

## Chapter 5

### WHERE TRADE AND COMPETITION INTERSECT

In this chapter, the Advisory Committee considers the intersection of trade and competition policy. Notably, the Advisory Committee focuses on anticompetitive or exclusionary restraints on trade and investment that are implemented by firms, governments, or some combination of the two, and that hamper the ability of firms to gain access to or compete in foreign markets. Traditionally, such problems have been considered primarily the responsibility of national competition authorities concerned about anticompetitive effects to markets and consumers on their soil. Some countries, notably the United States, have at times applied their law extraterritorially in an attempt to remedy such practices. As formal governmental barriers to international trade and investment are reduced or eliminated, international attention is turning more to anticompetitive practices occurring *within* nations that affect trade and investment flows *from* nations. As a result, perceived restrictions emanating from exclusionary or anticompetitive practices have generated economic and political tensions between nations and firms.

This chapter reviews the landscape of global problems that implicate both international trade concerns about access to markets and competition policy concerns about anticompetitive practices that inhibit the operation of markets. Not all international competition problems are relevant to trade problems, however. As discussed in Chapters 2 and 3, the proliferation of merger control regimes is raising transaction costs and introducing new frictions. As discussed in Chapter 4, international cartels appear to be a serious problem for the United States and the global economy. These matters are global competition problems but they are not trade and competition policy issues. There is an important global competition agenda that needs greater attention by policymakers at home and abroad and also requires some new policy initiatives (see Chapter 6).

This chapter considers a variety of acts of governments and firms that can restrict both international trade and international competition. Anticompetitive private arrangements can also have adverse effects on international trade and access to markets, while formal governmental actions around the world immunize some firm conduct that is excessively trade-restricting and anticompetitive. Governments may also take measures that are excessively trade restricting and anticompetitive, and in some instances private arrangements occur against a backdrop of supportive governmental restraints. The latter are neither purely private restraints nor purely governmental practices, but a mix of both.

Trade and competition policies are designed to address these economic distortions from different sources. Trade policy is centrally focused on the actions of governments. Competition or antitrust laws

are principally focused on firm conduct.<sup>1</sup> As this chapter discusses, aspects of these tools can be mutually supportive. At the same time, overlapping policy concerns lead to different conclusions regarding the effects of a particular restraint. For example, U.S. antitrust law might find a vertical distribution practice efficiency-enhancing and beneficial to consumers, while a trade policy perspective might find the same practice exclusionary and adversely affecting access to markets.

Neither trade nor antitrust policy tools provide complete solutions to the problems that emanate from this mix of governmental and private restraints. Extraterritorial enforcement of national antitrust laws appears to have had little effect in removing restraints and opening access to markets. Rules promulgated by the World Trade Organization (WTO) are currently unavailable for private restraints, and U.S. trade rules, such as Section 301 of the 1974 Trade Act, as amended, offer only limited application to governmental practices that tolerate anticompetitive private restraints.<sup>2</sup> At present, no international set of rules directly addresses business practices, although some observers are of the view that such disciplines should be developed at the international level.

Through its outreach efforts and public hearings, the Advisory Committee solicited input from various enforcement officials, business groups, economists, organized labor, and other interested parties as to potential policy options for addressing foreign-based harms. The Advisory Committee is of the view that seeking full-scale convergence of antitrust laws is neither feasible nor desirable at this time. Hence, it considered the utility of positive comity, extraterritorial enforcement, and multilateral initiatives.

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<sup>1</sup> Experts have long noted that these two policy areas have different sources of domestic political support and differing substantive standards. For much of the postwar period, the goals of trade policy have been to remove discriminatory distortions by governments that inhibit access to markets for exporters. Competition rules, in contrast, are nationally determined and are centrally focused on protecting the operation of the market. *See* Robert E. Hudec, *A WTO Perspective on Private Anti-Competitive Behavior in World Markets*, 34 *NEW ENG. L. REV.* 79 (1999). This essay contains a thorough and nuanced discussion of differences between trade and competition policy perspectives of relevance to possible treatment of competition policy under the WTO.

<sup>2</sup> In 1988, domestic U.S. trade law took a step in the direction of antitrust laws when it clarified that “unreasonable” practices under Section 301 of the 1974 Trade Act, as amended, can also apply to those governmental actions that constitute systematic toleration of anticompetitive activities by foreign firms that restrict market access. Harvey M. Applebaum, *The Interface of Trade Laws and the Antitrust Laws*, 6 *GEO. MASON L. REV.* 479, 483 (1998) citing 29 U.S.C. §2411(d)(3)(B)(I)(IV). Foreign government toleration of anticompetitive practices was defined as an “unreasonable” practice under Section 301. In the 1994 amendments to Section 301 following the Uruguay Round, Congress clarified the definition of anticompetitive practices. A government may be found to be acting unreasonably if it: (1) tolerates systematic anticompetitive activities by state-owned enterprises as well as private firms; (2) denies market access for U.S. services as well as goods; and (3) restricts the sales of U.S. goods or services to a foreign market. *See* Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-316, 103d Cong., 2d Sess., at 1018 (1994) cited in C. O’Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 *VAND. J. TRANSNAT’L L.* 209, 216-17 (1997). The legislative history of this revision shows that foreign law is the basis for the determination of whether anticompetitive practices have been tolerated. Applebaum at 486.

The Advisory Committee believes that no single one of these approaches is capable of addressing all aspects of competition problems facing the United States and the global economy. Several different approaches may be promising. Bilateral agreements with positive comity offer a potentially useful instrument for addressing private restraints. The potential or actual use of extraterritorial enforcement of U.S. antitrust laws may be necessary and effective in some circumstances. And further development of international competition policy initiatives is, in the Advisory Committee's view, important for the global economy.

This chapter considers and evaluates the utility of both old and new approaches to such problems. It starts by defining the scope of trade and competition problems, reviews cases that have animated international attention, and considers alternative policy approaches, including bilateral cooperative solutions, extraterritorial enforcement responses, and expanded international initiatives, at the WTO and elsewhere.

### **THE ADVISORY COMMITTEE'S DEFINITION OF RELEVANT PRACTICES**

In thinking about the interface of trade and competition issues, the Advisory Committee believes that U.S. policy needs to take a broader focus than purely private business practices alone. Indeed, governmental practices as well as practices undertaken by firms with the blessing, encouragement or toleration of governments can also have anticompetitive and exclusionary effects. This section provides a non-exhaustive description of a range of practices that the Advisory Committee believes policymakers should consider as relevant practices.

As noted in Chapter 1, there are also a variety of practices that may be reprehensible, illegal, or offensive under U.S. or foreign law that can fundamentally impact the nature of competition within a domestic or international market but that are not part of the discussion herein. Substandard wage and employment standards, utilization of child labor, or lax environmental regulations are a few such examples. The decision by groups of purchasers to boycott products that are exported under those conditions may also affect trade; however, these matters are all beyond the scope of this examination.<sup>3</sup>

#### **Private Anticompetitive or Exclusionary Restraints**

Broadly speaking, most countries that have established competition policies have identified a range of permissible and impermissible horizontal and vertical restraints and exercises of market power by firms in a dominant position. Many of the private business practices that are proscribed under U.S. or foreign

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<sup>3</sup> A representative of the AFL-CIO recommended that the Advisory Committee consider the potential distortions to international competition when jurisdictions with diminished labor standards are in fact providing an unfair subsidy to their economies. *See* Remarks by Thea Lee, Assistant Director of Public Policy, AFL-CIO, ICPAC Full Committee Meeting (July 14, 1999), Meeting Minutes at 14-15 [hereinafter Lee July 14, 1999 ICPAC Meeting Remarks]. Traditionally, this has not been considered an international antitrust issue and it is unclear to what extent deficient labor standards have an adverse impact on foreign firms' market access. The consideration of unfair subsidies is outside the scope of the Advisory Committee's consideration of trade and competition policy issues.

competition laws can, if left alone, not only harm the domestic economy and domestic consumers but also harm foreign firms seeking to expand or gain access to those markets (see Box 5-1 for hypothetical example of a private anticompetitive restraint). This could in theory be the case for horizontal, vertical, or monopolistic practices. For example, if a group of domestic firms with market power agree to boycott foreign products the consequence of that horizontal cartel agreement can be to inhibit foreign firms from gaining access to the market. But as the Report demonstrated in Chapter 4, business collusion is not just a domestic concern. Such cartels could, in theory, be comprised only of domestic firms or could be formed among some combination of domestic and international firms. The arrangements could result in market allocation agreements with respect to a single or multiple markets.

Similarly, under some facts, 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. For example, a domestic manufacturer(s) with market power could threaten to cut off sources of domestic supply to domestic distributors unless the latter agree not to handle competing imported product. As discussed in Chapter 2, mergers may have anticompetitive spillover effects in other jurisdictions than the regulating nation where the transaction is occurring. One can imagine a set of facts whereby the development of national champion firms through domestic mergers can harm world markets and foreclose access to a market for would-be foreign entrants. Alternatively, nations have raised concerns over mergers that impact foreign markets and sought to ensure that a foreign firm's acquisition of interests in a domestic firm does not exclude their other domestic firms from entering the foreign market.<sup>4</sup> Since the host government is approving the merger, the actions of the government are also implicated in these practices.<sup>5</sup>

Private anticompetitive practices often occur with the blessing or encouragement of the national government. A state may limit or close off many avenues by which a newcomer might naturally penetrate a market (a government, for example, might limit foreign direct investment or licensing). In such an environment, exclusive dealing contracts and other exclusionary practices that would otherwise be innocuous can effectively close the market. In those cases, where the government action is supportive of the private action, the lines of accountability are blurred. Because such exclusionary practices are neither

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<sup>4</sup> See e.g., *United States v. MCI Communications Corp.*, 1994-2 Trade Cas (CCH) ¶70,730 (D.D.C. 1994) (British Telecom sought to acquire minority interest in a U.S. carrier, MCI. U.S. obtained a consent decree requiring compulsory access to the British national network for other U.S. international carriers); *United States v. Sprint Corp.*, 1996-1 Trade Cas (CCH) ¶ 71,300 (D.D.C. 1995) (As a condition of allowing the government-owned French and German telephone monopolies to acquire minority shareholdings in the third largest U.S. international carrier, Sprint, the consent decree negotiated by the U.S. Department of Justice prohibits the proposed joint venture from providing certain services until other U.S. international carriers had the opportunity to provide similar services in France and Germany). For a further discussion of these cases, see Donald I. Baker and W. Todd Miller, *Antitrust Enforcement and Non-Enforcement as a Barrier to Imports*, INT'L BUS. LAW., 488, 490 (Nov. 1996).

<sup>5</sup> Private restraints can also take the form of abuse of intellectual property rights, including technology licensing arrangements that exclude licensees from a market after the life of the intellectual property right has expired can also block a firm from entering a foreign market.

purely anticompetitive private restraints nor purely governmental practices, they are sometimes called “hybrid practices.”<sup>6</sup>

Anticompetitive restraints that can act as barriers to a market may stem from a set of circumstances that could not have occurred “but for” some antecedent action by a government that may or may not rise to the level of ongoing governmental supervision or regulation. For example, if a government were to delegate authority over whether or not to grant licenses or permits to an industry association that then used that power to exclude all foreign firms from entering into the market or to keep foreign presence to a minimum, these actions, taken together, might constitute a “hybrid” practice.

Similarly, as new technologies are developed in high-tech areas such as telecommunications and information technology, the adoption of an industry standard can offer powerful benefits to the manufacturer of that standard. In a global market, the activities of standard-setting bodies can also have an increasing impact on international trade, as firms and consumers will seek to use technological standards that can work easily abroad. A standard that is not compatible with other technologies can “tip” the development of the technology toward the selected standard and eliminate the ability of other firms, particularly foreign firms unrepresented in the standard-setting organization, to compete in the market.

Private restraints may also be encouraged by governmental regulators or even by the lack of enforcement by domestic competition agencies. Governmental policy makers may even be more proactive and encourage firms to allocate market share or develop interlocking distribution networks in the belief that such actions will stabilize or benefit a domestic industry in the early stages of its development. Moreover, a lack of enforcement by competition agencies may also give tacit encouragement to private firms that their anticompetitive conduct is permissible. Although these are hypothetical examples, they have all surfaced in some variant in international economic policy debates. Under many of these potential fact patterns, an important question is whether and to what extent the resulting competition problems are attributable to a government versus the private or quasi-private commercial entities that are engaging in the exclusionary or anticompetitive practices.<sup>7</sup>

### **Governmental Practices**

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<sup>6</sup> See e.g., AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE, REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES AS MARKET ACCESS BARRIERS 15 (January 2000) [hereinafter ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES].

<sup>7</sup> Current trade policy tools have not yet been tested with respect to hybrid restraints. For example, the Technical Barriers to Trade (TBT) agreement at the WTO prohibits the use of standard setting for the purpose of impeding a market entrant. As yet, however, there has not been a WTO dispute settlement panel decision under the TBT concerning this problem.

Governmental practices can of course also be trade restraining.<sup>8</sup> The governmental impact can be felt through formal antitrust exemptions or parochial state action designed to promote national champions at the expense of foreign competitors. These examples can imply the lack of law, exceptions to law, or a lack of enforcement. Other regulatory practices such as the strategic application of competition policy (at the expense of foreign firms and on behalf of domestic players) can also affect on market access. Governmental practices may be overt, or they may be subtle. Governments could be held accountable to some degree for acts of omission, such as the failure to enforce competition laws, and the toleration of private anticompetitive conduct, such as import cartels, as a de facto or de jure substitute for traditional protection from imports. These points are amplified by identifying three different types of competition policy problems arising from government actions.

The availability of governmental exemptions and exclusions from competition laws has received extensive attention by policymakers and scholars.<sup>9</sup> This Advisory Committee has given it some consideration because the effects of such practices can be felt outside the regulating economy as well as by would-be foreign (and domestic) participants in a market. While significant deregulation has occurred in many OECD countries, many nations have not unilaterally reviewed and constrained the scope of their applicable exemptions and exclusions to competition policy. Further, some exemptions may not be viewed as in an individual country's interest to repeal in that they promote exports or have anticompetitive consequences, if any, only in offshore markets. Individual countries may be reluctant to eliminate or reduce the scope of exemptions if its trading partners continue to permit comparable arrangements to thrive.

A significant amount of economic activity around the world is insulated from challenge by competition laws. One important study commissioned by the OECD (hereinafter referred to as the 1996 Hawk Report) found substantial exclusions from competition 10 OECD countries including in employment-related activities, agriculture, energy and utilities, postal services, transport, communications, defense, financial services, and media and publishing, among other sectors.<sup>10</sup> Additional empirical work is needed to better understand the amount of economic activity affected by such arrangements around the world.

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<sup>8</sup> See e.g., Merck & Co., Inc., "Competition Policy and the Pharmaceutical Sector," submitted for inclusion in the Advisory Committee record (May 25, 1999).

<sup>9</sup> One particularly thoughtful article explores the problem that state-authorized spillovers advantage states by undermining efficiency. See Robert P. Inman and Daniel L. Rubinfeld, *Making Sense of the Antitrust State Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997). Inman and Rubinfeld would deny exemptions for state regulations with significant spillovers unless supported by a negotiated interstate agreement. Meanwhile, to restore the federalist balance, they would make congressional decisionmaking subject to the publication of a Federalist Impact Statement (FIST), which would, among other things, protect participatory local and state policies.

<sup>10</sup> The specific circumstances under which the sector is subject to a relaxation of competition laws, differs of course by country and sector. See OECD, *ANTITRUST AND MARKET ACCESS: THE SCOPE AND COVERAGE OF COMPETITION LAWS AND IMPLICATIONS FOR TRADE* (Paris, 1996).

Various groups have considered the costs and benefits of exemptions. The 1978-79 National Commission for the Review of Antitrust Laws and Procedures undertook an extensive consideration of antitrust immunities and economic regulation. Their report called for a broad reexamination of antitrust immunities, affecting many sectors of the U.S. economy.<sup>11</sup>

The reluctance of governments to abandon their existing exemptions and exclusions is reflected in the recent 1998 OECD Recommendation on Hardcore Cartels. That Recommendation represented an important statement among OECD countries regarding their desire to cooperate with enforcement actions against hardcore cartels. This constructive undertaking notwithstanding, the Recommendation did not attempt to impose any disciplines on national exemptions and instead acknowledges a large carve out for arrangements that “are excluded directly or indirectly from the coverage of a Member country’s own laws; or are authorized in accordance with such laws.”<sup>12</sup>

A second problem arises from private action unleashed by government approval. The U.S. federal analogy is the state action defense in *Parker v. Brown*<sup>13</sup> and its progeny.<sup>14</sup> In the United States, actions by one state that has adverse spillovers in other states can be corrected by the political process and the passage of federal preemptive law or other corrective measures. Internationally, however, the problem can be more intractable. A nation may undertake measures or immunities because it gains more from those measures than foreign parties. An additional problem with this type of state-blessed private action is that it is regarded as state action under competition law as a defense of the private action, but it is not typically regarded as state action in trade policy terms. Participants at Advisory Committee hearings offered several examples of negative crossborder spillovers from private conduct immunized by state action.<sup>15</sup>

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<sup>11</sup> The report recommended that an inquiry be conducted for each proposed exemption which would start with a strong presumption against exemptions from the rule of competition. It would proceed with a factual, contextual inquiry with the burden on the proponent of the exemption to demonstrate empirically clear and substantial defects in the market that make the exemption necessary. If an exemption is considered necessary, it should be tailored to meet the regulatory goals by the least anticompetitive means possible. See REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 185-187 (January 22, 1979).

<sup>12</sup> See 1998 OECD Recommendation on Hardcore Cartels, (I)(A)(2)(b).

<sup>13</sup> 317 U.S. 341 (1943).

<sup>14</sup> See e.g., *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). For an overview of the treatment of state regulation under the competition laws of the U.S. and EU, see Dirk Ehle, *State Regulation Under the U.S. Antitrust State Action Doctrine and Under E.C. Competition Law: A Comparative Analysis*, 6 E.C.L.R. 380 (1998). See generally, Eleanor M. Fox, *The Problem of State Action that Blesses Private Action that Harms “the Foreigners,”* in TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION 325 (Roger Zäch, ed., 1999).

<sup>15</sup> Two examples referenced at the hearings include: (1) the 1996 merger between Union Pacific and Southern Pacific Railroads, which was approved in the United States. While the Departments of Justice, Transportation, and Agriculture all urged that the merger not go forward, the Surface Transportation Board, which has final jurisdiction over railroad

A third type of problem is harm caused to outsiders by private action taken against a background business environment of public restraints. Some of the mixed private-public restraints discussed above can fit into this category. When most avenues for market entry are unavailable (for example, when acquisitions are not possible or distributors are unavailable), seemingly innocuous business practices (such as exclusive dealing contracts) may close the market to a new foreign market entrant. Whether this last set of problems is one that should be seen as properly the concern of competition policy or even trade policy remains controversial.

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mergers, accepted the merging firms' assertions that the merger would produce efficiencies and approved the merger.

Mexican competition authorities argued that the effects of the merger have been negative in Mexico, with limited remedial measures available to Mexico. Testimony of Fernando Sanchez Ugarte, President, Federal Competition Commission, Mexico, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 90; and (2) the practices of standard setting bodies, such as the European Telecommunications Standards Institute (ETSI), whose procedures by design or consequence appear to benefit nationals at the expense of foreign market entrants. Submission by Peter Grindley, David J. Salant, and Leonard Waverman, Law and Economics Consulting Group, "Standards Wars: the Use of Standard Setting as a Means of Facilitating Third Generation Wireless Telecommunications Standard Setting," ICPAC Hearings, (May 17, 1999) [hereinafter Grindley, Salant and Waverman Spring Hearings Submission.] *See also* Submission by Leonard Waverman and David Salant, "The Use of Standard Setting as a Means of Facilitating Cartels and its Trade Effects," ICPAC Hearings (Nov. 4, 1999) [hereinafter Waverman and Salant November Hearings Submission].



**Box 5-1: Hypothetical Example of Private Anticompetitive Restraint**

Imagine a concentrated product market abroad where three domestic manufacturers have held roughly stable shares for many years-- say 20, 25, and 50 percent. Imports of this product account for 5 percent of the market and most of the imported volume comes from the offshore plants of the three domestic manufacturers. Traditional barriers to entry include production experience, large investment requirements, and the local distribution system. The domestic manufacturers typically sell their product to intermediaries that sell and finance sales to end users. Virtually all of the wholesalers and other intermediaries deal exclusively with one of the domestic manufacturers or an affiliated wholesaler. Many of the largest end users also have close business ties to the major manufacturers and their affiliated wholesalers. Some domestic distributors and users have suggested that they are afraid of losing their most important domestic suppliers if distributors handle imported product. Market entry through acquisition is rare although not legally impossible. Distributors or dealers are required, either by contract or by practice, to notify domestic suppliers before handling competing imported products. Foreign firms are unable either to buy existing distributors or to convince distributors to handle their product, which they believe is competitive in both price and quality. The local producers control all of the available warehousing and storage facilities. In the past, this sector has been one of the targeted areas for national industrial policies, and government policies contributed to the current structure of the industry.

Is this a problem for trade policy or competition policy? The answer is not straightforward but it appears that both antitrust policy and trade policy tools would reasonably be considered:

***Antitrust Policy Tools:***

- C Facts as presented probably insufficient to determine whether conduct violates U.S. laws, although they suggest possibility of horizontal agreement to fix prices or allocate markets to protect status quo, as well as possibility of vertical restraints. Additional evidence would be required such as data showing effect on commerce is non-trivial, testimony from experts and participants, evidence of horizontal agreement. Potential violation of foreign antitrust law is also possible.
- C What are the options for obtaining evidence?
  - voluntary production from parties or witnesses, which is unlikely
  - utilize bilateral agreement if available or request assistance from foreign government if unavailable.
  - refer the case under positive comity provisions or initiate the case in the foreign jurisdiction, or possibly initiate US court proceeding if evidence is sufficient.

***Trade Policy Tools:***

- C Facts suggest exclusionary practices in the foreign jurisdiction. While evidence of past government intervention is suggested, contemporaneous involvement is unclear. The industry might well be able to establish that it is experiencing market blockage requiring some US government attention -- at least hortatory or political pressure.
- C Evidentiary standard for “unreasonable” practices under 301 are not uniform, only one 301 action alleging “toleration” has been attempted. Such a claim will need to show significant government nexus. Possibility of bilateral negotiation and agreement, although remedies are unclear.

## **Not All Competition Problems are Trade Problems**

Surely, not all restraints are anticompetitive and not all competition problems that are global in nature are by definition matters of relevance for international trade policy. Countries differ as to what is considered impermissible conduct as a matter of domestic competition laws. For example, U.S. law with respect to most vertical distribution practices considers the economic consequences of distribution restraints under a rule of reason analysis, a method of antitrust analysis in which the court is permitted to make a detailed inquiry concerning the effect on price and output of a certain practice in order to determine whether consumers have been harmed. The treatment of vertical restraints has been an area of controversy and a fluid area of the law.<sup>16</sup> The controversy surrounding vertical restrictions centers on whether or not antitrust should prohibit non-justified restraints that hinder rivals, or injure individual firms but cannot be shown to injure consumers or competition in a market as a whole. Business practices such as vertical distribution practices may have the effect of excluding other domestic firms or foreign firms from utilizing a distribution channel, but those practices may not be anticompetitive under U.S. or foreign law.

And, 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 U.S. antitrust law, it will consider the effects on efficiency and consumer welfare. Viewed from the perspective of trade policy, on the other hand, 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.

There are other competition problems that are not matters of concern for trade policy. For example, Chapters 2 and 3 considered the procedural and substantive features of multijurisdictional merger review that warrant additional efforts at convergence, harmonization and minimization. These issues, while important, are not matters customarily considered of consequence for trade policy, however. Similarly, expanding cooperation between competition authorities and developing protocols regarding the treatment of confidential information are important global challenges to competition policy but are not matters of relevance to trade policy.

Thus, there are areas where the distinction between trade versus competition policy concerns can be drawn quite sharply. There are other areas, however, where there are overlapping concerns but the policy tools have different points of application.

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<sup>16</sup> In the United States, for example, some vertical restraints have at times been prohibited but at other times been considered efficiency-enhancing and subject to a rule of reason analysis.

## **THE SCOPE OF THE PROBLEM**

To what extent do anticompetitive or exclusionary practices inhibit access to markets around the world? Is this a problem of sufficient magnitude to warrant attention from policymakers? To answer those questions the Advisory Committee set out to consider the evidence. The following summary of that record brings together examples of restraints that have caused economic tension between nations in recent years. Many of the incidents have been the subject of bilateral discussion between the conflicting parties; occasionally incidents have been taken up in multilateral forums such as the WTO or the Organization for Economic Cooperation and Development (OECD). In addition, this Advisory Committee has undertaken its own outreach effort, and the views advanced by trade associations, individuals, corporate executives and other experts are also summarized here.

The Advisory Committee did not attempt to determine whether the practices cited in the examples were in fact anticompetitive, commercially reasonable, or even accurately characterized. Its sole purpose was to illustrate the possible scope of the economic disputes stemming from this mix of governmental and private restraints. Indeed, some of the cases cited by foreign governments as representative of international trade and competition problems may not even be seen as competition problems under U.S. law. Measurements of the costs to the global economy of these alleged anticompetitive or exclusionary practices are not available now nor likely to be in the foreseeable future. Nonetheless, as discussed herein, the Advisory Committee believes that the problems are real and serious enough to warrant attention from policymakers.<sup>17</sup>

### **Anecdotal Evidence**

Some of the evidence presented to the Advisory Committee came from U.S. companies that believed their entry or expansion in a foreign market had been hindered by the anticompetitive or exclusionary business practices of their overseas competitors, sometimes with the support of the foreign government.

#### *U.S. Complaints about Japanese Business Practices*

Many of the most well-known disputes in recent years have occurred between the United States and Japan. The American firms typically brought their complaints to the attention of U.S. trade officials, and negotiations or consultations occurred between U.S. and Japanese trade and foreign policy officials. The U.S. team often included representatives from the Office of the U.S. Trade Representative (USTR),

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<sup>17</sup> The Advisory Committee notes that the first suggested recommendation of the recent report by the American Bar Association's (ABA) Task Force on International Trade and Antitrust Concerning Private Anticompetitive Practices and Market Access Barriers is "[T]hat the United States should reaffirm the importance of the issue of private anticompetitive practices that prevent or inhibit access by U.S. and other competitors to other markets." ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES at 109.

Antitrust Division in the Department of Justice, along with officials from the Departments of State, Treasury and Commerce. The evidence presented by the aggrieved U.S. firm or industry was often anecdotal or circumstantial in nature. For example, many U.S. companies pointed to their unsatisfactory export performance in the Japanese market compared with other foreign markets, their overall competitiveness in third-country markets, and instances of exclusionary or anticompetitive treatment by local Japanese firms.<sup>18</sup> Although the degree of industry concentration and other facts varied by sector, U.S. trade complaints have tended to center on vertical distribution practices seen as thwarting access to the Japanese market. And further, that some Japanese governmental practices, laws, and regulations have reinforced restrictive private arrangements.

**THE AUTO INDUSTRY:** The U.S. 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 U.S. industry also complained that U.S. 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.<sup>19</sup>

**THE FLAT GLASS MARKET:** In the highly concentrated Japanese flat glass market, the U.S. 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. One Advisory Committee hearing participant representing a U.S. flat glass manufacturer told the Advisory Committee that access to the Japanese market is controlled by an entrenched oligopoly of manufacturers that have effectively organized themselves into a cartel. According to this hearing participant, 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. U.S. companies

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<sup>18</sup> One such qualitative allegation, advanced by the American Electronics Association submission to the Office of the U.S. Trade Representative in 1991, was as follows: "One U.S. company sought to sell an electronic component to three large Japanese industrial companies which accounted for more than 90 percent of purchases of that component in Japan. After seven years of effort, after technical approval by all three Japanese companies, after being recommended to top management as the superior (compared to Japanese competitors) component by the staffs of two of the three companies, and after having been told repeatedly by purchasing staff that its prices were 'fully competitive' or 'more than competitive' the U.S. company never made a single sale." See ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES at 11. See also discussion *infra*.

<sup>19</sup> For example, the Japanese industry argued that there were no such limitations and in fact that each manufacturer had (at the Japanese Government's urging) made it plain to distributors that they were free to handle imports.

allege that an extensive network of industry trade associations ties distributors, retailers, and manufacturers to allow for collusive marketing efforts.<sup>20</sup>

In response, Japanese glass manufacturers and distributors have publicly stated that the market was open to all suppliers, foreign and domestic alike.<sup>21</sup> Japan's Fair Trade Commission (JFTC) has undertaken several surveys in this sector. Those surveys, which are answered on a voluntary basis and therefore are not akin to a formal investigation and have resulted only in limited recognition that some industry practices restrained trade. Absent a formal investigation, the results of the surveys cannot be considered conclusive.<sup>22</sup>

**THE PAPER INDUSTRY:** A representative from the U.S. Forest and Paper Association made similar allegations about the Japanese paper industry. According to this witness, anticompetitive business 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 antimonopoly laws.<sup>23</sup> In April 1992, the U.S. and Japanese governments signed a "Paper Agreement" intended to increase market access for foreign firms exporting competitive paper products to Japan. In the view of U.S. industry, the agreement has not had its intended effect.<sup>24</sup>

**THE JAPANESE FILM MARKET:** The Advisory Committee also heard testimony from a representative from Eastman Kodak Co. concerning its complaints about distribution practices in the Japanese film market and the resulting U.S. trade case. Specifically, Kodak alleges that anticompetitive 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,

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<sup>20</sup> See Testimony of Stephen Farrar, Director, International Business, Guardian Industries Corp., ICPAC Hearings, (May 17, 1999) Hearings Transcript at 118 - 125 [hereinafter Farrar ICPAC Spring Hearings Testimony]. See also Submission by Stephen Bolerjack, Counsel, Antitrust and Trade Regulation, Ford Motor Company on behalf of the National Association of Manufacturers (NAM), (Apr. 22, 1999) at 7 [hereinafter NAM Submission]; and Statement of John C. Reichenbach, Director of Government Affairs, PPG Industries, Inc., Before the Subcommittee on Antitrust, Business Rights and Competition of the Committee of the Judiciary, United States Senate (May 4, 1999).

<sup>21</sup> See Prepared Testimony of Peter S. Walters, Group Vice President, Guardian Industries Corp. before the Senate Judiciary Committee, Subcommittee on Antitrust, Monopolies and Business Rights (Oct. 2, 1998).

<sup>22</sup> It is extremely rare for a survey undertaken by the economic research division of the JFTC to result in a formal investigation.

<sup>23</sup> See Submission by Maureen Smith, Vice President, International, American Forest and Paper Association, ICPAC Hearings at 1-2 (Apr. 22, 1999) [hereinafter American Forest and Paper Association Submission].

<sup>24</sup> *Id.* at 3-5.

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 percent for the last 25 years.<sup>25</sup>

In 1995 Kodak filed a petition with the USTR alleging that the Japanese government's toleration of systematic anticompetitive practices by Fuji Photo Film in Japan's consumer photographic paper and color film market were a violation of Section 301 of the U.S. trade laws.<sup>26</sup> 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 impedes U.S. exports of consumer photographic materials to Japan, and in which restrictive business practices occur that also obstruct 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).<sup>27</sup> The U.S. 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 U.S. 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.<sup>28</sup>

**ELECTRONIC EQUIPMENT:** In 1991 the American Electronics Association (AEA) requested that the USTR launch a sectoral negotiating initiative to address a broad range of governmental and private market access barriers that U.S. manufacturers of electronic equipment allegedly encountered in Japan. AEA surveyed its thousands of member companies and found that the most significant market barrier the

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<sup>25</sup> See Transcript of Testimony of Christopher Padilla, Director, International Trade Relations, Eastman Kodak Co., ICPAC Hearings (May 17, 1999), Hearings Transcript at 108-109 [hereinafter Padilla ICPAC Spring Hearings Testimony].

<sup>26</sup> See Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper, Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974, as amended (May 1995).

<sup>27</sup> The General Agreement on Tariffs and Trade (GATT) concept of nullification and impairment is related to the concept in Article 23 of reasonable expectations of the other party reflected. Under GATT (and now WTO) practice, a breach of an obligation can be a prima facie nullification and impairment, and the Dispute Settlement Understanding (DSU) also provides for nonviolation nullification and impairment.

<sup>28</sup> See Japan-Measures Affecting Consumer Photographic Film and Paper, WTO Doc WT/DS44/R (panel report issued 31 March 1998). Since the case was initiated, there have been changes in Japan that some commentators believe may increase the possibilities for foreign companies to sell in Japan in this sector. See Alan Wolff, Unanswered Questions: The Place of Trade and Competition Policy in the Seattle Round, Paper delivered at the OECD Conference on Trade and Competition, Paris (June 30, 1999) at 15-16 [hereinafter Wolff, Unanswered Questions].

companies perceived was exclusionary purchasing practices by Japanese industrial companies.<sup>29</sup> Among other grievances, AEA companies complained of refusals to deal despite lengthy efforts and superior offers, demands that U.S. manufacturers establish production in Japan, predatory pricing to exclude foreign competitors, discriminatory bank lending, discriminatory standards, and a complex distribution system that acts as a *de facto* barrier to sales by foreign companies.<sup>30</sup>

THE SODA ASH INDUSTRY: Anticompetitive practices in the Japanese soda ash industry have also been a point of contention. In 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.<sup>31</sup> 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.<sup>32</sup>

#### *U.S. Complaints about Japanese Competition Law*

The practices described above are but a sampling of the sectoral complaints that U.S. businesses have lodged against exclusionary or anticompetitive practices in Japan. Complaints have also been raised in other sectors, such as insurance,<sup>33</sup> semiconductors, amorphous metal transformers, some of which have resulted in formal trade cases and agreements. Some of these alleged barriers were thought to result from the lax enforcement of Japan's competition law (called the Anti-Monopoly Act).<sup>34</sup> Although the JFTC conducted several "surveys" of competitive conditions in sectors that were prone to bilateral tension, virtually none of the surveys found any violations of Japan's Anti-Monopoly Act. Nonetheless, many of

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<sup>29</sup> See Submission by Richard Cunningham, Steptoe & Johnson LLP, "Private Practices as Market Access Barriers," Attachment A, p. 1-2 (Jan. 21, 1999), for inclusion in the Advisory Committee record [hereinafter Cunningham Submission].

<sup>30</sup> *Id.*

<sup>31</sup> See OECD Materials on the Impact of Anticompetitive Practices on Trade Submitted to the WTO Working Group on Trade and Competition, March 11, 1998 [hereinafter OECD Materials].

<sup>32</sup> See Wolff, Unanswered Questions, at 17.

<sup>33</sup> See UNITED STATES TRADE REPRESENTATIVE, 1999 NATIONAL TRADE ESTIMATE ON FOREIGN TRADE BARRIERS 236-39 (1999) [hereinafter 1999 NATIONAL TRADE ESTIMATE].

<sup>34</sup> A few features of Japan's Anti-Monopoly Act that appeared to be discriminatory on their face or at least in their application -- e.g., requirements that foreign joint venture contracts be subject to notification to the JFTC, while domestic contracts were not. Those aspects of the law now appear to have been eliminated.

the sectoral disputes resulted in bilateral agreements that focused on some combination of private and governmental restraints. Examples include semiconductors, paper products, glass, automotive cars and parts, and construction services. In these accords the Japanese government promised to encourage imports and new business relationships with U.S. firms seeking entry into the Japanese market; it also promised to enforce its competition laws vigorously and to ensure that domestic manufacturers did not use their market power to coerce domestic distributors to refuse to handle competitive imports.

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.<sup>35</sup> Notable developments that occurred through the SII process included increases in the JFTC's budget and personnel; increased penalties for anticompetitive 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.<sup>36</sup>

Bilateral discussions on deregulation and competition policy continued during the Clinton Administration, and further steps were announced under the auspices of the "Enhanced Initiative on Deregulation and Competition Policy" as part of the Clinton-Hashimoto Denver summit in June 1997.<sup>37</sup> Bilateral consultations continue to this day under that initiative.

### *U.S.-European Conflicts*

The perceived problem of private anticompetitive restraints that impede market access is by no means limited to disputes between the United States and Japan. U.S. companies have alleged similar practices in Europe. For example, the U.S. Department of Justice's first formal positive comity request

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<sup>35</sup> See Merit E. Janow, *U.S. Trade Policy Towards Japan and China: Integrating Bilateral, Multilateral and Regional Approaches*, in *TRADE STRATEGIES FOR A NEW ERA* (Geza Fezakuty and Bruce Stokes, ed., Council on Foreign Relations, 1998).

<sup>36</sup> Recently the JFTC has taken some action with respect to domestic cartel arrangements inhibiting foreign firms market access to the automotive glass markets. Specifically, in December 1999, the JFTC issued a formal finding of a violation under the Anti-Monopoly Act to associations of Japanese auto glass manufacturers and to a wholesale subsidiary of an auto glass manufacturer for agreeing not to sell imported replacement glass for domestic automobiles. See Japan Fair Trade Commission Press Release, "Regarding Notifications Given to Tokyo-Prefecture Branch of the Auto Glass Industry Association, and Auto Glass Eastern Japan, K.K." (December 21, 1999) available at <http://www.jftc.admix.go.jp/pressrelease/99.December/99122103.html>.

<sup>37</sup> For the most recent update on the status of the initiative, see Second Joint Status Report under the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy, May 1999, available at [www.pub.whitehouse.gov](http://www.pub.whitehouse.gov).



to the antitrust authorities of the European Union (EU), discussed more fully below, concerned complaints that a European airline reservation company was engaging in anticompetitive practices that prevented an American company from entering the European market.

In addition, 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 component, and conditioning non-European firms' participation in Airbus-related research and product development on agreements to relinquish proprietary technology without compensation.<sup>38</sup>

Other complaints of discriminatory practices in Europe cover products such as computers and telecommunications equipment.<sup>39</sup> During its hearings, the Advisory Committee heard detailed testimony about the potentially anticompetitive telecommunications standards being established by the European Telecommunications Standards Institute (ETSI), which could act as a hybrid restraint to market access.<sup>40</sup> 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 U.S. business complained to the Advisory Committee about anticompetitive cross-subsidization by the German post office of its package delivery subsidiary.<sup>41</sup>

Classic international cartels, designed to fix prices, allocate markets, and jointly restrain output and delivery on a global basis, have long been alleged to operate in Europe in specific sectors such as steel.<sup>42</sup>

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<sup>38</sup> See Cunningham Submission at 2.

<sup>39</sup> See R. Shyam Khemani and Rainer 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 [hereinafter Khemani and Schöne].

<sup>40</sup> See Grindley, Salant, and Waverman Spring Hearings Submission; Waverman and Salant November Hearings Submission.

<sup>41</sup> See Submission by Larry Stevenson, Vice President, International Industrial Engineering, United Parcel Service, ICPAC Hearings, (May 17, 1999).

<sup>42</sup> See e.g., the discussion by Alan Wm. Wolff, *The Problems of Market Access in the Global Economy: Trade and Competition Policy*, in NEW DIMENSIONS OF MARKET ACCESS IN A GLOBALISING WORLD ECONOMY (OECD 1995). See also Mark Tilton, "Antitrust Policy and Japan's International Steel Trade," for presentation at a workshop on "The Changing Japanese Firm," Center on Japanese Economy and Business, Columbia University, December 11, 1998. There are also allegations that governments had a hand in the formation of a global production reduction program in the aluminum sector that may have evolved into a cartel. See *Foiled Competition: Don't Call it a Cartel, but World Aluminum has*

The international Heavy Electrical Equipment cartel was found to have fixed prices at higher than competitive levels in many national markets over a period of several decades.<sup>43</sup>

*Complaints about Latin American Practices*

Anticompetitive 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 denies fair and equitable market opportunities for U.S. exporters of high fructose corn syrup (HFCS) by encouraging and supporting an agreement between Mexican sugar growers and bottlers to limit use of HFCS.<sup>44</sup> The USTR initiated a Section 301 investigation in May 1998 and in May 1999 appears 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 has "failed to refute allegations that it promoted and endorsed conclusion of an agreement to limit purchases of U.S. HFCS."<sup>45</sup> Some aspects of this case are also being addressed in the context of an ongoing WTO dispute settlement proceeding.

Two World Bank economists have described several examples of anticompetitive practices they learned of during their extensive consulting work in Latin American countries.<sup>46</sup> In Colombia, for example, the leading brewer allegedly has geographic market-sharing agreements with existing and potential competitors in neighboring countries. It also owns the sole bottle manufacturing plant and has exclusive-dealing clauses with the great majority of distributors. In another example, an attempt by a U.S. biscuit manufacturer to enter the Colombian market was stymied by the exclusive distribution clauses between the dominant manufacturer and leading retailers. Instead, the U.S. manufacturer was required to enter into licensing and joint marketing agreements with the dominant firm.

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

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*Forged a New Order*, THE WALL STREET JOURNAL, June 9, 1994, at A1; *Cartel Well Smell and Rhyme Quite Well, But Aluminum isn't Oil*, AMERICAN METAL MARKET, June 20, 1994, at 1; *Soda Makers Rip Aluminum Producers*, AMERICAN METAL MARKET, February 27, 1995, at 2.

<sup>43</sup> See Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, World Trade Organization, WT/WGTCP/2 33, n. 143 (Dec. 8, 1998) [hereinafter 1998 WTO Trade and Competition Working Group Report].

<sup>44</sup> See Petition for Relief Under Section 301 of the Trade Act of 1974, as Amended on Behalf of the Corn Refiners Association, Inc., April 2, 1998.

<sup>45</sup> United States Trade Representative Press Release 99-44, "United States to Further Explore Mexican Practices Affecting High Fructose Corn Syrup" (May 14, 1999).

<sup>46</sup> Khemani and Schöne, at 9.

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.<sup>47</sup>

*Anticompetitive and Exclusionary Practices Alleged to Exist in Other Countries*

Other sources, including the USTR's annual National Trade Estimate Report on Foreign Trade Barriers (NTE), have identified several other countries where anticompetitive or exclusionary practices allegedly inhibit the ability of foreign firms to penetrate a market. These problems have often been brought to the USTR's attention by U.S. firms that believe they have been shut out of these foreign markets. The NTE references do not represent conclusions that the listed problem violates either U.S. trade or antitrust laws. The grievances do, however, serve as an indication of agency concerns, and future Section 301 cases that may be self-initiated by USTR may be drawn from matters reported in the NTE. At the very least, the NTE listings provide some feel of both the nature and variety of practices that U.S. firms find troubling in foreign markets.

For example, the 1999 National Trade Estimate cited both Hungary and Hong Kong for lacking full competition in their telecommunications sectors.<sup>48</sup> Egypt does not have a basic law prohibiting anticompetitive practices by monopolies and cartels, and a few players dominate most sectors.<sup>49</sup> In India, the NTE noted, "one can find examples of both state-owned and private Indian firms engaging in most types of anticompetitive practices with little or no fear of reaction from government overseers or a clogged court system."<sup>50</sup> In Korea, U.S. firms in the telecommunications and semiconductor industries have expressed concerns that the Korean government is spurring consolidation of different chaebols' business lines in a manner that impedes open competition in Korea.<sup>51</sup> A number of other countries have been cited in the NTE for allegedly anticompetitive practices.<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> 1999 NATIONAL TRADE ESTIMATE at 167, 173.

<sup>49</sup> *Id.* at 100.

<sup>50</sup> *Id.* at 187. The National Trade Estimate noted that these practices are not viewed as major hindrances to the sale of U.S. products and services at this time. U.S. firms are more concerned with issues such as market access, corruption, arbitrary and capricious behavior by their partners or government agencies and procurement discrimination. Yet as these issues are addressed, it is likely that anticompetitive practices will become a larger obstacle to the ability of U.S. firms to export to India.

<sup>51</sup> *Id.* at 288.

<sup>52</sup> Examples include South Africa, with its formerly weak competition laws and oligopolies and monopolies in certain industries (a new competition law went into effect in South Africa on September 1, 1999); Switzerland, with its allegedly high degree of cartelization; Taiwan, with its allegedly anticompetitive practices in the domestic cable TV industry; and Turkey with its monopolies in alcohol and telecommunications that are alleged to have impeded U.S. firms from selling

## Complaints Raised before the WTO Working Group

Similar examples of anticompetitive or exclusionary practices that inhibit international trade have been brought to the attention of the WTO Working Group on the Interaction between Trade and Competition Policy. According to a report issued in 1998, the WTO Working Group said its members submitted examples of “actual cases of domestic export cartels, international cartels that allocated national markets among participating firms, unreasonable obstruction of parallel imports, control over importation facilities, exclusionary abuses of a dominant position, and vertical market restraints to competitors, certain private standard setting activities and anticompetitive practices involving industry associations.”<sup>53</sup>

One set of submissions to the WTO came from the OECD, which has discussed trade-related anticompetitive practices in the OECD Joint Group on Trade and Competition, held conferences on the issues involved, and conducted analytical studies. The OECD materials included discussion of horizontal agreements such as cartels, standardization, and certification restrictions; vertical agreements such as exclusive dealing and licensing agreements; abuse of dominant positions through rebate systems; and international mergers.<sup>54</sup> Clearly, only some of these areas of discussion reflect “access” problems arising from private restraints.

The OECD submission to the WTO identified a debate over exclusive dealing in the United Kingdom’s automobile industry. According to the OECD, some argued that competition policy was not adequately tackling exclusive agreements between domestic auto manufacturers and distributors. Consequently, potential auto importers were unable to secure access to distributors and were thus foreclosed from the UK’s domestic market. Others argued that restrictions on market access resulted primarily from other factors such as standards, government regulations, and trade measures rather than inadequate application of competition law.<sup>55</sup> The OECD submission also described how a domestic producer of fertilizer in Norway controlled distribution channels by using a rebate system that acted as a barrier to entry into the domestic market.<sup>56</sup>

The individual country submissions to the WTO Working Group also provide examples that have been challenged as restricting market access. The EU’s submission to the WTO identified several cartels

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in those markets. 1999 National Trade Estimate, at 384 (South Africa), 387 (Switzerland), 394 (Taiwan), and 411 (Turkey).

<sup>53</sup> 1998 WTO Trade and Competition Working Group Report at 31, para. 84.

<sup>54</sup> OECD Materials at 1-3.

<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.* at 3.

that it said had a significant international dimension.<sup>57</sup> These included a European cement cartel, in operation since 1983, which had formed a coalition to deal with the threat of Greek cement exports to several Member States.<sup>58</sup> European carton board producers formed a cartel to fix prices and regulate their market.<sup>59</sup> European producers of steel beams agreed to preserve their traditional pattern of trade and agreed on price increases in various Member States.<sup>60</sup> 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 nonaffiliated firms, which in effect prevented foreign firms from entering the market.<sup>61</sup>

EU cases have not been limited to cartels. The EU also identified examples where abuse of dominance hindered entry into a market. The EU's Court of First Instance recently condemned a practice by a group of dominant shipping companies that instituted a low price on shipping between Northern Europe and the Republic of Congo in order to eliminate a competitor.<sup>62</sup> 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.<sup>63</sup>

The EU also described how the two manufacturers in the German ice cream market used vertical restraints, in this case freezer cabinets provided gratis exclusively for their ice cream to prevent competitors

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<sup>57</sup> Submission by the European Community and its Member States, "Impact of anti-competitive practices on trade," Working Group on the Interaction Between Trade and Competition Policy, World Trade Organization, March, 1998 (hereinafter WTO Submission by the European Community and its Member States). Here again, this Advisory Committee has not tried to evaluate whether the cases identified by the EC are market access cases in the same sense as that term may be used in trade policy circles.

<sup>58</sup> Com CE Dec. 94/815, 1994 O.J. (L 343), TPI, T-25/95 cited in the WTO Submission by the European Community and its Member States at 5.

<sup>59</sup> Com CE Dec. 94/601, 1994 O.J. (L 243), TPI, T-295/94 cited in the WTO Submission by the European Community and its Member States at 5.

<sup>60</sup> WTO Submission by the European Community and its Member States at 6.

<sup>61</sup> CFI 22 Oct. 1997. "Dutch Cranes" (T 213/95 and T-18/96) cited in the WTO Submission by the European Community and its Member States at 6.

<sup>62</sup> TPI T-24/93, October 8, 1996 cited in the WTO Submission by the European Community and its Member States at 9.

<sup>63</sup> Com CE, 9.6.76, O.J. (L 223), CICE 13.2.79, n 85/76, Rec. 1979, P: 461 cited in the WTO Submission by the European Community and its Member States at 9.

from selling to the tied stores.<sup>64</sup> This is a case that might be analyzed very differently under U.S. law, which might see the restraint as a legitimate means to compete rather than as an anticompetitive foreclosure.

Individual countries have also identified anticompetitive practices that they allege inhibit access to EU markets. For example, in 1995, the French antitrust 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.<sup>65</sup> In 1988 the French also 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 1992 the Italian competition authority investigated an agreement on harbor and berthing services among three shipowners' associations. The agreement provided substantial discounts on the maximum charges for the services supplied in each port. Members of the association, virtually all Italian-registered ships, qualified while foreign ships did not. The practice was subsequently discontinued.<sup>66</sup>

In its submission to the WTO, Canada identified anticompetitive practices within its borders that have an impact on international trade.<sup>67</sup> In one example, the Interac case, a company was alleged to have abused its dominant position in the supply of shared electronic network services in Canada by leveraging the control of demand deposits and automated banking machines in Canada through membership and participation restrictions in the Interac network. The Canadian competition tribunal approved a consent order designed to improve competition in the market.<sup>68</sup>

U.S. firms have also been alleged to use anticompetitive restraints to prevent foreign companies from entering the U.S. 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 U.S. complaint, Dentsply, using its monopoly position in the U.S. market,

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<sup>64</sup> CFI, June 8, 1995, case T-7/93 Langese-Iglo GmbH v. Commission (1995) E.C.R. II-1533 and case T-8/93 Scholler Lebensmittel GmbH v. Commission (1995) E.C.R. II-1611 cited in the WTO Submission by the European Community and its Member States at 10.

<sup>65</sup> WTO Submission by the European Community and its Member States at 16.

<sup>66</sup> *Id.*

<sup>67</sup> Submission from Canada, The Impact of Anticompetitive Practices of Enterprises and Associations on International Trade, Working Group on the Interaction Between Trade and Competition Policy, World Trade Organization, March 11, 1998.

<sup>68</sup> *Id.* at 6-7.

threatened to terminate its relationship with dealers that sold teeth produced by Dentsply's competitors, including two foreign manufacturers.<sup>69</sup>

### **Evidence from Business Associations**

While little rigorous empirical or survey work has been conducted on market access restraints from exclusionary business practices, several business groups have conducted membership surveys in an effort to assess the extent to which foreign private anticompetitive practices are perceived to restrict market access. The numbers generated by these surveys do not represent statistically significant results, but they are summarized here to provide a sense of the problems that many businesses find troublesome.

In June 1999 the Business and Industry Advisory Committee (BIAC) to the OECD published the results of its Survey of Business Competition Law Concerns.<sup>70</sup> BIAC received 60 company responses from several different jurisdictions and types of businesses.<sup>71</sup> Nearly half (46 percent) of those members who responded agreed or strongly agreed that anticompetitive practices significantly limit their ability to enter new export markets. Approximately 29 percent of BIAC survey respondents agreed or strongly agreed that these practices limit their ability to expand in their primary export markets, while 41 percent of survey respondents agreed or strongly agreed that the enforcement of competition laws is ineffective in new export markets.<sup>72</sup> In addition to conducting a survey of its members, the BIAC has also gone on record as recommending policy proposals to address the concerns of private actions and artificial barriers that impede market access and recommended greater cooperation among competition authorities.<sup>73</sup>

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<sup>69</sup> See Complaint by the United States, *United States v. Dentsply International, Inc.*, Civil Action No. 99-005, (D.Del), January 5, 1999.

<sup>70</sup> BIAC 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].

<sup>71</sup> Responses came from ten countries: Belgium, Canada, Finland, France, Germany, the Netherlands, New Zealand, the Republic of Korea, Turkey and the United States. BIAC Report.

<sup>72</sup> The BIAC survey also asked its members to identify the relative importance of anticompetitive practices in a respondent's ability to expand or enter markets in both primary export markets and new export markets. Fourteen respondents listed anticompetitive practices as one of the top three factors in 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 the 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 percent of the respondents agreed or strongly agreed that the enforcement of competition laws by the government in new export markets is unpredictable, too costly or too burdensome. For primary export markets, 27 percent agreed or strongly agreed that this was a problem. BIAC Report.

<sup>73</sup> See BIAC Discussion Note on the Interaction between Two Policy Fields, "Trading to Compete and Competing to Trade" (1995); BIAC Consultation with the OECD Liaison Committee, "Pursuing Domestic Policy Objectives in a Global Economy;" (Nov. 8, 1996); Business Statement to the 1996 OECD Council Meeting at a Ministerial Level, (May 21, 1996).

In response to an invitation by this Advisory Committee, the Business Roundtable surveyed their CEOs. Of the 54 respondents, 30 percent indicated that they had encountered market access barriers attributable to private anticompetitive practices abroad.<sup>74</sup> The U.S. Council for International Business, in an appearance before the Advisory Committee, urged continued analysis in areas such as market access and contestability.<sup>75</sup> In a submission to the Advisory Committee, the International Chamber of Commerce described U.S. business concerns about the potential for private anticompetitive restraints to impede market access.<sup>76</sup> The Transatlantic Business Dialogue (TABD) has also urged all countries to make market access a priority in applying competition laws and regulations.<sup>77</sup>

### **The Advisory Committee's Assessment of the Evidence**

As this quick summary demonstrates, the level of quantitative and empirical economic analysis concerning private and government anticompetitive restraints that inhibit market access still remains quite limited.<sup>78</sup> Examples of exclusion range from direct evidence to much indirect, circumstantial and qualitative evidence. Nor are private anticompetitive restraints limited only to those countries where the problem recurs as a source of tension.<sup>79</sup> Many of the trade complaints begin with less (and different) evidence than would be required to demonstrate an antitrust violation.

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<sup>74</sup> See Submission by Robert Weinbaum, Office of General Counsel, General Motors Corporation on behalf of the Business Roundtable Task Forces on International Trade and Investment and on Government Regulation, ICPAC Hearings (Apr. 22, 1999) at 3 [hereinafter Business Roundtable Submission].

<sup>75</sup> See Submission by the U.S. Council for International Business (USCIB), ICPAC Hearings (Apr. 22, 1999) at 2 [hereinafter USCIB Submission].

<sup>76</sup> See International 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.

<sup>77</sup> See Transatlantic Business Dialogue (TABD) Overall Conclusions, Seville, Spain (Nov. 11, 1995) [hereinafter TABD Overall Conclusions]. See also TABD Berlin Communique (Oct. 30, 1999) at 50.

<sup>78</sup> Several commentators and advocates have decried the lack of empirical work on this issue. See e.g., Submission by Alan Wolff, Thomas Howell, and John Magnus, Dewey Ballantine, "Trade and Competition Policy: A Suggested U.S. Strategy," ICPAC Hearings (Nov. 4, 1998) at 4 [hereinafter Dewey Ballantine Submission].

<sup>79</sup> Advisory Committee Member Richard Simmons divided nations where anticompetitive practices occur into three groups: "(A) Developing nations which protect their home market [by] encouraging growing manufacturing companies to export to achieve critical mass. Unfortunately, many countries continue these anticompetitive practices long after the industries involved are large enough to compete effectively in the world markets; (B) Developed nations which act in groups utilizing market sharing agreements (formal or informal) to agree not to compete in the participants' home markets and compete only in identified 'fair game' markets; and (C) Non-market economies like the former Commonwealth of Independent States (CIS) countries where there is no body of law which prevents anticompetitive practices from occurring." Letter from Advisory Committee Member Richard P. Simmons to ICPAC Executive Director Merit E. Janow, February 2, 1998.



The uneven quality of the evidence in many specific instances is also reflected in the corresponding absence of empirical analyses that determine or estimate the magnitude of the effects of these competition policy problems on global trade flows or the global economy. This very issue is itself a matter of debate. For example, the International Chamber of Commerce (ICC) notes that certain elements of the business community assert that there is little or no evidence of private anticompetitive acts which have not “(a) received the imprimatur of government, or (b) cannot be dealt with by domestic legislation.”<sup>80</sup> According to the ICC, other segments of the business community maintain that evidence of international anticompetitive acts does exist and that these are a substantial barrier to market access.<sup>81</sup> Similarly, the OECD has had difficulty quantifying the extent to which anticompetitive restraints inhibit international trade. As a senior official of the OECD stated, “[i]t is often said that as trade barriers decline, private anticompetitive practices become a more important and more pervasive restriction on market access. The OECD’s trade and competition work has failed to turn up a large body of convincing evidence for that hypothesis, but it continues to examine the question.”<sup>82</sup>

In the view of this Advisory Committee, this record, while uneven, is sufficient to show that private, governmental, and mixed public-private restraints that inhibit market access are a problem. Additional analytical and empirical work of an international and comparative nature is needed to better establish the extent and nature of private, governmental and mixed public-private restraints of trade with international or global consequences. But the Advisory Committee also believes that the current record is sufficient for the U.S. government to make some policy judgments about the nature of the global trade and competition problems.<sup>83</sup> This Advisory Committee does not assume that national agencies can naturally be relied upon to remove or address the distortions in their own economy produced by private anticompetitive or exclusionary restraints. As this discussion has illustrated, many competition problems also implicate acts or omissions by governments and are not self-correcting. For this reason, the absence of remedial action by a government does not indicate that problems do not exist.

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<sup>80</sup> See Replies formulated by the ICC Joint Working Party on Competition and International Trade to Questions Asked by Members of the WTO Working Group on the Interaction Between Trade and Competition Policy in Geneva in March 1998, International Chamber of Commerce (October 6, 1998) at 2.

<sup>81</sup> *Id.*

<sup>82</sup> See Joanna R. Shelton, then-Deputy Secretary-General, OECD, “Competition Policy: What Chance for International Rules?”, submission by Bernard Phillips, OECD, ICPAC Hearings (Apr. 22, 1999) at 6. [hereinafter Shelton, Competition Policy].

<sup>83</sup> As the 1997 WTO annual report states, “While no empirical information of a systematic nature is available for measuring the size of the [enterprise practices that restrict or distort international trade] problems in practice that remain unresolved through existing laws and mechanisms, there would seem to be a widespread view that enhanced international cooperation is desirable.” *Chapter Four: Special Study on Trade and Competition Policy*, WTO ANNUAL REPORT FOR 1997, at 4.

The Advisory Committee believes that no single policy tool is capable of addressing all aspects of the competition problems raised here. Thus, it has examined several different approaches that could be used in various situations. Bilateral agreements with positive comity offer a potentially useful instrument for addressing private restraints. Extraterritorial enforcement of U.S. antitrust laws may be necessary and effective in some circumstances. And further development of international competition policy initiatives may prove extremely useful in the longer run. As discussed in the remainder of this chapter, by making certain adjustments in each of these approaches, the United States can improve its methods for resolving problems that intersect both trade and competition policy concerns.

### **POSITIVE COMITY**

Cooperation among competition authorities has been and will be one of the most viable alternatives in addressing anticompetitive restraints that affect international trade. Since instances of anticompetitive conduct occurring outside domestic borders that impact or affect competition are becoming more prevalent, governments have worked to advance cooperation through the initiation of bilateral agreements. One mechanism contained within bilateral accords that has gained increasing support and recognition from the international community is the concept of positive comity.

“Traditional comity” considerations have a long history in the extraterritorial enforcement of U.S. antitrust laws.<sup>84</sup> Nonetheless, the extraterritorial application of U.S. law has caused significant tensions over jurisdiction and sovereignty issues between the United States and its foreign counterparts. “Positive comity” attempts to avoid these conflicts by placing initial responsibility for investigation of market access barriers into the hands of the jurisdiction where the alleged anticompetitive conduct occurs. Since positive comity is a relatively untested mechanism and is premised on a high degree of trust and confidence in the antitrust enforcement policies of both jurisdictions involved, its actual application and potential are not fully known. The Advisory Committee believes, however, that use of positive comity as one element in the host of options available, including both unilateral and multilateral initiatives, holds the potential in discrete instances to reduce international conflicts and open foreign markets that are currently blocked by market access barriers.

In its most basic structure, positive comity is a mechanism whereby the jurisdiction most closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy. Specifically, when anticompetitive conduct that adversely affects the important interests of one party occurs within the borders of another party, the “affected party” may request that the “territorial

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<sup>84</sup> The term “comity” refers to the general principle that a country should take other countries’ important interests into account in its law enforcement in return for their doing the same. Traditional comity has been defined as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), *Black’s Law Dictionary*, (6<sup>th</sup> ed. 1990). See Discussion at Annex 1-C.

party” initiate appropriate enforcement actions. In so doing, positive comity attempts to reap the benefits associated with cooperation by avoiding potential conflicts or disputes pertaining to jurisdictional issues. Positive comity potentially obviates the need to pursue extraterritorial enforcement if the territorial party can adequately resolve or remedy the anticompetitive activities. Additionally, by assigning initial jurisdiction to the territorial party, the investigation will benefit from enhanced access to documents and witnesses and thus greater ability and resources to remedy the anticompetitive conduct.

### **Evolution of Positive Comity**

Although the term “positive comity” did not come into use until the early 1990s, the theory and practice of the basic principles of positive comity originated several decades earlier. The genesis of positive comity principles in bilateral cooperation agreements can be traced back to the 1954 Friendship, Commerce, and Navigation Treaty between Germany and the United States. The agreement acknowledged the existence of business practices that impeded or had “harmful effects” on commerce between the two signatory countries, and stipulated that “each Government agrees upon the request of the other Government to consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effect.”<sup>85</sup> Similar provisions also were contained in numerous other bilateral cooperation agreements from the same time period, such as agreements between the United States and Denmark, France, Greece, Italy, and Japan.<sup>86</sup> While some observers have hailed these early undertakings as a significant step toward cooperation through positive comity, there is little indication that these provisions were used.<sup>87</sup>

The concept of positive comity also was embedded in several multilateral initiatives adopted in early postwar years. In 1960 a GATT group of experts recommended that a nation “should accord sympathetic consideration to requested consultations . . . [and] if it agrees that such harmful effects are present, it should take such measures as it deems appropriate to eliminate these effects.”<sup>88</sup> As the OECD Report on Positive

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<sup>85</sup> See Kurt E. Markert, *Recent Developments in International Antitrust Co-operation*, 13 ANTITRUST BULL. 355, 359-60, fn. 11 (1968).

<sup>86</sup> ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMMITTEE ON COMPETITION LAW AND POLICY REPORT ON POSITIVE COMITY, DAFFE/CLP(99)19 (June 14, 1999) at 8, para. 29 (citing Competition Law Enforcement: International Co-operation in the Collection of Information, OECD, 1984, at paras. 98-114) [hereinafter OECD REPORT ON POSITIVE COMITY].

<sup>87</sup> *Id.* at 8.

<sup>88</sup> OECD REPORT ON POSITIVE COMITY at 8, para. 30 (citing Committee on Restrictive Business Practices, Report on the Problems Relating to the Control of Restrictive Business Practices Affecting International Trade, Jan. 12, 1965, E.41450, at 3).

Comity notes, this provision appears to have been first invoked during the photographic film dispute before the WTO although consultations did not occur.<sup>89</sup>

The OECD first incorporated positive comity principles in its recommendations pertaining to competition and trade issues when it adopted the 1973 Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade.<sup>90</sup> Over the years, the OECD has refined and modified the recommendation on positive comity and most recently revisited the concept in its 1995 Recommendation. The OECD proposes that a member country may request consultation with another member country when it believes anticompetitive activity occurring in another country is affecting its interests. If the territorial party “agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interest of the requesting country,” then it should “attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests.”<sup>91</sup> If the affected country does not believe that the territorial party has handled the matter satisfactorily, the OECD Recommendation makes available a voluntary mediation mechanism whereby the Competition Law and Policy Committee acts as a medium for possible conciliation between the two Member countries.<sup>92</sup> To the best of the Advisory Committee’s knowledge, this mediation provision has not been pursued by any OECD member country.

### *1991 U.S.-EC Agreement*

Positive comity did not become a formal component of an international agreement until the U.S.-EC Agreement was negotiated and signed in 1991.<sup>93</sup> The inclusion of positive comity principles in the Agreement marked a significant departure and a step forward from previous international agreements.

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<sup>89</sup> *Id.* at 8.

<sup>90</sup> OECD, Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C(73)99(Final)].

<sup>91</sup> OECD, Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130(Final)], at B.5(c).

<sup>92</sup> *Id.* at B.8.

<sup>93</sup> Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 23, 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504; 61 Antitrust & Trade Reg. Rep. (BNA) 382-85 (Sept. 26, 1991; O.J. L 95/45 (1991), corrected by O.J. L 131/38 (1995). The implementation of the 1991 Agreement was delayed pending a legal challenge initiated by several Member states. The European Court of Justice ruled that the Commission did not have the necessary authority to enact the 1991 Agreement. *France v. Commission*, Case C-327/91 (Aug. 9, 1994); [1994] 5 C.M.L.R. 517. The Commission, subsequently, was allowed to enter into a nearly identical agreement in April 1995. 1995 O.J. (L95) 45, corrected, 1995 O.J. (L131) 38.

While the term positive comity was not explicitly used or defined in the Agreement, statements by the architects of the Agreement led to widespread recognition and discussion of the concept.<sup>94</sup>

Based on the recognition that anticompetitive practices occurring in one jurisdiction may negatively impact the interests of another jurisdiction, Article V of the allows a jurisdiction affected by anticompetitive practices to notify the jurisdiction in which the alleged conduct is occurring and to request that it commence appropriate enforcement action.<sup>95</sup> Such a request is predicated on an assumption that the alleged conduct violates the antitrust laws in the jurisdiction where it occurs. Article V is premised on purely voluntary cooperation; the territorial party retains complete discretion as to whether to initiate an investigation and any subsequent enforcement action against the alleged violations.<sup>96</sup> Nor do the Agreement and any formal referral preclude the affected party from pursuing its own investigation and subsequent enforcement action regardless of any action or inaction by the territorial party.<sup>97</sup> Additionally, Article V requires the territorial party to tell the affected party whether it plans to investigate the disputed practices, and, if so, what the outcome of the investigation is.<sup>98</sup>

### *1998 Supplemental Agreement*

On June 4, 1998, the United States and the European Commission signed an antitrust cooperation agreement that supplements the positive comity provisions outlined in the 1991 Agreement.<sup>99</sup> Importantly, the 1998 Agreement reaffirmed both the U.S. and the EC commitment to pursuing cooperative efforts through the use of positive comity. Furthermore, the 1998 Agreement took steps designed to clarify the procedures for formal referrals of cases under the terms of the Agreement. First, the supplemental provisions list appropriate instances for deferral of extraterritorial enforcement when the territorial party is proceeding with an investigation.<sup>100</sup> Deferral should normally occur, for example, when the anticompetitive conduct can be “fully and adequately investigated” and subsequently remedied by the territorial party.<sup>101</sup>

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<sup>94</sup> See, e.g., Claus Dieter Ehlermann, Address, The Role of Competition Policy in a Global Economy, Brussels (June 22, 1994); EUROPEAN COMMISSION, TWENTY-FIRST REPORT ON COMPETITION POLICY, at 54, para. 64 (1992).

<sup>95</sup> 1991 Agreement, art. V(2), 4 Trade Reg. Rep. (CCH) at ¶21,430.

<sup>96</sup> 1991 Agreement, art. V(3), (4), 4 Trade Reg. Rep. (CCH) at ¶21,430.

<sup>97</sup> 1991 Agreement, art. V(4), 4 Trade Reg. Rep. (CCH) at ¶21,430.

<sup>98</sup> 1991 Agreement, art. V(3), 4 Trade Reg. Rep. (CCH) at ¶21,430.

<sup>99</sup> Agreement 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 (June 4, 1998), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,504A (June 17, 1998) [hereinafter 1998 Agreement].

<sup>100</sup> 1998 Agreement, art. IV.

<sup>101</sup> 1998 Agreement, art. IV(2)(b).

In an attempt to avoid protracted, lengthy investigations, the 1998 Agreement recommends that investigations generally should be completed within six-months.<sup>102</sup> Additionally, the 1998 Agreement outlines an appropriate course of action in which the territorial party should engage during the course of an investigation.<sup>103</sup> If these conditions are met, however, and the affected party chooses not to defer its own investigation, it must tell the territorial party why it is pursuing a separate investigation.<sup>104</sup> As in the 1991 Agreement, both the affected party and the territorial party reserve the right to pursue their independent action as to the conduct at issue.

The 1998 Agreement appears to address, in part, concerns that had arisen regarding the positive comity process during the first formal referral and the subsequent debate occurring throughout the international antitrust community. The 1998 Agreement, itself, substantially improves upon various components of the inaugural 1991 Agreement, including addressing timing and communication concerns put forth by those involved in the Amadeus referral (see below). These improvements were noted by then-EC Commissioner Karel Van Miert through an acknowledgment that the supplemental provisions constituted “a substantial step towards closer cooperation through confidence building.”<sup>105</sup>

Following up on the advancement of positive comity principles in the 1991 and 1998 Agreements between the United States and the European Commission, the United States has entered into agreements containing positive comity provisions with Canada,<sup>106</sup> Israel,<sup>107</sup> Brazil,<sup>108</sup> and Japan,<sup>109</sup> and an agreement

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<sup>102</sup> 1998 Agreement, art. IV(2)(c)(v). Despite the inclusion of this time frame, U.S. government officials have expressed some pessimism as to whether a six-month time frame is feasible for any antitrust investigation, particularly one with an international component such as a market access case. See William J. Baer, then-Director, Bureau of Competition, U.S. Federal Trade Commission, *International Antitrust Policy*, 1999 FORDHAM CORP. L. INST. 247, 255 (B. Hawk, ed. 1999).

<sup>103</sup> A competition authority investigating a formal positive comity request should: (1) devote adequate resources to the investigation; (2) pursue all reasonably available sources of information; (3) regularly update and notify the Affected Party as to the status of the investigation and provide relevant documents obtained during the investigation; (4) take into account views of the Affected Party during the entire process. 1998 Agreement, art. IV(2)(c).

<sup>104</sup> *Id.*

<sup>105</sup> Karel van Miert, then-Commissioner, EC Commission, *International Cooperation in the Field of Competition: A View from the EC*, 1998 FORDHAM CORP. L. INST. 13, 24 (B. Hawk, ed. 1998).

<sup>106</sup> Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (Aug. 3, 1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503 (Apr. 23, 1997).

<sup>107</sup> Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws (Mar. 15, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,506 (Mar. 17, 1999).

<sup>108</sup> Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws

has recently been signed between the EC and Canada.<sup>110</sup> The positive comity provisions in these agreements closely mirror the provisions agreed upon in the 1991 U.S.-EC Agreement. Although none of these subsequent agreements incorporate the “next generation” provisions contained in the 1998 U.S.-EC Supplemental Agreement, they do set forth the primary requirements for the application of positive comity. None has yet been tested in a formal referral. It is clear, however, from the mere enactment of the agreements that several jurisdictions are cooperating and that a requisite level of confidence is developing between the respective competition enforcement authorities in jurisdictions with strong antitrust regimes.

In this vein, the agreement recently enacted with Japan has generated significant attention and debate, particularly from U.S. congressional representatives. A coalition of twenty-six Senators sent a letter to the President expressing their belief that such an agreement with Japan would be inappropriate based on Japan’s apparent failure to honor past agreements.<sup>111</sup> While expressing significant doubt as to whether the positive comity agreement could effectively reduce or eliminate market access barriers, the Senators noted that, if indeed enacted, close monitoring of the agreement should occur.

### **Positive Comity in Practice**

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.

#### *Formal Use: Computer Reservation Systems*

In the only instance thus far of a formal referral under the 1991 U.S.-EC Agreement, the United States announced on April 28, 1997, that it had formally requested that the EC investigate alleged

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(Oct. 26, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,501 (Nov. 3, 1999).

<sup>109</sup> Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation on Anticompetitive Activities (Oct. 7, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,507 (Oct. 13, 1999).

<sup>110</sup> Agreement Between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws, *reprinted in* 1999 O.J. (L 175).

<sup>111</sup> See Prepared Testimony of Senator Mike DeWine, Before the U.S. Senate Judiciary Antitrust, Business Rights and Competition Subcommittee (May 4, 1999); see Prepared Testimony of Senator Herb Kohl, Before the U.S. Senate Judiciary Antitrust, Business Rights and Competition Subcommittee (May 4, 1999).

anticompetitive conduct occurring in Europe in the computer reservation system (CRS) industry.<sup>112</sup> 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.<sup>113</sup> The Sabre Group, a CRS based in the United States and a would-be competitor of Amadeus in Europe, had lodged several complaints with the Antitrust Division regarding the practices of Amadeus and its carrier owners. A computer reservation system acts as a large database that contains fare, ticketing, and schedule information for airlines, trains, and other modes of transportation. Travel agents access the CRS to schedule and ticket reservations from a wide array of different transportation carriers. A CRS can be truly effective, and thus competitive in the marketplace only if its database contains complete and up-to-date information from a large percentage of carriers and is able to provide air travel services, such as ticket on departure and frequent flyer benefits (this is known as “functionality”).

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.”<sup>114</sup> 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 consumers there are the ones who are principally harmed if competition has been diminished.”<sup>115</sup> 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 “U.S. companies may have been blocked from becoming effective competitors and the exclusionary conduct might have adverse effects on U.S. markets as well.”<sup>116</sup>

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

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<sup>112</sup> U.S. Department of Justice Press Release, “Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting U.S. Airlines’ Computer Reservation Systems,” (Apr. 28, 1997) [hereinafter U.S. Department of Justice Computer Reservation Press Release]. The referral antedated the 1998 Agreement and the application of the Agreement’s terms is unclear.

<sup>113</sup> Lufthansa, Air France, and Iberia Airlines, the national flag carriers of Germany, France, and Spain, respectively each own 29 percent of the Amadeus CRS. The remainder is held by Continental Airlines. At one time, SAS, the dominant carrier in Scandinavia, also held an interest in Amadeus. Although it no longer possesses an ownership interest in Amadeus, SAS markets the Amadeus CRS in Scandinavia.

<sup>114</sup> U.S. Department of Justice Computer Reservation Press Release at 2.

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Id.*



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 U.S. authorities will handle our future requests."<sup>117</sup>

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 U.S. Senate Judiciary Committee, acting in its oversight role, convened several hearings 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 favored 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."<sup>118</sup> The release further noted that pursuant to the provisions outlined in the U.S.-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."<sup>119</sup>

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

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<sup>117</sup> David Lawsky, Reuters, *U.S. Seeks International Pacts to Guard Against Price Fixing*, ROCKY MOUNTAIN NEWS, October 5, 1997, at 14A.

<sup>118</sup> European Commission Press Release, "Commission Opens Procedure Against Air France for Favouring Amadeus Reservation System," (Mar. 15, 1999).

<sup>119</sup> *Id.*

airlines that will allow for enhanced access to essential data on the European markets.<sup>120</sup> 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 U.S., 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.

### *Informal Applications*

While the positive comity provisions encompassed in current bilateral agreements have resulted in only one formal referral thus far, competition enforcement officials have publicly endorsed several informal referrals. In these instances, a country may informally request that another country investigate potentially anticompetitive practices occurring within its borders. One of the most widely publicized informal positive comity referrals involves the retail sales tracking industry. The Antitrust Division had been investigating possible anticompetitive practices by AC Nielsen Co. in the way it tied the terms of service contracts for its multinational accounts in one country to its contracts in other countries. When it became known that the European Commission also was conducting an investigation of the same conduct, the Department of Justice allowed the EC to take the lead in the investigation since the majority of the disputed conduct occurred in Europe. The Antitrust Division eventually terminated its investigation when the EC and AC Nielsen entered into an agreement to resolve the charges that also satisfied the Division's concerns. Both the U.S. and the EC publicly heralded this level of cooperation not only as an example of conditional deference of jurisdiction to the party most closely connected to the conduct, but also for the high level of cooperation between the parties, who were permitted to exchange confidential information pursuant to a waiver and closely coordinated the legal theories of the case.<sup>121</sup> This instance, together with several others, confirms that bilateral agreements support enhanced cooperation on many different levels and calls into question those commentators who may assess the benefits derived from positive comity solely on the experiences gleaned from the single formal referral lodged to date.

### **Assessments of Positive Comity**

The positive comity concept has ardent supporters as well as some skeptics. Upon signing the 1991 Agreement, both the EC and the United States openly extolled its benefits, calling it "innovative" and "an important first step" toward increased antitrust cooperation.<sup>122</sup> The authors of the Agreement said the Article V provisions would deter not only conflicts over jurisdiction, but also would "be an important step

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<sup>120</sup> Testimony 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.

<sup>121</sup> U.S. Department of Justice Press Release, "Justice Department Closes Investigation Into the Way AC Nielsen Co. Contracts its Services for Tracking Retail Sales," (Dec. 3, 1996); European Commission Press Release, "Following an Undertaking by AC Nielsen to Change its Contractual Practices, the European Commission Suspends its Action for Breach of the Competition Rules," (Dec. 4, 1996).

<sup>122</sup> See *U.S., EC Commission Forge Antitrust Cooperation Accord*, 61 *Antitrust & Trade Reg. Rep.* 375 (Sept. 26, 1991).

toward minimizing disputes over the extraterritorial application of the antitrust laws.”<sup>123</sup> Even then, however, some commentators were questioning its likely effectiveness. One concern revolved around inherent national interests that directly conflict with the practical application of positive comity. As one commentator noted, the principle of positive comity cannot be expected to alter the fundamental “proposition that laws are written and enforced to protect national interests.”<sup>124</sup>

After nine years and the experience derived from both formal and informal applications, the public officials appear to have tempered their enthusiasm. While it is apparent that government representatives still maintain visible support for positive comity, the emphasis now has shifted to the “limited role” it can achieve in international cooperation. FTC Chairman Robert Pitofsky recently noted that positive comity is “a small and modest element that you use in unusual cases to try to protect American firms doing business abroad or foreign firms doing business in the United States. It’s hardly a common resort.”<sup>125</sup> This shift in public declarations seems to have emanated from practical experience with the concept. While U.S. government officials appear not to have relinquished their belief that positive comity holds the potential to minimize international conflicts and enhance enforcement efforts against market access barriers, the scope of its applicability, at least in the current environment, has been drawn more narrowly.

Similarly, some foreign officials publicly have lowered their expectations for the role that positive comity can play in international antitrust cooperation. EC Competition Director Schaub said in January 1999 that the concept of positive comity had been “oversold” at its inception.<sup>126</sup> Despite statements of this kind, however, officials of foreign government have clearly voiced their continued support for positive comity and, in some instances, are pressing for expansion of positive comity agreements. At hearings before the Advisory Committee in November 1998, then-EC Competition Commissioner Van Miert noted that recent experiences with positive comity had led to efforts to improve the process. While positive comity itself should not always be the first approach taken, Van Miert said, it “should be part and parcel nevertheless of a global approach.”<sup>127</sup> Canada’s Director of Investigation and Research in the Competition

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<sup>123</sup> Statement by James F. Rill, then-Assistant Attorney General, Antitrust Division, U.S. Department of Justice, U.S. Department of Justice Press Release, “U.S. and Commission of European Communities Sign Antitrust Cooperation Agreement,” (Sept. 23, 1991) at 2.

<sup>124</sup> James R. Atwood, *Positive Comity -- Is It A Positive Step?*, 1992 FORDHAM CORP. L. INST. 79, 87 (B. Hawk, ed. 1993).

<sup>125</sup> Transcript of Testimony of Federal Trade Commission Chairman Robert Pitofsky before the Senate Judiciary Committee, Antitrust, Business Rights and Competition Subcommittee (May 4, 1999).

<sup>126</sup> In remarks at the American Bar Association Section of Antitrust Law Advanced International Antitrust Workshop, January 14, 1999, Schaub also expressed concern regarding the appearance of political interference in the positive comity process, hence raising the possibility that countries may choose to avoid the complications of such interference by not pursuing a referral.

<sup>127</sup> Testimony of Karel Van Miert, then-EC Competition Commissioner, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 48.

Bureau, Dr. Konrad von Finckenstein, commended the 1998 Supplemental Agreement between the United States and the EC and urged Canada and the United States to work to expand their current agreement to include provisions similar to those contained in the U.S.-EC Agreements.<sup>128</sup> The OECD expressed similar support in a report issued in June 1999. The report noted that even though the ultimate viability of positive comity has yet to be determined, no apparent risks were associated with using the positive comity mechanism, and significant benefits were apparent in specific instances.<sup>129</sup> The OECD recommends its Member nations continue to support such forms of voluntary cooperation.

The discussion and debate centered around positive comity has extended far beyond the reaches of antitrust enforcement officials. The Advisory Committee heard from various commentators during its series of hearings and meetings regarding the viability and effectiveness of positive comity. The business community generally has expressed its support for the positive comity mechanism. In statements before the Advisory Committee, both the U.S. Council for International Business and the Business Roundtable noted that the principles of positive comity help to alleviate potential international tensions while also providing “a sensible, systematic approach to fact-gathering, reporting, and bilateral consultation among competition authorities.”<sup>130</sup> Both organizations also cautioned the United States to retain its authority to pursue extraterritorial enforcement of domestic antitrust laws when the application of positive comity is not feasible or does not have satisfactory results. Despite a significant level of confidence in current positive comity agreements, several commentators representing business expressed concern regarding the application of positive comity principles in an agreement with Japan. In the words of a spokesperson for the National Association of Manufacturers, “such an agreement would . . . not be advisable until the JFTC acts to resolve [several] outstanding competition issues in a manner that is both transparent and credible.”<sup>131</sup>

### **The Advisory Committee’s Assessment of Positive Comity**

Taking into full consideration any shortcomings in the positive comity approach, some of which are attributable to the novelty of application and thus are correctable, the Advisory Committee believes that positive comity remains at the least a useful first step in addressing anticompetitive restraints affecting trade where the territorial party has the authority and the willingness to take effective action.<sup>132</sup> The benefits

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<sup>128</sup> Testimony of Konrad von Finckenstein, Director of Investigation and Research, Canada Bureau of Competition, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 36.

<sup>129</sup> OECD REPORT ON POSITIVE COMITY at 16.

<sup>130</sup> Business Roundtable Submission at 5; *see also* USCIB Submission at 3.

<sup>131</sup> *See* NAM Submission at 7 (Apr. 22, 1999); *see also* Submission by Guardian Industries Corp., “Barriers to Entry Into the Japanese Flat Glass Market: Opportunities for Bilateral Cooperation,” ICPAC Hearings (May 17, 1999) at 14; Padilla ICPAC Spring Hearings Testimony at 112-13.

<sup>132</sup> *See U.S. Broadens Enforcement Posture on Foreign Application of Sherman Act*, 62 Antitrust & Trade Reg. Rep. 479 (Apr. 9, 1992) (discussion regarding the DOJ’s rescission of Footnote 159 in the 1988 International Guidelines).

associated with the positive comity process hold the potential for enhanced cooperation and minimization of conflicts that can arise during cross-border investigations of conduct affecting market access. By requesting that the territorial party assume responsibility for determining whether an investigation into disputed conduct is warranted and for pursuing ways to remedy the conduct if justified, the need for extraterritorial enforcement can be diminished in some specific circumstances. Thus, the application of positive comity can permit the resolution of at least some conflicts in a cooperative manner that is consistent with sovereignty considerations.

A significant hurdle in extraterritorial enforcement lies in the considerable difficulty encountered during the discovery process. Attempts to obtain access to necessary documents, evidence, and potential witnesses, all of which may be located outside the borders of the investigating jurisdiction, can prove to be an insurmountable obstacle or, at the very least, a barrier to effective and timely enforcement.<sup>133</sup> By requesting that the territorial party pursue the investigation, chances of successful prosecution of the case improve because the territorial party maintains significant advantage in securing necessary documents and witnesses to aid in the investigation of the alleged conduct. Furthermore, the extraterritorial application of domestic laws can result in the inability to secure the necessary remedies to resolve the anticompetitive practices. When the territorial party assumes responsibility for the investigation and potential enforcement actions, such requisite remedies are within the jurisdictional scope and reach of the territorial party.

In addition to these tangible benefits, some have recognized that bilateral accords containing provisions such as positive comity may promote or facilitate increased convergence of domestic antitrust laws between both parties to the agreement.<sup>134</sup> As cooperation on any level—formal or informal—increases, jurisdictions become more cognizant of the laws and policies of other jurisdictions. Such awareness potentially could lead to enhanced mutual recognition of the antitrust laws of each party involved in the cooperative efforts and, therefore, potentially minimize the possibility of divergent outcomes from any investigation.

The OECD has noted that an attempt at positive comity through a referral does not, in itself, entail any substantial risks.<sup>135</sup> The initial pursuit of the resolution of anticompetitive practices through the positive comity channel does not eliminate any future options, including extraterritorial enforcement of domestic antitrust laws if positive comity does not resolve the disputed practices appropriately. It is significant, however, that in some instances, the time delay associated with a positive comity referral that does not

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<sup>133</sup> For example, the inability to secure necessary documents and witnesses apparently contributed to the Department of Justice's failed prosecution attempt in the GE/DeBeer's price-fixing case. See Joel I. Klein, then-Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Criminal Enforcement in a Globalized Economy, Address before the Advanced Criminal Antitrust Workshop, Phoenix, AZ (Feb. 20, 1997).

<sup>134</sup> Mitsuo Matsushita, *United States-Japan Trade Issues and a Possible Bilateral Antitrust Agreement Between the United States and Japan*, 16 ARIZ. J. INT'L & COMP. LAW 249, 253 (Winter 1999).

<sup>135</sup> OECD Report on Positive Comity at 14.

satisfy the concerns of the requesting party may affect consumers or competitors adversely. Nevertheless, the array of benefits associated with an attempt at positive comity merits its application as a first step in appropriate situations, taking into account the explicit retention of all prosecutorial discretion as noted in current positive comity agreements.

Although the benefits derived from positive comity are clear, the Advisory Committee recognizes that the current climate and prior experiences illustrate several shortcomings that need to be addressed if positive comity is to become a fully effective element of international cooperative efforts. First, the historic enforcement record of worldwide antitrust agencies does not promote unqualified confidence in the willingness of antitrust authorities to pursue action against domestic firms that impair the ability of foreign firms to compete, despite possible domestic consumer harm. In the absence of a nation's serious commitment to take such actions, the benefits of positive comity may remain modest or illusory.

Delay following a referral to another jurisdiction to investigate alleged violations also remains a significant obstacle to effective and timely resolution of cases. As illustrated by the one formal referral to date, more than two years elapsed between the time the territorial party was asked to initiate an investigation and the time the territorial party issued an official statement on its progress. As one member of Congress said during congressional hearings, the current situation where a referral is "started reluctantly, staffed inadequately, and dragged out interminably . . . is clearly unacceptable" as a means to resolve potentially damaging private restraints of trade.<sup>136</sup>

Any delay in the investigatory process by the territorial party is magnified when a lack of transparency exists in the process. Uncertainty about whether an adequate or appropriate investigation is occurring engenders doubt on the part of the affected party and strengthens any tendency toward pursuing extraterritorial enforcement. Confidence and trust remain preeminent components of effective cooperation through positive comity channels. Transparency in the entire investigatory and procedural process promotes increased assurance that the affected party's concerns are being addressed in a manner consistent with the premise of the bilateral accord.

To be truly effective, positive comity also requires fundamental symmetry between the parties' antitrust laws and enforcement commitment.<sup>137</sup> Without confidence in the authority and effectiveness of the

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<sup>136</sup> See Statement of Senator Mike DeWine, Before the U.S. Senate Judiciary Antitrust, Business Rights and Competition Subcommittee (October 2, 1998).

<sup>137</sup> See Testimony of Mitsuo Matsushita, Professor, Seikei University, ICPAC Hearings (Nov. 4, 1998) Hearings Transcript at 97.

parties' competition agencies and a requisite level of similarity in domestic antitrust laws,<sup>138</sup> the possibility for a multitude of bilateral positive comity agreements in today's international environment is not feasible.

Finally, the application of positive comity remains a viable option only for market access or restraint of trade cases. Statutory timing issues make positive comity infeasible for merger cases. Thus, while positive comity holds the potential to make a contribution in international antitrust cooperation, it should not be viewed as a singular vehicle for enforcement of cross-border antitrust violations of all forms.

### **The Advisory Committee's Recommendations for Strengthening Positive Comity**

Certain improvements in the positive comity process could be implemented to promote a more effective mechanism for addressing cross-border market access violations. These modifications should aim to provide a heightened degree of confidence in the process for both jurisdictions and the restrained private parties.

At congressional hearings held in October 1998 on the effectiveness of positive comity, a representative from Sabre, the only private complainant involved in a formal referral to date, put forth a number of recommendations to improve the procedural elements of the process.<sup>139</sup> FTC Chairman Pitofsky subsequently endorsed the essence of these recommendations. The Advisory Committee supports some of the proposals which were advanced by Sabre, including the following: provision of a realistic assessment at the outset of an investigation whether the requested party can devote adequate resources to the investigation; dissemination of status updates from the affected party to the private party whose complaint is at issue to the degree permissible under domestic law and practice; and establishment of a timetable to the extent possible for processing the referral. The central purpose behind these suggestions is to ensure that the referred jurisdiction pursue a case vigorously and provide at least as much information to involved private parties and the referring jurisdiction as would occur in a domestic investigation.

The Advisory Committee recognizes that future experience with positive comity in actual referrals might induce additional refinements in the process. Such additional modifications might usefully include the right of the restrained private party to participate in the process, at least to the extent permitted under its domestic laws; a commitment by the territorial party to use its discovery powers to the fullest extent; and timely advice to the restrained private party regarding the focus and substance of information needed to support its complaint.

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<sup>138</sup> See Merit E. Janow, *A Look at U.S.-EU Cooperation in Competition Policy*, in *STRENGTHENING TRANSATLANTIC COOPERATION ON COMPETITION POLICY* (Evenett, Lehmann, and Steil, eds., forthcoming) ("positive comity is unlikely to prove to be an antidote to those market access cases that reflect conflicting national policies or where there are substantial differences in law").

<sup>139</sup> Prepared Testimony of Andrew B. Steinberg, Senior Vice President, General Counsel and Corporate Secretary, The Sabre Group, Inc., Before the Senate Judiciary Antitrust, Business Rights, and Competition Subcommittee (Oct. 2, 1998).

Confidence in the application of positive comity principles is essential to ensure its effectiveness and success. By instituting measures to increase communication and transparency in a positive comity referral, such as those outlined above, the Advisory Committee hopes that the procedural components of a formal referral will further enhance international cooperation.

In addition to visible support for positive comity by competition enforcement agencies, international organizations that address trade and competition issues also should endorse positive comity in their mission. By “advertising” the advantages reaped from effective positive comity cooperation, international organizations hold the potential to expand such cooperation to jurisdictions that have similar antitrust laws and enforcement policies.

The OECD has played an important role in demonstrating the merits of international cooperation. In addition to incorporating provisions related to positive comity in its recommendations on trade and competition, the OECD recently published a report expressing support for the principles of positive comity and concluding that positive comity “has significant potential benefits in a limited number of situations [and] smaller benefits in a wider range of cases.”<sup>140</sup> Such an endorsement can steer countries toward the establishment of bilateral agreements and the use of cooperation as a mechanism for combating private restraints blocking access to foreign markets.

As set forth in the 1998 U.S.-EC Agreement, positive comity appears to be a useful course of action for pursuing some types of market access cases. The Advisory Committee recognizes its importance as a vehicle for minimizing conflict and enhancing enforcement of law in market access violations. Positive comity, however, can succeed only if the international antitrust community maintains a full understanding of its ultimate goals and potential. It is imperative that both parties to an agreement set realistic goals for what positive comity can and cannot accomplish. As Assistant Attorney General Klein recently noted, “positive comity is not a quick and easy panacea for all antitrust-related trade problems.”<sup>141</sup> Indeed, positive comity is not a replacement for the aggrieved jurisdiction’s option to enforce its laws. Since positive comity remains an option in a limited number of instances, it should be used as one tool within the entire framework of options available to antitrust enforcement officials (e.g., both unilateral and an expanded array of multilateral initiatives).

In summary, positive comity should be used in a manner that develops its potential and prevents it from being perceived as either an idealistic objective or a vacuous policy tool. This will, of course, be driven by actual cases. Recently, the United States entered into a number of bilateral antitrust cooperation

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<sup>140</sup> OECD REPORT ON POSITIVE COMITY at 16.

<sup>141</sup> Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust 6, Address before the OECD Conference on Trade and Competition (June 30, 1999).



agreements that contain positive comity features.<sup>142</sup> It is the hope of this Advisory Committee that a conscientious effort will be made to implement and test those agreements as a first response to solve real problems, when meritorious cases arise.<sup>143</sup>

### **U.S. ENFORCEMENT TO GAIN MARKET ACCESS**

At the Advisory Committee hearings in the Spring of 1999, representatives from several business organizations argued that the United States should use its antitrust tools more robustly to remedy foreign restraints on market access experienced by U.S. firms. For example, one trade association recommended that U.S. antitrust laws be amended to clarify “their application to conduct outside the United States which hinders access to U.S. markets” and that “U.S. enforcers could work with U.S. agencies responsible for compliance with existing trade agreements to determine whether conduct that constitutes non-compliance with such agreements amounts to an antitrust violation.”<sup>144</sup> Another business organization urged U.S. authorities to “continue to exercise extraterritorial antitrust jurisdiction where foreign relief is not forthcoming, substantive violations are presented, the standards for U.S. jurisdiction are met, and effective relief can be obtained.”<sup>145</sup> Another suggested that “the United States antitrust enforcement agencies must aggressively investigate and prosecute persistent anticompetitive conduct abroad,” and “the U.S. should consider forging new tools if those at our disposal prove to be inadequate.”<sup>146</sup>

Extraterritorial antitrust enforcement is one of the approaches available to the United States to remedy anticompetitive conduct that deters U.S. firms from entering or expanding their operations in foreign markets. This section examines the record in an effort to assess, first, when the use of extraterritorial enforcement is appropriate or feasible, and second, what changes, if any, might be made in the process to make it a more effective tool.

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<sup>142</sup> See previous discussion above for a list of those jurisdictions with whom the United States has entered into agreements containing positive comity provisions.

<sup>143</sup> Advisory Committee Member Eleanor M. Fox would hesitate to put any burdens on a sister competition agency to report to an “affected” private party. When a requesting government asks a territorial agency to investigate a possible violation, it should make the request in the public interest, not private interest. Normally, the public interest will lie in opening a market for world competition, not for a particular American firm. Apart from the problem of requesting authorities’ aligning their interests with complaining competitors, requested authorities have good reason to be jealous of their own priority setting in view of their limited resources.

<sup>144</sup> American Forest and Paper Submission at p. 5.

<sup>145</sup> Business Roundtable Submission at 5.

<sup>146</sup> Farrar ICPAC Spring Hearings Testimony at 119, 125.

## **The U.S. Government's Extraterritorial Enforcement Policy**

Justice Department policy has varied in its approach to conduct abroad that restrains U.S. export commerce. In its 1977 Antitrust Guide for International Operations, the Antitrust Division stated that a major purpose of its effort was “to protect American export and investment opportunities against privately imposed restrictions. The concern is that each U.S.-based firm engaged in the export of goods, services, or capital should be allowed to compete and not be shut out by some restriction introduced by a bigger or less principled competitor.”<sup>147</sup> This reflected the concern in the guidelines with competitor opportunities. In the 1980s, the DOJ rejected this concern and imported the consumer welfare paradigm into the international arena as well as domestic law. In 1988, the DOJ stated that as a matter of prosecutorial discretion, it would pursue enforcement actions against only those export restraints that harmed U.S. consumers and not those that only harmed U.S. exports. The 1988 Antitrust Enforcement Guidelines for International Operations included a footnote 159 which stated:

Although the FTAIA [Foreign Trade Antitrust Improvements Act] extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.<sup>148</sup>

In 1992 the Antitrust Division deleted footnote 159, stating that “Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers. Today, when both imports and exports are of importance to [the U.S.] economy, we would not limit our concern to competition in only half our trade.”<sup>149</sup> This policy was later incorporated into the 1995 guidelines, which state that “the Agencies may, in appropriate cases, take enforcement action against anticompetitive conduct, wherever occurring, that restrains U.S. exports, if (1) the conduct has a direct, substantial and reasonably foreseeable effect on exports of goods or services from the United States, and (2) the U.S. courts can obtain jurisdiction over persons or corporations engaged in such conduct.”<sup>150</sup>

The guidelines also state that the Department of Justice and the Federal Trade Commission “have agreed to consider the legitimate interests of other nations in accordance with the recommendations of the

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<sup>147</sup> U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 5 (1977).

<sup>148</sup> U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS, 30, n. 159 (1988).

<sup>149</sup> U.S. Department of Justice Press Release 92-117, “Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws” (Apr. 3, 1992), p. 2.

<sup>150</sup> U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 16 (1995)[hereinafter 1995 DOJ/FTC INTERNATIONAL GUIDELINES].

OECD and various bilateral agreements.”<sup>151</sup> A number of factors that the antitrust agencies consider are itemized in those guidelines.<sup>152</sup>

In addition, the enforcement guidelines say that the Department of Justice, as a matter of prosecutorial discretion, would take “full account of comity beyond whether there is a conflict with foreign law.”<sup>153</sup> As part of a traditional comity analysis, the agencies would consider “whether one country encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies. In addition, the Agencies [would] take into account the effect of their enforcement activities on related enforcement activities of a foreign antitrust authority.”<sup>154</sup> Taking a controversial position among legal commentators, the Justice Department has stated that it “does not believe that it is the role of the courts to ‘second-guess’ the executive branch’s judgment as to the proper role of comity concerns under these circumstances.”<sup>155</sup> These comments suggest that at least as a matter of stated policy, the Department of Justice remains committed to pursue foreign restraints that harm U.S. exports, but would do so only after considering how foreign governments might react to U.S. actions.

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<sup>151</sup> 1995 DOJ/FTC INTERNATIONAL GUIDELINES at 20, n. 73.

<sup>152</sup> *Id.* at p. 21, n. 74. These include: The relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; the nationality of the persons involved in or affected by the conduct; the presence or absence of a purpose to affect U.S. consumers, markets or exporters; the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad, the existence of reasonable expectations that would be furthered or defeated by the action; the degree of conflict with foreign law or articulated foreign economic policies; the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities may be affected; and the effectiveness of foreign enforcement as compared to U.S. enforcement action. The first six of these factors are based on previous international guidelines. The seventh and eighth factors are derived from considerations in the 1991 U.S.-EC Antitrust Cooperation Agreement.

<sup>153</sup> As earlier, the term “comity” refers to the general principle that a country should take other countries’ important interests into account in its law enforcement in return for their doing the same. Traditional comity has been defined as the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. There is currently a debate as to whether the guidelines go beyond the requirements under U.S. law. For a discussion of the uncertain status of comity considerations in major U.S. cases such as *Hartford Fire*, see Appendix A to Chapter 1. See also Spencer Weber Waller, From the Ashes of Hartford Fire: The Unanswered Questions of Comity, Paper delivered to the Twenty-Fifth Anniversary Conference on International Antitrust Law & Policy, Fordham Corporate Law Institute (Oct. 22-23, 1998).

<sup>154</sup> 1995 DOJ/FTC INTERNATIONAL GUIDELINES at 20.

<sup>155</sup> *Id.* at 21-22 citing *United States v. Baker Hughes, Inc.*, 731 F.Supp. 3, 6, n.5 (D.D.C. 1990), *aff’d*, 908 F.2d 981 (D.C. Cir. 1990). Some legal commentators take issue with the Justice Department’s position and have argued that the Executive Branch decision to sue is subject to final review by the courts. See e.g., AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST 164 (September 1, 1991).

*The Government Case Record*

The Advisory Committee has examined the record of antitrust cases filed by the United States and identified 44 cases since 1912 in which the United States claimed that defendants were engaged in conduct that restrained U.S. exports abroad.<sup>156</sup> An analysis of the case record does not manifest a clear pattern of antitrust enforcement actions regarding export restraints. The cases deal with several types of practices, including allegations of anticompetitive conduct that also affects U.S. domestic commerce.<sup>157</sup> Indeed, many of the cases include a combination of U.S. and foreign companies acting in concert to limit competition in a particular industry. For example, two cases from the 1950s demonstrate how enforcement actions against export restraints were designed to break up international cartels, rather than ensure U.S. firms market access.<sup>158</sup> The Advisory Committee was able to find only five cases since 1978 that involved export restraint allegations.<sup>159</sup>

Thus, the record of U.S. government antitrust enforcement against foreign restraints that bar market access by U.S. firms is limited. Although some have generously viewed this record as indicating that enforcement is “not infrequent,”<sup>160</sup> unilateral government enforcement cannot be considered to have played a major role in opening foreign markets. Many of the early cases address international cartels with U.S. members or conspiracies by U.S. firms with foreign firms or subsidiaries to restrain competition. The record has not produced antitrust enforcement cases directed at the prototypical market access problem: where non-U.S. private firms or firms located outside the United States, perhaps with the support of the host government, engage in anticompetitive conduct that restricts exports to that market and inhibits access by U.S. firms.

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<sup>156</sup> See Antitrust Cases Filed by the U.S. Involving Export Restraint Allegations, Memorandum prepared by ICPAC Staff for the December 16, 1998 Advisory Committee meeting. This memorandum does not purport to be an exhaustive survey of U.S. antitrust enforcement actions.

<sup>157</sup> See e.g., *United States v. General Electric Co.*, 1962 Trade Cas. (CCH) ¶¶ 70342; 70546 (S.D.N.Y. 1962).

<sup>158</sup> *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), Modified 341 U.S. 593, 71 S. Ct. 971 (1951). *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950), amended, 96 F. Supp. 356 (D. Mass. 1951). For a further description of these cases, see Annex 5-A.

<sup>159</sup> *United States v. Westinghouse Electric Corp.*, 471 F.Supp. 532 (N.D. Cal 1978), *affirmed in part, reversed in part*, 648 F.2d 642 (9<sup>th</sup> Cir. 1981); *United States v. Gulf Oil Corp.*, [U.S. Antitrust Cases, Summaries, Complaints, Indictments, Developments 1970-79 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,078 at 53,722-23 (W.D. Pa. 1978); *United States v. Bechtel Corp.*, 1979-1 Trade Cas. (CCH) ¶¶62,649, 62,430 (N.D. Cal. 1979), *affirmed*, 648 F.2d 660 (9<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. C. Itoh & Co., Ltd.*, 1982-3 Trade Cas. (CCH) ¶65,010 (W.D. Wash 1982); *United States v. Pilkington PLC*, 1994-2 Trade Cas. (CCH) ¶70,842 (D.Ariz 1994). For a further description, see Annex 5-A.

<sup>160</sup> See Wilkie Farr & Gallagher, “Liberalizing Trade Through Competition Policy: Cooperation or Conflict,” (March 1999) at 17, submitted for inclusion in the Advisory Committee record.

There are several possible explanations for this record. First, while the U.S. Department of Justice has expressed a willingness to use its antitrust laws to reach foreign anticompetitive arrangements that harm U.S. exports, the difficulties of establishing jurisdiction, overcoming potential objections to offshore discovery, conducting the investigation, establishing proof, and enforcing any remedy can all act as practical barriers to bringing such cases. U.S. officials may not have considered export restraints to be a priority in some years; certainly few cases with that profile appear to have been brought to the attention of U.S. enforcers. It is not publicly known how many, if any, firms have discussed antitrust problems in foreign markets with the Justice Department or sought official action by the Antitrust Division. It is curious that only a few such instances, even anecdotal, have surfaced in the press. Firms may be discouraged from bringing their problems in foreign markets to the Department of Justice because of the difficulties in developing evidence to prove a case in a court of law or because they have decided that the benefits of such litigation are too uncertain to justify the expense. It is also conceivable that some U.S. officials have been reluctant to pursue such cases because they have not wanted to antagonize their foreign counterparts without a strong case.

Finally, some complainants may have turned to trade laws to try and settle their grievances, rather than antitrust laws. In cases where either antitrust or trade law might apply, complainants may have found formal or informal trade policy instruments to be a more attractive option than antitrust tools because trade officials are more accustomed to using public jawboning and pressure to try to induce foreign governments to undertake corrective measures. Antitrust officials have generally been much more circumscribed with respect to their public statements about possible enforcement matters.

### **Private Enforcement Record**

The Advisory Committee has also considered the extent to which private litigation can serve as a meaningful tool to open markets. Two private antitrust cases reviewed by the Supreme Court, *Continental Ore Co. v. Union Carbide and Carbon Corp* and *Zenith Radio Corporation v. Hazeltine Research Inc.* have delineated the reach of the antitrust laws against export restraints.<sup>161</sup>

To aid its inquiry into the utility of private litigation as a means of enhancing market access, the Advisory Committee invited the Section of Antitrust Law of the American Bar Association to prepare a submission discussing this issue. The resulting paper noted that the total number of private antitrust cases had declined dramatically from 1978 to 1998.<sup>162</sup> The paper also pointed out that private antitrust litigation

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<sup>161</sup> *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *Zenith Radio Corporation v. Hazeltine Research Inc.*, 395 U.S. 100 (1969). For a description of these cases, see Annex 5-A.

<sup>162</sup> The Report also notes that despite this overall decline “private international antitrust litigation continues to grow.” ABA Antitrust Section Private Litigation Submission at 4, 22.

against export restraints faces many of the same difficulties as governmental enforcement.<sup>163</sup> Obstacles to obtaining jurisdiction, gathering evidence and developing effective remedies all exist in private export restraint litigation.

Besides the hurdles inherent in litigation, whether public or private, tackling foreign-based restraints that bar access or sales through private antitrust litigation poses additional problems. First, while the U.S. Department of Justice considers principles of comity before considering whether to bring an enforcement action, private parties are not bound by such strictures. U.S. law gives little guidance to governments and international business executives where U.S. competition policy comes into direct conflict with the competition policy of foreign governments.<sup>164</sup> Thus, the Advisory Committee believes that significant improvements should be sought in the process and standards by which competing interests are balanced for comity purposes or otherwise. Moreover, federal, state and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy should invite concerned governments at an early stage in the litigation to submit their views, which commonly takes the form of *amicus curiae* submission.

Second, the previously dormant application of the doctrine of *forum non conveniens* in antitrust litigation may be revived. This doctrine applies when another forum has superior contacts with the subject matter of the litigation and is better able to conduct the litigation.<sup>165</sup> Until recently, few nations had competition law systems sophisticated enough to offer litigants antitrust remedies and many nations opposed private rights of action. Thus, U.S. courts were unwilling to use the doctrine to dismiss transnational antitrust cases.<sup>166</sup> Recently, however, a U.S. court applied the doctrine to dismiss a private antitrust claim. In *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, the court ruled that the English courts, which are bound to enforce competition provisions of the Treaty of Rome, provided for a more convenient alternative forum to resolve a private antitrust dispute because the conduct was alleged to have taken place in England and most witnesses and documents were located there.<sup>167</sup> As other nations develop more sophisticated competition law structures, the doctrine of *forum non conveniens* may play a greater role in private international antitrust litigation.

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 22.

<sup>165</sup> 28 U.S.C.A. § 1404(a).

<sup>166</sup> See e.g., *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5<sup>th</sup> Cir. 1982) (Defendants cannot use the rules of *forum non conveniens* as a substitute for the rules concerning the extraterritorial application of the Sherman act).

<sup>167</sup> *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, 96 Civ. 6465 (S.D.N.Y. 1997), *aff'd* 155 F.3d 603 (2d Cir. 1998). *But see* *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998) (Second Circuit decided antitrust issues despite parallel action in French courts finding that “it remains unsettled in France what conduct is permissible on the part of France Telecom S.A. and Filetech S.A. . . .” 157 F.3d at 928).

An additional problem concerns the private treble damage remedy in private antitrust cases. As the ABA Working Group notes, a private defendant who is found to have violated the U.S. antitrust laws can be subject to automatic treble damage liability with the potential for enormous judgments.<sup>168</sup> Concerns abroad about the U.S. treble damage remedies have led to the passage of “clawback” statutes, such as that in the United Kingdom, which allow a national to file a suit in a local court to recover damages from the successful U.S. plaintiff paid in excess of compensatory amounts in connection with a foreign action for multiple damages.<sup>169</sup> For these reasons and others, one business group has urged that “the U.S. Government needs to intensify its efforts to enhance the rights of parties attempting to enforce judgments in antitrust actions.”<sup>170</sup> Finally, given the difficulties of litigating a private export restraint case, the ability to bring a complaint under Section 301 of the U.S. trade laws may offer private parties an attractive alternative for addressing anticompetitive restraints, at least in those instances when the foreign government may have played some role in the perceived problem (see discussion of Section 301, below).

Thus, on the one hand private antitrust litigation of foreign-based restraints that hinder export commerce offers an opportunity for aggrieved firms to pursue their claims without relying on the enforcement choices of the U.S. Department of Justice. On the other hand, such suits can be difficult to pursue for all the same reasons as any litigation and can also lead to greater tensions with foreign nations that believe such suits violate notions of traditional comity or that object to U.S. treble damage remedies.

The private action treble damage remedy has been a particular source of tension between the United States and other nations. Many foreign jurisdictions chafe at the prospect of having their firms pay treble damages in another country’s courts, particularly for conduct that may not even violate their own competition laws. In light of this considerable opposition, the Advisory Committee considered whether the United States should detreble, at least with respect to export restraint claims, and concluded that such action would not be appropriate. The U.S. private treble damage remedy plays a useful deterrent effect against anticompetitive conduct both at home and abroad.<sup>171</sup> U.S. antitrust law currently does not distinguish between foreign and domestic defendants. The removal of the treble damage remedy in these export restraint cases might result in fewer conflicts with foreign law, but it would also reward jurisdictions that have proven to be the most adamantly opposed to the offshore application of U.S. antitrust laws. Such an approach would result in foreign defendants gaining better treatment under U.S. law than U.S.

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<sup>168</sup> ABA Antitrust Section Working Group on Private Litigation Report at 23.

<sup>169</sup> United Kingdom, Protection of Trading Interest Act 1980, and Evidence (Proceedings in Other Jurisdictions) Act 1975. Reprinted in A.V. LOWE, *EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS* (Grotius Pub. Ltd., London 1983), pp. 186-193.

<sup>170</sup> Business Roundtable Submission at 6-7.

<sup>171</sup> Advisory Committee Member Eleanor M. Fox disagrees and believes that U.S. law does not reach contracts, combinations, or monopolization in another nation that block access to markets of that nation where the only geographically relevant market is abroad.

defendants and could lead to protracted litigation over whether the offending conduct harmed “import” commerce or “export” commerce. Moreover, as the case record shows, such a distinction in claims may itself be very difficult to make; most of the cases that have had an export commerce claim have also claimed anticompetitive effects in the United States. As discussed in Chapter 4, the Advisory Committee concludes that the potential benefits from increased cooperation from foreign authorities and firms, notwithstanding, modifications of the treble damage remedy is not recommended.

## **Reactions from Abroad to Extraterritorial Enforcement**

The issue of treble damages aside, some governments have strongly resisted the extraterritorial application of the U.S. antitrust laws in general. A Canadian government official outlined the dilemma succinctly in the late 1970s: “Where a transnational antitrust issue is really a manifestation of a policy conflict between governments, it should be recognized that there may be no applicable international law to resolve the conflict. In such cases, resolution should be sought through the normal methods of consultation and negotiation. For one government to seek to resolve the conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right.”<sup>172</sup>

Several jurisdictions expressed similar sentiments in their comments on the Antitrust Division’s draft 1995 extraterritorial enforcement guidelines. The United Kingdom, for example, argued that “the Agencies assert that foreclosure of a foreign market or refusal to adopt U.S. technical standards is sufficient to establish the requisite effect. Such jurisdictional claims show U.S. antitrust law being used as an instrument of trade policy to open markets perceived as closed to U.S. exporters. The U.K. Government regards this as an objectionable and inappropriate use of antitrust powers.”<sup>173</sup> The EC’s comments noted the potentially harmful impact of U.S. extraterritorial enforcement on antitrust cooperation: “The Commission believes that the accent which the Guidelines lay on unilateral action by the U.S. authorities in fact contradicts on the one hand the commitment to take account of comity principles and on the other hand, the efforts of the U.S. authorities to strengthen international cooperation. . . .”<sup>174</sup>

U.S. officials and U.S. antitrust policy need to consider such complaints. Any decision to use the antitrust laws against restraints in foreign markets that restrict U.S. exports will need to take account of the

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<sup>172</sup> J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT’L L.J. 195 (1978). See also Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertion of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505 (1998).

<sup>173</sup> Comments of the Government of the United Kingdom on the draft Antitrust Enforcement Guidelines for International Operations (December 19, 1994)

<sup>174</sup> Comments of the European Commission Services on the U.S. Antitrust Enforcement Guidelines for International Operations 1994 (February 9, 1995)



potentially negative consequences to both U.S. foreign relations and U.S. efforts to enhance cooperation with other competition authorities.

### **Consideration of Proposals for Dealing with Anticompetitive Practices Abroad**

Some lawyers and business executives have called for more effective policy tools to open foreign markets, including proposals to involve the trade agencies in making determinations of market foreclosure stemming from anticompetitive practices abroad. For example, lawyers at the firm of Dewey Ballantine have argued that “traditional antitrust law quickly runs into limits where the hand of a foreign government intervenes, and when private practices are involved, there are serious problems of gathering evidence in a foreign jurisdiction.”<sup>175</sup> In addition, these lawyers argue that few foreign antitrust authorities can be relied upon to attack conduct that affects U.S. producers because very few foreign competition agencies are as effective as the Department of Justice or the Federal Trade Commission.

This perspective sees anticompetitive restraints abroad as barriers to market access and therefore the necessary response is enhanced unilateral trade remedies rather than enhanced antitrust tools. The Dewey Ballantine lawyers recommend that the Department of Commerce or other U.S. trade agency undertake an empirical inquiry into foreign market access restraints. A study of this kind could “(1) identify large markets where there are few or no imports; (2) identify where there are no exports from one major country to another; and (3) identify where persistent and dramatic price differentials exist between markets.”<sup>176</sup> Inferences from such data could then become the basis for the initiation of a trade policy response. The proposal advocates that Section 301 of the U.S. trade laws be amended to give the USTR or the Department of Commerce the authority to issue “cease and desist orders against those anticompetitive foreign practices that restrict U.S. commerce.”<sup>177</sup> The USTR would be provided with new authority to assess fines against private parties that refuse to desist from engaging in harmful anticompetitive practices.<sup>178</sup>

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<sup>175</sup> Dewey Ballantine Submission at 4.

<sup>176</sup> *Id.* at p. 2 of Summary.

<sup>177</sup> *Id.* at 9. The Dewey Ballantine paper notes that this option was recommended by the Commission on United States-Pacific Trade and Investment. See COMMISSION ON UNITED STATES-PACIFIC TRADE AND INVESTMENT POLICY, BUILDING AMERICAN PROSPERITY IN THE 21<sup>ST</sup> CENTURY: U.S. TRADE AND INVESTMENT IN THE ASIA PACIFIC REGION 37, 40 (Apr. 1997). In the long run, the Dewey Ballantine proposal envisions that the WTO can play a role in addressing private anticompetitive restraints: the WTO should provide a robust guarantee of market access. Trade negotiators would attach an explicit warranty to every trade concession that private restraints of trade, private collaboration with government bodies, or informal administrative guidance will not frustrate the intent of the parties by undermining the value of a trade concession. If this warranty is violated, the aggrieved party would have grounds for seeking WTO-sanctioned compensation for the impaired concession. Dewey Ballantine Submission at 8, 9.

<sup>178</sup> A similar proposal was advanced in 1997 by the Coalition for Open Trade (COT), an organization that includes several large American companies and labor unions and is represented by the Dewey Ballantine law firm. COT recommended that the USTR be given the authority, after a full evidentiary proceeding, to issue cease and desist orders

The Advisory Committee heard a similar proposal at its Spring 1999 hearings. A representative from the Eastman Kodak Co. recommended that the Advisory Committee consider a proposal to have an independent authority, such as the International Trade Commission, make a finding that foreign anticompetitive practices exist and are creating a barrier to U.S. commerce; such a finding would then create a presumption on the part of either the FTC or Department of Justice would pursue an enforcement action.<sup>179</sup>

This Advisory Committee believes that the proposal to undertake an empirical or analytical inquiry to analyze the nature and extent of market access barriers resulting from anticompetitive restraints on trade flows is constructive. Indeed, in the following section of this chapter, the Advisory Committee recommends an examination of this kind, involving both trade and competition policy experts. However, the proposals are problematic in that they imbue trade agencies with antitrust responsibilities, and they put primary emphasis on U.S. unilateral tools for resolving international competition problems. Instead, this Advisory Committee believes that a more broadly international approach is necessary, one that preserves the ability of the United States to use its antitrust laws to reach offshore conduct where necessary and possible, but one that focuses first on eliciting cooperation and coordination with other jurisdictions, where possible.

In fact, if the U.S. interagency process is working as it should, economic disputes that appear to contain some mixture of private and public restraints are considered in a variety of interagency settings such as those that occur in the National Economic Council, in the USTR's trade policy review group, or elsewhere. It should be natural and is clearly important for the U.S. antitrust agencies to coordinate closely with other executive branch agencies about international economic disputes that require consensus within the U.S. government and particularly those disputes that may implicate the conduct of both private firms and governmental practices. In cases that appear to have some mix of this kind, the dispute could conceivably be handled either as an antitrust dispute under the Sherman Act or as a trade dispute under U.S. trade laws, notably Section 301, and policymakers would need to confer, as they often do, on the proper disposition of the case.

Proposals that vest U.S. trade agencies with the ability (or near ability) to make "findings" of anticompetitive practices abroad do not solve the real-world problems faced by antitrust enforcers, namely,

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against "restrictive business practices" found to burden U.S. commerce. These restrictive business practices would be defined as coextensive with the practices identified by the U.S. courts as *per se* illegal under U.S. antitrust law. Penalties would be imposed both for engaging in restrictive business practices and for violating cease and desist orders, and such orders would be reviewable by U.S. Courts of Appeal. Alternatively, COT has proposed that the FTC, rather than USTR, could be given the authority to issue and seek court enforcement of cease and desist orders. USTR would make the initial finding as to whether specific restrictive business practices are burdening U.S. commerce. If the finding were affirmative, and if no remediation occurred within three months, USTR would turn its findings over to the FTC, which could then issue a cease and desist order. COUNCIL FOR OPEN TRADE, ADDRESSING PRIVATE RESTRAINTS OF TRADE: INDUSTRIES AND GOVERNMENTS SEARCH FOR ANSWERS REGARDING TRADE AND COMPETITION POLICY 32-33 (1997).

<sup>179</sup> Padilla ICPAC Spring Hearings Testimony at 117, 142-43. Eastman Kodak retained the law firm of Dewey Ballantine to represent it in its Section 301 petition before the USTR involving the Japanese film market.

the requisite gathering of strong evidence to support the claim. Further, these proposals can easily politicize antitrust determinations to the detriment of such a law-based adjudicatory process.

The Advisory Committee believes that antitrust agencies are in the best position to evaluate the *anticompetitive* nature of private restraints and to follow up with either an enforcement action or, if appropriate, a referral to the competition authority in the country where the private restraint exists. Trade agencies, for their part, are better able to assess the trade impact of governmental restraints. This is the allocation of responsibilities under existing law, and it is viewed as fully appropriate by the Advisory Committee.

It is important that enforcement authority over private restraints reside in an agency with responsibility for antitrust policy, rather than a trade agency, such as USTR, where the hortatory and often political aspects of Section 301 cases are better suited to governmental practices. Application of this same methodology can be intimidating when applied to firm practices.

If the trade methodology were to be applied to allegedly anticompetitive private practices occurring offshore, U.S. enforcement against firms operating in foreign markets could occur under a different standard than that applied to firms doing business in the United States. The consequences of an asymmetrical treatment of firms operating in foreign markets versus domestic practices would be adverse. Not only could it call into question the attractiveness of the U.S. environment, but it might stimulate comparable responses by other nations, which U.S. firms would doubtless find objectionable.

For these reasons, improving international cooperation and effective antitrust enforcement is a more principled way to address such problems in the world than trying to equip U.S. trade agencies with new legal tools to undertake unilateral actions.

### **The Advisory Committee's Approach for Applying U.S. Extraterritorial Enforcement**

To improve the effectiveness of U.S. antitrust enforcement, including that pertaining to foreign restraints on U.S. exports, the Advisory Committee believes that the Department of Justice must continue to develop its multipronged strategy of enhancing the credibility as well as the utility of bilateral instruments, expanding multilateral initiatives and preserving its enforcement tools for use when necessary. The following outlines the Advisory Committee's proposed approach with respect to extraterritorial enforcement action.

#### *Consider Foreign Enforcement*

To minimize the possibility for conflicts arising from U.S. extraterritorial enforcement and to increase the possibility of meaningful remedy of the perceived problem, the Advisory Committee supports the view that the Antitrust Division review the ability of the foreign authority in addressing the claim. This approach is consistent with current Justice Department policy, which states that the department will consider whether the objectives to be obtained by the assertion of U.S. law could be achieved in a

particular instance by enforcement efforts of a sister agency in another nation. In many instances, the affected foreign nation's antitrust enforcers are likely to be in a better position to complete the investigation of anticompetitive conduct and develop appropriate remedies.

According to the 1995 Antitrust Enforcement Guidelines, "the Agencies may consult with interested foreign sovereigns through appropriate diplomatic channels to attempt to eliminate anticompetitive effects in the United States" in lieu of bringing their own enforcement action.<sup>180</sup> If the U.S. has a cooperation agreement with the foreign antitrust agency, such a request may be made through a formal positive comity referral. Otherwise, the request for enforcement may be made informally.

#### *Using Extraterritorial Enforcement When Necessary*

When a requested nation is unwilling or unable to investigate allegations of anticompetitive conduct by private firms or some mix of private and public conduct within its borders, then the United States should stand ready to apply its own antitrust laws against anticompetitive conduct that has a "direct, substantial and reasonably foreseeable" effect on U.S. commerce.

Market-blocking restraints abroad challenge the antitrust agencies with the difficulties of gathering evidence and proving a violation of the U.S. antitrust laws. In addition to these obstacles, transnational cases can be expensive and time-intensive. Some might argue that pursuing such cases is an improper allocation of the scarce resources of the Antitrust Division. There is no ready solution for those problems. But it is also true that the potential use of U.S. remedies is important. It may, for example, be a factor that encourages foreign jurisdictions to enter into cooperation agreements with the United States. It is important that the United States have a credible ability to prosecute these violations of the antitrust laws; without that ability, nations with haphazard enforcement records that are sheltering such conduct have little incentive to act. A track record of acting against such restraints will create a climate in which nations are less able to ignore anticompetitive practices in their jurisdictions that have a deleterious impact on the flow of international trade.

The Advisory Committee recognizes that U.S. extraterritorial antitrust enforcement against foreign market-blocking restraints is a sensitive issue for foreign governments that can affect not only antitrust enforcement cooperation efforts, but international law enforcement cooperation more broadly. Because of these concerns and the obstacles to successful prosecution, the expected results of extraterritorial enforcement against offshore restraints on U.S. exports should not be overestimated. Indeed, it is for such reasons that the Advisory Committee recommends that a first step in attempting to address these restraints should be to review whether it is realistic to approach the foreign nation where the practices occur and seek its cooperation. However, the Advisory Committee believes that where such cooperation is not forthcoming, a willingness to use U.S. antitrust enforcement tools may have the salutary effect of acting as

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<sup>180</sup> 1995 DOJ/FTC INTERNATIONAL GUIDELINES at 21.

lever to encourage excluding nations to pursue their own enforcement actions. A tenable U.S. antitrust enforcement effort against market blocking restraints may contribute to a greater culture of cooperation and enforcement. It is also essential to the credibility of U.S. antitrust enforcement, that parties that bring cases to the Department of Justice have confidence that the Antitrust Division will vigorously pursue cases, including market-blocking foreign cases, when they appear to be well founded and when no superior alternatives such as positive comity are available. Further, the Advisory Committee recommends that the U.S. antitrust agencies continue to have responsibility vis-à-vis trade agencies over legal determinations of the anticompetitive conduct of private firms, at home or abroad.

*Develop a Base of Evidence on Export Restraints*

One of the most challenging aspects of U.S. enforcement against anticompetitive restraints of U.S. exports is developing adequate evidence of anticompetitive conduct. In any particular case, that information and analysis will be highly fact specific. It may, however, also be useful to undertake some broader empirical analysis of cases and conditions.

As this chapter has shown, reliable empirical data about the existence and pervasiveness of anticompetitive business restraints abroad that restrict access to markets are generally lacking, and the effects of the identified restraints on the global economy in general and on U.S. exports in particular are often disputed. Indeed, several business organizations such as the U.S. Council for International Business and the Transatlantic Business Dialogue as well as a number of trade and antitrust experts have urged further study of the problem of market access and market contestability.<sup>181</sup> To help businesses and governments better understand the nature and extent of such restraints, the Advisory Committee recommends that the U.S. government commission a study that would attempt to assess the magnitude of global market access problems that stem from some combination of private or governmental restraints. At the least this study could evaluate the effects of known problems. In Chapter 4, this Report suggested an international collaboration to examine and understand global transnational cartels and their market effects. That review should be linked to this suggested examination. And indeed, a U.S. study could be undertaken in collaboration with foreign experts or governments, or indeed even undertaken under the aegis of international organizations such as the OECD.

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<sup>181</sup> See USCIB Submission at 2; TABD Overall Conclusions; Dewey Ballantine Submission at Summary, p. 1. The Federal Trade Commission engaged in such a study in 1916 during a period of commercial history when international commerce was being distorted by formal governmental cartels. The FTC used several methods for gathering information including: (1) special reports for the Commission from United States consuls who submitted national reports for the countries to which they were posted; (2) public hearings where manufacturers, exporters, and others interested in export business appeared and discussed foreign trade conditions; (3) systematic study of all the recent published material of importance regarding foreign cartels, syndicates, combinations and other factors affecting American exporters in overseas markets; (4) surveys, which were sent to over 25,000 businessmen of which 10,000 replies were received. 2000 more detailed surveys were also completed; and (5) field investigations by Commission field agents. FEDERAL TRADE COMMISSION, COOPERATION IN AMERICAN EXPORT TRADE 13-15 (1916).

Any study of aggregate effects or market contestability is obviously difficult. Such inquiries might consider questions at the heart of the debate between trade and competition policy officials: In the international context where there is less likely to be direct evidence, such as a signed agreement among domestic firms with market power to keep out imports, are there other indicators or measures that governments might rely upon as evidence of market foreclosure? Are any trade or other indicators more credible than others? Of course, assessments about foreclosure are complex. Many measures of market access cannot differentiate between benign versus anticompetitive explanations for disappointing performance in penetrating a market. Circumstantial data may not accurately reflect whether anticompetitive practices exist in a market. Low market penetration by foreign imports is a problematic indicator because it is impossible to determine what the proper level of market share should be absent any anticompetitive restraints.<sup>182</sup> Similarly, an attempt to draw inferences from a lack of new entrants to a market also presents problems. In a contestable market, sellers are forced to price competitively and thus other firms may have no incentive to enter the market.<sup>183</sup> Moreover, inferring that a market is blocked if domestic prices are higher than foreign prices may be a mistake; discounts, sales or reduced services may all make the actual transaction price lower than the published price.<sup>184</sup> There are doubtless many competing explanations for almost every observed market outcome, including those outcomes that are thought to be anomalous. And, because some of those explanations are benign, inferences drawn on market outcomes alone are likely to be unreliable.<sup>185</sup>

Although many complex questions arise, the Advisory Committee nonetheless believes that further analytical and empirical work needs to be undertaken and hence sees some value in studies commissioned or undertaken by the U.S. government, or with the cooperation of foreign governments, if possible. The expectation of this Advisory Committee is not that such a study would establish definitive estimates, but that it could provide a firmer foundation of evidence and analysis for informed national decisionmaking and international discourse.

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<sup>182</sup> See Edward M. Graham and Robert Z. Lawrence, *Measuring the International Contestability of Markets*, 30 JOURNAL OF WORLD TRADE 7, 15 (1996).

<sup>183</sup> *Id.* at 15.

<sup>184</sup> *Id.* at 16-17.

<sup>185</sup> The Advisory Committee undertook to “test the waters” in this arena and invited two U.S. economists to prepare a background paper that assessed the empirical literature on market access and cartels. See Valerie Suslow and Simon Evenett, “Assessment of Empirical Literature on Cartels and Market Access: An Economic Analysis”, Paper Prepared for the International Competition Policy Advisory Committee (September 23, 1999). This paper was then circulated to a wider group of respected economists for comment. With respect to the market access question, the paper argued that existing measures of market access identified in the economics literature cannot adequately differentiate between benign versus anticompetitive explanations for poor export performance. Few determinants of market access are observable and usually cannot be taken into account in econometric analysis. However, the authors suggest that policymakers can identify a set of questions or filters that offer some guidance and at least serve to eliminate less compelling claims.

## **THE ROLE FOR INTERNATIONAL ORGANIZATIONS**

As it stated earlier in this chapter, the Advisory Committee believes that bilateral cooperation arrangements are important instruments for fostering cooperation between jurisdictions and thereby improving prospects for increasing the effectiveness of enforcement. The Advisory Committee also believes, however, that bilateral cooperation, even with active utilization of positive comity, is unlikely to be a sufficient response to all of the competition problems and the opportunities presented by the global economy.

Bilateral cooperation may not, for example, provide adequate incentives for countries to dismantle beggar-thy-neighbor practices. The structure of national law itself may be excessively territorial, stopping at the nation's shores despite negative spillover effects in other jurisdictions. National law also can be excessive if it allows states and state-owned entities certain protections that harm international trade.

History is replete with many instances where a nation has perceived its national economic policy to be in conflict with other nations — because of national industrial policy priorities, for example, or because countries disagree about the facts surrounding alleged market access restrictions or about what constitutes practices to be proscribed by competition laws. An expanding web of bilateral arrangements, especially with positive comity provisions, can go some way in addressing some of these issues. Yet, not all nations are likely to be parties to effective bilateral cooperation agreements and hence will not be able to use or develop positive comity or align with strong competition policy regimes. In other words, bilateral arrangements can be extremely useful in some contexts but are unlikely to prove a complete answer to the transnational competition policy problems that the global economy is facing.

This Advisory Committee therefore believes that the United States should continue with its vigorous expansion of bilateral cooperation agreements and positive comity provisions, but that it must also continue to develop its broader multilateral engagement on competition policy matters. These efforts should encompass a variety of forums and should seize opportunities for developing more nearly seamless markets as well as facilitating meaningful cooperation on practical enforcement problems. In short, efforts should be made to:

- C Develop a more broadly international perspective toward competition policy, with the goal of reducing parochial actions by governments and firms;
- C Foster greater soft harmonization of competition policy systems;
- C Develop improved ways of resolving conflicts;
- C Develop a greater appreciation for the negative spillovers from domestic firm or governmental actions; and
- C Develop a degree of consensus among nations on what constitutes best practices in competition policy and its enforcement.

While the reduction of governmental barriers to trade and the integration of economies have given new emphasis to cross-border trade effects of private anticompetitive restraints, this problem is in fact not new to the international trade agenda. An early attempt to address restrictive business practices on a multilateral level was the 1948 Havana Charter, which aimed to establish an International Trade Organization (ITO) and included a chapter on restrictive business practices.<sup>186</sup> After that charter failed, the United Nations Economic and Social Council (ECOSOC) endorsed in 1953 a draft convention that would have established a new international agency to receive and investigate complaints of restrictive business practices. The United States rejected the draft convention, arguing that differences in national policies and practices were so large they would make the new international organization ineffective.<sup>187</sup> Concerns were also expressed that the one nation, one vote provision would allow nations hostile to the United States to instigate harassing complaints.<sup>188</sup>

Little more happened on this issue multilaterally until 1958, when a GATT Experts Group issued a report recommending that business practices be left outside of dispute settlement review. The majority contended that the absence of consensus and experience in this policy area made it unrealistic to try to arrive at any multilateral agreement regarding the treatment of international restrictive business practices.<sup>189</sup> In 1960 the GATT adopted a resolution recommending that the parties to a dispute consult with each other on the issue of restrictive business practices.<sup>190</sup>

In 1973, at the instigation of the developing nations, negotiations on restrictive business practices were initiated in the United Nations Conference on Trade and Development (UNCTAD). In 1980 the U.N. General Assembly adopted UNCTAD's Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.<sup>191</sup> However, the Set is nonbinding, and it has not become a

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<sup>186</sup> United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization, Final Act and Related Documents, 1948.

<sup>187</sup> The draft convention included the same list of restrictive practices as the Havana Charter, with one exception relating to technology agreements. See Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 284-5 [hereinafter Wood]. For details of the draft convention, see F. M. SCHERER, *COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY* 39 (1994) [hereinafter SCHERER].

<sup>188</sup> SCHERER at 30.

<sup>189</sup> GATT Resolution of November 5, 1958, 7<sup>th</sup> Supp. BISD 29 (1959) cited in Dale B. Furnish, *A Transnational Approach to Restrictive Business Practices*, 4 INT'L LAWYER 317, 328, n. 54 (1970). See also Merit E. Janow, *Competition Policy and the WTO*, in *THE URUGUAY ROUND AND BEYOND* 279, 281 (J. Bhagwati and M. Hirsh, ed. 1998)

<sup>190</sup> GATT Resolution, BISD 28 (9<sup>th</sup> Supp, 1961).

<sup>191</sup> This voluntary code contained several provisions calling for special concern to the problems facing developing nations. The Code's substantive provisions condemn collusive anticompetitive actions such as price-fixing, collusive tendering, market or customer allocations, sales, or production quotas and various kinds of concerted refusals to deal. The Code also condemns abuses of dominant position such as predatory behavior, discriminatory commercial terms and



source of international law.<sup>192</sup> Although UNCTAD has an extremely broad membership base, it has not evolved into a dynamic organization for the consideration of competition policy issues. Since the successful completion of the Uruguay Round in 1994, consideration of trade and competition issues in a variety of fora including the WTO has increased.

More than forty years have passed since the 1958 GATT experts group argued that national competition laws and antitrust institutions were necessary preconditions to expanded international efforts. Since then the number of competition regimes around the world has grown considerably, but the degree of experience with competition laws and policies still varies greatly. In the view of this Advisory Committee, new or expanded multilateral initiatives must be structured in a flexible manner to recognize that diversity of experience. With that objective in mind, the following discussion looks first at the institutional capabilities of existing international organizations and then at the views of many experts on the appropriate role of these organizations regarding the intersection of trade and competition policy.

### **The Organization for Economic Cooperation and Development (OECD)**

No binding multilateral agreements on competition policy have been adopted, but a variety of consultative mechanisms have been established, most notably at the OECD. The OECD has been at the forefront of efforts to consider the international dimensions of competition policy, serving as an important consultative body for countries with competition regimes as well as a source of technical assistance to many jurisdictions introducing competition laws and policies.<sup>193</sup>

At least, two different OECD committees have engaged in serious work on competition policy: the Competition Law and Policy Committee (CLP), known before 1987 as the Committee of Experts on Restrictive Business Practices; and the Joint Group on Trade and Competition. The CLP is made up of representatives from competition enforcement authorities of the 29 OECD members and “aims primarily to promote common understanding and cooperation among competition policy authorities and officials.”<sup>194</sup> As a venue where enforcers can meet and discuss competition issues, the CLP has encouraged greater convergence in the analysis of substantive competition law and policy. Through the production of monographs and more recently, through roundtable discussions and framework papers, the CLP has

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anticompetitive mergers. Wood at 286.

<sup>192</sup> Wood at 287, *See also* GLOBAL FORUM ON COMPETITION AND TRADE POLICY, HARMONIZATION OF INTERNATIONAL COMPETITION LAW ENFORCEMENT 15, n. 73 (1995).

<sup>193</sup> For a fuller description of the OECD’s activities on competition policy, *see* P.J. LLOYD AND KERRIN M. VAUTIER, PROMOTING COMPETITION IN GLOBAL MARKETS: A MULTI-NATIONAL APPROACH 131-138 (1999). *See also* the testimony before the Committee of Bernard Phillips and Mark Warner, who described the scope and nature of the OECD’s work on trade and competition policy. Testimony of Bernard Phillips and Testimony of Mark Warner, OECD, ICPAC Hearings (Apr. 22, 1999), Hearings Transcript at 150-179.

<sup>194</sup> *See* OECD Web Site located at <[www.oecd.org/daf/clp/COMMTE.htm](http://www.oecd.org/daf/clp/COMMTE.htm)>.

assisted member countries in developing a common understanding of competition principles. The OECD has also engaged in outreach to nonmember countries to help them develop competition legislation and train judges to develop the analytical tools to review competition cases. More formally, the OECD has produced nonbinding recommendations, including a 1998 Recommendation condemning hard core cartels and a 1995 recommendation on international cooperation among competition authorities (see Chapter 4).<sup>195</sup>

The OECD's Joint Group on Trade and Competition has also pursued a work program that seeks to increase members' understanding of issues relevant to the interface of trade and competition policy. One series of reports examines legal and regulatory exceptions and exclusions in existing competition laws. Another series addresses various issues that affect both trade and competition policy; these include conceptual issues, vertical restraints, consistencies and inconsistencies between trade and competition policy, and competition elements in international agreements. Similar to the WTO Working Group on Trade and Competition, the OECD Joint Group has provided a forum for trade policymakers and competition enforcers to meet and develop a common understanding about the framework for addressing issues that affect both trade and competition policy.

The OECD's strengths in competition policy lie in its ability to encourage soft convergence among its members. Because OECD members make up most, if not all, of the world's advanced economies, greater substantive convergence in competition policy can have significant beneficial effects in developing a worldwide competition culture. Yet, although the OECD contributes significantly to advancing the international competition policy debate, institutional limitations constrain its ability to play a more expansive role in developing a global approach to trade and competition interface issues. For one thing, the organization is perceived by nonmember nations as a forum for more developed countries. More recently, the failure of the negotiations on a Multilateral Agreement on Investment (MAI) which occurred at the OECD may have cast a shadow over its ability to serve as a forum for negotiating international agreements. These limitations notwithstanding, the OECD is clearly the international organization with the greatest depth of experience in considering a broad range of competition and trade policy issues. Its deliberations remain important and it is embarking on new collaborations with other international organizations, such as the World Bank, that appear promising.

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<sup>195</sup> The 1995 Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade is the most recent in a series of such OECD recommendations. This Recommendation contains provisions for a notification process between OECD Members so that Member countries are aware that their interest may be affected by another Member's antitrust enforcement actions; implementation of positive comity principles; consideration going to legitimate interests of other nations in accordance with the recommendations of the OECD; cooperation between members in the enforcement of their antitrust laws, including through the exchange where possible of confidential information; conciliation of disputes between member countries, if requested and agreed upon by all the member countries involved.

## **The World Trade Organization**

The World Trade Organization, by virtue of its inclusiveness (with 135 members from developed and developing economies) and its centrality as a forum for negotiating binding rules governing the economic conduct of nations, holds a unique place among international organizations and rule-making bodies. The expansion of areas of coverage introduced in the Uruguay Round of multilateral trade negotiations as well as improved dispute settlement procedures have further enhanced the importance of the WTO to the world community.

The WTO (and the GATT before it) is centrally concerned with the trade-distorting conduct of governments. This is where the expertise of WTO resides and where it has an established track record. With a few exceptions such as antidumping, WTO rules have not been focused on firm conduct. Instead, the WTO has developed an extensive set of rules that oblige its member governments to abide by agreed-upon nondiscrimination principles and the market-opening commitments contained in tariff and other schedules.

Before the WTO came into existence in 1995, several GATT cases had arisen where the petitioning government alleged that the actions of other governments facilitated or encouraged exclusionary conduct by private firms. For example, in a 1988 case, a GATT panel held that even nonbinding administrative guidance could constitute a government measure, if certain criteria were met.<sup>196</sup> In that case, which involved restraints on exports of semiconductors by the Government of Japan, the specific criteria identified by the panel included: (1) reasonable grounds to believe that the government measures created sufficient incentives to persuade private parties to conform their conduct to the nonmandatory measures, and (2) that the effectiveness of the private conduct was “essentially dependent” on the nonmandatory actions taken by the government. In the more recent film dispute between the United States and Japan, the panel held against the United States on the facts of that case. On the general question of actionable government measures, however, the panel built upon the semiconductor case to argue that analysis of alleged “measures” must “proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors.”<sup>197</sup>

Few cases have come before the WTO that implicate a mix of nontransparent private restraints supported or fostered by some government measures, and neither the GATT nor the WTO has been a primary forum for resolving disputes centering on allegations of private restraints of trade that foreclose

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<sup>196</sup> See Japan-Trade in Semiconductors, GATT, BISD, 35th Supp. 116 at 155 (1989)(decision adopted May 4, 1988).

<sup>197</sup> See Japan-Measures Affecting Consumer Photographic Film and Paper, WTO Doc WT/DS44/R(panel report issued Mar. 31, 1998) at 389. Indeed the opinion argues that “government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner can potentially have adverse effects on competitive conditions of market access.” *Id.* at 389-90.

access to markets. And except in narrow circumstances such as those discussed above, international trade rules have not held governments responsible for the private actions of firms. In this sense, there is no multilateral set of rules that hold governments accountable for firm practices that undermine open markets.

That does not mean, however, that the WTO is devoid of features that are congenial to competition policy objectives. Indeed, the basic nondiscrimination principles of national treatment, most-favored-nation treatment, and transparency that compose the foundation of the WTO support the operation of impartial competition policy regimes. And a domestic policy framework that ensures that private firms do not, through private arrangements, inhibit the flow of goods and services that governments have agreed should be subject to market forces is equally important to support the international trading system. In at least these ways, the two policy frameworks are mutually supportive.

### *Competition Policy Features of Existing WTO Agreements*

Furthermore, several WTO agreements contain competition policy concepts or elements, although these are fragmentary. Following are the most notable examples:<sup>198</sup>

- C The Basic Telecommunications Agreement contains important “competitive safeguard” provisions designed to facilitate procompetitive interconnection and objective, neutral regulation of foreign monopolies, as well as the maintenance of appropriate measures to prevent certain anticompetitive practices.<sup>199</sup> Because telecommunications traditionally has been a heavily regulated sector, dominated by state monopolies or state-sanctioned firms with a dominant market position, commitments by governments to permit competitive access to the telecom markets ran the risk of

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<sup>198</sup> Mention of a few additional examples may be instructive: The Safeguard Agreement in article 11.1 prohibits “members from encouraging or supporting the adoption or maintenance by private enterprises of measures equivalent to voluntary export restraint exercised by the government.” The Technical Barriers to Trade Agreement (“TBT”) in Article 3.4 contains a provision stating that a WTO member shall “not encouraging private control organizations to discriminate against foreign products with regard to testing and certification.” The Trade-Related Intellectual Property (TRIPS) agreement recognizes in Article 8, paragraph 2 that measures may be necessary to “prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.” And, Article 40 recognizes that “some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.”

<sup>199</sup> See Section 1.1 of the Fourth Protocol to the General Agreement on Trade in Services. A “major supplier” covered by these safeguard provisions is one that has the power “to materially affect the terms of participation (having regard to price and supply), either owing to control over essential network facilities or its market position.” That Agreement defines anticompetitive practices to include three practices: cross subsidization; use of information obtained from competitors; and withholding technical and commercial information about essential facilities. Not all of these terms are further defined, so it would presumably be up to a dispute settlement panel to come up with their own interpretation of key terms.

being meaningless in the absence of commitments directed at restraining the conduct of such domestic firms with domestic market dominance.

- C The General Agreement on Trade in Services (GATS) also contains several provisions material to competition policy. Specifically, Article VIII requires each member to ensure that a monopoly supplier does not “abuse its monopoly position” when it competes in the supply of services outside of its area of authorized monopoly. Article IX:1 provides that “Members recognize that certain business practices of service providers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.” And Article IX:2 obliges members to accede to any request for consultation with any other member on such practices “with a view to eliminating” them.
- C Competition policy arises indirectly in Article 9 of the Agreement on Trade-Related Investment Measures (TRIMS), which requires the Council for Trade in Goods to review the operation of the TRIMS and propose necessary amendments to it by the end of 1999. The council was directed to consider whether those amendments should include provisions on competition policy.
- C In 1960 the GATT agreed to permit its members to request consultation on private practices with adverse trade effects. As noted, this has been invoked only once, in 1996 by the United States in the context of the film dispute with Japan, and consultations under this provision did not commence.

Two additional WTO agreements, the Trade-Related Intellectual Property (TRIPS) accord and the Accounting Disciplines agreements, are notable in that they both suggest alternative “architecture” for including more general, though perhaps minimal, provisions on competition policy into the WTO, should countries decide that such is the desired course of action. The TRIPS accord probably offers the closest existing model that may also be congenial for competition policy.<sup>200</sup> Traditionally, the GATT focused on limiting distortions introduced by governments; these limits told governments what they could not do rather than setting out a set of affirmative obligations that they were required to undertake. The TRIPS accord introduced an entirely different construct by obliging countries to introduce intellectual property laws that contained some minimum common features to those laws, and by requiring WTO members to provide nondiscrimination, national treatment, transparency and most-favored-nations treatment. TRIPS also requires member countries to introduce effective national enforcement systems, the precise structure and design of which are left in the hands of national authorities but which must provide effective measures for both private and governmental enforcement. The agreement specifically requires countries to introduce enforcement procedures that are sufficient to “permit effective action against any act of infringement.”<sup>201</sup> These provisions, introduced during the Uruguay Round of Multilateral Negotiations, were subject to a five-

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<sup>200</sup> For example, environmental or labor interests may similarly see the TRIPS approach as one that can incorporate other new areas where governments can agree on the value of additional affirmative obligations.

<sup>201</sup> See Article 41 of the TRIPS.

year moratorium on the use of dispute settlement for less developed economies, notably on nonviolation nullification and impairment. As a result, the enforcement provisions of TRIPS have been largely untested as of this time.<sup>202</sup>

More recently, in December 1998 the WTO Council on Trade in Services adopted the WTO Disciplines on Domestic Regulation in the Accountancy Sector; these are nonbinding principles that WTO members are exhorted to follow.<sup>203</sup> These principles are relevant because they suggest that the WTO may be able to accommodate various “framework” agreements that are nonbinding guidance to members on matters of domestic regulation or oversight. But this proposition also relies on a limited track record; the GATT and now the WTO have not been structured as forums to help governments consult broadly on shared regulatory problems.

*The Working Group on the Interaction Between Trade and Competition Policy*

The inclusion of competition policy into the Singapore Work Program in December 1996 and the formation of the Working Group on the Interaction Between Trade and Competition Policy were important developments in the WTO. They may reflect a recognition that competition policy can work in tandem with trade policies and efforts at regulatory reform to foster markets that are more open, contestable and competitive, to the benefit of foreign and domestic interests alike. At the same time, a discussion of competition policy within WTO also reflects the long-standing recognition that private restraints can nullify the benefits of negotiated trade liberalization measures, thereby reducing the benefits of the negotiated trade bargains and potentially the very support for liberalization of trade.<sup>204</sup>

This Advisory Committee’s review of the work undertaken by that Working Group since its inception suggests that it has been constructive and active. It has construed its mandate to consider a very broad set of issues such as the relationships among the objectives, principles, scope, and instruments of trade and competition policies; the types and effectiveness of existing instruments, standards, and activities regarding trade and competition policies; and the interaction between trade and competition policies, including a review of the effects of anticompetitive firm practices state monopolies on international trade,

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<sup>202</sup> Technically, this moratorium expired in January 2000.

<sup>203</sup> See WTO, Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector, S/WPPS/4 (Dec. 10, 1998).

<sup>204</sup> The 1960 GATT Decision on Arrangements for Consultations on Restrictive Business Practices, for example, “recognizes that business practices which restrict competition in international trade may hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade.” GATT Resolution, BISD 28 (9<sup>th</sup> Supp, 1961)

and the relationship between trade-related aspects of intellectual property and investment and competition policy.<sup>205</sup>

As of this writing the Working Group has held 10 formal meetings since it was established in December 1996 and received a total of 129 written contributions, about 60 of which have come from developing or transition countries. In addition, papers have been submitted from other international organizations, from the WTO Secretariat and from the Chairman. The report of the Working Group chronicles not only a very broad range of issues examined, but many areas where WTO members disagreed.

It was clear from the outset that the initiation of the Working Group did not mean that international negotiations in the area of competition policy were a foregone conclusion. The Ministerial Declaration stated that the work undertaken in the competition policy arena (and other areas) “. . . shall not prejudge whether negotiations will be initiated in the future . . .”<sup>206</sup> However, the Chairman of the Working Group has noted that its discussions have heightened the understanding that the interface of international trade and competition has to be addressed in some way. Moreover, the debate has obliged competition enforcers to “abandon their situation of splendid isolation,” with a corresponding recognition by trade officials of the limits to negotiation as a means of securing access to markets.<sup>207</sup> It seems that the dialogue and hard work undertaken by the Working Group has already made a contribution.

### **Views on the Appropriate Role for the WTO**

The question now facing policymakers is what further steps, if any, should be undertaken at the World Trade Organization in the area of competition policy? This is a question of continuing relevance in light of attempts to initiate a next round of multilateral trade talks, sometimes called a Millennium Round, sometime in the future. Should competition policy be part of the negotiating framework for a resurrected Millennium Round? If so, what should be considered: a set of rules subject to dispute settlement procedures; frameworks for transparency and nondiscrimination obligations to remove bars to market access; or some other aspect of the problem? What is the appropriate role for the WTO over the longer term on competition policy matters? The questions were raised before the Seattle Trade Summit of December 1999 and continue after its inconclusive end.

In the course of its outreach activities, the Advisory Committee heard from senior officials from more than 10 jurisdictions, as well as business groups, lawyers, academics, representatives from

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<sup>205</sup> See 1998 WTO Trade and Competition Working Group Report at 8.

<sup>206</sup> See Singapore Ministerial Declaration, Para. 20, WT/MIN (96)/Dec. (Dec. 13, 1996).

<sup>207</sup> Frederic Jenny, *Globalization, Competition and Trade Policy: Issues and Challenges*, in TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION 3 (Roger Zäch, ed., 1999)

international organizations, and other experts on these questions. The scholarship in this area is also vast, and the Advisory Committee staff has considered much of it. This Advisory Committee has also given close consideration to the views expressed by U.S. and foreign competition officials.

### *Views of Governments*

As noted, the WTO Working Group received submissions and participation from many countries. A full recounting of those views is not possible here. In addition, the positions of a number of jurisdictions have altered somewhat in the run-up to the Seattle summit. The positions of a few jurisdictions are described below as they represent important polarities.

**U.S. GOVERNMENT:** While actively supporting the deliberations of the WTO's Trade and Competition Policy Working Group, the U.S. government has taken a cautious tone regarding the WTO's role as a forum for negotiating any rules or framework governing competition policy. Assistant Attorney General Klein has argued on numerous occasions that for the time being, he sees greater practical value in bilateral cooperation arrangements, such as those the United States has entered with Australia, Canada and the European Commission than in negotiated rules at the WTO. This network of bilateral arrangements, coupled with technical assistance to new regimes and dialogue at the OECD, WTO, regional groupings, and other international forums, have been the core policy elements of U.S. international antitrust policy.

Klein has also raised several concerns about the WTO venturing into the terrain of competition policy.<sup>208</sup> In Klein's view, the global community does not yet fully know what key trade and competition questions may benefit from binding international agreements, let alone whether there is any possibility of developing a consensus on these issues. Additionally, it is not clear that the WTO is well suited to solving practical antitrust problems. Moreover, Klein has said, WTO oversight of antitrust actions by governments would "involve the WTO in second-guessing prosecutorial decision making in complex evidentiary contexts -- a task in which the WTO has no experience and for which it is not suited -- and would inevitably politicize international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making."<sup>209</sup>

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<sup>208</sup> See e.g., Joel Klein, *No Monopoly on Antitrust*, FINANCIAL TIMES, February 13, 1998 at 20, in which Assistant Attorney General Klein stated: "The U.S. experience has shown that a crucial component of international competition policy is cooperation in the enforcement of national or regional competition laws . . . . What is needed is to develop a culture of sound antitrust enforcement, built on the basis of shared experience, bilateral cooperation, and technical assistance to countries just starting down this road."

<sup>209</sup> See Joel Klein, Assistant Attorney General For Antitrust, U.S. Department of Justice, *A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust*, Address before the OECD Conference on Trade and Competition (June 30, 1999) at 6.



THE EUROPEAN UNION: While stressing the importance of effective bilateral cooperation as a foundation, former External Affairs Commissioner Sir Leon Brittan and former Competition Commissioner Van Miert have been forceful advocates of a new round of multilateral negotiations focusing on developing a set of competition rules and holding governments responsible for the implementation of those rules. EU officials have proposed that the initial negotiations focus on requiring countries to adopt competition laws based on “core principles” that include rules on restrictive business practices and abuse of market power; provide adequate and transparent enforcement; and provide for international cooperation through exchange of nonconfidential information, notification, and positive comity provisions. Broader substantive coverage could be considered over time, these officials say. The EU proposal suggests that these rules should be subject to dispute settlement, initially only for breaches of common principles or rules relating to the adoption of a competition law structure or that do not appropriately cover agreed disciplines on anticompetitive practices of an international dimension. Dispute settlement might also be used for alleged “patterns of failure to enforce competition law in cases affecting the trade and investment of other WTO members.” Individual cases would not be examined.<sup>210</sup> A group of leading European experts in an influential report in 1995 supported this general approach, but without the nuance limiting the applicability of dispute resolution.<sup>211</sup>

The EU position appears to have some support from the governments of Australia, Canada and Japan, although each of these three jurisdictions also has advanced its own nuanced position on the issues. For example, Japan appears to support the development of international competition rules but also appears to have aligned itself with developing country perspectives, particularly from the Asia-Pacific region, by stressing that multilateral examination of competition policy must also consider antidumping issues.<sup>212</sup>

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<sup>210</sup> See K. 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, (Apr. 17, 1999).

<sup>211</sup> The experts called for movement on two fronts: first, a further deepening of existing forms of bilateral cooperation; second, the gradual construction of a plurilateral agreement inclusive of a “dispute settlement procedure based on a set of jointly determined competition rules.” The EU experts group argued in favor of establishing minimum rules and then gradually expanding the number of countries signing on to those rules. It suggested common principles (e.g., prohibition of cartels, building from the OECD Recommendation in this area) in some instances and rule of reason for other -- e.g., vertical restraints. The report argues for harmonization of procedures in the merger field to give authorities sufficient time to consult each other. Further that state trading enterprises be subject to the same competition rules as commercial enterprises. At the international level, that group suggested that the WTO serve as a forum for analyzing and possibly extending the principles; registering anticompetitive practices and providing for dispute settlement procedures. EUROPEAN COMMISSION, REPORT OF THE GROUP OF EXPERTS: COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING INTERNATIONAL COOPERATION AND RULES (July 1995).

<sup>212</sup> At the Advisory Committee hearings, the senior Japanese JFTC representative stated: “We also consider that the possibility of making international common rules on competition law and policy should be studied, examining merits and demerits of such rule-making.” See Testimony of Takaaki Kojima, Deputy Secretary General, Japan Fair Trade Commission, ICPAC Hearings (Nov. 2, 1998), Hearing Transcript at 86-87. In addition, on August 25, 1999, Japan tabled a formal proposal on competition policy. See Communication from Japan, Preparations for the 1999 Ministerial Conference, Trade and Competition, WT/GC/W/308 (August 25, 1999).

The head of the Canadian competition authority told the Advisory Committee that the Canadian government concurred with much of the EC proposal. Konrad von Finckenstein urged that work begin at the WTO toward establishing a sound multilateral competition framework and noted that the key building blocks are in the process of being worked out in the OECD. Von Finckenstein suggested that the developing OECD consensus in several areas, including a common approach to abuse of dominance, core principles, and minimum elements for a competition law and antitrust enforcement be formalized, moved into a plurilateral agreement, and combined with a dispute settlement mechanism designed to ensure that members implement these minimum commitments in accordance with their own jurisprudential and legal traditions. Von Finckenstein said the dispute settlement mechanism should not be able to question a country's application of its own antitrust laws.<sup>213</sup> Another Canadian official more recently stated that the Canadian government supports a framework agreement at the WTO "which would include an obligation for member countries to adopt sound competition law, as well as new options for dispute settlement that respect the competence of national authorities."<sup>214</sup>

The head of the Australian competition authority, Dr. Allan Fels, testified at the Advisory Committee hearings that in his view, the WTO and the OECD "should be used as discussion forums. . . . In the longer term, it's likely . . . that [the WTO will] take on an enhanced role in the interface between trade and competition policies. If it does this, it's important that the principles of competition policy should govern the WTO's work."<sup>215</sup> Several other jurisdictions have indicated to the WTO that they are at least sympathetic to expanded disciplines at the WTO.<sup>216</sup>

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<sup>213</sup> See Submission of Konrad von Finckenstein, Director of Investigation and Research, Canadian Competition Bureau, ICPAC Hearings (Nov. 2, 1998) at 4-6.

<sup>214</sup> See Statement of the Honorable Pierre S. Pettigrew, Minister of International Trade, Address before the Joint Meeting of the Canadian Club of Toronto, the Canadian Institute of International Affairs and the Toronto Board of Trade (Nov. 26, 1999).

<sup>215</sup> See Submission of Allan Fels, Chairman, Australian Competition and Consumer Commission, ICPAC Hearings, (Nov. 2, 1998) at 6.

<sup>216</sup> Korea's submission to the WTO supported the development of core principles and rules on competition policy with a dispute settlement mechanism but also proposed grace periods for the application of the rules according to the level of each Member's economic development, exemptions of certain obligations, waivers, reservations and technical assistance. Communication from Korea, Preparations for the 1999 Ministerial Conference, Trade and Competition, WTO, WT/GC/W/298 (August 6, 1999). Norway also supports a multilateral horizontal framework on competition within the WTO, taking due account of the particular needs of Members at different stages of development through transitional arrangements and technical assistance. See Communication from Norway, Preparations for the 1999 Ministerial Conference, Competition, WTO, WT/GC/W/310 (September 7, 1999). In a WTO submission, Venezuela has also proposed the "development of multilateral competition rules" without any further elaboration as to the suggested content of the rules. See Communication from Venezuela, Preparations for the 1999 Ministerial Conference, Proposals Regarding the GATS Agreement (Paragraph 9(a)(ii) of the Geneva Ministerial Declaration), WT/HGC/W/281 (August 6, 1999). Turkey agrees that "a multilateral approach on competition would be helpful to achieve the objectives of the WTO," and recommends that "future work should be focused on studies to reach a common understanding on the issue." Moreover, "a multilateral framework of competition rules should include provisions for transitional periods . . .

LESS DEVELOPED COUNTRIES: Several developing countries have expressed some doubts about the value of negotiations on competition policy. For example, Kenya, on behalf of the African Group, noted that only a limited number of African countries have domestic legislation on competition law and policy or effective enforcement agencies. The African Group advocates continuation of the educative, exploratory, and analytical work of the Working Group on the Interaction Between Trade and Competition Policy with increased technical assistance to developing countries.<sup>217</sup> In its own individual submission to the WTO, Kenya noted that some developing countries view the inclusion of competition policy in the multilateral trading system as a way of “clipping the wings” of comparatively stronger firms of developing countries so that “they do not withstand the competition with the well established firms of the developed countries.”<sup>218</sup> Therefore, Kenya proposed that any multilateral competition regime should consist of a code of conduct for transnational corporations aimed at curbing unfair trade practices.<sup>219</sup>

South Africa has also proposed a thorough educational process that would take into account the “huge analytical demands on developing countries regarding the preparations of the next round” of negotiations. South Africa suggested this prenegotiation process should span at least two years with resources made available to developing countries to ensure meaningful participation in the formal negotiations.<sup>220</sup>

### *Business and Labor Viewpoints*

The U.S. and international business communities have commented on the appropriate role for the WTO regarding competition policy. In the United States, the Business Roundtable has consistently held that competition policy negotiations at the WTO are both “unnecessary and potentially counterproductive.”<sup>221</sup> According to the Business Roundtable, negotiations should not proceed in the absence of an international consensus on competition policy, uncertainty about the WTO’s institutional competence on competition policy matters, and the possibility that developing countries might use the negotiations to “disturb the carefully crafted multilateral balance embodied in the WTO Antidumping

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. to allow Members at different stages of development to subscribe to the commitments. . .” See Communication from Turkey, Preparations for the 1999 Ministerial Conference: Competition Policy, WT/GC/W/250 (July 13, 1999).

<sup>217</sup> See Communication from Kenya on behalf of the African Group, Preparations for the 1999 Ministerial conference, The Interaction Between Trade and Competition Policy, WT/GC/W/300, August 6, 1999.

<sup>218</sup> See Communication from Kenya, Preparations for the 1999 Ministerial Conference, Contribution to the Preparatory Process, WT/GC/W/233, July 5, 1999, at p. 9.

<sup>219</sup> *Id.*

<sup>220</sup> See Communication from the Republic of South Africa, WT/WGTCP/W/138, October 11, 1999, at 2, 4.

<sup>221</sup> See Business Roundtable Submission at 4.

Code.” The organization said a more appropriate role for the WTO would be to establish a new work program to assist governments in framing competition policy issues, to act as an information clearinghouse, and to provide technical assistance.<sup>222</sup>

Both the U.S. Council for International Business and the International Chamber of Commerce believe that a basis has not yet been established for international agreement in the WTO on competition principles or rules. “Thus, consideration by the WTO Working Group of a dispute settlement mechanism coupled with new international rules governing competition policy would be premature,” the USCIB’s president told the Advisory Committee. Both groups do support continued education in this area.<sup>223</sup>

Labor representatives have also been reluctant to support competition policy negotiations at the WTO at this time. In a presentation before the Advisory Committee, a representative of the AFL-CIO expressed skepticism about the value of WTO competition policy negotiations, arguing that an international consensus on competition policy does not exist and national policies are still too divergent to expect that there would be compliance with such rules.<sup>224</sup>

### *Other Expert Views*

Although the empirical work assessing the effect of private restraints on international trade flows is quite limited, the scholarly and expert commentary on the question of competition policy and its possible nexus to the WTO is extensive. Three of the more prominent approaches offered by and debated among these experts are summarized here.

**A MULTILATERAL ANTITRUST CODE:** Perhaps the most all-encompassing proposal that has been advanced in recent years is one calling for a world antitrust code, with substantive principles to be administered by a supranational competition authority. In 1993 a private group of 12 scholars and other experts meeting in Munich (the “Munich group”) proposed an International Antitrust Code, which would set out minimum standards to be incorporated into the WTO (as an Annex 4 Agreement). Those standards in turn would be enforceable in domestic jurisdictions by national enforcement agencies. Disputes would be adjudicated by a permanent international antitrust panel, operating as part of the new dispute settlement regime. The minimum standards would cover specified principles of competition law; national treatment; supervision of enforcement by an independent authority empowered to request domestic authorities and courts to initiate investigations; and intergovernmental dispute settlement procedures.

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<sup>222</sup> *Id.*, See also THE BUSINESS ROUNDTABLE, PREPARING FOR NEW WTO TRADE NEGOTIATIONS TO BOOST THE ECONOMY (May 1999).

<sup>223</sup> See USCIB Submission at 2. See also International Chamber of Commerce, Joint Working Party on Competition and International Trade, “Statement on Future WTO Work on Competition and Trade,” (Nov. 3, 1998).

<sup>224</sup> See Lee July 14, 1999 ICPAC Meeting Remarks at 15.

CREATION OF NATIONAL COMPETITION REGIMES: Another approach, akin to that being advanced by the EU, argues in support of WTO competition rules to support the development of structural features of competition regimes. Under this proposal, the WTO would establish a set of rules, subject to dispute settlement, that requires countries to enact national laws; allows for private suits; seeks to guarantee political independence of administrative agencies; promotes nondiscrimination; abolishes antidumping laws; prohibits strategic antitrust policy; provides procedural minimum standards for merger review; and expands cooperation between authorities.<sup>225</sup>

GENERAL PRINCIPLES: Rather than a patchwork of competition-type undertakings in sectoral WTO agreements on the one hand or a binding set of competition rules on the other, several experts have advanced proposals that center on the development of new general principles at the WTO. In 1999, then-Deputy Secretary-General of the OECD, Joanna Shelton, suggested that the WTO could develop a set of “core principles,” both procedural and substantive, upon which there could be broad agreement.<sup>226</sup>

Parties would bind themselves to abide by the core principles, but the specific rules that they adopt for doing so would not be subject to dispute settlement. The multilateral approach should provide some nonbinding suggestions about possible common approaches to aid nations in designing and enforcing substantive criteria such as the tests to assess the legality of horizontal agreements, vertical restraints, abuse of dominance and proposed mergers.

Other experts have argued along similar lines that nations should negotiate a set of procedural rules or principles of competition policy and then make those rules an Annex 4 or plurilateral agreement that would not be subject to dispute settlement procedures at all.

Some experts have suggested that the central challenge to the WTO is to develop an antitrust market access principle as a correlative to the market access principle underpinning trade laws.<sup>227</sup> One formulation of this approach argues that such principles would imply a duty not to block access to markets by anticompetitive means. Each nation would be responsible for implementing this principle in its national laws. This duty would apply both to governmental and private restraints. This approach envisions that the formulation of a precise principle on anticompetitive market blockage would not be necessary because the proposal itself contemplates a choice-of-law principle: the law of the excluding nation would apply. Implementation would require that nations provide effective discovery, fair process, and sufficient remedies. National policies would have to be clear and nondiscriminatory. The WTO would be charged with

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<sup>225</sup> See Khemani and Schöne.

<sup>226</sup> See Shelton, *Competition Policy*.

<sup>227</sup> See e.g., Eleanor M. Fox, *International Antitrust: Against Minimum Rules; for Cosmopolitan Principles*, 43 THE ANTITRUST BULL. 5 (1998); and Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L 1 (1997), who would do the same but would limit the scope to private restraints that unreasonably impair market access.

monitoring whether nations were adopting and enforcing the principles. Remedies might include mandatory injunctions to implement the undertakings and could include fines and compensatory damages rather than retaliatory trade action.

Recently, a joint ABA Antitrust and International Trade Section Task Force produced a report considering the intersection of trade and competition policy. Without specifically offering a view on the appropriate role for the WTO, the thrust of that report urges governments to take action against private anticompetitive practices that restrain market access by foreign competitors in ways that substantially lessen competition in the markets within that government's jurisdiction. The task force did not suggest that governments agree on the details of substantive antitrust law or procedure, but rather that governments take actions consistent with the principles of national treatment and most-favored-nation treatment as well as provide a fair, transparent process, accessible to foreign companies, where complaints can be made of access-denying practices and a resolution will be reached within a reasonable period of time. The ABA took no position as to what, if any, dispute resolution mechanism should be established to deal with the situation where one country is aggrieved by another country's failure to take action against an access-denying private practice that substantially lessens competition.<sup>228</sup>

All of the approaches that focus on the development of new principles share a common interest in integrating antitrust into a larger market access framework rather than trying to maintain a strict boundary between private and public restraints.

### **The Seattle Ministerial and Its Treatment of Competition Policy**

As proved true for many issues on the agenda at the Seattle Trade Summit in December 1999, the treatment of competition policy was not fully vetted, and language in the draft declaration on competition policy did not represent consensus language.<sup>229</sup> Moreover, the position of all WTO members on the issue

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<sup>228</sup> ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES at 109-110.

<sup>229</sup> The language that was produced for the negotiations and contained in the Draft Declaration as of December 3, 1999, reportedly stated:

“41. Building on the work done on the interaction between trade and competition policy, we agree to continue the educational and analytical work, based on proposals by Members. The issues on which this work shall focus shall include core principles of competition policy and of the WTO, approaches to anticompetitive practices of enterprises, appropriate modalities and support mechanisms for exchange of experience and other forms of cooperation, and measures to address the particular needs and situations of developing countries.

42. This work shall be purposeful and focused and aim to assist all Members to prepare for, and adequately assess the possible implications of negotiations on this issue.

A report on this work shall be presented to the Fourth Ministerial Conference, which shall decide whether specific guidance is needed for any negotiation to be launched at that time under the single

of competition policy and its treatment at the WTO has not been fully disclosed. However, USTR Charlene Barshefsky has suggested that the EU was virtually alone in its interest in global negotiations on competition policy. She has stated publicly that “efforts to launch negotiations will falter again if the EU insists on negotiations on investment and competition rules for which there had been no support among members. It was clear in the smaller Green Room meetings at Seattle that full-scale negotiations on investment, competition policy, government procurement, and possibly other areas are not supported by the ‘vast, vast, vast majority’ of members.”<sup>230</sup>

### **The Advisory Committee’s Assessment on a Role for the WTO**

This Advisory Committee was not of an entirely shared view on the appropriate role for the WTO over time; however, unless otherwise indicated, the recommendations and perspectives that follow reflect consensus views.

The Advisory Committee believes that the two extremes of the spectrum described above do not offer realistic approaches to the complex problems associated with trade-distorting governmental and private restraints. Namely, this Advisory Committee sees efforts at developing a harmonized and comprehensive set of multilateral competition rules administered by a new supranational agency as not only unrealistic but also unwise. It is apparent that the laws of the industrialized countries have already converged to some extent, but the differences that remain are still substantial, and such differences are probably the most resistant to harmonization. Hence, there is limited likelihood of binding agreement on substantive standards except at the highest level of generality or perhaps with respect to hard-core cartels. This inability to reach convergence in approach as well as structure is even more severe where developing countries are concerned.

The Advisory Committee is not arguing against efforts at promoting soft convergence -- far from it; several proposals that this Advisory Committee believes would be useful efforts along those lines are discussed later in this section. However, deliberations and consultations on substantive as well as procedural features of competition policy regimes are different from the negotiation of a comprehensive international antitrust code. Even if a greater degree of formal harmonization of law than envisioned here were achievable, it is fanciful to imagine that jurisdictions with established competition policy regimes would be prepared to cede national authority to review cases that adversely affect them to a new supranational authority. To establish such a body requires a shared vision and commitment to economic integration that does not currently exist among nations.

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undertaking.”

As of this writing, the status of the WTO Working Group and the immediate next steps are unresolved.

*See* INSIDE U.S. TRADE, *Special Report*, December 10, 1999 at 10.

<sup>230</sup> *See* INSIDE U.S. TRADE, Vol. 17, No. 51, at 3, December 24, 1999.

The other end of this spectrum is equally untenable over the medium term. That is the proposition that purely national approaches are sufficient and that broader international engagement is not necessary. This viewpoint ignores both the costs of the current sources of disharmony among nations and, equally important, the opportunities that now appear to exist for productive collaboration among competition authorities as well as between trade and competition authorities, including at the WTO.

Hence this Advisory Committee believes that attention should be focused on the substantial middle ground, where there is a constructive role that the WTO can and should be encouraged to develop with respect to competition policy. At the same time, the Advisory Committee members were not of a unanimous view about the role of the WTO regarding private restraints of trade, nor about whether new substantive or procedural obligations subject to dispute settlement might usefully be included in WTO rules.

This Advisory Committee recommends that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. A great deal of trade liberalization still remains to be accomplished, and much of that agenda can itself have a positive impact on the environment for competition policy around the world.

Because of the diversity of national experiences with competition laws and policies, the Advisory Committee has given considerable attention to whether the WTO could and should serve as an educational and deliberative forum on the full range of competition problems that exist in the world today. Clearly, many competition policy issues would benefit from expanded international consideration and deliberation. But, as this Advisory Committee has noted earlier, not all competition policy problems are trade problems, and simply because a practice is trade-related does not automatically mean that it should be subject to WTO rules or review.

The efforts of the WTO Working Group on the Interaction Between Trade and Competition Policy are promising, but not definitive. The activities of the WTO continue to evolve and the United States may be taking too narrow a view if it assumes that the WTO can serve *only* as a forum for the negotiation of rules that are subject to dispute settlement; it may be able to serve also as *a deliberative and educational body over time*. Competition policy issues that are fundamentally international in nature should be receiving attention in multiple international fora. Such discussion could lead to consensus on some points and at least to an improved understanding of differences on others. The momentum that has built in the WTO could be useful in this regard, and its potential should be developed. Hence, this Advisory Committee recommends that the U.S. government and the Department of Justice undertake efforts to nurture this role for the WTO, but to do so with modest expectations for the medium term and not to the exclusion of other international initiatives. Moreover, to the extent that the WTO appears to be able to focus usefully only on those features of a global competition policy agenda that are directly related to the trade and market access issues, then the Advisory Committee urges that other competition policy-centered initiatives be undertaken elsewhere.



The Advisory Committee further recommends that in the near term the U.S. government support and pursue additional incremental steps at the WTO to deepen the work already under way to understand the relationship between trade and competition policies and the effect on international markets of private and public restraints.

To this end, the Advisory Committee recommends several specific steps that could be taken, all of which are intended to make the WTO a more “competition policy friendly” environment. The most obvious step in this direction would be the continuation of the deliberations of the Working Group on the Interaction between Trade and Competition Policy. As noted earlier, that Working Group has had a productive start, but it is still in its early stages of deliberations. The Working Group should develop an active work program and be the focal point for dialogue on issues where both trade and competition issues arise.

Additionally, the Advisory Committee recommends that competition policy expertise be expanded at the WTO and in the country missions, wherever possible. The WTO should conduct regular summary reports or review of those countries that have competition laws or policies in place. For example, competition policy could be made a regular element of the country reviews conducted under the Trade Policy Review Mechanism (TPRM), which provides a broad mandate for multilateral surveillance of members’ trade policies and practices. Such reviews could consider national competition policies from the perspective of core WTO disciplines such as transparency, nondiscrimination and accountability; this type of peer review, currently undertaken with respect to some jurisdictions, would be consistent with the interest in the EU and the United States in seeing the development of transparent, nondiscriminatory competition policy regimes around the world.

While this Advisory Committee does not believe that the WTO should *oblige* countries to introduce competition laws, if countries choose to introduce such domestic policy measures then the WTO should be one of the institutions capable of supporting the development of sound competition policy regimes around the world consistent with these WTO principles.

Although U.S. and EU official views appear to be in tension on the specific question of whether the next round of multilateral negotiations should include negotiations of horizontal rules covering competition policies at the WTO, there seem to be points of agreement between the U.S. and EU in several other areas that this Advisory Committee believes offer the basis for constructive collaboration. For example, the EU and the United States are forceful advocates for bilateral cooperation agreement and have entered into a detailed and forward-looking bilateral cooperation agreements that can serve as a model for much of the rest of the world. Moreover, both jurisdictions have a shared interest in the development of sound competition regimes around the world, and both jurisdictions are putting considerable effort into technical assistance and institution building. The Advisory Committee urges the U.S. government to build upon these areas of overlapping interests, not only between the United States and the EU, but between and among all interested jurisdictions. Obvious areas include development of bilateral cooperation instruments, promotion

of best practices in competition policy and its enforcement, and improving understanding on problems that transcend national boundaries.

### *Private Restraints*

At this juncture, the majority of the members of the Advisory Committee believe that the WTO as a forum for review of private restraints is not constructive.<sup>231</sup> Governments have legitimate concerns about the ability as well as the appropriateness of the WTO in reviewing the decisions of their domestic regulatory authorities or the conduct of private business firms.

Even more fundamentally, trade policy may view a competition-market access problem differently than does competition policy. It is conceivable that private firms can engage in actions that inhibit access to the market for new and foreign entrants to the detriment of the international trading system. At the same time, such foreclosure may have other efficiency-enhancing features for domestic firms and the domestic economy and not be anticompetitive under local law. To say to the trade community that the foreclosure does not present a real market problem is just as unacceptable as to say to antitrust policymakers that its standards of law must shift in the context of international disputes to accommodate this perceived inequity. The notion of developing generalized principles enforced through national law are clearly an attempt to get at this dilemma.

That approach, however, poses somewhat different dilemmas: it may reduce the intrusiveness of WTO oversight of national judgements about private conduct, but it does not solve the likelihood that the principles will be very general and unable to provide a robust means of resolving concrete disputes among nations. Also, and importantly, 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. Given these limitations, together with the more fundamental lack of international consensus on the appropriateness of rules or dispute settlement in this area, the majority of the Advisory Committee believes that the WTO should not seek to encompass new competition rules.

Although it is not a fully satisfactory solution in the near term, national authorities are best suited to address anticompetitive practices of private firms that are occurring on their territory. For this reason, and because there is no sound foundation of competition law and policy regimes around the world, efforts at this time should be focused on supporting and encouraging the development of such systems. If private business practices that restrict market access are occurring in a jurisdiction that does not have a competition law or the authority is unable or unwilling to remedy the problem, then the harmed nation may be able to apply its own laws extraterritorially. If relief is not practicable (perhaps because of an inability to obtain

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<sup>231</sup> Advisory Committee Member Eleanor M. Fox believes, to the contrary, that artificial public and private market-blocking restraints are two sides of one coin, and that nations should be held accountable for them in the context of the WTO. See Eleanor M. Fox, *International Antitrust: Cosmopolitan Principles for an Open World, Chapter 16* in 1998 FORDHAM CORP. L. INST. (Barry Hawk, ed. 1999). See also her Separate Statement to this Report in Annex 1-A.

necessary evidence), then it may be the case that the harmed nation simply has limited relief available to it under the current system. This may be an appropriate subject of international consultation; it seems, however, less appropriately a matter for WTO dispute settlement.

*Mixed Governmental and Private Restraints*

Over the longer term, the issue of restraints that stem from a mix of governmental and private conduct is closely tied to the conduct of governments; this is therefore an area where this Advisory Committee can envision that the WTO will be called upon to consider disputes between nations that hinge on whether private practices that foreclose access to markets are encouraged or supported by governmental practices. At a minimum, dissatisfaction by some parts of the international trade and business community is likely to continue to result in some interest in developing new tools or approaches (be such approaches unilateral or multilateral) to address mixed public-private restraints that are seen as undermining open markets. The effects of public sector regulatory measures on market access, especially if discriminatory though facially neutral, might also constitute a type of mixed public-private restraint and should be considered within this context as well. The WTO has already witnessed several trade cases that bear this profile. One can easily envision any number of circumstances -- and this Advisory Committee has certainly heard testimony from experts, executives and trade associations to this effect -- that suggest the problem of mixed public-private restraints is real and likely to recur as a source of tensions between nations.

The discussion in this Report has recognized that the WTO currently has several large loopholes that pertain to such practices. First, governments can avoid their open-market obligations by letting their firms close the market; in those circumstances the responsibility does not lie with the government, and hence the WTO has a limited, if any, voice on the matter. Second, governments may be able to avoid an obligation by showing that their restrictive measures were in place when, for example, lower tariffs were negotiated; therefore the complaining WTO member had no reasonable right to expect that the market would be free of the problematic restraints. Third, and perhaps most complex, where some part of the restraint is state-imposed or inspired and some portion is the result of firm practices, the system as it stands requires that any complainant elect to go forward under antitrust law or trade law. In so doing, the claimant, therefore, must prove two aspects of a problem under separate tracks, and the understanding of the problem can be diluted or seen as no problem at all.

The Advisory Committee believes that the anticompetitive closing of foreign markets is a significant disruption in the world trading system. It is important that international initiatives be undertaken that can help to resolve these problems. Several specific proposals are advanced in the chapter that follows, most notably the suggested creation of a new Global Competition Initiative.

As the world moves into the next century and new countries join the WTO, the problems of market access will surely deepen, and the line between public and private restraints will become increasingly opaque. Hence, it is a particularly important area of attention by trade and competition policymakers.

## **SUMMARY OF RECOMMENDATIONS**

The Advisory Committee believes that there is no single approach that responds to all aspects of competition problems facing the global economy and U.S. firms. Several different approaches may be promising. Bilateral agreements with positive comity offer a potentially useful instrument for addressing private restraints. The extraterritorial enforcement of U.S. antitrust laws can be necessary and prove effective under some circumstances. Importantly, in the view of this Advisory Committee, economic globalization requires the further development of international competition policy initiatives. Through certain adjustments in each of these approaches, United States policy can improve upon its approach to problems that intersect both trade and competition policy concerns.

### **Bilateral Agreements with Positive Comity**

1. The U.S. Department of Justice should build on the U.S. - EC positive comity agreement as a model for future agreements and should continued to expand the jurisdictions with which it enters into bilateral cooperation agreements.
2. It may be possible to improve upon the structure of positive comity provisions still further. The Advisory Committee proposes several specific recommendations to increase communication and transparency in the positive comity process.
3. In addition to visible support for positive comity by competition enforcement agencies, international organizations that address trade and competition issues also should endorse the benefits associated with positive comity in their mission. By advertising the advantages reaped from effective positive comity cooperation, international organizations hold the potential to expand such cooperation to nations or jurisdictions that have similar antitrust laws and enforcement policies.
4. As a means to ensure that aggrieved U.S. firms view positive comity tool as a serious policy option for addressing anticompetitive practices in foreign markets, the Department of Justice should make a conscientious effort to implement and test recent bilateral agreements with positive comity provisions as a first response to solve real problems, when meritorious cases arise.

### **U.S. Enforcement To Gain Market Access**

1. Although the Advisory Committee believes that the United States should develop incentives to obtain foreign authorities cooperation, U.S. antitrust laws should not be weakened in an effort to obtain such assistance. For example, the Advisory Committee believes in maintaining treble damage liability in cases where the only antitrust violation alleged is harm to U.S. export commerce.

2. Private and governmental litigation can raise traditional comity concerns on the part of foreign governments. Improvements should be sought in the process and standards by which competing interests are balanced for comity purposes. To that end, the Advisory Committee recommends that federal, state, and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy invite concerned governments, including the U.S. Department of Justice, to submit their views at an early stage in the litigation. Such “airing of views” commonly takes the form of *amicus curiae* submissions.
3. The Advisory Committee recognizes that U.S. extraterritorial antitrust enforcement against foreign market-blocking restraints is a sensitive issue for foreign governments that can affect antitrust enforcement cooperation efforts in particular and law enforcement cooperation more broadly. Because of these concerns and the potential obstacles discussed above, the expected results of extraterritorial enforcement against offshore restraints on U.S. exports should not be overestimated. *Indeed, it is for such reasons that the Advisory Committee recommends that a first step in attempting to address these restraints should be to consider whether it is realistic to approach the foreign nation where the practices occur and seek its cooperation.* Where such cooperation is not forthcoming, a willingness to use U.S. antitrust enforcement tools may have the salutary effect of acting as a lever to encourage excluding nations to pursue their own enforcement actions. A tenable U.S. antitrust enforcement effort against market-blocking restraints may contribute to a greater culture of cooperation and enforcement. *It is also essential to the credibility of U.S. antitrust enforcement that the business community have confidence that the Antitrust Division will vigorously pursue cases, including export restraint cases, wherever possible and when no superior alternatives (such as positive comity) are available.* Further, the Advisory Committee recommends that the U.S. antitrust agencies continue to have responsibility vis-à-vis trade agencies over legal determinations of the anticompetitive conduct of private firms, at home or abroad.
4. One of the most challenging aspects of U.S. enforcement against market-blocking restraints is developing adequate evidence of anticompetitive conduct. In any case that could result in an enforcement action, that information and analysis will be highly fact specific. Nonetheless, there remains considerable disagreement about the merits of particular disputes and the extent to which private, governmental, and mixed public-private restraints inhibit trade. It therefore may be useful to undertake some broader empirical analysis such as a study of the magnitude of global trade problems that stem from private or governmental restraints abroad or an analytical effort to evaluate the effects of recent transnational cases such as in the cartel area. Such a study would not establish definitive estimates, but it could provide a foundation of evidence or analysis for informed national decisionmaking and international discourse that could be updated, as needed.

## **The Role of International Organizations**

1. The Advisory Committee recommends that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. A great deal of trade liberalization has yet to be achieved and that agenda can itself have a positive impact on the environment for competition policy around the world.
2. The Advisory Committee also recommends that the U.S. government support and pursue additional incremental steps at the WTO to deepen the work already under way on the intersection of trade and competition policy. The WTO Working Group on the Interaction Between Trade and Competition Policy is a productive intergovernmental initiative engaging trade and competition officials from both developed and developing economies. To foster the work of this group, the Advisory Committee recommends the WTO undertake these illustrative and largely educational steps to make the WTO a more “competition policy friendly” environment.
  - C The most obvious step in this direction would be the continuation of the deliberations of the Working Group, which has had a productive start but is still in the early stages of deliberations.
  - C The WTO should increase the competition policy expertise at the WTO Secretariat and in the country missions, wherever possible.
  - C The WTO should continue to conduct regular summary reports or review of those countries that have competition laws or policies in place, possibly including such reports in the Trade Policy Review Mechanism.
3. At this juncture, the majority of the Advisory Committee believes that the WTO as a forum for review of private restraints is not appropriate. Given the limited likely results, the risks and the lack of international consensus on the content or appropriateness of rules or dispute settlement in this area, this Advisory Committee believes that the WTO should not develop new competition rules under its umbrella. Various concerns animate the Advisory Committee’s skepticism toward competition rules at the WTO, including the possibility that the quid pro quo nature of WTO negotiations could distort competition standards; the potential intrusion of WTO dispute settlement panels into domestic regulatory practices; and the inappropriateness of obliging countries to adopt competition laws. While recognizing that in some instances it may not be a fully satisfactory result, the Advisory Committee believes that national authorities are best suited to address anticompetitive practices of private firms that are occurring on their territory.
4. If anticompetitive and market blocking practices are occurring in a jurisdiction that does not have a competition authority or that authority is unable or unwilling to remedy the problem, then the

harmful nation may be able to apply its own laws in an extraterritorial fashion. If relief is not practicable (owing to an inability to obtain necessary evidence or other means), then it may be the case that the harmed nation simply has limited relief available to it under the current system. This may appropriately be a subject of international consultation. However, it is less appropriately a matter for WTO dispute settlement.

5. Over the longer term, the WTO may be called upon to resolve disputes between nations that hinge on whether private practices that foreclose access to markets are ultimately attributable to governmental practices. The ability of the WTO to resolve such disputes is not fully tested under the WTO's existing rules or jurisprudence and is an area that this Advisory Committee believes needs particular study and consideration by trade and competition policymakers in the years ahead. As the world moves into the next century, and as new countries join the WTO, the problems of market access will continue, and the line between public and private restraints will become increasingly opaque. Hence, it is a particularly important area of attention by trade and competition policymakers.