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The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?

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THE OTHER SIDE OF HARMONY: CAN TRADE AND COMPETITION LAWS WORK TOGETHER IN THE INTERNATIONAL MARKETPLACE?

JULIAN EPSTEIN*

INTRODUCTION	343
I. BACKGROUND	345
A. TWO PARALLEL UNIVERSES?	345
B. THE U.S. EXTRATERRITORIAL APPLICATION OF COMPETITION LAWS	346
C. EVOLUTION OF RECENT U.S. POLICY CHANGES	349
D. INTERNATIONAL DEVELOPMENTS IN COMPETITION LAW	354
II. CAN COMPETITION LAWS WORK IN CONCERT WITH TRADE LAWS?	360
A. DIFFERENT INSTITUTIONAL PERSPECTIVES	360
B. EVIDENCE OF PRIVATE AGREEMENTS REPLACING TRADE BARRIERS	362
III. PROPOSAL	364
CONCLUSION	368

INTRODUCTION

As the world's major trading partners travel down the path of harmonization of trade laws, they continue to defer consideration of the new "Achilles heel" of international trade: harmonizing the world's competition laws. Such a failure to grapple with this parallel track is encouraging gamesmanship in the international trading arena. As international trade agreements continue to strike down

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government-sponsored tariff and non-tariff barriers, privately sponsored restrictive agreements—frequently vertical anticompetition agreements beyond the reach of the World Trade Organization (“WTO”) sanctions—are replacing the old barriers to free and fair trade.

After briefly tracing the evolution of the application of U.S. competition law extraterritorially and developments in international competition law generally, I argue that international negotiators can no longer ignore this parallel track of international trade dealing with national competition laws of member states. Specifically, I propose a minimal international code of competition laws that should be mandated on all WTO member nations that are modeled on the *per se* violations found in the United States antitrust laws prohibiting such practices as price fixing, cartels, and output restraints. I use these as a baseline because the *per se* rules proscribe conduct that no country can persuasively argue as having redeeming economic value. If all countries are required to adopt those rules, the vexing problems of comity and judicial abstention should disappear for some offensive conduct. Beyond that baseline, however, I argue that it is foolish to attempt to impose an international competition regime because nationalist courts are ill-equipped to deal with differing economic traditions and concepts of competition and because attempts to harmonize widely divergent definitions of competition that arise from divergent jurisprudential experiences would be futile.

More appropriately, the WTO should cross the Rubicon, as it has begun to in 1994 with the Uruguay Round of the General Agreement on Tariffs and Trade,¹ and address private and hybrid government/private conduct that the governments of trading states tolerate. This will place the vexing issue of private anticompetitive

1. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreements] (creating the World Trade Organization and expanding rules of international trade) available at http://www.wto.org/english/docs_e/legal_e/final_e.htm; see also INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, FINAL REPORT 260-62 (2000) [hereinafter ICPAC REPORT] (describing competition policy features of WTO Agreements) at <http://www.usdoj.gov/atr/icpac/icpac.htm>.

conduct with transboundary consequences into the ambit of the WTO.

I. BACKGROUND

A. TWO PARALLEL UNIVERSES?

Traditionally, competition laws (primarily antitrust laws) are aimed at *private* behavior that limits competition and hurts consumers. If two parties conspire to fix prices, reduce output, or boycott economic competitors, antitrust laws provide both civil and criminal penalties to deter such conduct. Antitrust laws are traditionally thought of as protecting consumers' interests by maintaining vigorous competition. Competition laws are largely based on domestic legal principles, intended to maximize economic efficiencies, and enforced by judicial branches of government not ensconced in the ever-evolving nuances, standards, and diplomacy of international trade issues aimed at market access.

Trade laws, by contrast, are aimed at public behavior, whereby governments create tariff and non-tariff market barriers thereby protecting domestic producers at the expense of foreign competitors. Trade laws have international roots, and are enforced by international bodies comprised of representatives from executive and diplomatic branches of national governments who often settle disputes through negotiated solutions, not in the winner-take-all environment of a courtroom. Trade laws, unlike competition laws, are aimed at opening markets to exporters of member countries, not at optimizing marketplace efficiencies and consumer benefits. In short, the two bodies of law involve fundamentally different actors with fundamentally different institutional perspectives, cultures, methods of dispute resolution, and legal principles.

The notion that these two worlds peacefully coexist along parallel universes is, today, a fool's errand. As will be discussed in this article, there is a myriad of evidence that private agreements and hybrid government-private agreements are prevalent and are becoming the new barriers to a truly open and competitive

international marketplace.² Further, such conduct does not fall under either international trade laws or nationalist competition laws.³ The difficult policy question is determining whether the ambit of competition laws or the ambit of trade laws should be expanded to address conduct that frequently creates both marketplace inefficiencies and barriers to free trade. Further complicating the picture are the widely disparate economic cultures and concepts of fair competition that have created widely divergent jurisprudence among the global trading partners.

B. THE U.S. EXTRATERRITORIAL APPLICATION OF COMPETITION LAWS

During the course of the past century, there has been relatively sparse governmental or private use of the antitrust laws extraterritorially due largely to the norms of judicial and executive abstention. Comity is the central doctrine of abstention whereby courts will defer to the legal systems of countries where offending actions occur and will only provide a forum if there are unsatisfactory results after host country remedies are exhausted, and then, only if the injury to U.S. markets or consumers is direct and foreseeable.⁴ Positive comity refers to agreements between two countries to defer government suits under essentially the same criteria.⁵ In addition to comity, the Act of State doctrine, the Foreign Sovereign Immunity Act of 1976, and the foreign compulsion doctrine are all related doctrines of judicial abstention that attempt to

2. See ICPAC REPORT, *supra* note 1, at 211-26 (discussing anecdotal evidence of anticompetitive or exclusionary practices submitted to international forums such as the Organization for Economic Cooperation and Development ("OECD"), the WTO, and to the Advisory Committee by trade associations, individuals, and business executives).

3. See *id.* at 209 (noting the potential overlap of trade and antitrust policy tools in attempting to address anticompetitive practices).

4. See *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909-10 (1993) (describing the court's decision-making process when deciding jurisdiction under the principle of international comity).

5. See Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 365 (2001) (providing a definition of positive comity in the context of U.S.-EU antitrust relations); see Matthew Cooper, *The Role of Positive Comity Review*, 10 PAC. RIM L. & POL'Y J. 383, 399-404 (2001) (discussing the general implications of positive comity in antitrust enforcement).

restrain entry by the courts into economic policies and decisions of other sovereigns.⁶

The Supreme Court recognized the need for international comity soon after the antitrust laws were enacted. In 1909, in *American Banana Co. v. United Fruit Co.*,⁷ the Court refused to apply the Sherman Act's⁸ prohibitions on "anticompetitive" agreements against United Fruit — an American company — that successfully importuned the government of Costa Rica to adversely possess territory needed by American Banana to run its railroads and distribute produce. Here, the Court held that comity considerations would preclude second-guessing by the U.S. courts of official actions by the Costa Rican government.⁹

Thirty-four years later, in *United States v. Aluminum Company of America ("Alcoa")*,¹⁰ in a case involving a conspiracy to form an

6. The Foreign Sovereign Immunity Act creates judicial immunities, with certain exceptions, for foreign government actions that otherwise could be cognizable under the antitrust laws. See Foreign Sovereignty Immunity Act of 1976, 28 U.S.C. §§ 1602–11 (1994) (setting forth the codification of the Act); see also Edith Yvette Wu, *Evolutionary Trends in the United States Application of the Extraterritorial Jurisdiction*, 10 TRANSNAT'L LAW. 1, 6–16 (1997) (discussing generally the doctrine of sovereign immunity and the Foreign Sovereign Immunity Act of 1976 and the act of state doctrine). The act of state doctrine is a close judicial analogue to the statute that requires judicial restraint where acts in question are decreed by another government. See, e.g., *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398, 400–01 (1964) (describing the act of state doctrine in a judicial context). The foreign sovereign compulsion doctrine will restrain intervention where actors are required by host countries to engage in actions otherwise considered illegal. See, e.g., *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970). See generally U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, § 3.3 (1995) [hereinafter 1995 ENFORCEMENT GUIDELINES] (discussing the doctrines and the antitrust consequences of foreign government involvement) available at <http://www.usdoj.gov/atr/public/guidelines/interna.htm>.

7. 213 U.S. 347 (1909).

8. See Sherman Act, 15 U.S.C. § 1 (1994) (setting forth the basic antitrust prohibition against contacts, combinations, and conspiracies "in restraint of trade or commerce among the several states or with foreign nations" proscribed by the Sherman Act).

9. See *American Banana*, 213 U.S. at 356–57 (explaining that it would be contrary to the comity of nations to treat an actor under U.S. laws when the acts were committed in another jurisdiction).

10. 148 F.2d 416 (2d Cir. 1945).

international cartel involving Alcoa, a Canadian firm, and multiple European aluminum suppliers, the Second Circuit found that the Sherman Act could be applied to such a conspiracy as its impact had a direct and intended effect on U.S. consumers and judicial action in the U.S. and would in no way conflict with the laws and policies of other countries.¹¹ Soon afterward, the American Law Institute ("ALI") fused the two critical concepts in the Second Restatement of Foreign Relations Law by saying that in order for foreign conduct to be cognizable under U.S. antitrust laws, the conduct should induce intended effects in the United States, and the application of domestic antitrust law should not offend (then-evolving) comity principles.¹²

The courts applied the Second Restatement in 1976, when, in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,¹³ the Bank of America was able to persuade the Honduran government to seize Timberlane Lumber's land, in an alleged scheme to restrict the output of lumber into U.S. markets. The Ninth Circuit held that the Honduran government's direct involvement in sovereign policy blocked, under comity principles, the otherwise cognizable conduct of an effort that had the intent and effect of raising prices and lowering output of lumber in U.S. markets.¹⁴ Most importantly, the

11. *Id.* at 442-45. In *Alcoa*, Justice Hand found that the international cartel had both the intent and effect to create economic harm in the U.S. economy. *Id.* Without expressly stating so, Justice Hand may have presciently been distinguishing between harm to U.S. exporters as occurred in *American Banana* which would not be subject to the extraterritorial application of the Sherman Act, and harm to U.S. consumers, which would be subject to Sherman Act protections. *Id.* This distinction has been at the vortex of the debate as to how U.S. antitrust laws should be applied. See *infra* Part I.C. (discussing the U.S. policy changes shifts focusing first on harm to consumers then on harm to exporters).

12. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (noting that comity is "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.").

13. 549 F.2d 597 (9th Cir. 1976).

14. See *id.* at 610-615 (holding that comity analysis should involve a multi-pronged analysis that should consider conflicts with foreign sovereigns, the locus of the offending action, the nature of the conflict of laws with the foreign sovereign, how likely enforcement in a domestic court can achieve compliance abroad, the intended and actual injury within the U.S., and whether such injury was foreseeable).

court noted that the extraterritorial application would directly conflict with government action pursuant to Honduran law, and therefore, should be restrained.¹⁵ In 1987, the ALI adopted the reasoning of the Ninth Circuit in evaluating comity concerns.¹⁶

In *Hartford Fire Insurance Co. v. California*,¹⁷ the Supreme Court found actionable a boycott by U.K.-based reinsurers designed to coerce certain changes in U.S.-based primary insurers commercial insurance policies, because the conduct had, under *Timberlane*, intended and foreseeable effects within U.S. shores and because proscribing such conduct in domestic courts would in no way conflict with any laws or regulations of the United Kingdom.¹⁸ The boycotts were not sponsored or fostered by U.K. law.¹⁹

C. EVOLUTION OF RECENT U.S. POLICY CHANGES

Meanwhile, Congress and the Department of Justice were grappling with the other maelstrom of the extraterritorial application of U.S. antitrust law: whether the law should apply to conduct that hurts only exporters and not U.S. consumers.²⁰ An example of this

15. *Id.* at 610 (discussing implications of extraterritorial jurisdiction).

16. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (identifying factors which generally tract those in *Timberlane Lumber*). Those factors include the locus of the offending action, the relationship of the offending party to the country where offending action occurs, the significance of the laws allowing such conduct in the country where the offending action occurs and extent to which such policies may be consistent with international norms, whether the effects were direct, intended and foreseeable, and the extent of conflict with foreign law that enforcement in domestic courts would impose. See also 1995 ENFORCEMENT GUIDELINES, *supra* note 6, § 3.2 (discussing the relevant factors that the agencies take into account when enforcing antitrust laws under the doctrine of international comity).

17. 509 U.S. 764 (1993).

18. See *id.* at 798–99 (analyzing whether there is true conflict between domestic law and the law of the U.K.).

19. *Id.* at 798 (noting that the district court should not have declined to exercise jurisdiction notwithstanding that the reinsurers' activity might have been legal under British law).

20. See generally James S. McNeill, Comment, *Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction*, 28 CAL. W. INT'L L.J. 425, 448–52 (1998) (discussing generally judicial, executive and legislative branches' continuing attempts to establish clear U.S. policy on the issue

might be a cartel-like conspiracy of five foreign manufacturers located in a particular foreign country to tie-up distribution channels in that host country so as to prevent market access by U.S. competitors.

With the beginning of the Reagan Administration and a generally *laissez-faire* attitude towards antitrust enforcement, the then-new administration successfully persuaded Congress to pass the Foreign Trade Antitrust Improvements Act of 1982²¹ ("FTAIA") to limit the application of the Sherman Act to conduct that occurs and affects markets abroad.²² The ostensible purpose was to create a "level playing field" whereby U.S. firms, and their foreign competitors, were similarly not burdened with restrictive U.S. antitrust rules applicable to their conduct abroad.²³ It was argued, for instance, that while foreign competitors could enter into market-share agreements, U.S. firms could not, putting U.S. exporters at a considerable disadvantage.²⁴

The Department of Justice, in 1988, memorialized this principle with its published DOJ Antitrust Enforcement Guidelines for International Operations.²⁵ In the famous footnote 159, the Department declared that it is "concerned only with adverse effects on competition that would harm U.S. consumers by reducing output

of extraterritorial antitrust jurisdiction).

21. See Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, § 402, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 6a (1994)) [hereinafter the FTAIA] (changing the application of the Sherman Act so that U.S. law does not follow U.S. exporters into foreign markets).

22. See McNeill, *supra* note 20, at 445-47 (discussing Congress' enactment of the Foreign Trade Antitrust Improvement Act of 1982).

23. See H.R. REP. NO. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (explaining that legislation would subject American-owned firms, which operate entirely abroad or in export trade, to the same antitrust regime as applied to foreign-owned competitors).

24. See *id.* at 4, *reprinted in* 1982 U.S.C.C.A.N. at 2489 (noting perception of certain business interests that U.S. antitrust laws prohibited certain exporting activities).

25. See U.S. DEPT. OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1988), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Spec. Supp. Nov. 17, 1988) (outlining applicable law, enforcement, policy, and jurisdictional considerations in the international antitrust context).

or raising prices.”²⁶ This policy would characterize a general hands-off approach to anticompetitive conduct abroad by the Reagan and Bush Justice Departments that did not change until the waning hours of the Bush Administration when both the Bush Administration and major exporters realized such an extraterritorial application may be needed to break down market barriers abroad that U.S. trade laws were unable to reach.²⁷

Towards the end of the Bush Administration, the Department of Justice, prodded by numerous U.S. exporters, was persuaded that the limitation of footnote 159 was a greater hindrance than help to U.S. exports.²⁸ During the launching of the “Structural Impediment’s Initiative,” the Bush, and subsequently, the Clinton Administration’s realization that remaining entrenched barriers in numerous countries—Japan in particular—were private, not public in nature, and therefore could not be addressed by the trade laws.

In 1992, the Bush Administration formally declared an end to the requirement of direct harm to U.S. consumers as a condition for the application of antitrust laws abroad.²⁹ In April 1993, the Clinton Justice Department followed suit and also announced that the guidelines would no longer require direct harm to U.S. consumers.³⁰

26. *Id.* at note 159 (qualifying overseas jurisdiction of FTAIA as applied to U.S. exporters).

27. See Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1, 10-11 (1997) (discussing the shift in the early 1980s from antitrust law that favored open markets and entrepreneurial opportunity to a narrow application of the law wherein the focus was on “output limiting conduct that provably raise[d] prices for U.S. consumers.”).

28. See McNeill, *supra* note 20, at 449 (noting footnote 159 limited extraterritorial application of antitrust laws to situations where U.S. consumer prices effected).

29. See U.S. DEP’T OF JUSTICE, ANTITRUST ENFORCEMENT POLICY (1992), reprinted in 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 483-84 (declaring that the United States would take “action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers...”).

30. See Press Release, U.S. Dep’t of Justice, Foreign Business Conduct that Harms American Exports (April 2, 1993), reprinted in 7 Trade Reg. Rep. (CCH) para. 50,084 (continuing policy shift from solely consumer protection to more emphasis on domestic exporter protection in the extraterritorial application of antitrust law).

Rather, the Department said it may take action where anticompetitive conduct abroad has direct and foreseeable effects on U.S. exports, goods or services, and involves conduct that otherwise violates antitrust laws.³¹ In 1995, the guidelines were formally changed to permit government suits against foreign firms that engage in certain anticompetitive practices that close foreign markets.³² Notwithstanding the liberalization of the extraterritorial application of antitrust laws, there was still great skepticism by U.S. exporters of the potency of antitrust laws in breaking down what seemed to be the most impenetrable form of market access barriers: private agreements by foreign firms that were condoned or even tacitly encouraged by foreign governments.

The skepticism of at least one U.S. exporter in the utility of extraterritorial application of U.S. antitrust laws led in part to the Japanese film case.³³ In 1995, Kodak successfully persuaded the United States Trade Representative ("USTR") to utilize trade policy tools such as section 301 of the 1974 Trade Act³⁴ and WTO dispute settlement system³⁵—to attack what were largely private, vertical, non-price restraints on market access whereby Fuji was able to tie up

31. *See id.*

32. *See* 1995 ENFORCEMENT GUIDELINES, *supra* note 6, at § 3.121 (explaining that U.S. antitrust laws may apply in such cases where, inter alia, a foreign cartel, or vertical restrictions in a foreign market have "an anticompetitive effect on U.S. commerce").

33. This case began when Eastman Kodak filed a petition with USTR on May 19, 1995, pursuant to Section 301 of the Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1974) (codified at 19 U.S.C. §§ 2411-2421 (1994)). *See* Initiation of Investigation, 60 Fed. Reg. 35,447 (July 7, 1995). An investigation was initiated on July 7, 1995. *See id.* USTR subsequently determined that the government of Japan "established and tolerated a market structure that impede[d] U.S. exports of consumer photographic materials to Japan..." and announced it would pursue the matter within the WTO Dispute Settlement system. *See* Notice of Determination, 61 Fed. Reg. 30,929 (June 18, 1996).

34. *See* The Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1974) (codified as amended at 19 U.S.C. §§ 2411-2421 (1994)) (providing authority for the United States to enforce U.S. rights and to respond to actions by foreign countries inconsistent with or otherwise denying the United States benefits under trade agreements).

35. *See* WTO Agreements, *supra* note 1, the GATT 1994, art. XXIII (providing for procedures to remedy governmental measures that "nullify or impair" the benefits of the WTO Agreements).

distribution channels and prevent entry by Kodak into the Japanese market.³⁶ The Japanese film case was the most prominent application of 1988 amendments to section 301, a trade remedy.³⁷ The definition of “unreasonable practices” under section 301 of the 1974 Trade Act had been expanded in 1988 to include governmental actions constituting systematic *toleration* of anticompetitive activities by foreign firms with market access restricting consequences.³⁸ Thus began the creep of U.S. trade law into the competition arena.

Had this case been brought under the antitrust laws, which, considering the private nature of the market barriers, may have been more appropriate, comity considerations would have surely required the plaintiff to first exhaust remedies through the Japan Fair Trade Commission (“JFTC”), which enforces antitrust laws in Japan.³⁹ Relatedly, the USTR appeared to ignore the legislative history of section 301, which too states that the USTR should first consider remedies available in the country where the offending action occurs.⁴⁰ Predictably, the Japanese government vehemently objected, arguing that the bypass of its judicial system represented a potential usurpation of sovereign powers not condoned by the WTO Agreements.⁴¹

36. See generally William Barringer, *Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute*, 6 GEO. MASON L. REV. 459 (1997) (arguing against use of section 301 to address alleged market access problems related to private business practices in foreign markets).

37. See Spencer Weber Waller, *Can U.S. Antitrust Laws Open International Markets?*, 20 NW. J. INT'L L. & BUS. 207, 226–28 (2000) (noting aside from the Japanese film case, only two other antitrust type petitions have been filed with the USTR pursuant to the 1988 section 301 amendments).

38. Section 301 as amended provides that a government may be found to be acting unreasonably if it: (1) tolerates systematic anticompetitive activities by state-owned enterprises and/or private firms; (2) denies market access for U.S. firms; and (3) restricts the sales of U.S. goods or services to a foreign market. See 19 U.S.C. § 2411(d)(3)(B)(i)(I–V) (1994).

39. See Barringer, *supra* note 36, at 463–64 (pointing out that Kodak failed to exhaust domestic remedies and did not approach the JFTC before filing its petition with USTR).

40. See S. REP. NO. 98-308, 46–47 (1984), reprinted in 1984 U.S.C.C.A.N. 4910, 4955–56 (requiring the USTR to consider “the appropriate legal action available to, or taken by, the aggrieved United States party to defend its rights in the subject country.”).

41. See Barringer, *supra* note 36, at 464 (arguing that if Japan had accepted

Ultimately, the WTO panel found that the United States failed to demonstrate the necessary linkage between market access and official acts of the Japanese government in accordance with Article XXIII(1)(b) of the 1994 GATT.⁴² Kodak and other U.S. exporters responded, in turn, that both U.S. trade law and the multilateral trade rules were inadequate remedies to address anticompetitive practices in foreign markets, absent some showing of express government endorsement of such practices.⁴³ Indeed, the Japan-Film decision highlighted the difficulty in defining the requisite government nexus for redress, but seemed to suggest a measure could be deemed actionable under the WTO Agreements "if there is sufficient government involvement."⁴⁴ The necessary quotient of overt government participation and a scheme to block market access by foreign competitors still is unclear under WTO rules.

D. INTERNATIONAL DEVELOPMENTS IN COMPETITION LAW

While the extraterritorial application of U.S. antitrust law has seen significant policy shifts over the last ten years, there have also been other significant international developments aimed at harmonizing competition rules internationally. The 1948 Havana Charter for the International Trade Organization,⁴⁵ whose conception the United

USTR's jurisdiction in the Japanese film case, it would have ceded JFTC's authority to USTR to enforce its competition laws).

42. See Japan – Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WT/DS44/R (Mar. 31, 1998) [hereinafter Japan-Film Panel Decision] (concluding that the United States failed to demonstrate that the Japanese distribution measures nullified or impaired benefits accruing to the United States within the meaning of Article XXIII(1)(b) of the 1994 GATT) at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

43. See Barringer, *supra* note 36, at 472 (discussing the weaknesses of utilizing the Section 301 remedy to address anticompetitive behavior); see also Waller, *supra* note 37, at 228–29 (2000) (arguing that section 301 as it is currently written is ineffective in addressing anticompetitive behavior and that USTR is not the appropriate body to make determinations of "whether a foreign government is tolerating systematic anticompetitive activities by private firms.").

44. See Japan-Film Panel Decision, *supra* note 42, para. 10.56 (stating actions by private parties could be deemed governmental if there is "sufficient government involvement"); *id.* para. 10.52 (acknowledging past disputes where actions seem on their face private, but "may nonetheless be attributable to a government because of some governmental connection or endorsement of those actions.").

45. See Havana Charter for an International Trade Organization, United

States helped foster, was the first attempt to provide an international set of rules for both private and public trade practices. While it failed to muster the needed international consensus—including the support of the United States—it served as the precursor for GATT and the WTO.⁴⁶ And since the Havana Charter, international harmonization efforts in the ensuing forty years addressed government sponsored trade barriers, not private anticompetitive agreements.⁴⁷

The Organization for Economic Cooperation and Development (“OECD”), however, has, more recently, attempted to address the issue of competition policy by creating two working groups and publishing two non-binding recommendations addressing the issues of cartels and cooperation among competition enforcement agencies.⁴⁸ Yet, the effectiveness of the OECD in creating any international consensus on competition rules has been limited due to a membership of largely developed countries and a lack of an institutional mandate.⁴⁹

As discussed *supra*, only recently has GATT’s successor, the WTO, attempted to address competition by incrementally adding

Nations Conference on Trade & Development, Final Act and Related Documents, art. 46.1, U.N. Doc. E/Conf. 2/78 (1948) [hereinafter Havana Charter] (stating general principles calling on members to prevent private or public commercial enterprises from engaging in business practices affecting international trade, which restrain competition, limit access to markets, or foster monopolistic control); see also Friedl Weiss, *From World Trade Law to World Competition Law*, 23 Fordham Int’l L.J. 250, 261 (2000) (describing multilateral efforts to ensure nondiscriminatory market access in international markets beginning with the Havana Charter).

46. Although the agreement ultimately lacked U.S. endorsement, it is widely credited as the precursor for GATT because it was the first organized attempt to arrive at a plurilateral trade agreement. See F.M. SCHERER, *COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY* 39 (Brookings Institution 1994) (noting strong opposition from the U.S. business community to international competition policy framework).

47. See Weiss, *supra* note 45, at 260 (explaining that GATT/WTO competition policy efforts have focused on government market access barriers as opposed to privately sponsored restraints).

48. See P.J. LLOYD & KERRIN M. VAUTIER, *PROMOTING COMPETITION IN GLOBAL MARKETS: A MULTI-NATIONAL APPROACH* 131 (1999) (describing the OECD as the most active of all international organizations in the field of competition policy).

49. See ICPAC REPORT, *supra* note 1, at 258 (describing OECD competition policy initiatives).

language relating to government toleration of anticompetitive private barriers that constitute de facto trade barriers.⁵⁰ In contrast, previous GATT cases had required express government actions to trigger the dispute resolution process.⁵¹ In addition, The General Agreement on Trade in Services has provisions protecting against monopoly abuse and other competition restraining measures.⁵² The Agreement on Trade-Related Investment Measures creates a Council to develop competition guidelines,⁵³ and the Agreement on Trade-Related Intellectual Property also contains provisions to prevent the overly restrictive use of intellectual property rights in anticompetitive ways.⁵⁴

During the 1996 WTO Ministerial in Singapore, the WTO formed the Working Group on Interaction Between Trade and Competition Policy ("WGTC").⁵⁵ In doing so, the WTO recognized that private

50. See *id.* at 260-62 (outlining competition policy features of WTO Agreements); see also 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 (1997) (setting forth illustrations of anticompetitive practices in the area of intellectual property protection).

51. See *Japan-Trade in Semiconductors*, May 4, 1988, GATT BISD (35th Supp.) 116, at 155 (1989) (holding that it is necessary to find measures "dependent on government action or intervention" in order to be actionable).

52. See General Agreement on Trade and Services, Apr. 15, 1994, WTO Agreements, Annex 1B, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 46, arts. VIII, IX (1994), (addressing monopolies and exclusive service suppliers and business practices that may restrain competition and thereby restrict trade).

53. See Agreement on Trade Related Investment Measures, Apr. 15, 1994, WTO Agreements, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, art. 9 (1994) (directing Council on Trade in Goods to consider whether TRIMS should be supplemented with provisions on investment and competition policy) at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

54. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreements, Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81, art. 40 (1994) (addressing anticompetitive practices in the context of licensing).

55. See *DOHA WTO Ministerial 2001 Briefing Notes, Trade and Competition Policy Working Group set up by Singapore Ministerial* [hereinafter *Doha Briefing Notes on Competition Policy*] (describing WGTC activity since 1996, including a 1999 decision by the General Council of the WTO to examine: (1) the relevance of fundamental WTO principles of national treatment, transparency, and most-favored nation treatment to competition policy; (2) approaches to promoting

restraints had the potential to restrain the benefits of lifting trade barriers. The WGTCP has had several meetings since its initial meeting in July 1997, and accepted approximately one hundred eighty suggestions from members, but the question of developing a multilateral framework on competition policy remains unresolved.⁵⁶

Europe has long supported an approach to competition policy, as it recognizes the relationship of competition laws to trade liberalization. In fact, the WTO effort to address competition policy was prompted by European initiative.⁵⁷

Europe's efforts to develop a comprehensive competition policy dates back to 1957 (with the Treaty of Rome), which proposed rules for both private and public trade restrictions.⁵⁸ Principally, the Treaty of Rome proscribes agreements or concerted practices that distort competition or impose "must deal" requirements for firms with

cooperation and communication among members on this issue; and (3) contribution of competition policy to achieve objectives of the WTO) at http://www.heva.wto-ministerial.org/engl...e/minist_e/min01_e/brief_e/brief13_e.htm (last visited Nov. 9, 2001); see also Competition Policy and the WTO (providing overview of competition policy consideration at the WTO and related documents) at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Nov. 9, 2001).

56. See Doha Briefing Notes on Competition Policy, *supra* note 55 (noting that among WTO member countries "views differ[] as to the need for action at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system."); *id.* (proposing, in advance of the Nov. 2001 Doha Ministerial meeting, either further study on the issue of trade and competition policy by the WGTCP or initiation of negotiations on core issues taking into account developing countries' concerns); see also *Doha Ministerial 2001: Summary of 10 Nov. 2001* (indicating a lack of consensus on the competition policy issue with a few developed countries supporting launch of negotiations while developing countries in South Asia and Africa are firmly against negotiations and some developing countries in Latin America and East Asia indicating some flexibility on issue of launching negotiations) at http://www-chil.wto-ministerial.or...minist_e/min01_e/min01_10nov_e.htm.

57. See Fox, *supra* note 27, at 8 (noting Sir Leon Brittan's 1992 speech at Davos suggesting a multilateral approach to competition policy and trade liberalization).

58. See Treaty Establishing the European Economic Community, *opened for signature* Nov. 23, 1957, arts. 85-94, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter Treaty of Rome] (outlining competition law for the European Community); see also Fox, *supra* note 27, at 6-7 (commenting on Treaty of Rome competition policy-related provisions, which address private and public activities).

dominant market positions.⁵⁹ This is in stark contrast to the “refusal to deal” prerogatives of dominant firms in the U.S.⁶⁰ In addition, the Treaty of Rome treats some state-owned monopolies as “essential facilities” by requiring them to open up their networks and engage in competitive bidding.⁶¹ Importantly, the Treaty also governs the public/private barrier issues arising with state owned monopolies—such as state-run telephone industries—by applying Article 86 to the (formerly) state-owned monopolies, including British-run telephone industry,⁶² and the French-run telecommunications industry which is required to competitively procure equipment.⁶³

While the United States antitrust law stresses productive and allocation efficiency,⁶⁴ the Europeans seem to be more concerned with other matters such as distributional effects and fairness.⁶⁵ Meanwhile, Japan’s competition law seems to accommodate

59. See Fox, *supra* note 27, at 6 (explaining that Article 86 prohibits “dominant undertakings from abusing their dominance.”).

60. See Fox, *supra* note 27, at 12 (noting that in the United States even a dominant firm has the right to unilaterally set terms and will not be subject to antitrust action unless there is a concerted effort to lower output and prices rise); *id.* (comparing United States and European antitrust models).

61. See Treaty of Rome *supra* note 58, art. 37 (requiring states to ensure state monopolies of a commercial character eliminate discrimination in procurement and marketing of goods); *id.* art. 90 (making public undertakings, and those to which states give special or exclusive rights, subject to competition rules unless the application rules would frustrate performance of public tasks); *id.* arts. 92-94 (providing for notification, justification, or elimination of state aids).

62. See Case 41/83, Italy v. Commission, 1985 E.C.R. 873 (finding that the competition rules of the Treaty do apply to conduct “made possible by central government[s]”).

63. See Case 202/88, France v. Commission, 1991 E.C.R. 1223 (upholding directive requiring member states to abolish exclusive rights to supply telephone terminal equipment).

64. See Fox, *supra* note 27, at 12 (noting that differences in antitrust policy may be due to American perspective that a higher level of government involvement harms competition and efficiency).

65. See Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 3 (1997) (highlighting the different perspectives in competition policy).

industrial policy goals and allows for certain cartel arrangements.⁶⁶

Despite these different perspectives, the United States and European Commission signed two “positive comity” agreements in 1991 and 1998, binding signatories to investigate complaints of anticompetitive conduct, but doing little to harmonize competition principles or terms.⁶⁷ The European Commission has also signed positive comity agreements with Israel,⁶⁸ Brazil,⁶⁹ Japan,⁷⁰ and Canada.⁷¹ These agreements indicate an increasing interest in cooperation between competition enforcement authorities of some nations, which already have strong antitrust regimes in place.

However, when developed countries have such divergent perspectives on competition policy, it is no surprise that there are difficulties developing a multilateral approach to competition policy. These different perspectives have made it difficult to formulate a policy that harmonizes competition and trade rules.⁷²

66. See Gifford, *supra* note 65, at 3 n.11 (stating export import cartels, medium and small business cartels, shipping conferences, among others are “authorized cartels” under the Japanese Anti-Monopoly Law).

67. See generally Agreement Between the Government of the United States and the European Community on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, 1998 O.J. (L 173) 28 (describing the terms of the agreement) available at <http://www.ftc.gov/bc/us-ec-p.htm>.

68. 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).

69. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Brazil Regarding Cooperation Between their Competition Authorities in the Enforcement of their Competition Laws (Oct. 26, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) para. 13, 501 (Nov. 3, 1999).

70. Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities (Oct. 7, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) para. 13,507 (Oct. 13, 1999).

71. 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) para. 13,503 (Apr. 23, 1997).

72. See Doha Briefing Notes on Competition Policy, *supra* note 55 (noting that among WTO member countries “views differ[] as to the need for action at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system.”)

II. CAN COMPETITION LAWS WORK IN CONCERT WITH TRADE LAWS?

A. DIFFERENT INSTITUTIONAL PERSPECTIVES

While WTO is showing great success in striking down government imposed trade barriers, international consensus on competition policy is inherently more elusive.⁷³ Attempts to go beyond any regional compact require the bridging of wide gulfs in culture and practice. The underlying policies of European Commission competition law are distinctly different from those of the United States, and other non-European countries.⁷⁴ U.S. antitrust laws are concerned largely with optimizing marketplace efficiencies by protecting against concerted actions to increase prices or reduce output.⁷⁵ (As stated *infra*, for example, dominant firms in the U.S. are free under antitrust laws to “compete hard,” and to engage in such schemes as “refusals to deal” and other exclusionary practices so long as there are legitimate efficiency rationales.) The Europeans have rejected many of the U.S. competition paradigms in favor of greater protections for smaller and mid-sized firms requiring, for example, that market share as low as forty percent can trigger “must deal” requirements with horizontal or vertical competitors. Developing countries, by contrast, have only recently begun to formulate and implement antitrust laws,⁷⁶ and many strongly resist an

73. See *supra* Part I.D. (describing international harmonization efforts and international developments in competition law).

74. See Gifford, *supra* note 65, at 3-4 (recognizing different policy goals of competition policy in the United States and Europe, which are in part a result of different cultural experiences); Manisha M. Sheth, *Formulating Antitrust Policy in Emerging Economies*, 86 GEO. L.J. 451, 458-66 (1997) (describing the United States antitrust model as one based on consumer welfare standard while the European antitrust model is based on guarding against abuse of a dominant position).

75. See Gifford, *supra* note 65, at 22 n.123 (stating that efficiency goals have long been recognized in U.S. antitrust law in merger guidelines and case law).

76. See Sheth, *supra* note 74, at 451-52 (noting that antitrust regimes have been adopted in Peru, Brazil, Mexico, Taiwan, Venezuela, India, Pakistan, Argentina, Russia, and Chile only within the last ten years); see also Fox, *supra* note 27, at 13 (stating that many Central European countries are modeling antitrust laws after those of the EC with aspirations of joining the European Union).

international competition policy regime arguing that their nascent industries are not prepared for the international imposition of regimes modeled on U.S. or European economic traditions.⁷⁷

Each country has differing ideas of what competition means, and has different economic traditions.⁷⁸ Interlocking vertical relationships—often referred to as Keiretsus—are an important part of the economic fabric in Japan but might be considered verboten by U.S. competition laws and by the European rules. At the same time, those same European rules which are intended to protect small businesses would be scoffed at as inefficient under the traditions of U.S. competition law.

A related problem is the widely divergent use of terminology. The definition of market power in the U.S.—the putative ability of a competitor to defeat the rules of a competitive marketplace and unilaterally raise prices or lower output—is far different than the definition of market power in Japan, Europe, or in developing countries. So, too, does the nomenclature diverge in the trade and competition arenas. The Final Report of the International Competition Policy Advisory Committee noted:

[C]onsideration 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

77. See WTO General Council, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WT/WGTCP/4, para. 31 (Nov. 30, 2000) [hereinafter WGTCP 2000 Report] (expressing concern that local firms in developing countries may be displaced by foreign firms as result of emphasis on competition); *id.* para. 30 (noting the importance of developing countries' ability to retain use of a broad range of development-related policies and not be hindered by imposition of international competition regime).

78. See WGTCP 2000 Report, *supra* note 77, para. 26 (pointing out that national competition policies are very diverse as a result of differences in members' history and stage of development, socio-economic circumstances, legal contexts, and cultural norms).

properties for the participants in the local market.⁷⁹

Trade and competition laws require different types of inquiry, by fundamentally different types of institutions with different institutional interests.⁸⁰ Trade laws are aimed at opening markets, often involve negotiated solutions, and involve representatives of governments who are engaged in ongoing bilateral and multilateral relationships and who will need to interact with one another after a dispute is resolved. Competition laws, which are nationalist in nature, and enforced to promote marketplace efficiencies, are fought out in courtrooms that are insulated from the give and take of diplomacy, and generally have a winner-take-all dynamic.

B. EVIDENCE OF PRIVATE AGREEMENTS REPLACING TRADE BARRIERS

Widely contrasting bodies of law, institutional perspectives, and conflict resolution mechanisms are legion, despite growing evidence of accelerating private and hybrid public/private barriers. A 1996 OECD study (the "Hawk Report"), found repeated private agreements restricting market access in ten member countries in the agriculture, energy, communications, defense, media, and other industries.⁸¹ In June 1999, the OECD's Business and Industry Advisory Committee ("BIAC") conducted a far reaching study of sixty companies in sundry industries and found that forty-six percent of respondents believed that private anticompetitive practices hinder their entry into the marketplace.⁸² In addition, forty-four percent of

79. See ICPAC REPORT, *supra* note 1, at 210.

80. See generally Daniel Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000) (raising institutional considerations in the assessment of viability of pursuing harmonization of competition policies within the context of the world trading system).

81. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, ANTITRUST AND MARKET ACCESS: THE SCOPE AND COVERAGE OF COMPETITION LAWS AND IMPLICATIONS FOR TRADE, 23, 29, 30 (OECD ed., 1996) (noting that the governmental electricity and gas monopolies in Japan are exempted from their countries' prohibitions of monopolies, that professional baseball is exempt from competition laws in the United States, and that France maintains a separate legal regime for audiovisual communications industry mergers).

82. See BUSINESS AND INDUSTRY ADVISORY COMMITTEE REPORT ON THE

respondents believed that the use of competition laws to break down the barriers is ineffectual, unpredictable, and burdensome.⁸³

The ICPAC Report details a number of industries where private anticompetitive practices hinder market access. The Japanese paper and auto industries have allegedly engaged in practices to preclude foreign competitors by entering into restrictive arrangements with distributors.⁸⁴ Flat glass manufacturers in Japan are accused of using a variety of anticompetitive practices to preclude access to distribution channels.⁸⁵ In Europe, there are continuing allegations of hybrid public/private restrictions in the telecommunications industry that create market access impediments.⁸⁶ Further, there have been allegations that Airbus was excluding foreign parts suppliers and requiring the relinquishment of intellectual property rights as a condition of foreign competitors engaging in joint research projects.⁸⁷ There have also been allegations of cartel behavior to fix prices and reduce output in the steel sector in Europe.⁸⁸

SURVEY OF BUSINESS COMPETITION LAW CONCERNS, TO THE OECD CONF. ON TRADE AND COMPETITION, (OECD ed., 1999).

83. *See id.*

84. *See* ICPAC REPORT *supra* note 1, at 212-13 (describing U.S. industry allegations that the paper imports into Japan are deterred by complex distribution arrangements and interlocking relationships among the relevant domestic industry actors); *id.* (describing U.S. industry allegations that Japanese auto manufacturers have established exclusive distribution networks and made it clear that sales of foreign vehicles are not welcome).

85. *See id.* (describing U.S. industry allegations that the Japanese flat glass market is characterized by a cartel that controls the market through a variety of collusive and exclusionary practices).

86. *See id.* at 217 (noting allegations that the European Telecommunications Standards Institute (ETSI) was developing potentially anticompetitive telecommunications standards); *see also* *U.S. Warns Europe to Abide by WTO Rules When Licensing New Mobile Phone Providers*, 16 Int'l Trade Rpt. 29 (BNA) (Jan. 6, 1999) (stating that the United States expected the European Commission to meet its obligation to provide non-discriminatory treatment to foreign suppliers by refraining from imposing a single mandatory standard for "third generation" mobile phone service).

87. *See* ICPAC REPORT, *supra* note 1, at 217 (noting allegations of anticompetitive practices against Airbus).

88. *See* John R. Wilke, *Hunting Cartels: U.S. Trust-Busters Increasingly Target International Business*, WALL ST. J., Feb. 5, 1997, at A1 (quoting Alan W. Wolfe, a trade lawyer, as saying a steel cartel allocates production of flat-rolled steel among European and Asian companies); *see also* Tarullo, *supra* note 80, at

Similar complaints have been lodged against the Mexican corn industry, the Colombian brewing industry, the Ecuadorian cement and steel industries, the Hungarian and Hong Kong telecommunications industries, and the U.K. automobile industry, all of which are allegedly condoned by government actions in differing degrees.⁸⁹ Additionally, there is minimal antitrust enforcement in countries such as India and Egypt, and in many other developing economies that have nascent competition rules and ineffective enforcement mechanisms.⁹⁰

III. PROPOSAL

The effects of globalization, together with the increasing interconnectedness of competition policy and international trade rules, require a new approach to address anticompetitive practices. Tacit government approval of anticompetitive conduct in the international arena has the potential to undo decades of negotiations through the privatized creation of new barriers.

A solution that merely focuses on incrementally advancing the principles of comity is unlikely to prove effective. Even were comity vastly expanded, it would not address the simple proposition that differing competition laws between countries and will leave many disputes unresolved and international competition rates muddy. Indeed, the ICPAC report concluded that “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.”⁹¹ Similarly former FTC Chairman Robert Pitofsky stated that positive comity “is a small and modest element that you use in unusual cases to try to protect American firms doing business abroad of foreign firms doing

480 (saying the U.S. Department of Justice, as of late 1998, was investigating possible cartel activity in more than twenty countries).

89. See ICPAC REPORT, *supra* note 1, at 218-19 (describing anticompetitive practices in Latin America and other countries).

90. See *id.* at 219 (noting that there is no basic law prohibiting anticompetitive practices by monopolies and cartels in Egypt, while business in India has little to fear in terms of governmental reaction to anticompetitive practices because of an overwhelmed court system).

91. ICPAC REPORT, *supra* note 1, at 235.

business in the United States. It's hardly a common resort."⁹² Director-General for Competition at the European Commission Schaub argued that the policy of comity has been "oversold."⁹³

At the same time, it is unrealistic to imagine that the rules of each country's purely private business activities could be supplanted by an international trade regime. For instance, in the United States, as discussed *supra*, the "compete hard" rules are believed to produce marketplace efficiencies that U.S. authorities would strenuously argue should not be supplanted by less economically efficient European rules. It is thus more realistic to attempt to first develop an international consensus for a baseline set of rules governing anticompetitive conduct that can serve as the foundation for subsequent incremental changes that may be implemented only when international consensus develops.

The *per se* rules of the U.S. antitrust laws provide the most promising template for developing an international consensus on competition policy. Under Section I of the Sherman Act, it is *per se* illegal for two or more firms to enter into agreements to increase prices (i.e. price fixing) or reduce output.⁹⁴ Any such agreement

92. See *International Antitrust Hearing Before Antitrust, Business Rights and Competition Subcomm. of Senate Judiciary Comm.*, 106th Cong. (1999) available at 1999 WL 273283 (Statement of Robert Pitofsky, Federal Trade Commission Chairman) (indicating application of positive comity more limited in scope).

93. See ICPAC Report, *supra* note 1, at 235 (citing Prepared Remarks of Director-General for Competition at the EC, Alexander Schaub at the American Bar Association Section of Antitrust Law Advanced International Antitrust Workshop (January 14, 1999)).

94. See Sherman Act, *supra* note 8, at § 1 (stating that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); *id.* § 2 (criminalizing "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. . ."); Clayton Act, 15 U.S.C. § 18 (declaring corporate mergers illegal, but not criminal, "where the effect. . . may be substantially to lessen competition" or "tend to create a monopoly in any line of commerce."). See also Federal Trade Commission Act, 15 U.S.C. §§ 41, 45 (1999) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful."). While the FTC Act does not provide for criminal penalties, the FTC may issue prospective decrees. See generally ABA SECTION OF ANTITRUST LAW, *Antitrust Law Developments* 1-227 (4th ed. 1997).

between private parties is actionable under the criminal and civil provisions, and generally requires no further fact based inquiry relating to market power, countervailing market efficiencies, or anticompetitive intent.⁹⁵ It is widely believed that such conduct has no countervailing benefits and always distorts the natural marketplace. Because there is little plausible basis to defend such conduct, it would be useful to begin developing such rudimentary rules that could be implemented with nationalist legislation as a condition of WTO membership. Such rules could also provide for proper discovery and legal procedures for timely resolution. Complete harmonization for this category of conduct would resolve problems relating to comity, as there would be a common set of rules.

Second, the WTO should consider crossing the Rubicon into private conduct that is tacitly sanctioned by governments as it started to in the 1994 GATT negotiations.⁹⁶ In the same way that the U.S. Supreme Court affirmatively ruled that a State's toleration of racially restrictive real estate covenants constituted necessary "state action" to trigger constitutional protections necessary to invalidate the covenants during the civil rights movement,⁹⁷ the WTO rules could be amended incrementally to prohibit government toleration of private conduct that *discriminates* against foreign competitors.

If, for instance, a dominant widget maker in the country Epsilon enters into exclusive contracts with the three available widget distributors, such conduct may not be cognizable under such a rule. But if a foreign cartel of widget makers in country Epsilon were to engage in an agreement with distributors to boycott all foreign suppliers, then such private conduct could be cognizable under such a new WTO rule. The benefit of such a proposal is that it avoids imposition of new competition rules that supplant historic and

95. See Sherman Act, *supra* note 8, § 1 (criminalizing conduct that significantly interferes with trade and is the product of an agreement between two or more independent actors).

96. See *supra* notes 52-54 and accompanying text (describing WTO Agreements provisions addressing competition policy).

97. See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that the State of Missouri applied laws in a discriminatory fashion and denied equal protection rights to minority property owners).

legitimate policy goals of competition law on a particular country, but prohibits those practices only if they are used to discriminate against foreign competitors.

Third, the WTO should borrow the “essential facilities” doctrine,⁹⁸ which requires that monopolists controlling the exclusive facilities—access to which is a prerequisite for entry into a line of commerce—to make those facilities available to competitors.⁹⁹ This was the basis for the break-up of AT&T and the subsequent legislative imposition of “open access” requirements on regional bell operating companies (“RBOCs”), which in theory allows competitors to access the infrastructure of local telephone companies.¹⁰⁰ This is also the basis on which many state-sponsored monopolies in Europe have been opened to competition by European Commission trade rules and agreements. In many cases, “essential facilities” involve state created monopolies in such sectors as telecommunications and energy. This rule is beneficial because it comports with principles of free trade (market-access principles) and is consistent with the widespread consensus among competition theorists that bottlenecks created by closed “essential facilities” are inefficient.

This proposal does not attend to private agreements, which, while arguably trade-restrictive, do not favor domestic over foreign competitors and show no government nexus. However, if the structure that I propose is put in place, this area could be the subject

98. The “essential facilities” doctrine arose in Supreme Court decisions involving concerted refusals to deal that were attacked primarily under Section 1 of the Sherman Act. See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 703–06 (4th ed., Michie 1999) (describing the “essential facility” doctrine and its origination under Supreme Court decisions).

99. See e.g., *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912) (holding that the several railroads operating a joint venture of toll bridges and cargo transfer facilities had to share the facilities with other railroads because they needed them to move their cargo); *Associated Press v. United States*, 326 U.S. 1 (1945) (holding that a news gathering service operating as a joint venture had to be opened to nonmembers). The doctrine makes it illegal for a person who operates an “essential facility” to deny access to another party. *Id.*

100. See SULLIVAN & HOVENKAMP, *supra* note 98, at 705 (discussing the government’s lawsuit against AT&T that resulted in the divestiture of the telephone monopoly that was predicated on the “essential facility” doctrine). The Seventh Circuit characterized the local telephone exchanges as an essential facility. See e.g., *MCI Commun. Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983).

of future negotiation, especially if the concept of government inaction of trade-restrictive measures through overly permissive competition rules is accepted as a basis on which to develop international agreements. Further, this category of private activities could also be addressed through bilateral and multilateral positive comity negotiations. Before such conduct can be addressed, however, a foundation should first be laid along the lines I am proposing.

CONCLUSION

There is very strong evidence that private barriers to free trade are supplanting advances made by the WTO in striking down government sponsored barriers. Neither the WTO nor the respective court systems of member states alone are competent to address the many different forms of the new private trade barriers. Most significantly, there must be an attempt by member countries to adopt an international code of fair competition that will serve as a foundation for further development. In order to get consensus, those rules should proscribe, in the first instance, standards that are clearly anticompetitive, inefficient, and have no countervailing justifications based in tradition or jurisprudence. WTO rules should also be expanded so as to prohibit government tolerance of private agreements that discriminate against foreign competitors. By doing this, the rules will not supplant existing competition norms, but only the use of such practices as *de facto* discriminatory trade barriers. Finally, the WTO should expand its definition of required "government measures" under the WTO rules to address both hybrid government/private trade-restrictive practices as well as essential facility bottlenecks.

These measures alone will not solve all private agreements that serve as *de facto* trade barriers, but this proposal will begin bringing both the jurisprudence of competition laws and negotiations involving trade laws into a sensible symmetry in order to begin eliminating the gamesmanship that could otherwise threaten the gains of the WTO.