing is widely practised, consumers are required to visit other stores to find competing products and compare their attributes and prices, something consumers may be reluctant to do for low valued items or, those required urgently or purchased on impulse. Higher customer search costs could thereby translate into higher average prices and lower consumer surplus. Furthermore, restrictions that decrease intra brand competition among distributors, e.g. by assigning exclusive territories, may also decrease competition at the upstream level by making producers' price cuts less attractive. That result flows from the fact that reduced competition among distributors means less pressure to pass any producer price cuts on to consumers. If price cuts might simply end up fattening distributor profits, producers will have less incentive to make such cuts.

Vertical restraints also may reduce competition in the long run if they can be used to erect significant barriers to entry and, if competition is not already substantial. In regard to competition at the producer level, most attention has focused on the role of long-term exclusive dealing arrangements (and provisions which can provide the same effects, e.g. full-line forcing and aggregated rebate schemes) in raising barriers to entry which may have the effect of excluding or foreclosing foreign or domestic competitors. Such arrangements between a producer and its distributors prevent other producers from distributing their brands through these agents. When exclusive dealing or other vertical restraints having similar effects are adopted by a dominant firm or, are used by a sufficiently large number of producers, they can effectively

raise rivals' costs by requiring them to use alternative less efficient marketing channels. The increased distribution costs may then be sufficiently high to deter entry.

5. Efficiency benefits

Where the supply of goods or services proceeds through successive vertical levels, the complementary nature of such vertical linkages means that coordination between them takes on considerable importance. The decisions of this structure, some taken by the upstream firm and some by the downstream firm, determine the nature and quality of the product or service supplied, its cost, and the price and locations at which it is sold; in other words, these decisions determine the economic efficiency with which the product or service is supplied. The terms of an agreement organize the vertical relationship and help coordinate what otherwise would be independent, sub-optimal (in terms of total profitability of the firms concerned) decisions.

6. Positive effects on competition

In addition to situations where vertical restraints reduce intra brand competition or in-store inter brand competition but, may nevertheless increase overall competition and efficiency, there could be circumstances where such restraints help to reduce problems associated with market power. In particular, where both producers and distributors have market power and are earning supra-competitive profits, distributors left to their own devices will only consider the effects on their own profits when deciding whether or not to raise their prices. They would totally ignore the fact that from the perspective of producers, distributor price increases simply reduce the amount sold with no compensating increase in the price received by a producer. As a result, when such distributors increase their prices, not only is consumer surplus reduced, combined manufacturer and

distributor profits might fall as well. In this “double margin” situation, manufacturers, distributors and consumers could all potentially be better off if distributors lost their power to set prices.

7. More complications

While not denying the potential for vertical restraints to improve consumer welfare, it is also true that the choice of product quality or distribution service that maximises total manufacturer and distributor profits will not necessarily be the choice that maximises economic efficiency, i.e. combined consumer and producer surplus (where producer surplus equals profits above and beyond a normal return on investment). For example, provisions that allow profitable price discrimination may or may not increase efficiency. The greater the competition that the vertical system faces from other suppliers the more its members will be collectively constrained to make choices that increase economic efficiency.

On the other hand, it is conceivable that vertical restraints can promote entry and competition. When restraints increase profits without raising entry barriers, either through increased efficiency or increased oligopolistic coordination, they promote entry. In addition, if restraints increase the returns that can be earned from investments in know-how, they promote investment in know-how, which in turn may lead to entry and both new brands and new distributors.”¹⁹³

8. Conflicts and consensus

The WTO WGTCP has also opined on these complexities.

“In reflecting on the effects of these practices and their implications for international trade, the point was made that the nature and severity of these

effects would vary depending on the type of practice, the market power of incumbent firms and other circumstances. For example, although vertical market restraints could be employed for market foreclosure purposes, they could also enhance efficiency and competition in many circumstances. Accordingly, the effects of such restraints would have to be evaluated on a case-by-case basis. The point was also made that the evaluation of trade-offs between market power and efficiency effects could be particularly important in small, developing countries, but that this was often not straightforward.

For example, the negative effects of vertical contractual arrangements could be particularly strong in small markets, given the low level of interbrand competition that often characterized such markets, and the high fixed costs of entry relative to the size of the market. On the other hand, vertical arrangements could facilitate beneficial investments in distribution services, which were often less than optimal in developing countries. In contrast, the point was made that efficiency justifications were highly unlikely to be relevant in regard to cases involving international cartels. The view was expressed that these were the arrangements which were likely to have the greatest impact on market access”.¹⁹⁴

It is at least possible to draw some general lessons from these various economic viewpoints. The following consensus position from the trade and competition perspectives appears appropriate.

Trade and competition policy makers have come to agree on a great deal concerning the effects of vertical restraints on their respective domains. The following is an attempt to list briefly these points of agreement, including a few areas where the two communities have simply come to better appreciate the constraints under which the other works.

¹⁹³OECD vrs paper, paras 11-16

¹⁹⁴WGTCP M/4, paragraphs 25 and 35

Vertical restraints have complex potential pro and anti-competitive effects.

They can also enhance or reduce market access by foreign-based competitors. Accordingly, vertical restraints call for a careful case-by-case, “rule of reason” (i.e. balancing) analysis. In markets sufficiently populated by competing firms, vertical restraints cannot be presumed to be anti-competitive simply because they raise rivals’ costs, though they should be subject to increased scrutiny the more they potentially exclude new foreign and domestic entrants.

The pro and anti-competitive effects of vertical restraints must be judged in the context of properly defined antitrust markets grouping together products and production locations which consumers consider to be good substitutes. The geographic dimension of such markets could extend beyond a single country, especially if barriers to international trade are low or non-existent. An emphasis on substitutability is central to market definition for competition analysis because the ultimate purpose for making the definition is to provide a context for estimating the existence/extent of market power. There is no market power in situations where consumers could escape harm from anti-competitive pricing by easily substituting other products or geographic sources.

With the exception of vertical restraints being used to facilitate collusion, it is highly improbable that such restraints will have net anti-competitive effects unless there is either: (a) market power on at least one level of a properly defined market; or (b) the restraint, either on its own or in concert with other vertical restraints, has the power to exclude or disadvantage a significant number of competitors (or a uniquely significant competitor or class of competitors) by virtue of its being widely used in the negatively affected market(s).

The usual first step in gauging market power is to estimate whether incumbent market shares are high enough to permit unilateral anti-competitive pricing or, to facilitate collusion. Where that is in fact the case, the analysis normally proceeds to examine barriers to entry, i.e. considers whether there is reason to believe that anti-competitive pricing will be unprofitable because it will quickly encourage existing or new firms to increase supply to the market.

Where it is necessary to take a close look at barriers to entry, both competition and trade officials will be especially interested in whether governmental action (or inaction) is contributing to such barriers.

Generally speaking, governmentally created or reinforced barriers to entry are among the most durable, hence serious constraints on competition. It follows that the existence of such barriers to entry could greatly increase the chances that competition officials will conclude that significant market power exists and action is warranted against vertical restraints affecting a particular market. Competition and trade officials should work together to reduce unwarranted governmental restrictions on competition and market access. They should also cooperate to reduce all types of anti-competitive private restraints that reduce market access.

The primary objective of competition agencies is to promote economic efficiency by enhancing or protecting the competitive process rather than individual competitors.

It follows that competition agencies will not necessarily be willing or able to take action against a vertical restraint merely because it harms certain actual or potential competitors, whatever their nationality might happen to be. In addition, extensive market analysis may be called for to assess anti-competitive effects. At the same time, competition laws applied to promote economic efficiency can, in appropriate cases, also

promote market access by for example, simultaneously addressing any anti-competitive exclusion or foreclosure of foreign firms or products.

The primary objectives of trade agencies in cases involving vertical restraints are to determine whether the restraints impede market access, and if so, to encourage or require the concerned government(s) to remedy the situation.

Compared with competition agencies, trade officials will attach greater significance to: (a) governmental action that affects the power of vertical restraints to exclude or disadvantage competitors; (b) possible discriminatory or differential effects of vertical restraints on foreign versus domestic competitors; (c) the potential for foreign firms to provide a qualitatively different kind of competition than might be available from domestic firms; and (d) the potential for competition policy analysis to underestimate the potential gains from trade in evaluating whether to intervene in a given vertical restraint case, thus erring on the side of inaction.. Trade officials generally have more power than competition agencies to press for a change in government policy in cases where such policy undergirds a vertical restraint restricting market access , or otherwise hindering competition between foreign and domestic firms. This is especially true where the impugned vertical restraint may not have anti-competitive effects under the analysis typically employed by OECD competition agencies. In these circumstances, competition and trade officials should work together to reduce these unwarranted governmental restrictions on competition and market access, bearing in mind that some such restrictions might be fully compatible with WTO obligations.

Both anti-competitive effect and negative impact on access by foreign producers are more likely to be associated with vertical restraints the longer their terms.

The pro-competitive effects could also be stronger the longer the vertical restraints'

terms. Claims that some vertical restraints have pro-competitive efficiency effects and a potential to either assist or restrict market access are more likely to be credible and significant the more technically sophisticated, expensive and infrequently purchased is a product.¹⁹⁵

With this examination of the prospective effects of such exclusionary anti-competitive practices on trade and on competition, and the resulting perspective on enforcement approaches of the trade and competition authorities, the report examines the instruments available to the authorities to address such practices.

¹⁹⁵OECD Joint Group on Trade and Competition, 'Competition and Trade Effects of Vertical Restraints', COM/DAFFE/CLP/TD(99) (26 May 1999) at 10-12

Section IV: Examination of the application of unilateral, bilateral and multilateral trade and competition instruments and mechanisms to exclusionary anti-competitive practices

This Section reviews and examines those instruments that are most indicative of the type available to combat exclusionary anti-competitive practices in foreign markets.¹⁹⁶ For example, the first measure considered is a unilateral trade remedy, and for this the report focuses on s. 301 of the United States Trade Act, as indicative of this type of remedy. A similar approach will be taken with respect to the other types of instruments, whether they are unilateral trade or competition measures, or bilateral or multilateral arrangements.¹⁹⁷

1. Unilateral enforcement

1.1 Trade remedies

The American Bar Association has offered a concise summary of the application of unilateral trade remedies to exclusionary anti-competitive practices in foreign markets.

No United States trade law directly reaches private access-denying practices in foreign markets. However, in theory

¹⁹⁶A comprehensive global study of all trade and competition mechanisms, domestic, bilateral and multilateral, that are available to address exclusionary anti-competitive practices is beyond the scope of this report; it is an essentially tabulative exercise that is already available to a large extent in OECD and UNCTAD documents. Here, it is intended to review the primary types of such instruments and consider their efficacy in addressing exclusionary anti-competitive practices.

¹⁹⁷The report does not include an involved study of the EU Treaties, as these are viewed as endemic to that particular political, legal and economic architecture and, are not viewed as being directly applicable to, or a model for, other fora or individual nations at this time.

such practices may be reached indirectly under the "unreasonable foreign practices" subsection of Section 301 of the Trade Act of 1974.¹⁹⁸ By its terms, Section 301 deals with unfair foreign governmental practices: violations of trade agreements, policies or practices that are "unjustifiable" in the sense that they are inconsistent with international norms (such as MFN or national treatment), and policies or practices that are "unreasonable" and that "burden or restrict United States commerce." Among the "unreasonable" practices enumerated by Congress in subsection 2411(d)(3) is the "toleration of systematic anti-competitive practices."

Under this "toleration" provision, Congress appears to have intended to address the situation in which one or more private parties in a foreign country engage "systematically" in an anti-competitive practice (e.g. a horizontal boycott) that "burdens or restricts United States commerce" (by denying to United States exporters access on the merits to that country's market) and, it can be shown that the foreign government has "tolerated" that unfair practice, presumably by failing or refusing to enforce its competition law. But the key phrases, "toleration," "anti-competitive" and "systematic". are not defined. Moreover, as discussed below, USTR, the agency administering this statute, has full discretion whether or not to take action in any given case.¹⁹⁹

^{198/19} U.S.C. § 2411 (1994). The "unreasonable foreign practices" subsection is at 19 U.S.C. § 2411(d)(3).

¹⁹⁹ABA, Market Access report

The following are examples of recent cases where s.301 has been used.

Anti-competitive practices that restrict market access have also been identified in Latin America. In one example, the Corn Refiners Association, Inc. filed a Section 301 petition in April 1998 alleging that the Mexican government denied fair and equitable market opportunities for United States exporters of high fructose corn syrup (HFCS) by encouraging and supporting an agreement between Mexican sugar growers and bottlers to limit use of HFCS. The USTR initiated a Section 301 investigation in May 1998 and in May 1999 appeared to have ended the Section 301 investigation but, announced that the United States would continue to explore the Mexican Government's role in limiting importation and purchases of HFCS. The USTR maintained that the Mexican Government had "failed to refute allegations that it promoted and endorsed conclusion of an agreement to limit purchases of United States HFCS."

Since United States imports supplied the bulk of HFCS consumed in Mexico, the primary impact of the alleged agreement was on United States producers of HFCS. After efforts by the United States Corn Refiners Association (whose members produce HFCS for export to Mexico) and by Mexican HFCS producers failed to persuade the Mexican antitrust authority to take action against the access-restricting agreement, the Section 301 petition was filed. USTR subsequently initiated a Section 301 proceeding, and concluded after investigation that there was "reason to believe" that the alleged agreement existed and, that it operated to reduce imports of HFCS from the United States.²⁰⁰ USTR has not yet taken action but, is continuing its inquiries and is pursuing a negotiated resolution with the Government of Mexico. Some aspects of this case are also being addressed in the

^{200/}United States to Further Explore Mexican Practices Affecting High Fructose Corn Syrup, USTR Press Release 99-44 (May 14, 1999).

context of an ongoing WTO dispute settlement proceeding.²⁰¹

Limitations of unilateral trade enforcement

The ABA has also offered the following opinion on how s.301 operates in practice, and indeed its efficacy.

"To speak of a Section 301 proceeding as a "case" -- implying a litigation leading to an adjudication and then to corrective action -- is to fundamentally misconceive the nature of the statute. While the statute speaks of "initiation," followed by an "investigation," a hearing (in some cases) and ultimate trade "retaliation", in practice none of these elements are crucial to the outcome of a typical Section 301 proceeding. USTR has no investigative staff to speak of, and there is in fact little "investigation," often none at all. And while retaliation occurs in some cases -- about 10 per cent of all proceedings -- "[r]etaliation is only the last resort," as then-United States Trade Representative Clayton Yeutter put it in testimony on Section 301 to the Senate Finance Subcommittee in 1986."²⁰²

Section 301 is in fact not primarily an adjudicative procedure, but rather a vehicle for negotiating with a foreign government for the removal or amelioration of an unfair trade practice. That practice is generally fully defined and largely evidenced in the original United States industry petition. In some cases, the petition is in fact never filed. Instead, USTR uses the threat of the petition (and the consequent possible initiation of a proceeding together with the possibility of trade retaliation in the course of that proceeding) as leverage to achieve a satisfactory negotiated resolution. Where the petition is filed and initiation ensues, the one-year period of the proceeding is

²⁰¹ABA, Market Access report, at 17-18

^{202/}Prepared remarks of Amb. Yeutter, July 22, 1986 at 9.

predominantly devoted to negotiation, with negotiating activity increasing in intensity as the one-year deadline for a decision whether to retaliate with trade restrictions approaches.

There are two fundamental reasons why Section 301 proceedings lead to negotiated resolutions rather than trade retaliation in the vast majority of cases. First, in almost all cases, the United States petitioning industry loses when trade retaliation is the final result. The reason is that the United States industry gets no benefit from trade retaliation except in those rare cases in which there is two-way trade in the product at the root of the market access problem. (in which case the retaliatory trade restrictions would benefit the petitioner in the United States market). Thus, the petitioner's problem, the unfair practice in the foreign market, remains unresolved and the retaliatory action taken provides the petitioner no offsetting benefit.

Second, in "unreasonable practice" cases, USTR is cautious about taking retaliatory measures because those measures themselves constitute a violation of WTO rules. The foreign country may well take the issue to WTO dispute resolution, where the United States is likely to be directed to cease the retaliation or face WTO-authorized counter-retaliation.²⁰³

1.2 Competition laws, including 'extra-territorial' enforcement

By definition, extraterritorial enforcement conjures up images of a law being applied beyond the territorial ambit of its sovereign legitimacy. It is not surprising then that this is tolerated only in the exception, and even then remains tainted by a somewhat pejorative connotation. To counter this perhaps, the long arm of American antitrust law is only extended into another country's territory when it can be justified objectively. The

²⁰³ ABA Market Access report

American authorities and courts permit the application of many United States laws to foreign actors where the latter's conduct could be seen to have a 'direct, substantial and reasonably foreseeable' effect on United States commerce.²⁰⁴

There are various attractions to this test; for one thing, an action's effects are presumably something that is capable of being determined objectively. The 'directness' and 'substantiality' of that effect ought to be able to be proven through analysis of economic evidence. Resort to legal argument will be required to demonstrate the 'reasonable foreseeability' of such effects. but, even then, it will be hard to argue with the facts, and economic evidence would again be useful to determine what consequence was and was not likely to be foreseen. Some cases of extraterritorial enforcement will be easier to justify than others. In the case of cartel activity at least, price increases will have been the primary rationale for the activity in question. Even if clever defence counsel can credibly deny this, such effects would be hard to deny as being 'reasonably foreseeable' consequences of the action. It may become more difficult to display the effects with other conduct, such as exclusive purchasing commitments or a particular merger transaction, but this does not mean that the effects test itself is any less relevant or applicable to these situations as well.

The American approach has met with some significant results.

For example, in 1982 the Division pursued a civil enforcement action against C. Itoh and seven other Japanese shellfish buyers when those firms entered into an agreement to fix the price that would be offered for processed tanner crab imported from Alaska.²⁰⁵

²⁰⁴ *Foreign Trade Antitrust Improvements Act of 1982* (7 *Sherman Act*, 15 U.S.C 6a)

²⁰⁵ *United States v. C. Itoh & Co.*, 1982-83 Trade Case.(CCH) ¶ 65,010 (W.D. Wash. 1982)(consent decree).

The Division pursued a civil action against the British glass manufacturer Pilkington plc for violations of United States antitrust laws because Pilkington was allegedly using exclusive technology licences that it granted to United States companies to prohibit the entry of those companies into certain foreign markets that Pilkington wished to keep for itself. Although the conduct of Pilkington that the Division challenged was essentially conduct that was intimately tied to the United States (i.e. the execution of restrictive licensing agreements with United States firms), among the net effects was the limiting of restrictive practices Pilkington allegedly was using to effectively foreclose markets outside the United States.²⁰⁶

Despite the initially appealing logic of the ‘effects’ test, American incursions have been met with blocking statutes in many countries, who simply will not accept their citizens, whether corporate or corporeal, being prosecuted or sued under the laws of another government.²⁰⁷ This is particularly so when the actions occurred wholly within the ‘home’ territory; [when they] may or may not be illegal under domestic law, and [when they] may even have been authorized by the domestic government. While the EU institutions themselves have not erected blocking statutes, they have made clear their distaste for extraterritorial enforcement.²⁰⁸

²⁰⁶United States v. Pilkington plc, 1994-2 Trade Case.(CCH) ¶ 70,842 (1994)(consent decree).

²⁰⁷In Canada, the *Foreign Extraterritorial Measures Act*, RSC CL. F-29 (1985) and in the United Kingdom, the *Protection of Trading Interests Act*, 1980, ch. 11.

²⁰⁸Communication to the Council, submitted by Sir Leon Brittan and Karel Van Miert, ‘Towards an International Framework of Competition Rules’, COM (96) 296 final, 18 June 1996 (hereinafter, ‘Commission Communication’).

This policy stance has meant that the Commission has had to find other justifications when it has wanted to address foreign conduct with anti-competitive effects within Europe. Rather than being perceived as reaching out and applying EC law within another sovereign territory, the EU institutions have instead devised various legal tests that seek to bring the conduct and the culprits within the ambit of EC law.

The European Commission, Council and Court have all provided various grounds by which EC competition law can be applied to foreign undertakings whose conduct has anti-competitive effects in the common market. As mentioned above, the criteria differ, but the result is the same – by typifying the activity in question as being domestic, the conduct is seen to fall within European legal jurisdiction, and no resort to ‘extra-territorial’ enforcement is required. Nevertheless, while an eminently neat legal solution may appear to have been devised, the contortions that are required to label some conduct as European and other conduct as not, raises problems both for businesses and for enforcers. The EU uses three primary tests to address foreign activity. Group economic unit.

The most established basis in EC competition law for asserting jurisdiction over foreign companies is the doctrine of the ‘group economic unit’.²⁰⁹ This test attributes to foreign parents responsibility for the anti-competitive activities of a subsidiary that is present and active in Europe and, over which they supposedly exert some control. The individual miscreant is present in Europe and, due to the supposed control that the parent can exert and should have exerted over the subsidiary, the parents and other relevant members of the group may be brought within the jurisdiction of European law.

²⁰⁹Case 48/69 *ICI v Commission* [1972] ECR 619, Case C-73/95 *Vihoo Europe BV v Commission* [1996] ECR I-5457

This method of asserting jurisdiction is not unproblematic. In its reasoning, the Court emphasized the corporate structural relationship between the parent and the subsidiary and merely considered the parent's ability to control the latter, rather than whether that control was actually exercised. Consequently, the facts of each case do not need to be analysed other than to set out the relevant corporate organization chart, and show where control was able to be, and hence should have been, exercised. In a post-Enron world, it is perhaps natural to seek to attribute corporate responsibility where control is possible, and thus should have been exercised. However, it is still at least arguable that European jurisdiction over foreign undertakings should be based on a role that is more active than that. After all, the European subsidiary is present in Europe, and available to be fined. Where the subsidiary is being wound down however, or has insufficient assets to satisfy a judgement against it, enforcers will naturally want to seek the controlling mind of the company group, whether or not it actually controlled the anti-competitive conduct in question. These are difficult issues that would benefit from further clarification by the Commission and the Court.

Where matters have become rather more confused however, is with the rejection by the Court of the Commission's use of the effects doctrine to justify asserting jurisdiction against foreign cartel members. The conflicting policy interests involved are most clearly displayed by a brief account of the arguments in the *Woodpulp* case.

In the *Woodpulp* case, the Commission prosecuted a foreign cartel for raising prices within the Common Market.²¹⁰ The accused were producers of bleached sulphate pulp established outside the Community who had entered into price

fixing arrangements. The producers were exporting either directly to purchasers within the Community or through branches, subsidiaries, agencies or other establishments in the Community. The Commission established jurisdiction by concluding that 'the effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was ... not only substantial but intended and was the primary and direct result of the agreements and practices.'²¹¹ The producers appealed the decision, claiming that it involved an incorrect assessment of the territorial scope of Article 81. The Court did not refer specifically to the effects test in its judgement. Instead, it ruled that the conduct infringing Article 81 consisted of two elements, the formation of the agreement and the implementation of it. The logical third step, that of the anti-competitive effect was wholly ignored. The Court simply stated that '[t]he producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.'²¹² In *Woodpulp*, since the cartel agreement had been 'implemented' within the Common Market through a marketing organization run by the parties in a Member State, it became a European matter and, was thus subject to European competition law.

The fact that the Court did not expressly reject the effects test means that its application as a legal basis for jurisdiction is still possible. Whether or not there is any significant difference in fact between the two tests is the subject of some debate. AG Van Gerven, along with other

²¹⁰Cases C-289, 104, 114, 116-7, 125/85. *Ahlstrom and Others v. Commission* [1988] ECR 5193: 4 CMLR 901

²¹¹[1985] 3 CMLR 474 (emphasis added)

²¹²Cases C-289, 104, 114, 116-7, 125/85. *Ahlstrom and Others v. Commission* [1988] ECR 5193: 4 CMLR 901 (emphasis added)

commentators has found that the two doctrines can ‘lead to different results in a narrow but significant group of cases.’²¹³ For example, there are doubts whether the implementation doctrine would establish jurisdiction in cases of direct sales by companies to customers within the Community in the absence of any type of marketing organization or, in respect of refusal to supply or collective boycotts entered into outside the Community by undertakings established outside the Community. However, it is not difficult to imagine cases where different results would occur. For example, the implementation doctrine’s insistence on there being some form of activity by the accused parties on the ground in the Community means that a wholly foreign cartel agreement which raises prices, but does so through arms-length sellers, may arguably not be implemented in a sufficiently ‘European’ manner to attract European jurisdiction. As such, considerable harm may be done to consumers that would be able to be addressed if the effects test were used instead. At the same time, the fact that the Commission does not require any proof of anti-competitive effect in order to justify an assertion of jurisdiction means that some conduct that should not be investigated at all may come under the DG-COMP’s magnifying glass. This would happen in the case of anti-competitive practices that are clearly implemented in the common market, and which may appear to harm competition, but where no anti-competitive effect can be proven. A network of vertical restraints, or an export cartel, that may harm foreign competitors or foreign consumers respectively, are obvious examples. Such conduct would not attract a fine or other remedial measure unless there was evidence of a substantive offence but, it is at least arguable that the Commission is free to assert jurisdiction over foreign entities that have operations

²¹³1989 Fordham Corporate Law Institute at 451-83; J.P. Griffin Foreign Governmental Reactions to U.S. Assertion of Extraterritorial jurisdiction, ECLR [1998] 68

in Europe without any evidence that their conduct actually has an anti-competitive impact within the common market. Without a requirement of having to prove reasonably foreseeable anti-competitive effects resulting from their conduct, too many companies may be brought within the scope of an initial investigation.

Who is to say that the Court is wrong in not simply using the effects test to justify extraterritorial enforcement? Other competition authorities are also reluctant to admit that they enforce their laws extraterritorially. The American authorities have rarely admitted that they enforce their laws in an ‘extraterritorial’ manner, even when they are clearly prosecuting foreign undertakings or individuals for foreign activity that has harmful effects in the United States. They focus on the harm to United States commerce. Presumably, such reasoning would bring much of the same type of conduct within the ambit of European law. However, the European Court has preferred to eschew any proof of anti-competitive harm in order to allow the Commission to assert jurisdiction, and instead has preferred to create a legal fiction that focuses on creating the impression that a foreign agreement is actually European. From an enforcement approach this may be a more effective way of addressing harmful effects that occur but are difficult to establish. However, it seems that the chance of either inadequate or inappropriate enforcement is higher under the current EU regime.

The third way of bringing foreign undertakings within European jurisdiction exists through the *Merger Regulation*²¹⁴. As Article 1 makes clear, the Regulation will only apply where a transaction has what is defined as a ‘Community dimension’, in terms of involving the

²¹⁴Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings OJ L395, 30.12.1989

requisite amount of sales within Europe. Article 5(1) goes on to specify that Community turnover consists of 'products sold or services provided to undertakings or consumers in the Community or in a Member State'. As such, unlike the Court's approach in *Woodpulp*, no distinction is made between sales made directly or sales made through a branch, agent, subsidiary or distributor within the EU by a foreign undertaking. Defining business activity in this manner avoids any admission that what is really going on is the extra-territorial application of European law to foreign undertakings. After all, their sales are 'in' Europe and thus, the merger's effects are also likely to be there, at least to the extent of those sales.

It is difficult to distinguish the effects test from the turnover test in this regard, and indeed, the Commission has been quite explicit in linking the two concepts. In the *Gencor* case, the Commission blocked a merger between two companies incorporated in South Africa that would have led to 'the creation of a dominant duopoly in the platinum and rhodium markets as a result of which competition would have been significantly impeded in the common market.'²¹⁵ The Commission justified exercising its jurisdiction using language usually associated with the effects test, stating that 'application of the regulation is justified under public international law, when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community... It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case'.²¹⁶ The Court found that the 'concentration would have the direct and immediate effect of creating the conditions in which the abuses were not only possible but

economically rational'.²¹⁷ The Court concluded that 'it was in fact foreseeable that the effect of creating a dominant duopoly position in a world market would also be to impede competition significantly in the Community, an integral part of that market.'²¹⁸ The underlying rationale for the turnover tests in the Merger Regulation is indistinguishable from the 'effects' test.

A similar situation arose in the *Boeing/McDonnell-Douglas* case, where the Commission exercised its jurisdiction over a merger between two United States corporations on the basis that both parties exceeded the Community wide turnover requirements.²¹⁹ Commissioner Mario Monti commented that the Court had made clear that the Commission's application of EC competition law to foreign undertakings in such cases was in accordance with the principles of public international law, where the merger produced direct, substantial and foreseeable effects within the EU.²²⁰ The propriety of the effects test has thus been clearly accepted in the context of merger control.

From this description of the three tests, it might be concluded that the logical way for EC competition policy to develop in this area is to accept the effects test more fully, at least in order to supplement the 'group economic unit' doctrine and, to replace, where inconsistent, the peculiar

²¹⁵Case T-102/96 *Gencor Ltd v Commission* para 91

²¹⁶Case T-102/96 *Gencor Ltd v Commission* para 90,92

²¹⁷Case T-102/96 *Gencor Ltd v Commission* para 94

²¹⁸Case T-102/96 *Gencor Ltd v Commission* para 100

²¹⁹*Boeing/McDonnell-Douglas* (Case IV/M877) [1997] OJ L336/16; [1997] 5 CMLR 270

²²⁰Mario Monti, "Co-operation between competition authorities - a vision for the future", The Japan Foundation Conference, Washington DC, 23 June 2000, at p.2, available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/234\[0\]RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/234[0]RAPID&lg=EN).

'implementation' doctrine. Without a firm statement in this regard from the EU institutions however, this will have to evolve gradually. It is the position of the author of this Section that the coherence and effectiveness of EC competition law enforcement would benefit from the formal adoption of the effects test sooner rather than later.

This is particularly the case as the occasions when the Commission needs to reach beyond its borders increase. When it takes jurisdiction over a merger there is a clear and effects-based rationale for such action. For the credibility of EC law within Europe and internationally, amongst undertakings and other competition authorities, this approach needs to spread to the non-merger area of EC law enforcement. The EU's credibility amongst other competition authorities is important, not least because the occasions where the Commission needs the help of its comrades-in-arms to address truly foreign conduct, far outnumber the situations where it can handle such conduct itself.

1.3 Limits of extraterritorial and unilateral enforcement action

Various problems with unilateral enforcement of this nature have been identified.

The principal tool for combating anti-competitive practices, the antitrust action, faces severe limitations in the international context. Antitrust plaintiffs, whether private litigants or government enforcement agencies, encounter significant obstacles in seeking remedies against defendants who reside or act abroad. The doctrine of "international comity" leads many courts to decline to exercise jurisdiction over foreign conduct or parties where asserting jurisdiction might strain diplomatic relations. Even in the absence of jurisdictional problems, collecting evidence through discovery abroad is a costly and uncertain process, further complicated by "blocking" statutes

in several countries that penalize compliance with United States antitrust discovery requests. Finally, governments frequently acquiesce to, or even orchestrate, anti-competitive practices, thereby allowing the private parties involved to assert a "sovereign compulsion" defence to antitrust liability.²²¹

Examples of international tensions generated by the extraterritorial application of United States antitrust law abound. For example, several decades ago the United States antitrust authorities began investigating activities related to international shipping. When the United States authorities sought documentation available only outside the United States, a number of foreign governments enacted legislation blocking access both to their nationals and to evidence for use in these proceedings. Similarly, United States antitrust investigations of an alleged uranium cartel in the 1970s sparked strong protests by foreign governments, including Australia, Canada, and the United Kingdom, which objected to the United States' assertion of its jurisdiction over conduct (arguably encouraged by those governments) occurring within their territories. The uranium cartel proceedings engendered a major international diplomatic dispute.

Aside from the international tensions that arise, United States antitrust enforcement agencies are likely to encounter practical difficulties in cases involving activities undertaken abroad by foreign nationals. For example, it is frequently difficult to obtain personal jurisdiction over foreign nationals other than multinational corporations. It is also difficult to obtain access to witnesses and documentary evidence, particularly where blocking legislation has been enacted and is applied. While the Hague Convention on the Service of Process^{222/} and the Hague

²²¹ COT report.

^{222/}The Hague Convention on the Service Abroad of Judicial and Extrajudicial

Evidence Convention²²³ have ameliorated this problem as to the signatory states, serious impediments remain in other jurisdictions. These difficulties indicate that antitrust enforcement authorities and private plaintiffs often may not be able to obtain access to the witnesses and evidence needed to prove a meritorious case.

There are other drawbacks inherent in the extraterritorial application of United States antitrust law. For example, representation in these factintensive, adversarial proceedings can be quite expensive. The litigation generally is extraordinarily lengthy; there is no "quick fix" regardless of how controversial the underlying issues may be internationally. Finally, federal courts may very well lack remedies that ensure the discontinuation of private anti-competitive practices by foreign nations outside the United States.²²⁴

2. Bilateral arrangements

2.1 Bilateral trade negotiations

Where extraterritorial enforcement of antitrust laws run into difficulties, bilateral trade negotiations have also helped in trying to open markets. As the ICPAC reported:

“Systemic bilateral discussions about Japan's competition law and enforcement regime first occurred in the context of the Structural Impediments Initiative (SII) (1989-92), which represented a broad-based dialogue between the United States and Japan on a host of structural issues thought to impede trade and competitiveness. In the early 1990s the USTR and the Department of Justice together pressed the Government of Japan and the JFTC to make Japan's Anti-Monopoly

Act enforcement "more effective" in deterring and punishing violations. Notable developments that occurred through the SII process included increases in the JFTC's budget and personnel; increased penalties for anti-competitive conduct; increased enforcement actions against hard-core violators; reinstatement of criminal enforcement after a 16-year hiatus and, certain procedural improvements aimed at reducing obstacles to private litigation of antitrust violations”.²²⁵

Jeffrey Lang, a former Deputy at the USTR, has noted the benefits that can accrue to exporters when their government enters into sectoral negotiations to address the problems of access that can arise where a former regulatory regime has left one or a few providers of goods or services with a dominant market position. In such circumstances, it has been necessary to fence off market segments to give newcomers time to build up the goodwill, capital base, and experience to take on the dominant supplier in the market.

In some instances, the United States has successfully transferred this pro-competitive regulatory thinking to trade negotiations. With regard to market access for insurance suppliers in Japan, the United States and Japan agreed in 1994 *to fence off a market segment of insurance services known as the 'third sector' for exploitation only by foreign companies* for a temporary period. Under this bilateral agreement, domestic Japanese companies could not compete in the third sector (in their home market) until the primary areas of insurance services in Japan had been opened fully to foreign competition for three years.

However, such approaches are increasingly viewed as resulting in sub-optimal outcomes from the perspective of efficient markets, and can violate trade

Documents in Civil and Commercial Matters, 20 U.S.T. 361 (Nov. 15, 1969).

²²³The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (July 27, 1970).

²²⁴ABA, Market Access report, at 50-52

²²⁵ICPAC report at 205

principles of most-favoured nation treatment. For these and other reasons, cooperation within the competition law sphere is also pursued.

2.2 Bilateral competition enforcement cooperation

The second method of addressing foreign conduct with anti-competitive consequences for exporters grows out of the limitations of unilateral enforcement and the current limited applicability of bilateral trade negotiations. No matter which test is used to justify extraterritorial application of laws, purely unilateral enforcement will always be an uphill and lonely struggle against undertakings that will be keen to remain at a distance. The most obvious problem is an evidentiary one. While it may be clear what anti-competitive harm a foreign activity may do to the common market, the evidence of the activity itself may reside in another country. No matter how powerful they may seem, competition officials cannot simply arrive in another sovereign jurisdiction and make a dawn raid. Nor will faxing information requests to foreign undertakings guarantee as full a response as may be desired, or indeed any response at all.

The only way that the authorities can get the evidence that they require is by combining forces with the competition authority that is responsible for the undertakings' 'home' jurisdiction or, the jurisdiction where the evidence required is thought to be located. This is why the EU institutions have been building bridges across various political borders so that the Commission can exchange information with, and benefit from, the enforcement powers of the American, Canadian, Japanese and other governments. Bilateral enforcement efforts based on such international agreements can help authorities to address conduct that harms competition and consumers within their respective jurisdictions. The Council and the Commission have also noted how such enforcement cooperation can help

trade.²²⁶ In particular, the European Commission can use 'positive comity' commitments that trigger foreign enforcement activity against foreign conduct which may not be harming competition and consumers in Europe but, may be preventing European undertakings from entering a particular foreign market. At the same time it is important to note that the American and Canadian authorities can use the same instruments to incite European enforcement action against European undertakings that may be harming American or Canadian exporters or investors.

To bridge the divide between national competence and international anti-competitive activity, governments have negotiated legal assistance treaties, usually of a bilateral nature. The EU and the United States entered into their first antitrust cooperation agreement in 1991.²²⁷ This agreement provides for forms of cooperation that have become fairly standard in most similar accords between other jurisdictions. It contains what are known as passive, or traditional, comity provisions. These are passive because although they permit an active communication of information and a consideration of a trading partner's interests, they do not involve any 'triggering' of enforcement activity in another jurisdiction. As mentioned in the preceding paragraph, that can only arise when a positive comity request is made and, one country asks another to begin

²²⁶Communication to the Council, submitted by Sir Leon Brittan and Karel Van Miert, 'Towards an International Framework of Competition Rules', COM (96) 296 final, 18 June 1996 (hereinafter, 'Commission Communication').

²²⁷For example, see *Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws* (23 Sept. 1991), reprinted in 4 Trade Reg. Rep. (CCH) 13,504; (hereinafter 'United States-EC 1991 Agreement').

enforcement proceedings in its jurisdiction.

In terms of traditional comity, the 1991 EU-United States Agreement provides that the authorities will notify one another when practices or enforcement activities would affect the other party to the Agreement. The Agreement also contains fairly basic provisions to allow information to be exchanged between the authorities and, to permit them to coordinate their enforcement activities in accordance with ‘traditional comity’. This is explained in more detail below. However, it is important to note that in complying with such commitments the Agreement cannot be interpreted inconsistently with United States or EU legislation. Perhaps most important in this regard are rules which protect the confidentiality of information that is gathered in investigations. The 1991 Agreement also contains certain basic provisions to provide positive comity. These are examined in more detail below. In 1998 the EU and the United States entered into a separate accord expressly supplementing these positive comity commitments. In particular, they specified the conditions under which the party requesting enforcement action should suspend its own enforcement activities and let the requested party ‘take the lead’.²²⁸ This suspension arrangement was limited however, to competitor-only complaints dealing with allegations of export restraints, i.e. where the anti-competitive activities at issue do not harm the requesting parties’ consumers (or harm them only incidentally) and, the primary problem is exclusionary conduct directed at the requested party’s competitors.

²²⁸Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, 4.06.1998

The EU and Canada also entered into a cooperation agreement in 1999²²⁹ which is broadly similar to the first EU-United States accord of 1991 and which provides for reciprocal notification of cases under investigation by either authority, coordination by the two authorities of their enforcement activities; positive and negative comity provisions and, the exchange of information between the parties, while also not affecting either party’s confidentiality obligations with respect to such information. Other accords are also being prepared between the EU and Brazil, Israel, Japan, Mexico, the Russian Federation, South Africa and the Ukraine. Similarly, many EEA countries have signed cooperation agreements with the Commission, which are also designed to ensure that such regimes align their enforcement regimes with European law.²³⁰ Despite the lack of any formal arrangement, the Commission also cooperated informally with many other authorities, in particular Australia and New Zealand. Many of these informal contacts come about as a result of the Commission’s participation in regional and multilateral meetings of competition authorities, in the context at the OECD, the International Competition Network (ICN), or the WTO.²³¹

The closest cooperation relationship to date that the EU has with foreign governments is that with its major trading

²²⁹Agreement of the European Communities and the Government of Canada regarding the application of the competition laws OJ L 175, 10.7.1999

²³⁰Report on Competition Policy 2001 p.117

²³¹OECD Members have agreed a non-binding Hard-core Cartel Recommendation based on the above agreements, which sets out the kind of enforcement cooperation that Members should provide in addressing such practices. The International Competition Network is a network of competition authorities with the aim of improving worldwide co-operation. It does not exercise any rule-making function but serves as a forum to establish best practices to be implemented by individual agencies whether unilaterally, bilaterally or multilaterally.

partner, the United States. They have begun designing a blueprint for future cooperation in matters relating to mergers by issuing 'best practice guidelines' with respect to their cooperation in merger cases.²³² They have proposed that their investigation timetables run in parallel to increase the effectiveness of cooperation and, that merging parties be given the possibility of meeting them together to discuss timing issues. Companies are encouraged to waive confidentiality so that the authorities can exchange information and allow joint EU/United States interviews of the companies involved. Key points are designated in the investigations for when it would be appropriate for direct contacts to occur between senior officials. The best practices guidelines also stress that the outcome of an agency's investigation will not be affected by an undertaking's choice to abide by all or some of the agency's recommendations. Therefore, companies are still left with the discretion to decide to what extent they cooperate regarding confidentiality waivers, transaction timings and notification decisions.

3. The forms of cooperation in detail

3.1 Traditional comity

Traditional comity is the 'general principle that a country should take another country's important interests into account in its own law enforcement in return for their doing the same'²³³. While this principle does not provide an obligation to take another country's interests into account as a matter of right, it does provide a way of avoiding conflicts in relation to the application of extra-territorial jurisdiction. For example,

²³²The EU and the United States issue best practices concerning bilateral cooperation in merger cases, Brussels 30 October 2002, IP/01/1591

²³³Merit E. Janow, *Transatlantic Cooperation on competition policy in Antitrust goes global* at 33

although the Boeing/McDonnell Douglas merger highlighted the different approaches to merger control taken by the United States and the EU (or at least to exclusive purchasing agreements at the heart of the case itself) and, the difficulties of cooperation in the face of such different standards, the Commission did take the United States Government's concerns relating to important United States defence interests into consideration to the extent consistent with EU law and, limited the scope of its action accordingly to the civil side of the operation relating to commercial aircraft.²³⁴ Comity has also played a part in the Department of Justice decisions on the international telecommunications joint ventures between BT/MCI and Sprint/France-Telecom/Deutsche Telekom. It is thought that the Department of Justice would have prohibited the BT/MCI transaction if it had not been for the competitive policies and safeguards that were being incorporated into the United Kingdom telecommunications regulatory regime, whilst the absence of such safeguards in the Sprint case meant the Department of Justice imposed more stringent conditions. For example, the substantive requirements imposed on MCI were devised to 'avoid direct United States involvement in BT's operation of its telecommunications network in the United Kingdom on an ongoing basis, minimizing the potential for conflict with United Kingdom authorities'²³⁵.

3.2 Positive comity

This principle requires that parties conduct acts of positive cooperation on behalf of another. It applies where undertakings from one party to a cooperation agreement are being harmed by the anti-

²³⁴Jean-Louis ARIBAUD, DG IV-B-1 Summary of the most important recent developments published in the EC Competition Policy Newsletter, vol 3 No 2 summer 1997

²³⁵Janet L. McDavid, *Case Study International Telecommunications in Antitrust Goes Global* at 182

competitive practices occurring within the territory of another party. As the injured party cannot itself initiate extraterritorial enforcement proceedings (because of the absence of evidence of harm to competition in its own market), it can request that the other party take action on its behalf.

3.3 Informal positive comity

The most public informal case of positive comity involved investigations by both the Department of Justice and the EU of the practices of A.C.Nielsen, a United States company that tracks retail sales. Following a complaint by Nielsen competitor IRI, the Department of Justice investigated Nielsen's practices with multinational customers of illegally bundling or tying the terms of contracts in one country with those in other countries. Specifically, the authorities were interested in whether Nielsen offered customers more favourable terms in countries where the company had market power as a way of ensuring that the customers would agree to use Nielsen in countries where it faced significant competition. The United States notified the EU of the problem and let the latter take the lead in the investigation since the conduct mostly affected Europe and, the Commission itself 'showed a firm intention to act'²³⁶. The Commission subsequently found that Nielsen had indeed implemented various exclusionary practices designed to impede IRI from entering the European market. As a result, Nielsen gave undertakings to the Commission to address the concerns of both the EU and the United States. The two authorities had cooperated extensively throughout the process.

²³⁶James F. Rill and Christine A. Wilson, *The A.C. Nielsen Case in Antitrust Goes Global* at 193

3.4 Formal Positive comity²³⁷

While much discussion on the international stage has focused on the feasibility of positive comity, its effectiveness in actual cases still remains difficult to assess. The number of instances where positive comity principles have been employed remains very limited. Despite this fact, positive comity has been used as a vehicle for cooperation in several specific instances and the experiences gained by those examples can provide some level of insight as to its viability in concrete circumstances.

In the only instance thus far of a formal referral under the 1991 United States-EC Agreement, the United States announced on April 28, 1997, that it had formally requested that the EC investigate alleged anti-competitive conduct occurring in Europe in the computer reservation system (CRS) industry.⁽¹¹²⁾ According to a statement released by the Department of Justice, the Antitrust Division had concerns that three national flag European airlines that own Amadeus, the dominant CRS in Europe, were denying a United States-based CRS of the necessary fare data and functionality needed to compete effectively.⁽¹¹³⁾...

The Antitrust Division asserted that the European "airlines did not give Sabre many air fares on a timely basis, refused to provide it with certain promotional or negotiated fares and, denied Sabre the ability to perform certain ticketing functions, although they provided these fares and functions to Amadeus."²³⁸ Despite a preliminary investigation undertaken by the Antitrust Division, then-Acting Assistant Attorney General Joel Klein noted that "[t]he European Commission is in the best position to investigate this conduct because it occurred in its home territory and

²³⁷Drawn from the ICPAC report

²³⁸US. Department of Justice Computer Reservation Press Release at 2.

consumers there are the ones who are principally harmed if competition has been diminished."²³⁹ While Assistant Attorney General Klein emphasized that the EC maintained an advantage in pursuing an investigation and possible remedial action regarding the alleged conduct, he also implied that the United States retained the option of pursuing its own investigation as it had a "strong interest" in the case since "United States companies may have been blocked from becoming effective competitors and the exclusionary conduct might also have adverse effects on United States markets."²⁴⁰

Following the formal referral, the EC reiterated its support of the positive comity process through remarks made by its director-general for competition, Alexander Schaub, who noted that the referral represented an important first step in this heightened level of cooperation between the two jurisdictions. Furthermore, he illustrated the EC's commitment to this specific case and the reciprocity factor associated with all positive comity requests, stating that the EC had "given our people the instruction to consider this as a priority case because we are aware of the fact that how we handle American positive comity requests will certainly determine largely how the United States authorities will handle our future requests."²⁴¹

Despite the EC's announced commitment to the Amadeus referral, some in the United States expressed concern as to the pace and attentiveness afforded to the EC's investigation. The United States Senate Judiciary Committee, acting in its oversight role, convened several hearings

²³⁹Preceding note.

²⁴⁰Preceding note

²⁴¹David Lawsky, Reuters, *U.S. Seeks International Pacts to Guard Against Price Fixing*, Rocky Mountain News, October 5, 1997

designed to study and evaluate the positive comity process in general and its relevant application in international antitrust cooperation. As will be discussed in greater detail below, one of the witnesses testifying at the hearings was a representative of The Sabre Group. Sabre relayed its own experiences with the positive comity referral process and expressed its reservations regarding the delay associated with the referral and several procedural "obstacles" confronting the process in general. Furthermore, Sabre set forth several recommendations designed to enhance the process in light of the firm's experiences during the Amadeus positive comity request, including increased communication between all involved parties and, a more defined timetable for the investigation. Some of these concerns were addressed in the 1998 Supplemental Agreement.

On March 15, 1999, more than two years after the Justice Department made its formal request, the European Commission announced that it had issued a Statement of Objections against Air France for possible abuse of its dominant position as a national carrier to foreclose competition in the CRS industry. Although the Statement of Objections has not been made public, the EC's press release asserts that Air France favoured Amadeus, "having provided Amadeus with more accurate information and on a more timely basis than it did to other CRSs, thereby putting the latter at a competitive disadvantage."²⁴² The release further noted that pursuant to the provisions outlined in the United States-EC Agreement, the Commission maintained regular contact with the Antitrust Division and "kept the DOJ closely informed on its analysis and on the progress of the procedure."²⁴³

²⁴²European Commission Press Release, "Commission Opens Procedure Against Air France for Favouring Amadeus Reservation System," (Mar. 15, 1999).

²⁴³Preceding note.

In accordance with EC procedure, the Statement of Objections does not represent any final determination on the part of the Commission. Air France has an opportunity to respond prior to final action by the Commission. Furthermore, as Assistant Attorney General Klein has observed, since the issuance of the Statement of Objections Sabre has entered into private settlements with two additional European airlines that will allow for enhanced access to essential data on the European markets.²⁴⁴ It is important to an evaluation of positive comity's effectiveness at this stage, to note that of the companies whose practices were identified by the United States, the Statement of Objections is directed only at Air France, and this preliminary action was not taken until some twenty-six months after the referral.

3.5 Positive comity's primary contribution – addressing exclusionary anti-competitive practices

A special report considering the value of positive comity²⁴⁵ has concluded that: Positive comity's potential appears to be *greatest* in cases where anti-competitive action in the requested country injures the requesting country's exporters but not its consumers. With respect to these "export restraint cases", what trade officials would call "market access cases", United States Assistant Attorney General Joel Klein has pointed to several benefits of positive comity. First, competition authorities tend to have a stake in taking such complaints seriously, even if they do involve foreign access, because they also harm consumers in the country where the conduct is occurring. Second, such a

²⁴⁴Testimony of Assistant Attorney General Joel Klein, Antitrust Division, U.S. Department of Justice, Before the Senate Judiciary Committee, Antitrust, Business Rights and Competition Subcommittee (May 4, 1999) at 12

²⁴⁵OECD CLP report on positive comity, DAFNE/CLP (99) at 14

process makes it much more likely that the evidence required to decide such cases properly can be obtained, since [the authority in the country where the conduct is occurring handles the case]. Finally, the positive comity approach should increase the credibility of competition laws and competition authorities, since it can address at least some market access issues through a systematic competition law-based approach. Whether under the general language of the OECD Recommendation or under bilateral cooperation agreements such as the presumptive deferral provision of the EC/United States Supplement, it seems clear that *positive comity's greatest potential involves cases in which the primary or exclusive injury is to the requesting country's exporters.*

The limits of voluntary and non-binding arrangements are obvious but, at the same time, there are other legal constraints to the effective operation of positive comity between States.

3.6 Limits of Positive Comity

Differences in levels of confidentiality afforded to information

Both the EU/United States and EU/Canada Agreements have a confidentiality provision whereby parties can refuse disclosure of any information if it is prohibited under the law of the party that holds the information or, if it would be incompatible with the important interests of the party that holds it. Therefore, there is a significant amount of discretion that is left open to the parties as to how far their cooperation extends. This is also a reflection of the importance of such information to the companies involved. They will want to be assured that any information exchanged will not be made known to competitors of the company and, will only be used for the purpose that it has been given to the authority.

In addition, the EU distinguishes between confidential business information and confidential agency information.²⁴⁶ Confidential business information is information obtained in the course of an investigation (including business or trade secrets) and cannot be disclosed to the United States unless the company expressly agrees. Confidential agency information relates to the investigation itself (including procedural aspects), and can be disclosed to the United States. On the other hand, the United States does not make such a distinction and prohibits the disclosure of any information that it holds without the consent of the undertakings involved, except in relation to administrative or judicial actions or proceedings.

Therefore, it is clear that a waiver of confidentiality is almost always required from parties involved in an EU/United States investigation. Past experience has shown that waivers are more readily given in merger cases where companies involved will cooperate in order to get expedited clearance for their merger.²⁴⁷ However, reports have shown that there has also been an increased level of information sharing between the EU and United States in cartel cases, including one company providing a waiver allowing the two authorities to exchange views regarding confidential evidence²⁴⁸. These developments are all the more important as the effectiveness of cooperation in

²⁴⁶ Commission Report to the Council and the European Parliament on the Application of the Agreements between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws 1 January 1997 to 31 December 1997, Brussels 11.05.1998 at 5

²⁴⁷ M. Monti, Cooperation between competition authorities - a vision for the future, The Japan Foundation Conference Washington DC, 23 June 2000

²⁴⁸ 2001 report on EU/US co-operation; Fine Art Auction Houses case

cartel cases depends greatly on the ability of the agencies involved to share confidential information.

Particular problems also arise with respect to differences in the regimes in the EU and Canada. For example, the EU will restrict disclosure of confidential information to the Canadians in much the same way as it distinguishes between business secrets and other agency information. However, in Canada information is protected if it is held by the Competition Bureau and was obtained under the powers provided by the Competition Act. However, information, including business secrets provided voluntarily to the Competition Bureau is not protected. Therefore, it would appear that information provided by the EU to Canada could be released or accessed under an Access of Information request under Canadian law, as it was not obtained using Canada's competition law. To try to address this, the Canadian Commissioner for Competition has issued a specific Communication of Confidential Information which states that such shared information would also be covered by Canada's confidentiality provisions. The question for undertakings is whether this assurance is enough. Companies should also note that confidential information in the hands of the Competition Bureau could be disclosed to the EU where the purpose is to receive reciprocal assistance regarding a Canadian investigation. However, the authority to do this is somewhat ambiguous and as a result the Commissioner has proposed amendments to the Competition Act in order to give formal status to such a disclosure of information²⁴⁹.

There is a need for a requirement for comparable downstream protection of information, as a way of reconciling business needs for confidentiality and the authorities' need for information. Down-

²⁴⁹ Lawson Hunter QC and Susan M Hutton, EU-Canada Co-operation in The European Antitrust Review 2002

stream protection would assure undertakings involved in investigations that any foreign cooperating agency would have in place comparable protections for shared information through a case-by-case examination and, assurance that adequate protection exists for the particular information being sought.²⁵⁰

Substantive differences in law

Another restriction on the utility of positive comity results from substantive differences in the parties' laws. Positive comity— and, cooperation itself, can only apply where the anti-competitive conduct is illegal in the jurisdiction of the requested party or, is regarded as anti-competitive by both competition authorities. The United States authorities still approach vertical arrangements in sufficiently different a way from the EU that cooperation may not work when 'westward' (EU to the United States) positive comity requests are made about such restrictions. European competition law prohibits arrangements that may significantly restrict competitors' access to a market. United States competition law however, takes further factors into account and requires that the arrangement must also substantially lessen competition, in order to prohibit it, unless efficiency benefits may be achieved. As such, it is not likely to be the case that the United States will act against vertical restraints even when expressly requested to do so by the EU, without evidence that the arrangements substantially lessen competition, despite the fact that they may impede the ability of a European company to enter the United States market.²⁵¹

As has been pointed out, 'it is not realistic to expect one government to prosecute its

²⁵⁰OECD Global Forum on Competition - Information Sharing in Cartel Cases

²⁵¹P. Marsden, "The Divide on Verticals", *Anti-trust Goes Global*, Brookings Institution Press, Royal Institute of International Affairs, Washington/London (October 2000)

citizens solely for the benefit of another. We should not expect the principle of positive comity to impact dramatically on the proposition that laws are written and enforced to protect national interests.'²⁵² Fundamentally, the application of positive comity is dependent on the good will and trust of the parties, factors that do not always come to the fore when their own political and economic interests are affected. However, this self-interest can also benefit positive comity, as the reciprocal nature of such agreements tends to make them self-enforcing.²⁵³ This was illustrated in the EU's willingness to cooperate in the Sabre-Amadeus matter in order to reap the benefits of such cooperation in subsequent cases. As Alexander Schaub explained, the American request's effect on the dynamic of transatlantic cooperation was 'important ... psychologically. We have given our people the instruction to consider this as a priority case because we are aware of the fact that how we handle American positive comity requests will certainly determine largely how the United States authorities will handle our future requests'.²⁵⁴

The trust implicit in the use of positive comity, particularly when one authority suspends its own enforcement activities, is most likely to work between jurisdictions that have well-developed, mature competition law systems and, a history of international contacts. It is least likely to work when the requesting party do[es] not have the resources, the experience or legal infrastructure to undertake a

²⁵²James R. Atwood "Positive Comity; Is it a positive step? 1992 Fordham Corporate Law Institute (B.Hawk, ed. 1993) at 86

²⁵³OECD, CLP Report on Positive Comity, DAF/CLP (99) 19 at 14

²⁵⁴A. Torres, 'E.U. Gives Priority to US Airline Reservation Case', (9 September 1997) citing Alexander Schaub.

requested investigation.²⁵⁵ or, as has been noted above, does not prohibit the particular practices under its own law.

The various limitations of bilateral enforcement cooperation have led the EU to push for wider and deeper commitment from their trading partners. Three limitations stand out in particular. First, the fact that cooperation is subject to various restrictions, and is voluntary in any event, has led the EU to push for binding commitments between governments to help one another battle international anti-competitive practices. Second, the fact that cooperation to date has been primarily bilateral has meant that enforcers are simply not able to keep up with the increasing international prevalence of anti-competitive activity.²⁵⁶ Even the development of a wider patchwork of individual agreements among countries would not constitute a web that would be broad enough, or strong enough, to capture all international cartels, let alone other forms of anti-competitive activity. Third, the fact that countries may have inadequate resources or differing legal regimes means that it will be difficult for their governments to act against anti-competitive conduct, and cooperate in that regard with one another.

4. Competition provisions in Regional Trade Arrangements²⁵⁷

If the non-binding nature of existing agency-to-agency arrangements is one

²⁵⁵ Merit E. Janow, Transatlantic Co-operation on competition policy in *Antitrust goes global* at 41

²⁵⁶ See for example, Working Group on the Interaction between Trade and Competition Policy - Communication from the European Community and its Member States WT/WGTCP/W/1 (11 June 1997) (available on the Document Distribution Facility (DDF) at www.wto.org).

²⁵⁷ See UNCTAD publication entitled "Competition provisions in regional trade agreements: How to assure development gains (UNCTAD/DITC/CLP/2005/1)

limitation, how helpful is it to include competition provisions in binding trade agreements?

When asked to include competition commitments in otherwise binding trade agreements, even Members with well-developed competition laws have only been able to agree to vague and general exhortations on competition policy. The three NAFTA Parties, for example, only agreed to enforce their competition laws and to cooperate in such efforts.²⁵⁸ Despite the banality of this approach - little more than a statement of the status quo - they expressly provided that '[n]o Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article'.²⁵⁹

Simply making generally-worded commitments binding however, might prove to be unhelpful. Allowing Members to 'litigate' on the basis of ill-defined commitments provides them with a wide scope with which to challenge each other's enforcement activities. If some of the challenges do indeed turn out to be specious, then this will make international tension more likely and, in turn, international cooperation less likely.²⁶⁰ Moreover, vague standards would not provide Members with any *ex ante* guidance on how anti-competitive practices should be prohibited. Nor would they provide a dispute settlement panel with much of the legal framework that it would need in order to opine on the effectiveness of enforcement.

²⁵⁸ *North American Free Trade Agreement (NAFTA)* Article 1501.

²⁵⁹ *NAFTA* Article 1501.3.

²⁶⁰ This is not unlikely. The United States did not require any international competition rule at all to launch its complaint against Japan's alleged toleration of the alleged anti-competitive activity of Fuji Film. *Japan - Measures Affecting Consumer Photographic Film and Paper: First Submission of the United States of America*, WT/DS44 (20 February 1997) (hereinafter '*Kodak-Fuji*').

There are a vast number of regional trade arrangements that include competition provisions, including APEC²⁶¹, the Euro-Mediterranean Association Agreements²⁶², COMESA²⁶³, MERCOSUR,²⁶⁴ Caricom, the Andean Community²⁶⁵ and EFTA²⁶⁶ but, it is not obvious that they are immune from the limitation pointed out immediately above. They are excellent signals of understanding and an agreed approach to anticompetitive practices but, their value within a binding trade agreement is usually diminished by opt-out clauses and exemption from dispute settlement. More detailed provisions exist in traditionally non-binding trade arrangements at the OECD and the UNCTAD. They have also been excellent indicators of agreement and models for individual nations and for future cooperation.

Members of the OECD agreed to a series of non-binding recommendations in 1967,

²⁶¹However, members have undertaken to introduce or maintain effective, adequate and transparent competition policies or laws and enforcement, to promote competition among APEC economies and, to take action in the area of deregulation in the legally non-binding APEC Principles to Enhance Competition Policy and Regulatory Reform.

²⁶²Notably, the EU-Med Agreement with Tunisia has detailed substantive competition provisions under Articles 36, 81, 82 and 87.

²⁶³J Musonda, "Enhanced Technical Assistance and Cooperation: Priorities for the Effective Implementation of Competition Policy in Africa – the Case of COMESA", Paper presented at the WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System, Capetown, South Africa, February 2000 [Hereinafter Musonda (2000)].

²⁶⁴See in particular the December 1996 protocol on competition policy.

²⁶⁵See in particular the March 1991, Decision No. 285, of the Commission of the Cartagena Agreement, entitled "Norms to Prevent or Correct Distortions in Competition Caused by Practices that Restrict Free Competition".

²⁶⁶See in particular Article 15.1.

1973, 1979, 1986 and 1995.²⁶⁷ The most recent OECD Recommendation states that:

"Member countries should cooperate in the implementation of their respective national legislation in order to combat the harmful effects of restrictive anti-competitive practices...[C]loser cooperation between Member countries in the form of notification, exchange of information, coordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged".²⁶⁸

The Recommendation's purpose is to improve enforcement of cooperation rather than to increase national enforcement itself. By communicating differences and similarities in their respective national enforcement priorities and methods, OECD Members hoped to avoid conflict and thereby enable further cooperation.

In 1980, members of the United Nations Conference on Trade and Development (UNCTAD) adopted a non-binding set of rules for the control of restrictive anti-competitive practices.²⁶⁹ While the *UNCTAD Set* was motivated by an

²⁶⁷OECD, *Recommendation of the Council of 5 October 1967* [c (567) 53 [Final]]. OECD, *Recommendation of the Council of 3 July 1973* [C (73) 99 (Final)]; OECD, *Recommendation of the Council of 25 September 1979* [C (79) 154 (Final)]; OECD, *Recommendation of the Council of 21 May of 1986* [C (86) 44 (Final)]; OECD, *Recommendation of the Council of 27 and 28 July of 1995* [C (95) 130 (Final)].

²⁶⁸OECD, *Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anti-Competitive Practices Affecting International Trade* (21 September 1995) c(95)130/Final, Preamble (hereinafter '1995 OECD Recommendation').

²⁶⁹UNCTAD, *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive anti-competitive Practices*, TD/RBP/CONF/10/REV.1 (Geneva: UNCTAD, 1980) (hereinafter '*UNCTAD Set*').

express concern for developing countries, its primary focus is not enforcement cooperation among developed and developing Members, but increased law enforcement within individual countries to remove private barriers to their markets.²⁷⁰ The *UNCTAD Set* thus recommends to its Members that ‘appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive anti-competitive practices’.²⁷¹ The *UNCTAD Set* also recommends to business that ‘enterprises ... should refrain from [restrictive anti-competitive] practices when ... they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade’.²⁷²

As non-binding recommendations and principles these are not provisions that can be relied upon to compel the opening of a case by another country against anti-competitive practices that are harming another nation’s exporters.

When finally negotiated, the Free Trade Agreement for the Americas may provide a change in this regard. As Stephen Woolcock points out:

“A second draft chapter of the FTAA on competition was produced in November 2002. Although this is still a negotiating text it provides some indication of the likely shape of the FTAA provisions. Signatories to the FTAA may have to establish national competition policies and national authorities to implement them. The draft covers RBPs, including abuse of market dominance, but merger

provisions are still in square brackets. There are also likely to be articles on pro-competitive regulatory practices, public monopolies and state enterprises, which seek to prevent cross subsidization. The latest draft suggests that there will only be an undertaking to study state subsidies. Institutional provisions will involve measures to ensure due process and transparency in competition investigations. With regard to cooperation on enforcement measures the draft includes provisions on exchange of information, notification and negative comity. The treatment of confidential information is treated as in the United States – EU bilateral agreement, namely confidential information cannot be divulged until the parties waive their right to such protection. Positive comity proposals remain in square brackets. *The FTAA dispute settlement provisions would apply to the implementation of the chapter in national law (de jure), but not to how the national laws required are implemented (de facto). This is likely to be a precedent that will shape any WTO negotiations.*²⁷³

Some indication of the value that binding commitments may provide may be seen by examining existing provisions in that regard, namely under the WTO agreements. Unfortunately, many of the limitations mentioned above also apply to these provisions. WTO Members appear to be caught between the Scylla of detail - which could thwart the creation of any meaningful agreement - and the Charybdis of vagueness - which would allow an agreement but would add nothing to the status quo.

²⁷⁰The *UNCTAD Set* recognizes that ‘restrictive anti-competitive practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries’ (preamble).

²⁷¹*UNCTAD Set*, Section C, (1).

²⁷²*UNCTAD Set*, Section D, (1) and (2).

²⁷³S. Woolcock, International Competition Policy and the World Trade Organization, Paper for the Commonwealth Trade Forum, July 7th-8th 2003; See Second draft Chapter on Competition Policy FTAA.TNC/w/133/Rev2 1 November 2002

5. Binding Multilateral instruments

5.1 WTO commitments

There are a range of WTO provisions that are arguably relevant to competition matters, or anti-competitive practices in general. This sub-section considers those most relevant to exclusionary anti-competitive practices in general rather than acts by governments and state trading enterprises or, the peculiarities of dumping provisions.

GATT and GATS

The *GATT 1994* requires that Members ensure that monopolies and enterprises with special or exclusive rights make purchasing decisions on the basis of commercial considerations and do not discriminate against imports.²⁷⁴

The non-violation nullification and impairment provision in the GATT also provides some opportunity to address the toleration of exclusionary anti-competitive practices, but perhaps not in a manner in which most competition experts would agree is appropriate. As Woolcock notes,

‘The use of so-called non-violation cases under Article XXIII of the GATT provides the option of using existing GATT rules to address anti-competitive practices. This provision can be used when a WTO Member believes that benefits accruing to it under the agreement are being nullified or impaired by measures that do not violate any part of the GATT. Article XXII can for example, be used when the benefits of market access for a WTO Member(s) are nullified by the absence of competition in a target market. Although this Article is held up as a possible alternative to a framework agree-

²⁷⁴GATT 1947, 55 UNTS 187; *General Agreement on Tariffs and Trade 1994*, Annex 1A of *WTO Agreement* (hereinafter ‘GATT 1994’) Article XVII:3.

ment on competition in the WTO, there are a number of drawbacks with it. Perhaps the most important it that nullification is, in practice, very difficult to prove and as a result there have been few attempts (none successful) to use this provision. Another difficulty is that in the absence of any agreed framework of rules WTO Panels would have to judge what national competition laws are acceptable and what are not. *Such an activist approach to WTO jurisprudence would be based on trade considerations, predominantly market access, rather than the rather broader competition policy criteria. This would not result in an integration of trade and competition policies, but the dominance of market access considerations and would fit uneasily with the general desire to bolster the WTO’s legitimacy*’.²⁷⁵

Under the *General Agreement on Trade in Services (GATS)*, Members must ensure that when a monopoly service supplier provides services outside of its monopoly rights, it does not ‘abuse its monopoly position’ in a way that would thwart Members’ specific commitments to open their markets to foreign products and service suppliers.²⁷⁶ The *GATS* also notes that services providers, other than monopolies and State enterprises, might also act so as to restrain competition and thereby restrict trade.²⁷⁷ Members have promised to consult each other to ensure that such activities are eliminated, to accord requests for such consultations ‘full and sympathetic consideration’ and, to cooperate with one another through the supply of non-confidential information.²⁷⁸ While only providing for

²⁷⁵Woolcock at 14

²⁷⁶*General Agreement on Trade in Services*, Annex 1B of *WTO Agreement* (hereinafter ‘GATS’) Article VIII.

²⁷⁷GATS, Article IX:1.

²⁷⁸GATS, Article IX:2.

consultations, the *GATS* was the first binding multilateral agreement to address the practices of private business in this manner.²⁷⁹

Nevertheless, the ABA has found it only of limited value in addressing exclusionary anti-competitive practices:

“The *GATS* provides no definition or explanation of the “certain anti-competitive practices” that “may restrain competition and thereby restrict trade.” That failure, together with the absence of an explicit requirement that a trade-restricting practice be eliminated, makes this a much less aggressive approach to private access-denying practices...”²⁸⁰

TRIPS

The *Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS)* took ‘trade and competition’ a step further in 1995.²⁸¹ It recognizes that anti-competitive practices involving the use of intellectual property rights may have adverse effects on trade. To prevent this, Article 40 affirms the right of WTO Members to prohibit licensing practices or conditions that may constitute an abuse of intellectual property. If a Member does not adequately address such practices, its trading partners can request consultations with it to resolve the issue. While the *TRIPS* does not ‘prescribe’ a particular level of enforcement, it provides Members with a right to complain about and, the WTO the ability to review, the enforcement approach of individual Members.

²⁷⁹As opposed to a decision or recommendation, for example.

²⁸⁰ABA Market Access report, p.87

²⁸¹ *Agreement on Trade-related aspects of Intellectual Property Rights*, Annex 1C of *WTO Agreement* (hereinafter ‘*TRIPS*’).

Pro-competitive regulation

At about the same time, governments also recognized that their telecommunications markets would not become or remain competitive if they simply restrained one another from discriminating against foreign suppliers. A United States Government submission explained that: “the negotiating parties [accepted] that a grant of *de jure* market access and national treatment was insufficient to grant *de facto* or effective market access, without commitments by governments to regulate former monopolies in a pro-competitive manner, because such former monopolies have both the ability and the incentive to dictate anti-competitive terms of market entry for new competitors.”²⁸²

A right of general entry had to be provided to new competitors, whether domestic or foreign, through pro-competitive ‘asymmetric regulation’ of major domestic suppliers.²⁸³ Trade negotiators thus provided a *Reference Paper on Pro-competitive Regulatory Principles* to require that WTO Members ensure that their large incumbents provide sufficient entry points on satisfactory terms so that their competitors could connect to their networks.²⁸⁴

The approach in the *Reference Paper* is part competition policy, part regulation.²⁸⁵ It protects competition by requiring that

²⁸²Communication from the United States, ‘The Impact of Regulatory Practices, State Monopolies, and Exclusive Rights on Competition and International Trade’ WT/WGTCP/W/83 (14 August 1998) (hereinafter ‘US Communication 83’) at 11.

²⁸³US Communication 83 at 12.

²⁸⁴Negotiating Group on Basic Telecommunications, *WTO Reference Paper on Basic Telecommunications* (24 April 1996) (hereinafter, ‘*Reference Paper*’).

²⁸⁵*Reference Paper*, Article 1.1 and 2.2, respectively.

governments prohibit major suppliers from engaging in anti-competitive practices that frustrate market entry. It promotes competition by requiring that major suppliers provide their competitors with market access for example, by allowing other firms to connect to their telecommunications networks on non-discriminatory terms and conditions, in a timely manner and upon request.²⁸⁶ ‘Major suppliers’ are those with the power to ‘materially affect the terms of participation (having regard to price and supply)’ due to their control over ‘essential facilities’ or their ‘position’ in the market.²⁸⁷ Examples of anti-competitive practices include: ‘anti-competitive cross-subsidization’ and ‘use of information obtained from competitors with anti-competitive results’.²⁸⁸ As the *Reference Paper* imposes regulatory obligations, certain competition policy-related concepts are left undefined, including ‘anti-competitive’, ‘essential facilities’ and ‘use’ of one’s position. Furthermore, a supplier can be ‘major’ without being what competition authorities would consider to be ‘dominant’.²⁸⁹ Each signing Member undertakes to have its regulator, which can be a competition authority, adhere to these commitments.²⁹⁰ When a Member has made the *Reference Paper* part of its specific commitments under the *GATS*, any failure to adhere to it can be the subject of WTO dispute settlement.

The *Reference Paper* is more detailed than any other binding multilateral ‘com-

²⁸⁶ *Reference Paper*, Article 2.2.

²⁸⁷ *Reference Paper*, Definitions.

²⁸⁸ *Reference Paper*, Article 1.2.

²⁸⁹ L. Sherman, ‘Wildly Enthusiastic’ About the Multilateral Agreement on Trade in Telecommunications Services’ 51/1 *Federal Communications Law* 61 (1999), at 71-72.

²⁹⁰ *Reference Paper*, Article 2.5.

petition’ rules. As such, trade negotiators are seeking to test the applicability of its principles to other formerly ‘public’ sectors with monopolistic or oligopolistic characteristics, including postal and courier, air transport and energy, as well as non-public sectors such as ‘distribution’ services. A ‘built-in agenda’ to this end is firmly in place and discussions are well-advanced.²⁹¹

5.2 Review of WTO commitments

The ABA summarized its view of the various WTO commitments as follows:

“In summary, while the WTO does not address the issue of private practice market access restraints in an across-the-board manner, the provisions discussed above make two things quite clear. First, the fact that the access-denying practice is private, rather than governmental, does not prevent the WTO from addressing it. Second, the structure by which the WTO addresses private practices is clear and consistent. The WTO looks in the first instance to each Signatory Government to create and enforce a regime dealing with the private practice in question. The WTO Agreement may provide only general principles which the Signatory Government’s regime must follow (e.g., ... the *GATS*) or it may lay out detailed substantive provisions (e.g. the *TRIPS* Agreement). In some cases (... *TRIPS*), the Signatory Government will be required to maintain a domestic procedure for private parties to enforce their rights

²⁹¹ WTO Secretariat, ‘Distribution Services - Background Note by the Secretariat’ S/C/W/37, 10 June 1998 at 14; Inside US Trade, ‘US presses for alternative negotiating methods for *GATS* (20 August 1999).

For a list of other trade provisions relating to competition, see Organization for Economic Cooperation and Development, ‘Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements’ COM/TD/DAFFE/CLP(98)26/Final (28 January 1999).

under domestic law. Under most WTO Agreements, one Signatory Government may take another Signatory Government's alleged failure to implement the WTO Agreement to the WTO's Dispute Resolution Mechanism. Under the GATS (where the condemned restrictive anti-competitive practices are not defined), the Agreement requires government-to-government consultations in which "full and sympathetic consideration must be given to the complaint of the foreign service provider's government."²⁹²

As the reference paper is the most detailed of competition commitments at the WTO to date and, the one that is mentioned most frequently as providing a framework for future commitments, a detailed examination of its contribution is in order.

The OECD has made 'three important caveats' about the Reference Paper.

First, it might be argued that if governments agree to create mutual obligations to enforce a given set of regulatory principles, they could be viewed as having tied themselves into an established pattern of regulation. This approach may be appealing from the point of view of opening up market access on a broadly reciprocal basis. However, it also has the potential drawback of locking in a uniform approach in circumstances that might be quite different among countries. In the specific context of the Reference Paper, and the more general context of possible future multilateral initiatives that might build upon the flexible architecture described above, this will not necessarily be the case. That is so because the Reference Paper does not set forth a detailed or mechanical "common standard" for regulation of the telecommunications sector. Rather, the Reference Paper provides an approach to applying principles of competition to the

telecommunications sector while leaving significant freedom and flexibility for Members to implement their regulatory policy choices.

This problem, to the extent that it exists, can also be addressed through the design of the regulatory principles that do not apply when a given threshold of diversification in relation to the sources of supply available in a market has been attained. Even so, multilateral uniformity may still in some circumstances lead to a suboptimal degree of regulatory intervention. In other words, the regulatory authorities, or the governments, to whom they are ultimately responsible, could find that multilateral commitments make regulatory forbearance harder in circumstances where it might otherwise seem desirable. Again, for the reasons described above, in the specific context of the Reference Paper, and the more general context of possible future multilateral initiatives that might build upon its flexible architecture, there is no *a priori* reason to expect this result to occur.

The third caveat is the risk that regulatory interventions putatively designed to promote competition, instead become primarily used to protect competitors, not competition. However, given the flexible architecture of ... and the Reference Paper, there does not appear to be any *a priori* reason to expect the problem of rent seeking to be worsened by the multilateral agreement. On the contrary, the embodied emerging consensus among trade and competition officials about telecommunications regulation would seem to strengthen, rather than weaken the hands of those authorities wrestling with these forms of rent-seeking behaviour. It must also be recognized that antitrust laws and their enforcement may, in certain jurisdictions, inside and outside the OECD, reflect multiple

²⁹² ABA Market Access report, at 87-92

objectives, including industrial policy considerations.²⁹³

The *Reference Paper* confirmed the hopes and fears of both of camps in the trade and competition debates. As the trade side had hoped, a binding set of commitments was forged, which could help WTO Members to discipline each other's large incumbent telecoms suppliers and thereby help foreign competitors to break into new markets. As the competition side feared however, the process of achieving agreement on the text of the *Reference Paper* demonstrated how the dynamic of international trade negotiations necessarily involves a descent to the lowest common denominator. One of the WTO negotiators - Laura Sherman - has explained how the text came together:

The process of drafting the *Reference Paper* began with the United States distributing a paper entitled, 'Pro competitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services'. Based on contributions from Australia, Canada and the European Union, Japan developed a *composite set of regulatory principles*. To accommodate the different political and legal structures of WTO Members, negotiators agreed that the principles needed to be *sufficiently flexible to accommodate differences in market structures and regulatory philosophies* among the various participants. No single uniform regulatory system should be imposed. Some countries may rely on antitrust law, while others may develop a complicated set of regulatory principles. The objective was to ensure certain results, a level playing field for new

entrants, not to determine the means by which the results would be achieved.²⁹⁴

Negotiators also had to agree on what 'level' that playing field should start at. There were obvious dangers in aiming too low. Various telecoms experts have argued that 'it is "very important that the playing field should be levelled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" do nothing but harm, rather than improve, consumer welfare'.²⁹⁵ At WTO negotiations however, it is difficult, as a purely practical matter, for so many Members to agree to follow the strictest standards available. At the WTO telecoms negotiations in particular, the pressure was on to find a happy medium, or minimum, among considerably different approaches. The Members accepted that the result would not necessarily be the ideal, let alone best, practice. As Sherman has explained, in the search for a 'composite' approach, the aspects of the original American proposal, which dealt with the crucial issue of the types of companies that would have to help their competitors into their markets, had to be watered down considerably.

The United States regulatory principles had referred to a '*dominant operator*', defined as an operator with market power. However, this was a United States term not used elsewhere.

Australia proposed that each WTO Member would *identify the relevant carriers* in its Schedule, but this idea was rejected.

²⁹³OECD, Implications of the WTO Agreement on Basic Telecommunications, COM/TD/DAFFE/CLP(99)12/FINAL

²⁹⁴L. Sherman, 'Wildly Enthusiastic About the Multilateral Agreement on Trade in Telecommunications Services' 51/1 Federal Communications Law (1998) 61, (hereinafter, 'Sherman') at 71-73 (emphasis added).

²⁹⁵Naftel and Spiwak at 63, n. 55 citing J. Farrell, 'Creating Local Competition' 49 Fed Comm, Law. J. 201 (1996) at 202.

Everyone agreed that the definition could not be limited to a single supplier, that is, solely to a monopoly provider, because the disciplines would cease as soon as there was a new entrant. *Negotiators decided to focus on the control of facilities as the operative way of defining the relevant carriers.*

The Canadian delegation offered a definition of 'essential facilities' as facilities that 'are available only on a monopoly basis (*de facto* or *de jure*); cannot be economically or technically substituted; and, are required by a competitor for the supply of a service'.

Some thought this definition was too narrow and would not cover former monopolies now subject to some competition. Consequently, the reference to *de facto* or *de jure* monopoly was replaced by 'exclusively or predominantly provided by a single or limited number of suppliers'.²⁹⁶

The European Union argued that it was *not control over essential facilities* that should define interconnexion obligations or competitive safeguards, but rather market power. The European Union suggested assigning interconnexion responsibilities to *suppliers with significant market power*. This is a term in EU directives where it is defined as carriers with more than 25 per cent market share.

Others believed that such a definition was too broad and would impose obligations on carriers that could not act anti-competitively.

There was agreement that some carriers that did not control essential facilities, could still act anti-competitively and, hinder market access by new entrants.

Therefore, negotiators agreed to include a concept of market power, applying the interconnexion obligations and compe-

²⁹⁶Sherman at 74-75.

titive safeguards to incumbent carriers . . . referred to as 'major suppliers'.²⁹⁷

As this final compromise was lower than any one Member's competition law standard, the result was clearly to impose a regulatory requirement on such suppliers. Competition law in America, Australia, Canada and even the EU only imposes similar obligations on firms to help their competitors when at least three conditions have been satisfied: first, the firms have been found to be 'dominant', as opposed to being merely 'major'; second, that they have been proven to be abusing their dominant position by, for example, refusing to deal with their competitors, and third, that this has been proven to have had the effect of lessening competition substantially²⁹⁸ or, of eliminating it all together.²⁹⁹ In addition, with the exception of the EU, the competition laws of each of these jurisdictions would require evidence that such a refusal was lessening competition substantially. As Debra Valentine has pointed out, the negotiation of the *Reference Paper* also resulted in a provision on 'essential facilities' that is lower than current practice in some jurisdictions.

Under the *WTO Agreement*, the facilities of a public telecommunications transport network or services are 'essential' if they are provided by only a few suppliers and are not readily amenable to substitution in order to provide the service. In essence, a duty to permit access arises solely from the status of the facility as 'essential'. By contrast, in the United States actual

²⁹⁷Sherman at 75 (emphasis added).

²⁹⁸United States *Sherman Act*, 15 U.S.C., Section 2; Australian *Trade Practices Act 1974* (consolidated), Section 46; Canadian *Competition Act*, R.S.C. 1985, c. C-34, as amended.; Sections 78 and 79. See for example, *MCI Communications Corp v AT&T*, 464 U.S. 891(1983).

²⁹⁹EC *Treaty of Rome*, Article 82. *Oscar Bronner v MediaPrint Zeitungs et al*, [1994] 4 CMLR 112 (hereinafter 'Oscar Bronner').

misconduct, beyond merely seeking monopoly rents, is required. No remedy may be imposed unless the supplier has denied access when it would have been feasible to permit it and, the denial likely injures the competitive process.³⁰⁰

In Europe, owners of facilities that have been found to be 'essential' only have to provide access to them after it has been proven both that the access was denied to them unreasonably and that this denial of access ensures that competition is, or remains, eliminated.³⁰¹ It is more than a little unfortunate that the *Reference Paper* set a regulatory approach that is so different from current practice, particularly as this comes at a time when the American and European approaches to essential facilities have been converging towards one another and when governments generally have been favouring the use of competition law disciplines rather than regulation. The preferred model in both Europe and the United States appears to be one where governments only intervene to order the owner of an essential facility to provide its competitors with access to it if, in addition to the above conditions, it is not possible (or at least not economically feasible), for them to develop a competing facility.³⁰² Any one of these conditions is far more rigorous than what Members have committed themselves to in the *Reference Paper*. Since the *Reference Paper* influences how Members intervene in their markets, this divergence needs to be sorted out sooner rather than later.

This is particularly the case since the *Reference Paper's* provisions are already being relied upon in dispute settlement

³⁰⁰Valentine at 6 (emphasis added).

³⁰¹*Oscar Bronner v MediaPrint Zeitungs et al*, [1994] 4 CMLR 112 (hereinafter 'Oscar Bronner').

³⁰²*MCI Communications Corp v AT&T*, 464 U.S. 891(1983); *Oscar Bronner*.

proceedings. The United States has used the *Reference Paper* already to effect considerable changes to the business environment in Mexico. The case in question arose after an American telecoms provider, Sprint, had partnered with Mexico's largest supplier of telecommunications services, Telmex, to provide mobile telecommunication services in the United States and Mexico. AT&T and MCI had to settle for deals with lesser Mexican players and could not benefit from Telmex's considerably larger network. They called upon the United States Trade Representative to help them get the kind of access that Sprint had. The resulting American WTO complaint requested that Telmex be required to provide these United States firms with non-discriminatory access as provided for under the *Reference Paper*.³⁰³ After only a few months of the pressure of strained trade relations with the United States, the Mexican telecoms regulator COFETEL issued a set of 'Asymmetric Regulations for Telmex'. These ordered Telmex to provide its long distance competitors with access to its network at cost.³⁰⁴ The United States then withdrew its WTO complaint.³⁰⁵

It is interesting to note that at no point did AT&T, MCI or the USTR make a public request for the Mexican competition authority to investigate Telmex's activities. They had no incentive to do so. Their allegations would have had to

³⁰³*Mexico - Measures Affecting Telecommunications Services - Request for Consultations by the United States*, WT/DS204/2 (17 August 2000).

³⁰⁴Inside Trade 'USTR backs off Mexico WTO threat in wake of telecom company deal' (www.insidetrade.com) (1 June 2001).

³⁰⁵The battle continued, however. 'On 13 February 2002, the United States requested the establishment of a new panel. In particular, the United States [is claiming] that Mexico's measures... did not prevent Telmex from engaging in anti-competitive practices'. WT/DS204/3.

survive a rigorous market analysis and satisfy a competition law standard, that competition in the relevant market had been proven to have been ‘diminished, impaired or prevented’,³⁰⁶ before the Mexican competition authority would have intervened. The complainants and the USTR probably thought that they stood a much better chance of success if Geneva-based trade panellists reviewed their complaint under the pro-competitive rules of the *Reference Paper*. They would not have to find evidence of ‘harm to competition’ but simply a failure by Mexico to honour its commitment to *promote* competition by increasing foreign entry. From the point of view of international trade policy, the use of this standard, combined with the threat that Mexican products would be barred from the vast American market, Mexico’s capitulation and imposition of ‘asymmetric regulations’ on its ‘major supplier’ was not at all surprising.

As the initial Mexican case was settled through bilateral ‘negotiation’, WTO dispute settlement panels have not yet had an opportunity to explain what the *Reference Paper*’s pro-competitive regulatory principles actually mean. However, given the vagueness of its terms, problems of interpretation are likely to arise in any dispute settlement proceeding. To minimize the possibility of regulation being introduced when it is not appropriate, the meaning, application and even the propriety of pro-competitive regulation are matters that have to be decided as a matter of urgency. As Marco Bronckers noted:

“Without a reference to common principles, and without the benefit of experience in other sectors of the economy, there is a risk of suboptimal interpretation. It will also be difficult to adjudicate disputes in WTO about the

correct interpretation of these critical, but generally worded, principles”.³⁰⁷

In April 2004, the Telmex panel proved this to be true. The rules in the WTO *Reference Paper on Pro-competitive Regulatory Principles* are quite basic, obliging signatories merely to enact “appropriate measures” to prevent “major suppliers” from engaging in “anti-competitive practices”. The WTO panel, detailed findings on market definition, explained what constitutes a “major supplier”, expanded the definition of “anti-competitive practices” and, overruling the state action doctrine, held that governments could not require businesses to engage in anti-competitive conduct.

Competition lawyers in any jurisdiction should be surprised at the decision, and dismayed about the reasoning behind it. Trade lawyers should be concerned about what the panel’s decision bodes for the balance between the WTO’s Dispute Settlement Mechanism and the General Council. It seems that when trade negotiators fail to reach agreement, dispute settlement panels will create the rules instead. This is troubling in itself but, even more so when panel decisions affect the terms of competition in the market without applying disciplined competition analysis.

To take just a few examples from the panel report, the *Reference Paper* offers a non-exhaustive list of examples of “anti-competitive practices”: namely, “engaging in anti-competitive cross-subsidization; using information obtained from competitors with anti-competitive results; and not making available to other services suppliers on a timely basis, technical information about essential facilities and commercially relevant information which

³⁰⁶ *Ley Federal de Competencia Económica*, Diario oficial de la federacion (24 December 1992) Article 8 and 10.

³⁰⁷ M. Bronckers, ‘Trade and Competition Inter-Linkages: the Case of Telecom’, Paper prepared for the Fondazione Eni Enrico Mattei, Venice (4-5 December 1998) (emphasis added).

are necessary for them to provide services”.

The panel began by noting that “[t]he term “anti-competitive practices” is not defined in ... Mexico’s *Reference Paper*”; the practices referred to just being examples. Instead, the panel turned to guides that other WTO panels have found to be indispensable - the Merriam-Webster and Shorter Oxford Dictionaries - to make the following pronouncements:

“The dictionary meaning of the word “practices” is very general. Its meanings include “the habitual doing or carrying on of something; usual, customary, or constant action; action as distinguished from profession, theory, knowledge, etc.; conduct.” The word “practices” thus indicates “actions” in general, or can mean actions that are “usual” or “customary”.

The dictionary meaning of the word “competitive” includes “characterized by competition; organized on the basis of competition”. The word “competition”, in its relevant economic sense, is in turn defined as “rivalry in the market, striving for custom between those who have the same commodities to dispose of”.

Consistent with these meanings, the word “anti-competitive” has been defined as “tending to reduce or discourage competition”. On its own, therefore, the term “anti-competitive practices” is broad in scope, suggesting actions that lessen rivalry or competition in the market.’

Having cleared that up, the panel then looked at the examples of “anti-competitive practices” in the *Reference Paper* and made the unedifying point that they ‘illustrate certain practices that were considered to be particularly relevant in the telecommunications sector’. They then noted that cross-subsidization, misuse of competitor information, and withholding relevant information are all things which a major supplier can, and might normally undertake on its own but, that ‘such a supplier could be comprised of different companies’. The panel said that this ‘suggests that horizontal

coordination of suppliers may be relevant.’ The panel then engaged in some more inductive reasoning: ‘cross-subsidization indicates that “anti-competitive practices” can include pricing actions by a major supplier.’ The panel had thus sown the seeds for finding that a *Reference Paper* designed primarily to address denial of access and other anti-competitive practices by a dominant operator could also be interpreted to be focused on horizontal price-fixing.

It pursued this course of reasoning by putting the *Reference Paper* to one side, and examining how “[t]he meaning of “anti-competitive practices” is also informed by the use of this term in Members’ own competition legislation’. Rather than look at any competition laws the panel relied on a Secretariat background note.

‘Many WTO Members maintain laws to ensure that firms do not undermine competition in their markets. The term “anti-competitive practices” is often used in these laws to designate categories of behaviour that are unlawful. The range of anti-competitive practices that are prohibited varies between Members but, practices that are unlawful under the competition laws of Members having such laws include cartels or collusive horizontal agreements between firms, such as agreements to fix prices or share markets, in addition to other practices such as abuse of a dominant position and vertical market restraints.’

The panel also found that:

‘the meaning of “anti-competitive practices” is informed by related provisions of some international instruments that address competition policy. Article 46 of the 1948 *Havana Charter for an International Trade Organization* already recognized that restrictive anti-competitive practices, such as price-fixing and allocation of markets and of customers, could adversely affect international trade by restraining competition and limiting market access.

The importance of ensuring that firms refrain from engaging in horizontal price

fixing agreements, market or customer allocation arrangements and other forms of collusion is likewise emphasized in the *United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Anti-competitive Practices*.

The panel felt that

‘[i]t is also worth pointing out, since both Mexico and the United States are members of the OECD, that the OECD has adopted a Recommendation calling for strict prohibition of cartels. In the work of the WTO Working Group ... reference has been made to the pernicious effects of cartels, and to the consensus that exists among competition officials that price-fixing "hard core cartels" ought to be banned. Cartels were also described as the most unambiguously harmful kind of competition law violation.’

Finally, the panel sought out the intent of *Reference Paper* itself - albeit without examining anything as mundane as *travaux préparatoires*:

‘An analysis of the *Reference Paper* commitments shows that Members recognized that the telecommunications sector, in many cases, was characterized by monopolies or market dominance. ... Accordingly many Members agreed to additional commitments to implement a pro-competitive regulatory framework designed to prevent *continued monopoly behaviour*, particularly by former monopoly operators, and abuse of dominance by these or any other major suppliers. ... Mexico's *Reference Paper* commitment to the prevention of "anti-competitive practices" by major suppliers *has to be read in this light*.’

With the focus thus clearly on monopolistic conduct by a dominant incumbent, the panel nevertheless found that ‘the object and purpose of the *Reference Paper* commitments made by Members supports our conclusion that the term "anti-competitive practices", in addition to the examples mentioned ... includes

horizontal price-fixing and market-sharing agreements by suppliers which, on a national or international level, are generally discouraged or disallowed.’

Mexico had argued that practices required by regulation could not be “anti-competitive” as they were mandated by ‘ILD Rules that are part of the regulatory framework of laws intended to increase competition’ by preventing predatory pricing by foreign entrants. As intervenor, the European Communities noted that even if Telmex’s acts were “anti-competitive” they could not be “practices” in the true sense of the word, as they were not freely undertaken. The EU argued that there was no room for “anti-competitive practices”. ‘[If] Mexico chooses not to allow competition between telecommunications operators on a certain matter, there is no scope for anti-competitive practices relating to that matter. It is not possible to restrict competition where competition is not allowed.’

The United States argued that anti-competitive practices do not change their nature simply because they are required by national laws and regulations: ‘just because Mexican regulation requires the suppliers to collude does not mean they are not indeed colluding or, in other words, engaging in horizontal price fixing.’ Any other interpretation, the United States argued, would render the provision ‘self-defeating and meaningless’, since a Member ‘could easily avoid the obligation to maintain appropriate measures to prevent “anti-competitive practices” by formally requiring such practices.’ The United States argued that ‘requiring telecommunications carriers to adhere to a Telmex-led horizontal price-fixing cartel ...[that] stifled market challengers’ and ‘preventing price competition by new entrants to protect a major supplier's high price cannot possibly be understood as promoting competition’. The United States submitted that the Mexican system is ‘not

directed at preventing harm to competition but rather is directed at preventing the natural results of competition’.

The panel chose to rise above this debate. It stated that it was: ‘aware that, pursuant to doctrines applicable under the competition laws of some Members, a firm complying with a specific legislative requirement of such a Member (e.g. a trade law authorizing private market-sharing agreements) may be immunized from being found in violation of the general domestic competition law.’

With a flourish however, it applied principles of public international law to sweep the state action doctrine aside:

‘International commitments made under the GATS "for the purpose of preventing suppliers ... from engaging in or continuing anti-competitive practices" are however, designed to limit the regulatory powers of WTO Members. *Reference Paper* commitments undertaken by a Member are international obligations owed to all other Members of the WTO in all areas of the relevant GATS commitments. In accordance with the principle established in Article 27 of the *Vienna Convention*, a requirement imposed by a Member under its internal law on a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent major suppliers from "continuing anti-competitive practices".’

The panel therefore, concluded that acts required by governments can be "anti-competitive practices" and be prohibited by WTO rules.

On the crucial point of whether Telmex’s practices were “anti-competitive”, the WTO panel was brief. It found ‘the United States argument convincing that the removal of price competition by the Mexican authorities, combined with the setting of the uniform price by the major supplier, has effects tantamount to those of a price-fixing cartel.’ The panel also found ‘that the allocation of market share

between Mexican suppliers imposed by the Mexican authorities, combined with the authorization of Mexican operators to negotiate financial compensation between them instead of physically transferring surplus traffic, has effects tantamount to those of a market sharing arrangement between suppliers.’ The panel noted that it had read horizontal practices such as price-fixing into the definition of "anti-competitive practices". It found, therefore, that the ILD Rules required practices by Telmex that are "anti-competitive" within the meaning of the *Reference Paper*.

On whether Mexico failed to maintain “appropriate measures” to prevent “anti-competitive practices” in its market, the United States had argued that ‘far from proscribing such behaviour, Mexico maintains measures that require Mexican telecommunications operators to adhere to a horizontal price-fixing cartel led by Telmex.’ Mexico tried to argue again that the measures were pro-competitive by preventing predation by foreign entrants. It also tried to argue more generally that by having a competition law in place it did maintain "appropriate measures" to prevent anti-competitive practices.

The panel noted that ‘[t]he word "appropriate", in its general dictionary sense, means "specially suitable, proper". This suggests that "appropriate measures" are those that are suitable for achieving their purpose – in this case that of "preventing a major supplier from engaging in or continuing anti-competitive practices".’ The panel accepted that ‘measures that are "appropriate" ... would not need to forestall in every case the occurrence of anti-competitive practices of major suppliers. However, at a minimum, if a measure legally requires certain behaviour, then it cannot logically be "appropriate" in preventing that same behaviour.’ The panel thus held that Mexico had violated its obligations under the *Reference Paper* by failing to maintain (and indeed requiring) “anti-competitive practices” by a “major supplier”. Subject to appeal, Mexico must

bring its measures into conformity with WTO law by significantly revising or eliminating its current system.

6. Conclusions

As this section has displayed, domestic, bilateral and multilateral instruments can contribute much to the removal of exclusionary anti-competitive practices, but also come with serious limitations, and risks.

The next Section examines some of these risks in more detail, assuming that governments were able to agree that they wished to 'multilateralize' commitments to cooperate in enforcement, in particular to make 'positive comity' binding; and that a model for addressing exclusionary anti-competitive practices was possible to negotiate and, also make an agreed 'core principle' within a binding multilateral framework.

Section V: Multilateralizing positive comity

In setting out its proposed ‘modalities for voluntary cooperation’, the European Communities proposed that the cooperation modalities of a WTO competition agreement would apply to all anti-competitive practices having an impact on international trade. Therefore, cooperation would not be limited only to hard-core cartels but, would also cover other trade-related anti-competitive practices of concern for developing countries, cross-border abuses of a dominant position affecting trade or, anti-competitive practices with a market foreclosure effect.³⁰⁸

It is obvious that to address cartels and exclusionary arrangements more effectively and, to review mergers more efficiently, the need for improved enforcement cooperation at the international level is unquestionable. However, the question that the WTO Working Group must answer, is whether any of the various cooperation models and ‘modalities’ that are possible should be made part of the WTO framework. ‘Best practice’ guidelines are being drafted at the International Competition Network, a forum of competition authorities, in an attempt to address costs and burdens of multi-jurisdictional merger reviews.³⁰⁹ Making such guidelines part of the *WTO Agreement* seems unnecessary and inappropriate. Without evidence that such procedural costs are impeding deals, inward investment or trade, the requisite

link to the WTO’s core concern with market access, and the binding nature of its rules is missing.

With respect to international cooperation in competition law enforcement more generally, some form of non-binding multilateral agreement is possible. The OECD Recommendations are examples. WTO Members with competition laws could at least agree on some basics, i.e. the types of information that they could exchange and the kind of assistance that they could provide.³¹⁰ However, many of the problems that arise in creating an agreement on common substantive provisions would also plague the construction of an international cooperation instrument. One challenge would be to forge meaningful agreement when so many countries do not have competition law regimes at all. Perhaps it might be argued in response that this should not impede what is being sought: namely, improved voluntary commitments. That begs the question however, of what precisely it is that a voluntary WTO accord would add to what has already been agreed at other fora. Also, how appropriate is it for a trade forum that is supposed to focus on opening markets and to adjudicate on market-access disputes, to become involved in ‘enforcing’ voluntary enforcement cooperation commitments? If the commitments are not to be enforced, then why are they needed? The WTO is designed to help enforce only binding market access commitments.

What if Members agreed to a more limited binding commitment to answer positive comity requests about exclu-

³⁰⁸Communication from the European Communities, ‘A WTO Competition Agreement’s Contribution to International Cooperation and Technical Assistance for Capacity-Building’ WT/WGTCP/W/184 (22 April 2002) at 2 (hereinafter, ‘EU Communication 184’).

³⁰⁹See: www.internationalcompetitionnetwork.org.

³¹⁰M. Howe, ‘Cooperation between Competition Authorities’, paper presented to the 11th Commonwealth Conference, (25-29 August, 1996), Vancouver, Canada, at 8-10 (on file with the author).

sionary practices? This would at least mean that they were focusing on the key market access issue. However, the experience with the *Hard-Core Cartel Recommendation* suggests that WTO Members would be unlikely to be able to agree on any form of commitment with respect to any anti-competitive practices without emasculating it with exceptions and opt-outs. Furthermore, no matter what it looked like, a binding comity commitment could actually do more harm than good. Cases will arise when one Member will need more time, more information or, more help than another is prepared to offer. Making cooperation commitments subject to dispute settlement would open the door to innumerable opportunities to challenge other authorities' decisions not to help, or not to help enough in a particular case, whether it be because of 'national interest', 'resource constraints' or, 'on any other grounds'.³¹¹ Challenges of such decisions would chill the development of the trust that is the basis of cooperation in the first place. As James Atwood has noted:

"We are dealing here not just with the laws of competition but also with the laws of human nature. It is not realistic to expect one government to prosecute its citizens solely for the benefit of another. It is no accident that this has not happened in the past, and it is unlikely to happen in the future. We should not expect the principle of positive comity, whether found in bilateral cooperation agreements, task force reports, or learned articles, to impact dramatically on the proposition that laws are written and enforced to protect national interests."³¹²

³¹¹US-EC 1991 Agreement, articles IV.1, IV.4, V.4 and VIII.1. See also *OECD Hard-Core Cartel Recommendation* above, Article B.2.

³¹²J. Atwood, 'Positive Comity: Is it a Positive Step?' 1992 Proceedings of the Fordham Corp. L. Inst. (B. Hawk, ed., 1993).

However, it is in the 'hard cases' where national interests collide that international cooperation and trust is most needed. While WTO Members are not likely to agree to mandatory and absolute cooperation commitments, it is not clear that they would ever be necessary. Even if it were possible to mandate cooperation, no such order would provide as firm a basis for genuine, interested joint action as when interests are free to collide.³¹³ Trust is built when parties have the freedom to renege on a promise or to demur to a request for help, and they do not exercise that freedom, but instead cooperate. Cooperating 'when you do not have to' allows further cooperation to evolve through a positive tit for tat cycle. Competition authorities know this. After the European Commission received the first, and so far only, American positive comity request, in the Sabre-Amadeus matter,³¹⁴ Alexander Schaub explained that the request's effect on the dynamic of cooperation was: 'important ... psychologically. We have given our people the instruction to consider this as a priority case because we are aware of the fact that how we handle American positive comity requests will certainly determine largely how the United States authorities will handle our future requests'.³¹⁵

³¹³R. Axelrod, *The Evolution of Cooperation*; (New York: Basic Books, 1984) See Sylvia Nasar, *A Beautiful Mind: A Biography of John Forbes Nash, Jr., Winner of the Nobel Prize in Economics in 1994* (London: Faber & Faber, 1999).

³¹⁴United States Department of Justice, 'Justice Department asks European Communities to Investigate Possible Anti-competitive Conduct Affecting U.S. Airlines' Computer Reservation Systems (28 April 1997) (www.usdoj.gov/opa/pr/1997).

³¹⁵A. Torres, 'E.U. Gives Priority to United States Airline Reservation Case', (9 September 1997) citing Alexander Schaub.

A Canadian contribution to the WTO Working Group has noted: ‘cooperation by definition can only be voluntary in nature. Countries cannot be mandated to cooperate and therefore precise and detailed obligations in this area would be inappropriate. Given this, the question is then why a multilateral framework with certain obligations is required in order to encourage cooperation’.³¹⁶

1. Multilateralizing a commitment to control exclusionary practices

1.1 The EU proposal

As mentioned in Section I, WTO Members did not pursue the EU’s proposals on multilateral commitments on exclusionary practices, focusing instead on an attempt to forge agreement on a ban on cartels and *de jure* discrimination. With the failure of the Cancun meeting to forge the ‘explicit consensus’ needed to launch negotiations on a Multilateral Agreement on Competition at the WTO, some – including this author - have called for WTO members to rethink that narrow approach on supposedly possible ‘deliverables’ and focus instead on rules that may be difficult to forge agreement on, but, where some increased understanding is needed if exclusionary practices are ever to be addressed effectively and, in a

³¹⁶Communication from Canada WT/WGTCP/W/174, (2 July 2001) at 2: ‘While cooperation must itself be voluntary, it is founded upon certain pre-requisites, notably that of mutual trust. Trust is also something which cannot be mandated by international agreement, nor can it be subject to rules - but *an international agreement can play an important role in facilitating trust by promoting convergence amongst the signatories*. The key element in this is encouraging familiarity amongst the countries in question. ... A multilateral agreement where countries commit themselves to certain *common approaches* on competition policy would provide over time the practical basis for such trust to emerge by broadening the convergence on best practices on competition between Members.’

coherent manner. In that regard, this next sub-section examines the detailed set of proposals for global rules on exclusionary practices that the EU has produced over the past few years.

One of the EU’s first proposals was ready in 1996, when the European Commission suggested that ‘[a] common approach to vertical restrictions could be found by concentrating on restrictions which create barriers to market access. The [WTO] ... could examine to what extent competition authorities could take into account the international dimension and weigh the effects on domestic competition of market access restrictions’.³¹⁷ This suggestion contains obvious parallels with European competition policy’s own approach of concentrating on restrictions of a ‘Community dimension’ that restrict trade between Member States. This was no accident. Sir Leon Brittan had launched the renewed push for WTO competition rules by arguing that for ‘the next stage in the logical process of opening up world markets to trade and competition ... that what the Community has gone through these last forty years is of considerable relevance to the challenge facing the wider world’.³¹⁸ This was to apply to issues of both process and of substance. With respect to the former for example, the Van Miert Group had recommended that WTO rules should comprise ‘a list of minimum principles ... [which] should be incorporated into the national law of the participating countries in much the same way as European Directives: each country would have an obligation as to the result to be achieved, but would not be obliged to amend its current legislation if it already contained these principles or, if it

³¹⁷Commission Communication at 11 (emphasis added).

³¹⁸L. Brittan, ‘A Framework for International Competition’, Address to World Economic Forum, Davos (3 February 1992) at 1.

was open to similar interpretation'.³¹⁹ As to the substance of the common rules, the Van Miert Group recommended that in analysing exclusionary arrangements, '[a] 'rule of reason' approach is desirable... Vertical agreements raise... difficulties since opinions differ as to the conditions under which they are acceptable from a competition perspective'.³²⁰ They did not propose leaving each Member completely free to conduct its own analysis. Foreseeing '[d]isputes over international rules of reason', the Van Miert Group recommended a WTO agreement to 'define minimum standards for national rules of reason and rules of conflicts of jurisdiction'.³²¹ Their specific proposal was for a formula that would 'prohibit agreements where their restrictive effect on competition is not offset by an advantage for the consumer and/or where they constitute a barrier to market access'.³²² As in European law, this would establish a competition offence that had an efficiency defence, as well as a separate offence of impeding market access.

The European Commission followed this up the following year with a more detailed formula for considering how competition authorities' review of exclusionary arrangements should be guided and the authority itself reviewed when a complaint is lodged through the provisions of the international framework. Competition authorities would continue

³¹⁹The Commission's Experts Group recommended EU law as one of the principles: 'As regards the control of dominant positions, a regime similar to that of Article 86 of the ... Treaty appears appropriate insofar as it focuses on the abusive behaviour of enterprises in a dominant position'. Van Miert Report at 22.

³²⁰Van Miert Report at 21-22.

³²¹Van Miert Report at 25.

³²²Van Miert Report at 21-22 (emphasis added).

to base their decisions on the efficiency goals that are fundamental to competition policy. But the principle that the international dimension needs be taken into account in international cases, would be incorporated into common rules with respect to all anti-competitive practices. *As a market would be assessed to be more closed, greater weight would be given to the importance of foreign competition to balance entry barriers.*³²³

In 1998, the EU submitted to the WTO Working Group the following further 'illustrative list of factors' for competition authorities to consider in reviewing vertical arrangements and exclusionary practices by dominant firms:

Vertical agreements. "There is a broad consensus that at the international level, vertical restraints are only a source of concern if such agreements have a foreclosure effect which significantly raises barriers to entry. The Group may therefore wish to explore the scope for identifying an illustrative list of factors to be considered by competition authorities when assessing whether vertical restraints have such a foreclosure effect. This may include such factors as *the presence of market power in upstream or downstream markets, collusion among upstream or downstream firms, cumulative impact of restraints, duration of restraints, role of government barriers to entry and overall structure of the market, including openness to foreign trade and investment...*

Abuse of dominant position. Certain practices by dominant firms have an exclusionary effect or otherwise limit effective competition from other firms, including foreign firms. The Group may wish to consider the scope for developing an illustrative list of such practices, taking into account the experiences gained by

³²³Commission Communication, Annex at 2 (emphasis added).

countries in the enforcement of competition law.”³²⁴

The EU is not simply asking that as part of their examination of the impact on domestic competition, WTO Members ‘consider’ how anti-competitive arrangements impede foreign competition. Most authorities do that already.³²⁵ Whether their particular jurisdiction comprises the ‘relevant market’ or, is simply part of a broader relevant market, many competition authorities already consider how foreign competitors may be excluded from their domestic markets. In an increasingly interconnected world, it is only natural for a thorough competition authority to consider how an arrangement may impede competitive discipline from abroad so as to be able to determine how this in turn lessens competition in the domestic market itself. However, the EU wants more than this. It is asking its fellow WTO Members to show more concern for foreign competitors’ need to enter a new market, than for the state of competition within it. Just as with its own approach under various provisions of EU

³²⁴EU Communication 62 at 13-14 (emphasis added).

³²⁵Canadian merger law, for example, has an express provision - s. 93 (a) - which provides that factors to be considered regarding lessening or prevention of competition include ‘the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger’. The Canadian Merger Enforcement Guidelines add that ‘[t]he assessment of foreign competition is particularly important in the context of the globalization of markets, the continuing growth in foreign direct investment and strategic alliances in Canada, the *Canada-United States Trade Agreement* (CUSTA), the rationalization of European industry that is being facilitated by the integration of the European Community member states, and increasingly vigorous competition from firms based in newly industrialized countries.’ (*Competition Act*, R.S.C. 1985, c. C-34, as amended; Section 4.2, *Merger Enforcement Guidelines*, <http://strategis.ic.gc.ca/SSG/ct01026e.html>).

law,³²⁶ the EU wants Members to introduce a separate offence of ‘substantial foreclosure of the domestic market’. The European Commission has expressly recommended that domestic competition policy analysis exhibit a special concern for foreign competitors. It proposes a graduated scale which provides that ‘[a]s a market would be assessed to be more closed, greater weight would be given to the importance of foreign competition to balance entry barriers’.³²⁷

There are two obvious responses to the EU’s proposal. One is to point out that the approach taken in Europe is not necessarily appropriate for the rest of the world. As the international tension that resulted from the *GE/Honeywell* case displayed, there are also arguments that the ‘substantial foreclosure’ model is not necessarily sound competition policy. For example, most governments believe that competition policy is not about considering the needs of competitors. Nor do they think that it should care about the effects that a practice may have on competitors, except insofar as this impacts on competition. As the ABA’s Market Access Report has noted:

“These analytical approaches run head-on into the fact that most national competition policy authorities - and certainly those in the United States - do not accept the concept that application of their domestic laws should consider the adverse effects on foreign companies or

³²⁶This description does not erect a European straw man. The EU’s stated Market Access Strategy is to help European companies access overseas markets. There is ample evidence from European case law, and from the EU’s own statements at the WTO Working Group, that the EU’s primary concern is to ensure that foreign competitors and their products are able to access other markets.

³²⁷Communication to the Council, submitted by Sir Leon Brittan and Karel Van Miert, ‘Towards an International Framework of Competition Rules’, COM (96) 296 final, 18.06.96 (hereinafter, ‘Commission Communication’), Annex at 2 (emphasis added).

foreign economies as an element in their 'rule of reason' analysis. In the United States, in particular, the focus on competition, allocative efficiencies and the interests of consumers *addresses the role of foreign competitors (as it does for domestic competitors) from the standpoint of their contribution to the competitive efficiency of the marketplace, and not from the standpoint of whether those foreign companies suffer adverse effects from practices of domestic competitors*".³²⁸

Moreover, the EU's graduated scale would provide a charter for affirmative action for foreign companies. It would skew any truly competition-based test by introducing a form of foreign favouritism into domestic competition policy analysis. Therefore, the political and practical unreality of such an approach should be obvious. Promoting foreign entry is also alien to competition policy, which is supposed to be concerned only with examining in a neutral and objective manner, the effects that anti-competitive arrangements have on the operation of the market. It does not sit well with WTO law either. WTO law may allow Members to favour foreign competitors (on a most-favoured nation basis) but it certainly does not mandate such an approach. The WTO Agreements are far more focused on eliminating less, rather than promoting more, favourable treatment of foreign products and suppliers.

The ABA therefore concluded that: "[i]t seems unlikely in the extreme that competition policy officials – in the United States or in other countries – could accept the proposition that an analysis that finds no substantial lessening of competition in the domestic market must be modified to take into account adverse effects on foreign competitors.

³²⁸ABA, 'Using Antitrust Laws to Enhance Access of United States Firms to Foreign Markets' 29 *International Lawyer* 945 (1995) (hereinafter 'ABA Market Access Report') at 78-79 (emphasis added).

Indeed, such a characterization of the issue by trade policy proponents leads competition law analysts to view trade policy as serving the interests of an individual country's competitors, not the interests of open competition or efficiency of the marketplace".³²⁹

Therefore, the EU's proposal, appears to clash with existing trade and competition practice and, is unlikely to be accepted by most WTO Members or, at least, not by their competition authorities.

There are two responses to the statement 'can't be done'. One is to show that it has been and is being done. The EU's own competition law and policy is ample evidence of this. The European approach is also being accepted by some WTO Members, as a matter of their domestic competition policy.³³⁰ It is important to note however, that this endorsement has only come from the group of countries that is seeking to accede to the EU. Moreover, their endorsement has not been given entirely voluntarily. It was mandated by the EU itself as an express pre-requisite of the countries' accession to the EU.³³¹ Therefore, it is difficult to view this concern with prohibiting practices that exclude rivals –but, which have not been proven to harm competition itself, as being anything more than an approach which is 'endemic' to the European trade area. As the ABA has noted:

³²⁹ABA Market Access Report at 37-38 (emphasis added).

³³⁰See E Fox, 'The Central European Nations and the EU Waiting Room – Why Must the Central European Nations Adopt the Competition Law of the European Union?' 23/2 *Brooklyn J. of Intl Law* (1997) 351.

³³¹ABA, *Report of ABA Sections of Antitrust Law and International Law and Practice on the Internationalization of Competition Law Rules, Coordination and Convergence*, (January 2000) (www.abanet.org/antitrust/reports) at 31: 'Central European nations have agreed to approximate their competition laws to those of the European Union in order to meet one of the preconditions to admittance to the EU.'

“It is part and parcel of a regime designed to remove national barriers and enhance the creation of ‘the common market’ and therefore it has a market-integrating aspect [which is greater than mere market-opening].

It reflects a European regulatory approach [which would be impossible to apply in the absence of the whole corpus and institutional machinery of EU law]; [and] it has eclectic goals and objects of concern, including concern for market actors as well as consumers”³³²

In summary, the EU proposal for a WTO commitment to prohibit the substantial foreclosure of competitors is likely to fail if transplanted forcibly to foreign soil. The EU paradigm may make sense in the context of creating an economic and political union, but the rest of the world has other, lesser ambitions.

The other response to the argument that something ‘can’t be done’ is to argue that it nevertheless should be done, and this is what the EU is arguing.

Convincing Members to adopt an approach that is so different from their existing enforcement stance will be more than difficult. Antitrust regimes such as the United States have moved on from prohibiting mere foreclosure, even if it is ‘substantial’ and it also ‘clogs’ access to a particular market. The American Bar Association has noted that:

“[s]ome believe that even agreement on a few trade-linked principles could involve pressures to change substantive United States antitrust law, e.g. from a consumer welfare law to a law against ‘unjustified foreclosures’ in the interests of freer trade. If existing United States antitrust law is the ‘best’ competition law for the United States, this could involve - in the view of some - degradation of antitrust. Also, one might fear that a dispute resolution panel... might broadly construe language such as ‘unjustified fore-

³³²ABA, Internationalization Report at 28.

closures’, and also might err in finding that the United States engaged in a pattern of non-enforcement of law prohibiting unjustified foreclosure.”³³³

It is perhaps reasonable to assume that vague language will be interpreted by trade officials and Panellists in the manner which most opens markets. If the only relevant signpost is a ‘foreclosure’ standard, this would be even more likely to be the case. Some believe that it could also be the case with any form of agreement at the WTO. Tarullo has argued that:

“[a] competition arrangement in the WTO will be substantively shaped by the norms and procedures of the trading system. Elaboration of the rules will be heavily influenced by the market-access norms of trade policy, and the consumer-welfare norm informing antitrust laws probably de-emphasised. No matter how adroitly these two sets of norms are reconciled in theory, they cannot realistically be expected to remain in happy equipoise in practice. *Housing a competition arrangement in the WTO would inevitably favour the trade norms where the two conflict. Accordingly, forcing the square peg of competition policy into the round hole of trade policy will change the shape of the peg*”.³³⁴

The whole point of the first two proposals is to change competition policy to make it more ‘trade-friendly’. Their proponents say that this will improve antitrust, not degrade it.

For example, the EU has taken the position that efficiency-enhancing arrangements might foreclose competitors, including foreign competitors –and, that this may in turn reduce the level of competition in the market thereby harming consumer welfare. If competition

³³³ABA, Internationalization Report at 87-88.

³³⁴D. Tarullo, ‘Norms and Institutions in Global Competition Policy’, 94 Am. J of Intl Law 478 (2000) at 479 (emphasis added).

rather than efficiency is the goal, it has been argued (in Europe at least) that such arrangements can be sacrificed for the greater good of long-term consumer welfare. In addition, the EU wants to ensure that competitors' opportunities are not being foreclosed. On this view, the opportunity to compete is an important 'right' in itself and a competitive discipline on other market participants. As these two separate but related concerns underpin much of the rationale for the first two proposals, the next two subsections evaluate their propriety.

Rivalry, rather than Efficiency

A 'competition' model that focused only on protecting rivalry would allow exclusionary arrangements to be prohibited without requiring evidence of a net harm to output or price. After the European Commission employed this model in *GE/Honeywell*, Mario Monti explained that the increasing exclusivity resulting from efficiency-enhancing arrangements might operate to exclude competitors, eliminate competition, and thereby harm consumers.³³⁵ Proponents of greater market access would be likely to find the 'rivalry' model appealing, since it more readily allows exclusion to be banned without proof of further harm to the market.

However, this preference for maintaining rivalry rather than protecting or maximising efficiency can be countered on a number of levels. One way would be to reject it as being out of touch with modern economic analysis. American judge Frank Easterbrook confirmed that a test which 'depends on "foreclosure" of sales to competitors without proof of injury to consumers, reflects a bygone day in antitrust analysis'.³³⁶ Buffing up antique analysis does not necessarily

make it useful or even relevant to the modern world.

One can also argue that the concern for 'rivalry' is only appropriate for jurisdictions where competition policy evinces an overriding political concern either to control the power of dominant private enterprises, as it does in Germany, or to restrict the ability of such companies to re-segment national markets, as it does in the EU. Neither of these concerns commend the model to the rest of the world, where individual WTO Members may not have decided to sacrifice efficient arrangements for the pursuit of these other goals.

A third response to the concern that rivalry be maintained at all costs could be to accept it in theory but then test for it in real cases. For example, there is no intuitive reason not to believe that the foreclosure of competitors will result in consumer harm. Since there has been so much debate precisely on this issue among those expert in antitrust law and economics, it is safe to say that even if harm is possible in theory it is not sufficiently certain to be taken as proof. In other words, the consumer harm that supposedly results from foreclosure of a rival still needs to be demonstrated.

The assumption that competitor foreclosure will necessarily harm competition and consumer welfare is not particularly robust. Such harms are theoretically possible and should not be discounted. However, the belief that foreclosure itself is harmful has fallen out of favour in the United States. It is also coming under some pressure to be proven, rather than simply assumed, in the EU. Surely it would be more appropriate if the belief in such harm was required to be proven in individual cases.

A multilateral rule committing governments to prohibit arrangements that appear to foreclose, or even to 'substantially foreclose', rivals is not going to be agreed upon any time soon. It would appear more sensible to try to build

³³⁵ *GE/Honeywell* European Commission Press Release, IP/01/939 (3 July 2001).

³³⁶ *Paddock Publications, Inc v. Chicago Tribune Co*, F2d 185 (7th Cir 1985) at 46.

support for agreement on the kind of analysis and evidence that is needed to prove that exclusionary arrangements are actually harmful.

Another argument has been made to justify prohibiting the foreclosure of competitors, without requiring evidence of harm to competition. Fox has argued that the true core of antitrust is liberal in the sense that it protects 'economic liberty'.³³⁷ She has argued that when competitors' 'opportunities to compete' are deprived by a market being full of exclusive arrangements for example, then this should be sufficient to justify prohibition. The 'Freiburg School' of antitrust economics offers some support for this philosophy. Some have argued that: "[c]ontrary to widespread criticism after the EC's decision in *GE/Honeywell*, European merger control is concerned with the situation of the consumers. It is merely in how the consumer should be protected that the European approach differs from the American. In a nutshell, the disciples of the ordo-liberal approach, largely developed and promulgated by economists in the German university town of Freiburg in the 1930s, believe that the individual should enjoy economic freedom as part of their political freedom. These liberal economists further believe that *widespread competition is necessary for economic well-being*. Learning from the experience of the 19th Century (and to some extent also from the Third Reich), they believe that *entities with too much economic power can present a considerable danger to competition and individual economic freedom, and must therefore be controlled...*"³³⁸

Under this economic philosophy, *the crucial point for competition law is not*

³³⁷Fox, *Modernization* at 1156.

³³⁸T. Horton and S Schmitz, 'A Tale of Two Continents: The Coming Clash of the Conflicting Economic Viewpoints in Europe and the United States' 2/1 ABA Economics Committee Newsletter 21 (Spring 2002) at 22 (emphasis added).

the market itself, but the position of the largest market players in the market. Their position must be controlled and, if necessary, capped in order to maintain competition and economic freedom. Only a market with no dominant players can guarantee complete economic freedom..."³³⁹

Adherents of the Freiburg School argue that efficiency should not be the sole ruler of antitrust: antitrust should be concerned about agglomerations of power that deprive traders of the opportunity to compete. If it is clear that competitors' opportunities to compete have been foreclosed as the Freiburg School would argue, then evidence of likely net reductions in output or other harm to the market, whether in 'seven-steps' or in a hundred, should not be necessary. The deprivation of the opportunity to compete is itself sufficient to warrant prohibition.

Opportunities for abilities

Experience in Europe reveals a range of problems in applying the Freiburg opportunity model to the real world. For example, Barry Hawk has noted that: "the principal weaknesses of the Freiburg School notion of restriction on economic freedom are (1) its failure to generate precise operable legal rules, (i.e. its failure to provide an analytical framework); (2) its distance from and tension with (micro)economics which does provide an analytical framework; (3) its tendency to favour traders/competitors over consumers and consumer welfare (efficiency); and (4) its capture... of totally innocuous contract provisions having no anti-competitive effects in an economic sense."³⁴⁰

³³⁹Preceding note.

³⁴⁰B. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 CML Rev. 973, at 977-8.

Applying the theory of economic freedom at the heart of the Freiburg School model means that a competition law prohibition ‘could literally cover most if not all contractual agreements on the reasoning that the contract contains provisions which limit or “restrict” the freedom of the parties as it existed prior to the contract’.³⁴¹ In contrast, American anti-trust law allows parties to restrict their own freedom of choice (of who they deal with, for example,) even though superficially at least this appears to limit the freedom of other traders to deal with them. This is permitted because the opportunity of other traders to deal with the parties has not in fact been restricted. Their freedom remains intact. While the parties are bound by the contract, their respective rivals still have an opportunity to compete for it. Furthermore, if it has been freely entered into, the contract itself may in most cases be the most efficient result. For this reason, the United States reminded its colleagues at the WTO Working Group: ‘not all practices that restrict business choices represent a net loss to consumer welfare’.³⁴²

This does not necessarily mean that the Freiburg School’s model of economic freedom is an inappropriate basis for competition policy rules at the WTO. Some may even argue that the Freiburg School’s approach accords with the interest that the WTO legal system has in preventing public measures or private practices which distort ‘competitive opportunities’. Are these arguments sufficient to make a prohibition of ‘substantial foreclosure’ an appropriate multilateral commitment?

³⁴¹ B Hawk, ‘United States Common Market and International Antitrust: A Comparative Guide’ (2d ed) Vol II (1990 Supplement) (New York: Prentice Hall, 1990) at 99.

³⁴² Communication from the United States, WT/WGTCP/W/66 at 15.

Economic freedom, competition policy and the WTO

The fundamental concern of the Freiburg School is economic freedom: the opportunity for competitors to have access to the resources, distribution channels and other ‘essentials’ that they may need in order to compete effectively. This concern also accords with competition policy’s fundamental approach. As Jenny has noted: ‘[t]he major goal of competition law is... to allow firms to *take advantage of business opportunities* and to make sure that through the competitive process the actual working of decentralized markets will foster static and dynamic economic efficiency to the fullest possible extent given the regulatory environment of these markets’.³⁴³ Competition policy protects the *opportunities* of rivals to compete because only then can their varying *abilities* interact. Whether or not a particular economic actor is *able* to be an effective competitor is up to the company in question. This is only as it should be. ‘True competition means the ability to succeed *and* the ability to fail.’³⁴⁴ Competition policy is not about supplementing a competitor’s own abilities. It is about protecting the environment in which those abilities are displayed.

While the WTO is an inter-governmental organization and does not deal with market activity directly, it is in its own way, concerned with competitive opportunities. Governments agree to remove their tariff and non-tariff barriers so that the comparative advantages and

³⁴³F. Jenny, ‘Globalization, Competition and Trade Policy: Issues and Challenges’, in J. Bhagwati (ed) *The Next Trade Negotiating Round: Examining the Agenda for Seattle*, J. Bhagwati (ed) (www.columbia.edu/vjb38/Seattle.pdf) at 136.

³⁴⁴M. Naftel and L. Spiwak, *The Telecoms Trade War* (Oxford: Hart Publishing, 2000) (hereinafter ‘Naftel and Spiwak’) at 65 (emphasis in original).

abilities of their industries have an opportunity to interact.³⁴⁵ The National Treatment commitment protects the 'equality of competitive opportunities' between domestic products and imports. In both competition law and WTO law, the protection of competitors' opportunity to compete is of fundamental importance.

Ernst Ulrich Petersmann has argued that this form of economic freedom should have constitutional status:

"Unlike many economists, who often have a utilitarian concept of individual and social welfare, lawyers rightly emphasize that individual liberty (including the liberty deriving from open markets, competition and, the price mechanism as a spontaneous information device) is a constitutional value in itself, regardless of economic theories. From the perspective of constitutional democracies, competition rules and liberal market institutions derive their constitutional value not from their contribution to some imaginary general welfare and efficient resource allocation, but from protecting the self-determination, equal freedoms and individual well-being of the citizens."³⁴⁶

However, the rights that Petersmann speaks of do not cut both ways. A distributor may wish to exercise its right to self-determination, freedom of choice and well-being by contracting exclusively with one supplier. No matter how difficult this makes matters for a competing supplier, no competitor could argue with any credibility that such an arrangement is thwarting its own self-determination, freedom of choice or well-being. After all, no right of the competing supplier is being denied by the exclusive arrangement. Joseph Kellard has noted that '[i]f a town's fruit-eaters buy only

from a vendor who offers fresh, delicious, cheap fruit and the vendors with comparatively inferior, costlier fruit are thereby eliminated from that market, "fruit-eater choice" has not been "undermined"³⁴⁷. So long as a buyer that a supplier wants to contract with exists, the supplier has the right, opportunity and freedom to compete for that customer's contract at any time. In contrast, breaking up an exclusive arrangement in order to grant the supplier what he wants serves only to deny the self-determination, freedom of choice and individual well-being of the parties to the contract. It also gives to the supplier something that he really should have earned, thus weakening his ability to compete for future contracts. Intervening in a freely agreed exclusive relationship deprives the parties of their right, opportunity and freedom to contract together as well as their ability to compete in that manner against their respective competitors. Moreover, such intervention also absolves the complaining rival of the need to develop the ability that it needs in order to compete in the future.

A rule that prohibited only those exclusive arrangements involving suppliers with either market power or, who had 'sewn up' a substantial number of distributors would not be any better. European competition law may have such a 'bright line' in its block exemptions for vertical arrangements, but this sort of approach suffers from some fundamental flaws.³⁴⁸ Basing an offence *solely* on market power only punishes companies for doing what they are supposed to be doing: trying to win. It sets a ceiling at an arbitrary level of success, thereby encouraging only half-measures and mediocrity. Basing a prohibition on the

³⁴⁵ GATT, Article III:4.

³⁴⁶ EU Petersmann, 'International Competition Rules for the GATT/MTO World Trade and Legal System' 27/6 J of World Trade 35 (December 1983) at 81.

³⁴⁷ J. Kellard, 'A Double Standard of Justice Toward Microsoft', *Capitalism Magazine*, January 1998 (www.capitalismmagazine.com) at 4.

³⁴⁸ Commission Regulation (EC) No 2790/1999 of 22 December 1999.

number of customers a firm has managed to secure on an exclusive basis is equally inequitable. This approach, one that has been rejected entirely under American antitrust law, is the current one prevailing in Europe.³⁴⁹ Setting a ceiling based on market share sends a clear signal to business that while they should compete, they must be careful not to try too hard. Rather than trying their best to foster their own durable customer relations, they are urged to make sure that they leave some customers to their competitors. The dampening effect that this has on competition may be unquantifiable, but it can only be substantial and negative. Drawing a line at a certain market share, and decreeing that it is an offence merely to cross it, is only a reasonable approach if there is clear evidence of harm beyond that point. The American model could not be more different. There, United States courts have found that instead of being harmful, '[e]nduring exclusive distribution contracts characterize markets that are recognized as competitive'.³⁵⁰

The EU's approach may be comprehensible in the context of its history and indeed preference for regulation. However, as the discussion above has shown, it is not so easily acceptable as a matter of either economics or a concern for competitive 'opportunities'. There is another problem with it. Suppose that a relationship of exclusivity would allow a supplier and distributor to benefit from certain efficiencies but, that a competition rule like that in Europe would prevent them from contracting exclusively with one another. What are the parties likely to do? If they were convinced of the benefits of exclusivity, then the answer is obvious: they would merge. This would create a worse situation for the competing supplier. When parties are in a contractual arrangement, the rival at least has an

³⁴⁹Commission Regulation (EC) No 2790/1999, Article 3, 8.

³⁵⁰*Paddock Publications, Inc v. Chicago Tribune Co*, F2d 185 (7th Cir 1985) at 47.

opportunity, and the ability, to compete for the custom of the distributor. Once the parties merge however, there is no contract for the rival to compete for. He can only complain about the merger, assuming that there is a system of merger review and, that the merger is large enough for a government to take notice of it. However, it is unlikely that the competitor would make such a complaint or, that the authority would be stirred to action every time a supplier snaps up a distributor. Thus, the overly stern approach to exclusive arrangements would eliminate opportunities competing suppliers had to compete for the contract. If an authority takes too strict a position *ex ante* against exclusive arrangements, this can lead the parties to effect a merger that would cause rival suppliers to lose the opportunity that they previously had to bid for the custom of the distributor.

This is what happened after the European Commission prohibited an exclusive arrangement between radio and television manufacturer Grundig and its exclusive distributor in France, Consten.³⁵¹ When the Commission's prohibition was confirmed by the European Court of Justice, 'Grundig reacted to the judgment by acquiring Consten and many of its other exclusive dealers'.³⁵² The stern approach to exclusive arrangements in the EU thereby contributed to Grundig's competitors losing all of the opportunity that they initially had when they were able to bid for Consten's custom.

Therefore, in its operation an over-zealous application of the Freiburg School's theory of 'economic liberty' can actually operate to eliminate competitive opportunities from the marketplace. Although the EU bases its arguments for

³⁵¹*Consten and Grundig v. EEC Commission* (Commission Decision) OJ 2545/64, [1964] CMLR 489; (ECJ) [1966] ECR 299.

³⁵²V. Korah & W. Rothnie, *Exclusive Distribution and the EEC Competition Rules*, (2 ed) (London: Sweet & Maxwell, 1992) at 39.

a commitment to prevent ‘substantial foreclosure’ on the Freiburg School’s approach, guaranteeing the prospect of a complete denial of the opportunity to compete cannot be what they intend to be implemented on a global scale. Nevertheless, it is a possible and an arguably likely result of their proposals.

Undermining incentives to make more competitive offers

Obviously, the Freiburg School’s concern with economic liberty is strong on the kind of rhetoric that would appeal to companies who are finding it difficult to access a market. In addition, there is always pressure on competition officials to act on such companies’ complaints.³⁵³ Derek Ridyard has noted that while ‘[i]t will always be tempting for a liberal-minded competition authority to respond favourably to firms who complain about lack of access to new markets, ... an uncritical approach favouring market entry can threaten the incentives to dynamic efficiency that provide the engine for economic and technical progress in workably competitive markets’.³⁵⁴ This is why competition officials have to review complaints with a critical eye and in a disciplined manner. Competition policy is not normally considered to be a weapon of the less efficient. However, it is very much a weapon of the downtrodden.

For example, in a competition for a contract, it is the competitors’ respective

abilities that should determine the winner, not their needs. If an exclusive arrangement has been freely entered into, then another trader always has the opportunity to make a more competitive offer. If some coercion or abuse of market power by a dominant party has deprived the rival of the *opportunity* to make a competitive offer, then that is certainly a matter for a competition authority. The authority must examine the acts of the dominant company to see if they truly did deprive the complainant of its opportunity to compete. This examination would focus on whether the complainant’s freedom to show its ability was expropriated by force by the incumbent. However, the authority will also have to assess whether the complainant had the ability to compete in the first place. If it did not have the ability to make a competitive offer for example, or if it seemed to have simply preferred not to bother, then the competition authority would rightly stay its hand. Government fiat should not be allowed to be used by complainants to attain what they cannot, or will not, try to accomplish by competing in the market.

In *GE/Honeywell*, for example, the merged entity was going to be able to offer goods and services that had never been put on the market before and, in a bundle and at a price that rivals said that they would not be able to match. It was only natural then to expect customers to flock to the merged entity, and to expect rival suppliers to gradually find themselves falling further and further behind in the race for new contracts. The analogy to a race is important. The merged entity was going to pull ahead of its rivals; so far ahead perhaps, that they would be lapped several times over. However, it was not going to push its rivals back or out of the race. It was not expropriating their opportunity or their ability to sell engines or avionics to airlines. If its rivals lost sales, then that was a result of normal competition. As American courts have explained: ‘competition for increased market share is not activity forbidden by the antitrust laws. It is simply vigorous competition.

³⁵³The people involved are also far from being Platonic guardians devoted to the public weal. Only those who expect to gain more from engagement than they expect it to cost them will bear the expense. Most of these plaintiffs will be competitors. Officials have careers to make, while judges may be consumed by self-love, love of power, or dislike of the defendant.’ (M. Wolf, ‘Caught in a web of jurisdiction’ *Financial Times* (15 May 2002) at 17.)

³⁵⁴D. Ridyard, ‘Essential Facilities and the Obligations to Supply Competitors Under EC and UK Competition Law’ [1996] ECLR 438, 451-2.

To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.³⁵⁵

As head of the United States Department of Justice's Antitrust Division, Charles James noted that:

"[t]he economic philosophy behind the antitrust laws is a tough philosophy. [They] recognize that competition means someone may go bankrupt. They do not contemplate a game in which everyone who plays can win. Or, as our Supreme Court explained much more recently: '*[t]he purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from the failure of the market.* The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself'."³⁵⁶

Actions that deprive traders of their economic liberty, their opportunity to compete, should be prohibited. If a competitor has leapt ahead of its rivals through its 'superior skill, foresight and industry' however, then so be it.³⁵⁷ Pulling ahead in a race and thereby freeing oneself from competitive discipline is a goal sought by all true competitors. If a company has taken a leading position by pushing its rivals back

³⁵⁵*Monfort of Colorado, Inc. v. Cargill, Inc.*, 479 U.S. 104, 114-17 (1986).

³⁵⁶C. James, 'Antitrust In The Early 21st Century: Core Values And Convergence' Remarks at a Programme on Antitrust Policy in the 21st Century Brussels, Belgium (15 May, 2002) at 2 citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (emphasis added).

³⁵⁷*U.S. v. Alcoa*, 148 F2d 416 (2d Cir 1945) at 430: 'A single producer may be the survivor out of a group of active companies, merely by virtue of his superior skill, foresight and industry'.

or out of the race, it has expropriated their liberty to its own ends, and should be condemned.

The Freiburg School's approach to economic freedom turns all of these axioms on their heads. This has serious ramifications for businesses and for consumers. As Dominick Armentano has noted: 'Business competition is never fair or "even", and any attempt to make it so will create strong disincentives to gain market advantages and pass them along to consumers. Consumers don't need or want level playing fields. They simply want the best product at the lowest price. And they certainly don't want competition itself "restrained" by antitrust regulation'.³⁵⁸ Preventing competitors from pulling ahead in a race, or even by too far a lead, undermines every competitor's incentive to compete in the first place. This is why competition policy only prevents competitors from doing something so harmful to their fellow rivals that it distorts the nature of the competition itself. It stops companies from thwarting the ability of their rivals to compete, or even from denying them access to the race in the first place. Competition policy guarantees competitors nothing more than the opportunity to make a competitive offer. If they already have that opportunity, then there should not be anything for competition policy to do.

Freeing merit

The Canadian Competition Bureau has explained that '[t]he basic idea is that competition law should not penalize efficient firms which have established a dominant position in their market due to their better performance compared to their competitors'.³⁵⁹ The philosophical

³⁵⁸D.T. Armentano, 'It's Time to Re-examine Antitrust Legislation' CATO Institute (13 November, 1997) at 2.

³⁵⁹Competition Bureau, 'Options for the Internationalization of Competition Policy -

tenet underpinning this approach is one of merit-based reward. This is arguably something far more important than 'economic freedom'. Both trade and competition policy seek to ensure that competitors have the freedom and the opportunity to compete; the eventual result of that competition however, depends on their respective abilities and their merits vis-a-vis their rivals. Of course, unless rivals have an opportunity to compete, there may not be any possibility of competition. All the opportunity in the world will not result in a true competition if merit-based reward is not its operating principle.

James Venit and John Kallaugher have pointed out that merit-based reward is a matter of fundamental justice. While 'inequalities of birth and natural endowment are undeserved... a much stronger claim can be made for inequalities resulting from achievement: "given a just system of... public rules and the expectations set up by it, those who, with the prospect of improving their condition, have done what the system announces that it will reward are entitled to their advantages..."³⁶⁰

If a competitor improves its product offering, and thereby attains a leading market position, it harms no one while also benefiting its customers directly. If competitors cannot survive in such an environment however, the market leader is not at fault. A truly competitive offer neither denies nor expropriates a rival's liberty. By definition, superior competitive performance cannot lead to a lessening of competition. However, if the

business activity is not merit-based, and, if it is likely to force a rival out of the market or, to restrict its opportunity to compete, then competition authorities need to act. Any other intervention by a government will only distort the market, provide rivals with unearned rewards and thereby deter competition itself.

In summary, the problem with the Freiburg School model of economic liberty is that it is too liberal in its prohibitions. It authorizes enforcement action in cases where a competitor has alleged that it has been deprived of its opportunity to compete. There is no examination of whether its opportunity to compete has been taken away, how it was taken away or even whether the competitor even had the ability to compete in any event. Competition policy seeks to protect merit-based competition. This means that those with the ability to compete should have the opportunity to do so. To that end, if an arrangement allows competitors the opportunity to compete, then their ability to display their merits is still intact, and no enforcement action is needed. However, if their opportunity to compete has been deprived as a result of anti-competitive activity of a rival, then there is a problem. In tailoring a solution to this problem, competition authorities should restore only the 'opportunity to compete'. That is all that true competitors need in order to compete on their merits. In protecting or restoring the opportunity to compete, governments should remove only unmeritorious action, and not sacrifice or handicap the abilities of other legitimate market players. In protecting competition in the market, governments should only use their coercive power to address coercion, not competition in the marketplace. Superior competitive performance is not something that should be attacked by competition authorities. Indeed, it is what they should protect.

Defining Canadian Interests'
(www.strategis.ic.gc.ca) (10 May, 1996) at 8.

³⁶⁰J. Venit and J Kallaugher, 'Essential Facilities: A Comparative Law Approach' Fordham Corp. L. Inst. Chapter 13, 315 at 321, note 17, citing J Rawls, *A Theory of Justice*, (Cambridge: Harvard University Press, 1971) at 73-74; 321, n.17 (emphasis added).

Economic evidence – a per se prohibition of exclusionary anti-competitive practices does not provide effective market access

Comanor and Rey analysed the American automobile distribution market and claimed that a harsh approach to exclusive arrangements would open markets.³⁶¹ While this seems plausible, it is difficult to reconcile with the findings of Geroski and Schwalbach on the likelihood of mandated access leading to effective, lasting market access. More importantly however, Comanor and Rey's findings are comprehensively refuted in a more detailed study that F. Michael Scherer conducted with respect to the same sector.

Scherer found that increased antitrust scrutiny of exclusive arrangements in the United States automobile industry had little or no effect on the ability of foreign manufacturers to access the American market.³⁶² He agreed that the sterner approach to exclusive arrangements that was introduced with the Standard Stations case made it more difficult for large American auto manufacturers to require that dealers carry their cars exclusively.³⁶³ He noted, however, that:

³⁶¹W. Comanor and P. Rey, 'Competition Policy Towards Vertical Foreclosure in a Global Economy' 23/10 International Business Lawyer (November 1995) at 468:

'A tolerant attitude towards these restraints can therefore discriminate against foreign producers and in favour of domestic ones. On the other hand, a vigorous policy against these restraints can promote international trade.'

³⁶²F. M. Scherer, 'Retail Distribution Channel Barriers to International Trade' 67/1 Antitrust Law Journal (1999) 67 (hereinafter 'Scherer') at 77.

³⁶³Scherer at 89: 'Under the somewhat unclear legal precedents existing during the 1980s, it is unlikely that the Big Three, with their large market shares, could have successfully defended themselves against antitrust charges in the United States if they cancelled a dealer's franchise for diffusing sales efforts by

“[a]uto manufacturers however, had means more subtle than explicit contractual restrictions for maintaining the exclusivity of their dealers. The dealer who strayed too far from the fold was likely to have difficulty securing timely delivery of the models it sought... Despite the passage of so-called 'dealer day in court' laws... unfaithful dealers were also susceptible to various other forms of harassment by their manufacturer-suppliers. As a result... most of the showrooms handling the leading American producers' cars have remained effectively exclusive to a single manufacturer's offerings”.³⁶⁴

Since American suppliers were able to maintain de facto exclusivity at the dealer level, the stricter antitrust approach to exclusive arrangements did not help foreign suppliers to achieve better access to the United States market. Scherer found that '[f]or importers, the easiest, if not the most effective, access to the United States market was through a dealer marketing other foreign cars... Most of the foreign cars that sought United States sales during the period following World War II were in fact sold through multi-manufacturer foreign car specialists.'³⁶⁵ Volkswagen, Porsche and Mercedes-Benz used each other's toeholds, just as did Toyota, Honda and Nissan, to gain their first real presence in the United States market. However, this kind of cooperation was not enough to allow them to expand their individual

taking on a competing auto line, but smaller auto manufacturers were able to do so.'

³⁶⁴Scherer at 89-90: 'In 1960, for example, although 33 per cent of all General Motors car dealers in the United States carried more than one GM nameplate (e.g. Pontiac and Cadillac), a mere 0.5 per cent of "Big Four" dealers stocked the cars of competing manufacturers... By January 1998... Among the 17,580 dealers holding franchises to sell new United States Big Three cars and light trucks, 1.6 per cent carried competing companies' vehicles.'

³⁶⁵Scherer at 90.

operations. Scherer found that to do that, Nissan and Volkswagen in particular, had to create their own independent dealer networks.³⁶⁶ This required a great deal of investment in training, promotion and after-sales service.³⁶⁷ Loyalty bonuses and other exclusive arrangements were used to help win and maintain a dealer's custom. The small market share of these new entrants allowed them to maintain these types of exclusive arrangements even under the strict antitrust regime that existed in the 1950s.³⁶⁸

It would have been reasonable to assume that under such a stern antitrust approach the growing number of foreign suppliers' exclusive arrangements would have been successfully challenged by competitors or by the competition authorities themselves. This did not happen however, for one important reason: antitrust analysis had evolved. The Tampa Electric decision meant that many exclusivity arrangements were removed from suspicion. This allowed foreign entrants to make much more use of such arrangements, thereby further ensuring that their own dealers focused only on selling and servicing their cars. Foreign suppliers could now further consolidate control over their distributors' operations and expand their United States networks without fear of antitrust challenge. This allowed them to attain greater economies of scale and better satisfy the enormous demand that the oil shocks of the early 1970s produced

³⁶⁶Scherer at 90-93.

³⁶⁷Scherer at 91-92.

³⁶⁸While Volkswagen was prevented from stipulating resale prices, it was allowed to terminate a dealer who sold a competing brand. 'As events ensued, VW's retail channels remained substantially exclusive'. Scherer at 91-92 citing *United States v. Volkswagen of America, Inc. et al.*, CCH 1960 Trade Cases paragraph 69, 643, District Court of New Jersey (February 1960); and *Reliable Volkswagen Sales and Service Co. v. Volkswagen of America Inc. et al.*, CCH 1960 Trade Cases paragraph 69, 644, District Court of New Jersey (February 1960).

for their more fuel-efficient cars. As a result, foreign suppliers' exclusive networks kept expanding. In 1960, only 20 per cent of United States dealers selling foreign cars had been bound by exclusive arrangements. By 1998, this figure had reached 80 per cent.³⁶⁹ As foreign automobile suppliers now compete directly with the Big Three automakers they can be said to have truly attained 'effective access' to the United States market.

Scherer's examination of entry into the United States auto market revealed two lessons.

First, a stern approach to exclusive arrangements did not help foreign competitors to enter their desired market. In fact, it would likely have hindered their ability to expand their operations there.

Second, foreign suppliers were only able to expand because the requirement of more rigorous antitrust analysis meant that fewer exclusive arrangements were falling subject to prohibition. Therefore, foreign suppliers could build more of their own independent distribution channels, and thereby gain a firm place in the United States market.

In the face of this evidence it seems counter-intuitive to increase prohibitions of exclusive arrangements through the imposition of a 'market access warranty'. Scherer's study reveals that increased prohibition of exclusive arrangements, whether through a strict liability offence, pro-competitive regulation or, simply greater antitrust enforcement will not actually be of any lasting benefit to the entrants who might be expected to rely on it, rather than their own efforts, to enter a new market.

³⁶⁹Scherer at 90.

Section VI: Prospect for further initiatives and instruments to address such harms.

The only way to move the ‘trade *versus* competition’ debate forward is to ensure that the concerns of both sides are being addressed. Managing that interaction will be quite a challenge. It is far more difficult than simply taking a route that seeks the ‘lowest common denominator’. Nevertheless, as the next Section explains, if the type of guidance that could help negotiators and dispute settlement panels at the regional or multilateral levels to craft and interpret helpful rules is to be offered, then consensus between the various ‘trade *and* competition’ interests is absolutely essential. In addition, it is the only way to avoid the harm that would result from standards that are ‘fair to middling’ and therefore, inherently subject to abuse.

The first step in building the necessary consensus is to recognize that trade policy and competition policy have much more in common than is usually thought. In their own way, they each try to remove artificial impediments to competition. However, how is a coherent ‘trade and competition policy’ approach to be developed when the two policies conflict so strongly on the issue of how exclusionary business arrangements should be addressed? Will agreement only come through one side giving in to the other? Brian Hindley thinks that such a compromise may be necessary but will prove impossible to achieve:

“Some discussions of trade-related aspects of competition law and policy ... seem to assume that differences between governments ... can be resolved by intellectual conversion; so that the prospective negotiation is viewed as a sort of inter-governmental seminar on antitrust economics. A negotiation though, needs *quids* and *quos* and, in the case of negotiations designed to lead to an

agreement on [trade-related competition rules], the character of these *quids* and *quos* is not self-evident.”³⁷⁰

The ICPAC agreed. It stressed that ‘the *quid pro quo* character of the WTO as a negotiating forum runs the risk of skewing points of emphasis in any competition policy agreement’.³⁷¹ The ABA also felt that ‘[t]here could be costs in negotiating widely-accepted antitrust standards that go beyond consensus generalities. The cost is compromise – either on the principles themselves or in other areas of international trade policy.’³⁷² Tarullo was very clear about the side that he thought would end up being sacrificed: ‘forcing the square peg of competition policy into the round hole of trade policy will change the shape of the peg’.³⁷³ It is also reasonable to conclude that even if the rules themselves do not display such a bias, dispute settlement panels in trade bodies such as the WTO would be likely to interpret vague or undefined terms, such as ‘anti-competitive’ for example, in a way that is most favourable to the goals of liberal trade policy. This is particularly probable if the governments involved in the dispute cannot agree on the appropriate

³⁷⁰B. Hindley, ‘Competition Law and the WTO: Alternative Structures for Agreement’, Fairness and Harmonization Project, London School of Economics, 1998 (Mimeo) at 1

³⁷¹International Competition Policy Advisory Committee, Final Report (Washington, 2000) (hereinafter ‘ICPAC Report’)

³⁷²ABA, Report on the Internationalization of Competition Law Rules, Coordination and Convergence (January 2000) (hereinafter ABA, Internationalization Report) at 79

³⁷³D. Tarullo, ‘Norms and Institutions in Global Competition Policy’ 94 An. J of Intl Law 478 (2000) (hereinafter, Tarullo) at 479 (emphasis added)

‘competition policy’ meaning of the terms.

However, if one is careful and demanding enough early on, then compromise of either policy area need not happen. Indeed, compromise *must* not happen. Seeking a middle ground usually means that each side accepts those views of the other that it shares, or at least tolerates, and they split the difference on the areas where they differ. However, if negotiators focus on those aspects of each policy area that are most amenable to agreement, they will only create some vague standard that lacks strong support from either side. Furthermore, compromise on what the respective camps view as the more objectionable parts of the other side’s wish list seems impossible. As difficult as it may seem, helpful guidance will only arise through the development of a robust consensus on what is the right thing to do for both trade and competition policy.³⁷⁴ Such a consensus can only be achieved if the concerns of both areas are seen to be being addressed in a coherent and rational manner.

1. Trade and competition policy

Coherence in public policy does not have to result from sacrificing one goal for another or, by trying to merge two policy areas into one. Coherence in public policy can also arise from ensuring that each area’s separate goals are aligned in a way that does not harm the other’s important interests. As the ABA recommends, ‘[r]ather than seeking to impose a market access regime on private access-denying practices as a derogation from competition policy analysis, efforts should be

³⁷⁴‘To me,’ said Margaret Thatcher, ‘consensus seems to be the process of abandoning all beliefs, values and policies. So it is something in which no-one believes and to which no-one objects.’ John Major [disagreed] ‘By consensus I don’t mean listening to both sides and summing up down the middle, I mean bringing people round to what is the right thing to do.’ (*Sunday Times*, (22 April 1997) at 43-44).

directed toward devising approaches to this important access problem that are consistent with the *fundamental principles* on which *both* competition policy and international trade policy are based.’³⁷⁵

It is possible to devise an analytical framework that accords with the fundamental principles of both policy areas. Although conflict between trade policy and competition policy will inevitably still result, their respective aims can actually be seen to not be so very different.³⁷⁶ In the short to medium-term, both policies seek to improve the efficient allocation of resources. Trade policy contributes to efficiency by removing barriers that impede the ability of foreign firms to access new markets. Competition policy contributes to efficiency by preventing firms from substantially lessening competition. Under antitrust analysis, at least in the United States, foreign or domestic competitors may be excluded from a market, so long as competition is not thereby lessened substantially. It could be argued that under such analysis the objective of both policy areas is met and an efficient outcome is achieved. Those who focus on the *means* of trade policy however, remain concerned that foreign competitors are being excluded or treated less favourably. They see only a barrier to market access that needs to be removed.

The issue then, is not that lax competition law enforcement is allowing anti-competitive activity to bar market access. The issue is that disciplined competition policy analysis is allowing pro-competitive activity to bar market access. This is not a problem if one considers that the shared aim of trade and competition policy is efficiency. However, it is

³⁷⁵ABA Market Access Report at 30 (emphasis added)

³⁷⁶P Marsden, ‘The Impropriety of WTO ‘Market Access’ Rules on Vertical Restraints’ 21/6 *World Competition* 5 (1998) at 9.

perceived to be a problem if one focuses only on the means of trade policy. Here, the fact that an exclusive arrangement is efficient and, does not lessen competition substantially, is irrelevant if one of the competitors it excludes is foreign. A policy of removing barriers to market access will always conflict with a policy that permits such barriers. The difficulty is that both trade policy and competition policy's shared and overriding concern for efficiency should allow each to permit pro-competitive exclusive and efficient arrangements that bar market access.

Hopefully, much of the analysis in the preceding chapters will have helped to explain the analytical process that allows competition authorities to approve such arrangements and show how it is actually quite objective. The next sections set out an analytical framework that accords with the fundamental principles and aims of both trade and competition policy. They begin by examining the concept of 'market access' and the need for something more than a prohibition of discrimination. It then develops a model whereby substantial private barriers to market access that substantially lessen competition may be identified and addressed.

"Trade..."

As complaints about impeded market access are both the defining element of the 'trade and competition' debate and the key trigger for complaints to the WTO, the first thing to do is to define what is meant by 'market access'. Unfortunately, neither the business community nor WTO Members themselves have been able to formulate, let alone agree, on a precise definition.³⁷⁷ Perhaps one way of coming to some agreement is to recognize that the concept of 'market access' may be the sort of thing that is only able to be defined when it is absent. The root of any

³⁷⁷See ICC Replies formulated by the ICC Joint Working Party to questions asked by the WTO Working Group (6 October 1998)

'market access' complaint will always be a prospective entrant's perception that it is being unfairly and artificially deprived of something that it deserves, namely, an opportunity to compete on its merits. This opportunity can be restricted by measures or activities that do or do not discriminate on the basis of nationality. If there is discrimination, then the impediment can and should be addressed through recourse to the various commitments of National Treatment available in the WTO Agreements. What is much more clearly and urgently needed is 'trade and competition' guidance on impediments to market access that do not discriminate against foreign entrants. Section IV explained in detail why commitments of non-discrimination are irrelevant to this sort of 'problem'. How are such non-discriminatory impediments to be addressed?

Fortunately, in Europe a significant body of law has developed on precisely this issue.³⁷⁸ The simple transposition of European legal norms to the WTO or other international fora is not going to be appropriate. However, mere transposition is not being suggested in this Section. The European approach to non-discriminatory market access barriers should not be applied to international trade cases without significant modification and the addition of several constraints on its application. However, the fact that the EU has already grappled with issues that the WTO for example, is only beginning to study, makes the lessons that it had to learn in arriving at its current approach, profoundly relevant to future discussions of 'trade and competition' issues at various fora.

EU law could only ever be a starting point. WTO and international trade law generally does not offer market participants the 'dynamic protection' of

³⁷⁸See P Craig and G de Búrca, *EU Law* (2nd ed) (Oxford: OUP, 1998), *Keck and Mithouard* [1993] ECR I-6097

commitments on 'free movement' between its Members. In EU law there exists a ban on 'substantial or direct hindrances to market access', a rule which sounds rather similar to the EU's proposals for multilateral disciplines on exclusionary anti-competitive practices. Due to the problems considered above, that such an approach would have in international trade, such a test would need to be restricted considerably, so that it did not simply allow complainant companies to rely on it to convince governments to break up efficient business arrangements that also happened to make it difficult for them to enter or expand their operations in foreign markets.

'...and Competition Policy'

When considering allegations that anti-competitive practices restrict trade, the most effective way of preventing the harms that would arise from a test of only 'substantial foreclosure' is to overlay it with a competition policy test. However, for the filter to be an effective discipline on the trade test, it obviously must do more than merely add a requirement that any complaint also assert that arrangements that impede market access are also 'anti competitive'. The proper approach is to require proof that the practices at issue substantially restrict market access and thereby harm the competitive process itself.

The harm to competition

In designing any test, it will be tempting for negotiators to use language that has already been agreed by the Members of the WTO. This should be avoided as the competition 'tests' that have been crafted already are imprecise and too easily satisfied.

The Telecoms *Reference Paper* for example, requires that Members provide competition safeguards to prevent 'anti-competitive' practices.³⁷⁹ Does it follow

³⁷⁹ *Reference Paper*, Article 1.2, for example

that a WTO competition guideline should simply require that Members undertake commitments to prohibit anti-competitive practices that substantially impede market access and are thereby 'anti-competitive'? Alternatively, should a page be taken out of the *GATS*, where Article IX speaks of addressing anti-competitive practices that 'may restrain competition'? The *TRIPS* permits Members to prohibit abuses of intellectual property rights 'having an adverse effect on competition' but does not stipulate the degree of adversity that must be proven.³⁸⁰ None of these 'tests' provide sufficient guidance or discipline. An unspecified degree of harm to competition is too easy to satisfy, particularly when any amount of foreclosure could arguably lessen competition to some degree. Allowing the trade test to satisfy the competition test negates the value of having a separate competition test at all. Indeed, if the extent of the requisite harm to competition is not set out, its terms could be interpreted literally by dispute settlement panels. If so, competition authorities would only be able to comply with the multilateral standard if they prohibited every trade-restrictive practice that had any negative impact on competition. However, this would radically alter competition law enforcement, and undo decades of the gradual, rational improvement allowed by the 'rule of reason'. After all, the courts developed that rule to prevent the prohibition and resulting deterrence of every mere 'restraint of trade'.³⁸¹ Requiring or even implying that every business arrangement that lessens competition in some way be prohibited would reverse centuries of common law

³⁸⁰ *Agreement on Trade-related Aspects of Intellectual Property Rights, Annex 1C of the WTO Agreement* (hereinafter 'TRIPS'), Article 40

³⁸¹ M. Handler, *Antitrust in Perspective* (New York: Columbia University Press, 1957) (hereinafter, 'Handler') at 3, where he describes 'The Judicial Architects of the Rule of Reason'

and ignore the economic analysis that has developed because of the requirement that the negative impact on competition be 'unreasonable'.³⁸² A competition test that does not sacrifice this discipline is clearly required.

What about a commitment that Members prohibit those business arrangements that substantially impede market access and would also, or thereby, be 'prohibited under the competition laws or equivalent measures of the Member'? As a competition policy filter however, this would not be much better. First, and most obviously, such a rule would be meaningless in jurisdictions where no competition laws or measures exist. There would have to be some form of measure in place for the commitment to attach to. Secondly, defining the offence itself by reference to a legal prohibition would make it easy both for Members to satisfy the commitment and for them to evade it. Members could satisfy the commitment by simply enacting a competition law; they could evade it at the same time by finding that in particular cases, the exclusive arrangements that were at issue did not violate their particular statute.

In addition, it may lead to WTO Panels having to review whether a Member's enforcement complies with its own competition law or measure. While this may seem to be the whole point of the movement to have a multilateral agreement on competition policy, it is not the point of dispute settlement. Dispute settlement is supposed to be used to review whether a measure complies with some multilaterally-agreed standard. Using the Members' own measure as the relevant standard removes all objectivity from the proceeding. It would also require that Panellists have detailed knowledge of the law in question. Even if they did this

³⁸²Handler at 8: In the United States, the antitrust 'legislation codified the antecedent common law which merely forbade contracts and combinations unreasonably restraining trade'

would not help them to determine whether or not the particular enforcement decision in question was for example, consistent with the Member's own enforcement priorities, economic policy or stage of development. Thwarted in their attempt to make the competition policy filter workable, there would be no counterweight to the natural pressure on them to review whether the competition decision itself was generally trade-enhancing or trade-impeding. Again, the pure market access approach would inevitably become more influential.

Relying on the individual Member's regime is too subjective. However, using a pure market access standard, even one tempered by a 'substantiality' requirement, is too harmful to the market. How can Members objectively identify whether a competition law decision is appropriate in terms of both trade and competition?

The obligation to be taken on by Members has to be defined by the market condition that is sought. In considering what trade-restrictive anti-competitive practices to prohibit, the analysis above has focussed on those practices which substantially impede market access. In deciding to overlay a filter that is designed to ensure that these practices also be proven to result in harm to the competitive process before triggering the prohibition, the relevant question is what we mean when we say that something is 'anti-competitive'? The fact that a thing is prohibited by competition law does not provide that answer; it logically follows it. An agreement on an objective competition standard is obviously needed.

Many potential standards can be objective. The question is whether they will also be the right ones and whether they will be acceptable. The likelihood of a rule's correctness and of its acceptability tends to increase with its rationality, its effectiveness and its reasonableness. These criteria are not unrelated. A business law's rationality would depend in part on how well it

worked in practice. Its ‘reasonableness’ would depend on it not distorting natural market incentives. These points have been made about competition law. For example, it has been noted that ‘[a]lthough the antitrust laws of the United States police diverse business activities; essentially they are variations on a single theme - the preservation and promotion of a rationally competitive economy’.³⁸³ Competition laws are not designed to distort market incentives, but to help the market work more efficiently and rationally by removing market-distorting conduct.

In seeking an objective multilateral framework for evaluating the effect that allegedly exclusionary arrangements have on competition, it is therefore submitted that the ‘substantial lessening of competition’ test is rational, reasonable and capable of being implemented in practice, and should be acceptable to all WTO Members.

‘...that thereby lessen competition substantially...’

What is the relationship (mentioned above)³⁸⁴ between competition laws and ‘a rationally competitive economy’? It has been argued that ‘[t]he qualification ... (‘rationally’) acknowledges the laws’ less than complete adherence to a philosophy of free and open competition’.³⁸⁵ In other words, competition laws do not promote a competition free-for-all. If they did, they would prohibit all restraints on competition. To do this would be to sacrifice the benefits of many efficient arrangements that can only exist through some ancillary competitive restraint. In fact, taken to its logical conclusion,

³⁸³Comment, “‘Substantially to lessen competition’”: current problems of horizontal mergers’, 68 Yale L J 1627 (1959) at 1627

³⁸⁴Preceding note

³⁸⁵Preceding note at 1627, Footnote 1

banning all restraints on competition would mean banning almost all agreements altogether. In contrast, it is both rational and reasonable for competition laws to prohibit only those restraints which ‘substantially’ lessen competition. Indeed, ‘[t]he concept of substantiality permits the causation inquiry to accommodate a notion of economic reasonableness’.³⁸⁶ This is how the ‘rule of reason’ exerts the sort of restraint on the analysis and discretion of a competition authority or court which is crucial for the acceptability of their decision-making.

The fact that an authority’s discretion operates within the confines of the ‘rule of reason’ has been the main complaint about competition policy, particularly from a trade perspective. In particular, Barutciski and Crampton have noted that: “in a challenge based on under-enforcement of domestic competition laws, it may be difficult to judge whether the exercise of discretion not to challenge a certain private restraint was based on ‘reasoning that falls within generally acceptable competition policy principles or whether it rests upon protectionist motives or reasoning.’ In other cases, a decision by a domestic authority not to challenge certain impugned conduct may be based on economic reasoning... that is not generally accepted”.³⁸⁷

However, without some room to exercise judgement, competition policy would not ‘work’. Given the diverse nature of business arrangements, the analysis that competition authorities have to undertake

³⁸⁶*Texaco v Hasbrouck* 490 US 1105 (1990) at note 2

³⁸⁷M. Barutciski and P. Crampton, ‘Trade Distorting Private Restraints: A Practical Agenda for Future Action’ paper prepared for the Pacific Economic Cooperation Council Conference on Trade and Competition Policy Montreal, Canada (13-14 May 1997) at 34 (citing B Hawk, *Antitrust and Market Access - The Scope and Coverage of Competition Laws and Implications for Trade*, (Paris: OECD, 1996) at 10

is extremely difficult. As Frank Easterbrook has argued, '[a]ggressive, competitive conduct by a monopolist is highly beneficial to consumers. Courts should prize and encourage it under the antitrust laws. Aggressive, exclusionary conduct by a monopolist is deleterious to consumers. Courts should condemn it under the antitrust laws. There is only one problem. Competitive and exclusionary conducts look alike.'³⁸⁸ In such cases, competition authorities need a zone of discretion within which to evaluate the economic context of an arrangement and decide whether it is competitive or anti-competitive.

John Maynard Keynes has noted that '[p]erhaps the most difficult question to determine is how much to decide by rule and how much to leave to discretion'.³⁸⁹ In competition policy however, in order to make the right decision under such a variety of conditions, discretion is crucial. Discretion allows experts to draw on their expertise and apply their considered judgement. It cannot be withdrawn, whether in whole or in part, from those undertaking the review of business arrangements without risking some harm to competitive conduct. This is why governments and courts have not sought to deny competition authorities their discretion but to confine it within limits. The 'substantial lessening of competition' (SLC) test intentionally provides the authorities with both the discretion and the limits within which to exercise it.

As some courts have noted, '[t]he word 'substantial' is not only susceptible of ambiguity; it is a word calculated to conceal a lack of precision. The difficulties and uncertainties which the use of the word is liable to cause are well

³⁸⁸F. Easterbrook, 'On Identifying Exclusionary Conduct' (1986) 61 Notre Dame Law Review 972 at 972

³⁸⁹J.M. Keynes, 'Proposals for an International Currency or Clearing Union' in J.K. Horsefield (ed.) *The International Monetary Fund 1945-1965*, (Washington: IMF, 1969), vol. III at 6

illustrated... It must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case'.³⁹⁰ One judge has admitted that he prefers the freedom and the responsibility that the test allows.

"I prefer not to substitute other adverbs... 'Substantially' is a word the meaning of which in the circumstances in which it is applied must, to some extent, be of uncertain incident and a *matter of judgement*. There is no precise scale by which to measure what is substantial... Accordingly, in my opinion, competition in a market is substantially lessened if the extent of competition in a market which has been lost, *is seen by those competent to judge to be a substantial lessening of competition. Has competitive trading in the market been substantially interfered with? It is then that the public will suffer*".³⁹¹

The fact that the test itself cries out for explanation is a very strong inducement on courts and competition authorities to explain their decisions.

The Australian competition authority has explained that in its competition law, '...“substantial” has been defined as large, weighty, big, real or of substance'.³⁹² Indeed, competition authorities and courts have been quite detailed in explaining what factors they have found to be indicative of a substantial lessening of competition. With respect to mergers, for example:

“[i]n assessing whether competition is likely to be prevented or lessened substantially, the United States and Canadian competition agencies evaluate

³⁹⁰*Tillmanns Butcheries Pty. Ltd v Australasian Meat Industry Employees Union* (1979) 42 FLR 331 at 34

³⁹¹*Dandy Power Equipment Pty. Ltd. v Mercury Marine Pty Ltd* (1982), ATPR 40-315, at 43, 887-43, 888 (emphasis added)

³⁹²Australian Competition and Consumer Commission, 'Best and Fairest, Restrictive trade practices' (www.accc.gov.au)

the likely magnitude, scope, and duration of any price increase that is anticipated to arise as a result of a merger. In general, a prevention or lessening of competition is considered to be 'substantial' if: (i) the price of the relevant product is likely to be materially greater, in a significant part of the relevant market, than it would be in the absence of the merger, and (ii) this price differential would not likely be eliminated within two years by new or increased competition from foreign or domestic sources. What constitutes a 'materially greater' price varies from industry to industry, and may be a differential that is less than the 'significant' price increase that is postulated for the purpose of market definition, which in the respective guidelines is notionally specified at five per cent.³⁹³

Price is not the only factor at issue. Obviously, non-price factors such as a restraint's impact on customer choice can be relevant. For example, when reviewing

³⁹³ LECG;

g) the dynamic characteristics of the market, including, 'Submission to the Commission of the European Communities on the Green Paper on the Review of Council Regulation (EEC) No. 4064/89' at paragraph 10.

The Australian Merger Guidelines, for example, provide:

In evaluating whether a merger is likely to have the effect of substantially lessening competition in a substantial market ... regard [must] be had to a non-exhaustive list of 'merger factors:

- a) the actual and potential level of import competition in the market;
- b) the height of barriers to entry to the market;
- c) the level of concentration in the market;
- d) the degree of countervailing power in the market;
- e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- f) the extent to which substitutes are available in the market, or are likely to be available in the market;
- g) growth, innovation and product differentiation;
- h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- i) the nature and extent of vertical integration in the market.

mergers, some authorities require that 'non-price dimensions of competition ... have to be both material and able to be sustainable for at least two years for there to be a substantial lessening, or likely substantial lessening, of competition'.³⁹⁴ Since hypothesis is inherent in the process, this approach can also be applied to the review of existing exclusive arrangements. One could compare the current state with the arrangements with a world without them, but which included the resulting entry or expansion of the competitor who complained about them in the first place. As one competition authority has noted in its guidelines: it 'will make an assessment of the likely outcome of the conduct, make an assessment of the likely outcome in the absence of the conduct, and make a judgement on whether the difference can be called "substantial"'.³⁹⁵

The ABA has considered whether the analysis of prospective entry would require altering SLC analysis itself. For example, it considered qualitative improvements that foreign competitors might offer to new markets and suggested that competition authorities examine 'the extent to which denial of access prevents a substantial improvement in the level of competition by introducing a superior product and/or a lower-cost competitor'.³⁹⁶

It is not clear that such a fundamental alteration of SLC analysis is required. After all, SLC analysis works in the review of the effects of prospective

³⁹⁴ New Zealand Commerce Commission, Practice Note 4 'The Commission's Approach to Adjudicating on Business Acquisitions under the Changed Threshold in Section 47 - A Test of Substantially Lessening Competition' (28 May 2001) at 1.2

³⁹⁵ Malaysian Communications and Multimedia Commission, Guideline On Substantial Lessening of Competition RG/SLC/1/00(1)

³⁹⁶ ABA Market Access Report at 83 (emphasis added)

mergers; why would it need to be changed when considering prospective entry? Furthermore, it appears to be a rather severe test to place on a complaining prospective entrant. Should it really have to demonstrate that its exclusion is preventing a substantial *improvement* in competition? In addition, such an ‘SIC’ test would seem to accord with the objectives of neither trade nor competition policy. To the extent that WTO commitments promote trade, they do so by focusing on removing or substantially *reducing* barriers to trade. Similarly, to the extent that competition policy promotes competition, it does so by addressing activities that *lessen* competition. Those are the only ‘improvements’ in trade and in competition that are sought. Existing arrangements should only be ordered to be disbanded after a robust demonstration of existing harm (or, as in the case of cartel agreements, the assumption that such harm exists or will exist). Causing harm to existing arrangements themselves should not be allowed in any other situation. In the context of international trade, the guiding principle should be that one removes exclusionary practices to increase the efficient operation of the market; one does not sacrifice efficient business arrangements simply to increase trade flows.

This principle and the aims of both trade and competition policy are only guaranteed by ensuring that a substantive ‘competition policy’ test disciplines allegations of substantial impediments to market access. It is proposed here that a comprehensive economic standard for reviewing whether exclusive arrangements significantly impede the opportunities for foreign firms to access markets, and thereby lessen competition substantially, would focus on *output*. If an incumbent’s distribution network offers intra-brand efficiencies that offset any reduction in foreign competition caused by exclusivity, then one would expect output to stay the same or even increase. As Melamed argued, it is only if output has decreased that one can expect that an

exclusivity commitment has been purchased using the spoils of supra-competitive profits.³⁹⁷

Probable harm

Evidence that competition has been lessened may be able to be adduced, but competition authorities also intervene when an SLC is merely likely. A WTO test should also allow this. The approach also results from a reasonableness inquiry: after all, it would be unreasonable to wait until there had been harm, if such harm was reasonably probable and could be prevented. Thus, in the United States, ‘Congress used the words “may be substantially to lessen competition”, to indicate that its concern was with probabilities, not certainties.’³⁹⁸ The Canadian Competition Bureau has confirmed in its merger enforcement guidelines that when it reviews whether a substantial lessening of competition is likely, ‘the word “likely” means “probably”, and not “possibly”.’³⁹⁹ Similarly, a court in New Zealand has agreed: ‘Likely does not necessarily mean “more likely than not”. It means more than a mere possibility but can mean less than a probability of 50 per cent. It means a real risk, a substantial risk of something that might well happen’.⁴⁰⁰

So much for the theory. Can competition authorities actually implement a competition policy filter that deals with probabilities of harm, rather than uncertainties? The answer of course is

³⁹⁷D. Melamed, ‘Exclusionary Vertical Agreements’, Address to the ABA Antitrust Section, Washington D.C., (2 April 1998) at 3-4

³⁹⁸*FTC v. H.J. Heinz Co.*, 246 F3d 708, 713 (DC Cir.2001) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962))

³⁹⁹Canadian *Merger Enforcement Guidelines*, at note 4

⁴⁰⁰*Commerce Commission v Port Nelson Ltd (1995)* 6 TCLR 406 at 432

that they do this all the time. Timothy Hazeldine has admitted that: “[t]o an economist, SLC antitrust is rather like a bumblebee - in theory it shouldn’t be able to fly, but somehow it does. It involves the prediction of highly uncertain future events involving very large sums of money with no formal ‘model’ or replicable technique for assessing the balance of probabilities. The authorities somehow weigh up a jumble of distinct considerations, including but not limited to evidence from economists. Yet as the economist [Douglas] Greer reminds us, ‘huge amounts of empirical evidence and the vast body of United States antitrust case law reveal the feasibility of identifying the basic characteristics of workable competition and enforcing them’”.⁴⁰¹

Hazeldine admits that the process of analytical review of the likelihood of harm is just as important as the substantive test. ‘SLCs are determined by an essentially legalistic (or so it seems to an economist) process of argument, cross-examination, reference to precedent, weighing of disjointed evidence, even recourse to dictionaries... It is all thoroughly immersed in the historical and social setting of the law. The end result is qualitative - that there will or will not be a “substantial” lessening of competition.’⁴⁰²

‘...in the relevant market’

The final element of the analytical framework proposed here focuses on the relevant market. The first stage trade inquiry into whether or not market access

⁴⁰¹T. Hazeldine, ‘Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy’ 13 Rev Industrial Org 243 (hereinafter ‘Hazeldine’) at 256, citing D. Greer, ‘Efficiency and Competition: Alternative, Complementary or Conflicting Objectives’ NZ Institute of Economic Research Monograph 47

⁴⁰²Hazeldine at 256

is being substantially impeded took the respondent Member’s geographic market, its jurisdiction, as its reference point. It is that market after all, that the complainant’s companies want to access. Furthermore, it is only that market which the respondent government has control over and, over which it could be tolerating any alleged access-impeding activities. No respondent would be satisfied if it were told that it had to prove that access to the relevant market as a whole was blocked. After all, it would be bizarre to allow a respondent government to claim that although access to its own market was foreclosed, the complainant’s companies could still sell into other countries. Should the respondent’s market also be the reference point for the competition analysis? The ABA has recommended that it should.⁴⁰³ This is misguided. The only relevant reference point for any competition analysis is the actual ‘relevant market’. This is the approach taken with respect to the competition-related commitment in the *TRIPS*. Article 40 examines whether an abuse of intellectual property rights may adversely affect competition ‘in the relevant market’.⁴⁰⁴ Competition may appear to be lessened in one country, but if the relevant market is wider than that, competitive discipline from abroad may mean that there is no substantial lessening of competition in fact. As Hawk notes, when competition in any market is influenced by competition in other jurisdictions, ‘the extent to which foreclosed competitors have access to other foreign

⁴⁰³ABA, Market Access report at 84: ‘The Sections recommend that the United States advocate in international trade negotiations, and adopt as its own policy, the principle that it is generally beneficial to international commerce for a government to take action against private anti-competitive practices that restrain market access by foreign competitors in ways that substantially lessen competition *in the markets of that government’s country.*’ (emphasis added)

⁴⁰⁴*TRIPs*, Article 40

markets' is obviously relevant.⁴⁰⁵ Hawk therefore argues that the: "[s]ubstantiality of foreclosure must be measured against the full range of opportunities open to rivals, i.e. all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations... [thus] where foreclosure of competing suppliers is in issue, the market should include the total output of the sellers who would be included in the market for assessing a horizontal merger between the seller and any allegedly foreclosed competitor."⁴⁰⁶

As such, the impact on competition of any '[f]oreclosure should be measured by taking into account all foreign markets available to United States exporters'.⁴⁰⁷

2. The proposed test for international disputes about trade and competition

In summary, the complete analytical framework that is hereby proposed would lead to the development of:

a trade and competition 'guideline' whereby governments would undertake to prohibit those business arrangements that substantially impede access to their markets and which are thereby likely to lessen competition substantially in the

⁴⁰⁵B. Hawk, *United States, Common Market and International Antitrust: A Comparative Guide* (2ed) Vol II (1990 Supplement) (New York: Prentice Hall, 1990) at 169-170 (hereinafter, 'Hawk, Comparative Guide')

⁴⁰⁶Hawk, *Comparative Guide* at 754-755 (emphasis added)

⁴⁰⁷Hawk, *Comparative Guide* at 213

relevant market for the products at issue.

A few more possible objections!

Undoubtedly, there are several objections that could be made to the 'guideline' proposed above and to its supporting analytical framework. Some critics may think the guideline is too narrow and would not catch enough exclusionary conduct. Others may think it to be too broad and that it still allows too much potential for harm. However, it is at least preferable to the many harmful proposals that have already been examined. It also seems manageable. Probably the strongest objection to it would be likely to come from the EU. It may say that it cannot sign up to any global guideline that includes an SLC test, because this is more permissive than their own approach. After all, since the EU prohibits practices that substantially foreclose competitors, or, which are employed by dominant firms, adding an SLC requirement on to those tests would undermine the operation of EU law.

One answer to this possible objection would be to say that a global requirement that Members at least prohibit those exclusionary arrangements that also lessen competition substantially, would only be a minimum standard; it would not add an extra hurdle to the European or any other regime. When contemplating arrangements that affect trade between its Member States, the EU could continue with its own harsher regime. Gradually, through the operation of the proposed guideline, it may come to pass that the European enforcement approach to arrangements affecting relevant markets that include non-EC jurisdictions may at least become less impressionistic, in terms of relying on assertions, rather than evidence, of harms only to competitors.

So long as it is understood that the proposed guideline is a minimum requirement, it is therefore submitted that

a guideline that includes a requirement of 'substantial lessening of competition' should be considered by governments to be an acceptable multilateral 'minimum' common core principle.

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