

# INTERNATIONAL ASPECTS OF COMPETITION LAW

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## I. INTRODUCTION AND SCOPE OF THIS WORK

The purpose of this article is to advance a proposal of solution to the current controversy surrounding the regulation of competition law on an international level. To such end I shall briefly canvass the conceptual background of the topic (§II), the efforts that have thus far taken place to address the issue (§III), the specific issues raised by the international ramifications of competition law (§IV), and will conclude with a general proposal as to how to address and regulate the international effects of competition law (§V).<sup>1</sup>

## II. CONCEPTUAL BACKGROUND

### A. GLOBAL INTERDEPENDENCE<sup>2</sup>

Although national markets have, to some degree, always had influence on one another, they have only recently behaved in an economically interdependent manner, and have increasingly become so in the last half century, particularly after World War II with the economic/financial institutions of global reach created thereafter.<sup>3</sup>

Before World War II, governments traditionally erected ‘fences’ by taxing goods in international trade, restricting imports, subsidizing exports, and limiting international capital movements. These ‘fences’ increased costs in cross-border transactions which led to their reduction and sometimes elimination. These practices were particularly rampant during the 1930’s, and are now believed to have lengthened the Great Depression.

After World War II, governments began to lower the referred ‘fences’ either unilaterally or collaboratively. As a consequence, borders became more porous,

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<sup>1</sup> I should warn the reader that, although the focus is on international regulation, on occasions I have anchored examples on Mexican law. The foregoing due to two reasons: when providing examples, I have felt the need to use *some* legal corpus so as to be specific. Second—and perhaps more important—I am a Mexican attorney by origin.

<sup>2</sup> This section borrows on the Brookings Project of Integrating National Economies. The goal of such project is to address the issues and ramifications inherent in the changes of the global landscape in specific fields, one of which is competition law and policy. To such end some of the world’s leading economists, political scientists, foreign policy specialists, government officials and other experts from different parts of the world were commissioned to write scholarly studies in several fields. The topic of competition law and policy was undertaken by Prof. F.M. Scherer in “Competition Policies for an Integrated World Economy”, 1994. I have found such study to be of utmost utility to my understanding of the topic.

<sup>3</sup> I refer to the International Monetary Fund and the World Bank which were the result of the Bretton Woods conference of July 1944.

leading, in certain instances, to the tearing down of these divisions.<sup>4</sup> This tendency has matured from the mere (negative) tearing down the walls of division, to the (positive) building of bridges of collaboration. Today the global economic landscape displays a colorful palette of differing forms of regional integration, ranging from the bilateral trade agreements (e.g., CUFTA,<sup>5</sup> Israel-Mexico FTA<sup>6</sup>) to customs unions which seek to amalgamate the markets comprehended in the same into a single one (e.g., the European Union). Within these two extremes we find multi-lateral trade agreements (such as NAFTA,<sup>7</sup> Mercosur,<sup>8</sup> and the Group of Three<sup>9</sup>) and initiatives which seek to comprehend entire continents.<sup>10</sup>

This economic interdependence has economic, legal, technological, political and cultural reasons. The economic and legal reasons are apparent from the discussion in the preceding paragraph. However, technology has also played an important role. Changes in technology have progressively integrated the world economy and its impact on the way people now communicate has been qualified by an important source of opinion as "The Death of Distance".<sup>11</sup>

Politically, the landscape has also changed. Early after World War II a single country, or a handful at most, effective wielded economic power and influence having world-wide ramifications. Not any more. Currently, international decision-making is more diffused than it used to be. Three factors are prominent in such change. First, there is a marked growth in the number of independent states. Secondly, the political and economic hegemony of the United States has suffered a gradual loss. Thirdly, the demise of the centrally planned economies has radically changed world politics.<sup>12</sup>

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<sup>4</sup> For instance, the General Agreement on Trade and Tariffs ("GATT") negotiations taking place in the Kennedy Round (1960) the Tokyo Round (1970) and the Uruguay Round (1986 —formally ending and signed on 1994) are the most salient examples of the lowering of fences in the trade of goods.

<sup>5</sup> The Canada-U.S. Free Trade Agreement.

<sup>6</sup> Signed on April 10, 2000 and which entered into force on June 30, 2000. Chapter VIII deals with competition matters.

<sup>7</sup> The North American Free Trade Agreement between Mexico, the United States of America and Canada.

<sup>8</sup> Between Argentina, Brazil, Uruguay and Paraguay.

<sup>9</sup> Which comprehends Mexico, Venezuela and Colombia.

<sup>10</sup> Such as the Initiative of the Americas, which seeks to include all the countries in the American Continent in a Free Trade Area, and the recent initiative by Asian countries to form a free trade zone.

<sup>11</sup> THE ECONOMIST, the leading article and survey of the an issue approximately of 1999. I beg the reader's pardon for my imprecise cite, but I found it to be no longer available.

<sup>12</sup> During the period when central planning was the economic method of choice of several countries, their governments limited external influence on their economies.

Culturally, the interesting oddness an outsider found in what was known as the “American melting pot”, has ceased to be so. Nowadays, most consumers purchase in their domestic markets products from all over the world. The cultural effects of this are obvious and are the result of the fact that culture is exported along with products.

The combined effect of the summarized phenomena has given place to what is now frequently referred to “globalization”. Although globalization has many foes,<sup>13</sup> it is believed by many to have significantly improved the living standards of most countries.<sup>14</sup> The foregoing, *inter alia*, as a result of the theory of competitive advantage.

Globalization and economic interdependence raise issues in several fields. One such field is competition law and policy. Competition policy has obtained a prominent spot in international economic policy discussions inasmuch as a nation’s policies are no longer exclusively concerned with the business practices within its borders and addressing cross-border practices is no longer believed to be within the exclusive realm of a single national government. The evolution of such paradigm raises the issue of erosion of national sovereignty and creates the possibility of intergovernmental clashes on the approach to take to address transactions that spill over frontiers. These disagreements risk frictions that may escalate into trade wars.<sup>15</sup>

#### B. IMPACT OF GLOBALIZATION ON COMPETITION LAW AND POLICY

The phenomena described has led to a clash between, on the one hand, political sovereignty and, on the other, cross-border integration. As a result, the effective domains of one market have come to coincide less and less with national jurisdiction giving place to a mismatch between economic and political structures as well as policy and legal instruments of each of the concerned jurisdictions.

Economic integration between economies and markets has made the artificial divisions (in the form of boundaries) between markets even more artificial. It used to be clear where “domestic”<sup>16</sup> policies ended and “international”<sup>17</sup> ones

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<sup>13</sup> And enemies of a congregated and organized nature who have fought against the crystallization of such phenomenon in many fronts, from the political (take the (sad) episode of Seattle) to the ideological (for instance, *confere* the compilation made by Jerry Mander and Edward Goldsmith, THE CASE AGAINST THE GLOBAL ECONOMY, AND FOR A TURN TOWARD THE LOCAL, Sierra Club Books, San Francisco, 1996).

<sup>14</sup> F.M. Scherer. COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY. The Brookings Institution, Washington, D.C., 1994, at xi (“Scherer – Competition Policies”).

<sup>15</sup> Simon J. Evenett, Alexander Lehmann and Benn Steil, ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE, in ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 1.

<sup>16</sup> Domestic policies traditionally addressed all matters behind a countries’ frontiers. For instance, competition law, worker safety, regulation and supervision of financial

began. Today the line is blurred. A matter traditionally believed to be reserved in the first category can have an impact on neighboring (or even distant!) countries.

The tensions/issues stemming from the above referred clash can be pigeonholed in one of the following three categories:

1. Cross-Border Spillovers: Put simply, these relate to activities resulting in effects or externalities taking place in jurisdictions other than the one originally concerned.
2. Diminished National Autonomy: governments experience an erosion in their ability to individually and effectively address and control events occurring within their borders as cross-border integration increases.

Although this is not new, it has been sharpened by technological change and tariff/quota reductions. Hence, when a country produces a “good” (e.g., research and development) or a “bad” (e.g., pollution) that affects other nations, individual governments acting sequentially and non-cooperatively cannot effectively deal with the issues inherent in the same. Accordingly, in the absence of cooperation, too few collective *goods* and too many collective *bads* will be supplied.<sup>18</sup>

3. Challenges to Political Sovereignty: Economic integration has qualified the earlier assumption that a government is sovereign with regards to all matters that occur within its jurisdiction. Certain individuals, groups and governments have identified certain circumstances which, it is claimed, allude to universal/international set of values which are not just national and which take precedence over the preferences or policies of particular nations. For instance, Human Rights<sup>19</sup> and environmental matters<sup>20</sup> are now deemed to exceed domestic concern. The common feature in them is that they relate to alleged “psychological externalities” or “political failures” which require the rejecting of unchecked political sovereignty in deference to universal or non-national values.

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institutions, environmental protection, taxing, etc. They referred to matters in which a nation was sovereign and which need not be concerned for its effects on other nations.

<sup>17</sup> International policies tended to deal with at-the-border barriers such as tariffs and quotas, or related to events taking place abroad.

<sup>18</sup> Preface of the Brookings Project, at xviii.

<sup>19</sup> Take egregious political arrangements such as Apartheid.

<sup>20</sup> Examples are tropical rain forests (which are considered the lungs of the world and a repository for animal and plant species considered the heritage of mankind); timbercutting by Brazilians and Indonesians; as well as tuna fishing by Mexicans and Venezuelans.

Several factors have accentuated the importance of competition law in the international arena. The (allegedly) decreasing use of trade barriers, the revolution of communications technology, the falling restrictions on foreign investment, the deregulation tendency displayed by several countries as well as the adoption of market-friendly policies by several governments.

Also, certain business phenomena and strategies have also played an important role. To begin with, an unprecedented scale of cross-border merger activity has taken place as a result of the belief that acquiring or merging with local partners is the most profitable mode of entry into overseas markets,<sup>21</sup> a belief which has been accentuated by the ongoing liberalization of investment laws. Two competition issues are raised by such phenomena: First, the extent to which import competition may discipline the market power of domestic entities; and, secondly, what the competition response should be to such transactions (mergers, acquisitions or joint ventures) when they create efficiencies which lower the cost of supplying foreign markets but not domestic ones.

The international fragmentation of production and vertical integration has also played an important role. The internal organization of businesses and business-to-business contracting and relationships has changed in two ways: a fragmentation of multistep production processes has occurred, and firms have sold their corporate subsidiaries, replacing intrafirm transactions with transactions between firms. I.e., the relocation of stages of production abroad.<sup>22</sup> The effect of this has been that components often cross many international borders before arriving to the consumer of the final product.<sup>23</sup> The competition issues raised by this phenomenon are that, inasmuch as arm's-length arrangements are subject to more competition scrutiny than supply agreements within firms, vertical disintegration will in all likelihood increase the competition enforcement activity.<sup>24</sup>

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<sup>21</sup> Patrick A. Gaugan. MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS. 2d. ed. John Wiley and Sons, 1999, explores the reasons of the rationales for corporate mergers and acquisitions as well as a history of several merger waves. (Cited by Simon J. Evenett, Alexander Lehmann and Benn Steil, ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE, at 4.)

<sup>22</sup> The reasons for such phenomena are the liberalization of foreign investment regimes, decrease of tariffs and intermediate products and improvements in communications. The fact that multiple crossing of borders takes place means that even small reductions of international transportation costs and tariffs have important effects on trade volumes. Also, multinational sourcing decisions are strongly influenced by exchange-rate changes.

<sup>23</sup> Simon J. Evenett, Alexander Lehmann and Benn Steil. ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE. At 7.

<sup>24</sup> Additional competition concerns, although ancillary to the preceding, are that the availability of inputs overseas should be studied when a firm alleges to be intentionally denied inputs by a domestic rival. Also, although the mitigation of trade impediments reduces the incentives to vertically integrate, inasmuch as other incentives exist for vertically integrating, such type of activity still merits monitoring. (Simon J. Evenett, Alexander Lehmann and Benn Steil. ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE. Pgs. 8-9.)

An additional business phenomenon that bears relevance in competition analysis is the spread of network-based industries.<sup>25</sup> Because of the characteristics of network industries,<sup>26</sup> the following competition concerns ensue: (a) the incentive to price-discriminate charging higher prices to consumers with price-inelastic demands; (b) whether monopoly in one product can be leveraged into another; (c) the potential for intergovernmental disagreement over standard setting by private entities; and (d) that standard setting<sup>27</sup> could be used to masquerade a discriminatory measure by domestic firms in detriment of foreign competitors.<sup>28</sup>

### C. SPLITTING THE GLOBALIZATION-CAKE BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

More than a decade has elapsed since the market economy triumphed over central planning. Although most countries are turning to market economy and some of them are still on a transitional stage (the so-called “transition economies”), the reforms being undertaken involve areas such as price liberalization, deregulation, de-monopolization, privatization, trade liberalization, and foreign direct investment liberalization.<sup>29</sup>

The reforms taking place are being made at different paces in different countries and, while the price to pay is frequently notorious and affects well-organized constituencies, the benefits—which outweigh the disadvantages—are not evident to the public at large, which is greatly benefited.

In such context, it is worth noting that even the so-called “developed market-economies” have not always been (true) champions of free trade. Many of said countries shielded substantive portions of their economy from free-market forces. Amongst these were the so-called “natural monopolies”<sup>30</sup> which often for alleged ‘prudential’<sup>31</sup> or ‘social’<sup>32</sup> considerations granted monopoly rights

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<sup>25</sup> Networks can be physical (e.g., railroads) or ‘virtual’ (e.g., software).

<sup>26</sup> The characteristics of these are: first, that the value of any one consumer derives from connecting to a network depends in a great measure on the number of consumers already using the same. Secondly, network industries usually have high fixed costs and a very low marginal cost. Thirdly, extensive cooperation on standard setting, product compatibility and licensing.

<sup>27</sup> See Alan O. Sykes. PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS. The Brookings Institution, Washington D.C., 1995.

<sup>28</sup> In this regard, Paul Krugman concludes that, although, theoretically, government intervention may raise national welfare, the preconditions for successful intervention are so difficult that resisting the temptation to intervene is most likely the best rule of thumb. (Paul Krugman, Is FREE TRADE PASSÉ?, Journal of Economic Perspectives, 1:131-44, 1987.)

<sup>29</sup> Phillippe Brusick. UNCTAD'S ROLE IN PROMOTING MULTILATERAL CO-OPERATION ON COMPETITION LAW AND POLICY. World Competition, vol. 24, No. 1, 2001, at 32.

<sup>30</sup> E.g., network industries often the preserve of State or private monopoly.

<sup>31</sup> For instance banking, insurance, civil air transport.

<sup>32</sup> Cross-subsidizing low profit services with high profit ones.

through regulation which shielded them from competitive forces and competition rules.<sup>33</sup>

A concern that can be observed in the North-South relation *vis-à-vis* globalization is that, while it is accepted that globalization unleashes competitive forces that are believed to foster efficiency by gradually eliminating economic distortions and serves as a catalyst for increased efficiency, accelerated innovation and, eventually, economic development, the absence of globally agreed upon rules of the game and limited world-wide co-operation gives place to "unfettered competition" aggravating discrepancies which could result in monopolization of entire sectors of the world economy as a result of regional or international cartels, megamergers and takeovers, ultimately creating dominant firms and monopolies.<sup>34</sup>

By and large, globalization has been taking place without the adoption of competition rules of a global reach. I.e., globalization of markets has not been accompanied by globalization of the rules of the game, of which competition law is an important component. This concern led the UNCTAD to state at the X Bangkok Declaration that "*the international community as a whole has the responsibility to ensure an enabling global environment through enhanced co-operation in the fields of trade, investment, competition and finance ... so as to make globalization more efficient and equitable.*"<sup>35</sup>

#### D. PROBLEMS OF STATUS QUO

It has been noted that the current status quo of competition enforcement, coupled with certain trends in international affairs,<sup>36</sup> has generated the following problems with regards to competition law enforcement:<sup>37</sup>

1. Competition authorities increasingly target foreign nationals and foreign-based companies in their enforcement efforts and increasingly seek access to evidence located abroad. The foregoing is particularly true in the fields of cartel and merger enforcement.
2. Conduct is investigated by multiple competition agencies simultaneously, each applying its own substantive laws. The problems stemming from the

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<sup>33</sup> Brusick at 31.

<sup>34</sup> Brusick at 23.

<sup>35</sup> Bangkok Declaration, Global Dialogue and Dynamic Engagement, para. 4.

<sup>36</sup> These trends are: (a) the increasing globalization of business; (b) the increasing proliferation of new competition laws around the world; (c) the increasing acceptance of the principle that foreign conduct may fall within the scope of a nation's competition law and within the jurisdiction of that nation's courts if that conduct has adverse "effects" on consumers in that country; and (d) the increasing liberalization of government-sponsored trade-barriers, which has had the effect of exposing private sector conduct that frustrates market access by foreign-based competitors.

<sup>37</sup> Larry Fullerton and Camelia C. Mazard. INTERNATIONAL ANTITRUST CO-OPERATION AGREEMENTS. World Competition, Vol. 24, No. 3, 2001, pgs. 410-412.

referred parallel enforcement are that matters sensitive to other countries may be affected, and simultaneous parallel investigations run the risk of inconsistent remedies.

3. The frequency of parallel investigations in the concentration control area is increasing. Because of the proliferation of concentration review controls many concentrations need to be notified to a number of enforcement bodies, each with different notification thresholds, review processes and substantive approval criteria.
4. There is increasing pressure —particularly from the United States— to apply competition law extraterritorially to resolve problems of market access. The application of United States competition law to protect U.S. exporters remains controversial, particularly because alternatives exist which touch less diplomatic nerves, such as the positive comity principle.

In a nutshell, uncoordinated parallel competition enforcement activity from multiple competition authorities addressing the same conduct which allegedly has effects in more than one jurisdiction is ever more frequent and zealous.

The mentioned problems are not theoretical. Real-life examples of the described problems are the Boeing/McDonnell Douglas case, the WorldCom/Sprint matter, and the GE/Honeywell affaire. Each will now be summarized.

### *1. Boeing/McDonnell Douglas*

The landmark case Boeing/McDonnell Douglas has important legal, economic and political ramifications.

Both Boeing and McDonnell Douglas were the two remaining U.S. producers of commercial jet aircraft and jointly represented 70% of sales worldwide. Their only competitor was Airbus, a European consortium, which had Spanish, Italian, German and British firms. Hence, the market was very concentrated but could not be qualified as without competition since intense rivalry existed among competitors and each sale is generally big and important. In 1997 Boeing purchased McDonnell Douglas. The reactions of the competition authorities involved (U.S. and EU) are worth mentioning.

The U.S. Federal Trade Commission determined that McDonnell Douglas was no longer a competitive force in the market and cleared the concentration. In the FTC's opinion, the effect on competition would be negligible since McDonnell Douglas adding to Boeing's high market share had little effect on future sales increase potential. Also, it was esteemed that banning the deal would have deleterious effects on U.S. security interests.

The EC took a different stance. The former Directorate-General IV found the transaction unlawful under EC law since: (a) it enhanced the dominance of Boeing both on a worldwide and European basis and vested an unfair

competitive advantage over the only competitor: Airbus; (b) the fact that Boeing had exclusive long-term supply and maintenance arrangements (for 20 years) with many airline companies would lead to an anticompetitive environment; and (c) the possibility of cross-subsidies would provide Boeing the opportunity to benefit from government aids McDonnell Douglas received for military R&D programs. In a nutshell, the concern raised by EC authorities was that Airbus might be squeezed out of the market. The EU Merger Control Task Force used its broad jurisdictional authority, particularly the extraterritorial jurisdiction potential which sustained that, as long as the parties fell within their jurisdictional turnover thresholds, the Merger Control Task Force was legitimated to review the concentration. As a result, it almost blocked the US\$ 40 billion deal *even though both firms were based in the US and had no productive assets in the European Union!*

The matter became politicized. Authorities on both sides of the Atlantic alleged that the companies involved were in receipt of illegal subsidies. The result was a destructive theater of wrangling and questioning the quality of competition analysis in the decisions of each other. The matter almost lead to a trade war. However, a deal was struck. Boeing agreed to: (i) waive its right to exclusivity on the supply contracts; (ii) to license patents derived from defence R&D funding at a reasonable royalty; and (iii) agreed not to sign additional exclusive deals.

## 2. *WorldCom/Sprint*

A more tragic example is the concentration of the telephone groups WorldCom and Sprint. The deal collapsed as a result of the failure of competition regulators to accept the concessions put forward by the parties.

The positions of the respective authorities were as follows. The U.S. (Janet Reno — Attorney General— and Joel Klein —Head of the Antitrust Department of the U.S. Department of Justice—) alleged that WorldCom and Sprint ranked second and third in the U.S. long-distance telephone market, just behind AT&T. All three of them control 80% of the market. Hence, the proposed merger would result in dominance in the long-distance and internet markets. The fear, as may be observed, was horizontal consolidation. Also, the risk existed that the transaction would lead to higher prices, lower service quality and less innovation for millions of residential and business customers. Finally, dominance in the internet would be achieved since WorldCom had the largest internet backbone in the U.S. (with 37% of the data traffic) and Sprint had the second-largest (approx. 16%). Therefore, the U.S. Department of Justice sought the extraction of important concessions asking that Sprint's long-distance and internet backbone be sold as a condition to clear the merger.

The EU (Mario Monti —EU's Competition Commissioner) objected to the deal on the following grounds:<sup>38</sup> (a) concern of the market power over EU internet

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<sup>38</sup> The merger plans had been withdrawn by the time the stated unofficial concerns were made public.

services WorldCom would acquire with the merger; and (b) for the deal to be cleared it was indispensable that Spring divest its long-distance telecoms network believing that it would become a strong competitor putting a check to the otherwise obtained market power.

The US\$115 billion deal fell through as a result of not being able to satisfy the competition concerns of the U.S. and EU authorities involved notwithstanding the belief of the parties that a US\$2.1 billion cost-saving would have ensued. The concern of power in the internet traffic market outweighed such envisaged benefits.

### **3. GE/Honeywell**

The GE/Honeywell saga is another (sad) example of the problems already described. While the General Electric Company/Honeywell International Inc. merger was, *inter alia*, authorized in the U.S.<sup>39</sup> and Mexico,<sup>40</sup> but banned in Europe.<sup>41</sup> This led to a watershed of criticism from the U.S. antitrust agencies, senior administration officials,<sup>42</sup> leading economists,<sup>43</sup> competition legal scholars,<sup>44</sup> editorial writers<sup>45</sup> and the business community generally.

The EU based its resolution on two theories of competitive harm: that (a) the merger would strengthen GE's already dominant position in the market for large jet engines; and (b) the merger would enable Honeywell to gain a dominant

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<sup>39</sup> GE announced its proposed acquisition of Honeywell on October 22, 2000. On May 2, 2001, the U.S. Department of Justice announced that an agreement to resolve the limited competitive concerns with the transaction had been reached and hence would allow the deal to proceed.

<sup>40</sup> File Number CNT-04-2001, Competition Gazette, April 2001, Year 4, No. 9, at 189. My firm handled the concentration notice procedure.

<sup>41</sup> Case No. COMP/M.2220 – General Electric/Honeywell. 03/07/2001. Regulation (EEC) No. 4064/89 Merger Procedure, Article 8(3). The conclusion of the Commission was that (para. 567 of the July 3 decision):

“... the merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine, as a result of which effective competition in the common market would be significantly impeded. The proposed merger should therefore be declared incompatible with the common market pursuant to Article 8(3) of the Merger Regulation.”

<sup>42</sup> John R. Wilke. U.S. ANTITRUST CHIEF CRITICIZES EU DECISION TO REJECT MERGER OF GE AND HONEYWELL. Wall Street Journal, July 5, 2001, at A3.

<sup>43</sup> Hal R. Varian. ECONOMIC SCENE; IN EUROPE, GE AND HONEYWELL RAN AFOUL OF 19TH CENTURY THINKING. N.Y. Times, June 28, 2001.

<sup>44</sup> George L. Priest. THE GE/HONEYWELL PRECEDENT AND FRANCO ROMANI. Wall Street Journal, June 20, 2001, at A1.

<sup>45</sup> EUROPE TO GE: GO HOME. Editorial, Wall Street Journal, June 15, 2001, at A14. Also, OBSTRUCTIONIST EUROPE. Editorial, Washington Post, June 22, 2001, at A24.

position in the small engine, avionics and non-avionics markets in which it competes.

The U.S. disagreed with the foregoing findings inasmuch as it believed (a) that GE and Honeywell operated in a highly competitive market; (b) the dominance finding was questionable;<sup>46</sup> and (c) relying on the “range effects” theory of competitive harm<sup>47</sup> was inappropriate.<sup>48</sup>

As per the latter ground, the EU concluded that GE Capital would offer GE businesses enormous financial means enabling it to take more risks in product development than its rivals and to offer customers heavy discounts on the initial sale of engines, recouping those discounts through sales of spares and repairs, moving—in the EU’s view—the breakeven point of an engine project further into the future, thereby forcing rivals to rely on external financing at a higher cost of capital than GE (which has AAA bond rating). The U.S.’s position on this argument was that it was unsupportable inasmuch as (a) mergers are a means by which firms can improve their ability to compete; (b) the size of GE’s market capitalization is irrelevant; (c) the increase in the aggregate firm resources does not mean that any one division of a firm will obtain capital more readily or more cheaply than its rivals;<sup>49</sup> (d) cheap capital is a source of efficiency since it serves to lower prices and promote innovation; (e) the reasoning that, inasmuch as lower prices of the merged firm will enable Honeywell to outrun rivals since they will be unable to cover their fixed costs for the development of new products, is a species of “ruinous competition argument” which is anathema to healthy competition notions; and (f) the GE Capital theory espoused by the EU is

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<sup>46</sup> The EU’s finding of dominance was premised on GE’s share of 65% of the market which was growing because it increasingly obtained a portion of the outstanding orders for aircraft engines still in production. The U.S. believed this to be a weak indicator of competitive conditions in the market inasmuch as GE’s large share was almost completely dependent on a single sole-source contract with Boeing for the 737. Excluding those sales would result in fairly balanced market shares, even if 100% of the remaining sales of CFM’s were assumed to go to GE: GE: 44%, Pratt & Whitney: 23% and Rolls Royce: 27%. (Deborah Platt Majoras. GE-HONEYWELL: THE U.S. DECISION. Remarks of the Deputy Assistant District Attorney General, Antitrust Division, U.S. Department of Justice, before the Antitrust Law Section, State Bar of Georgia, November 29, 2001, at 5.)

<sup>47</sup> Which, in a nutshell, states that mergers could be condemned if they strengthen an already dominant firm through greater efficiencies or gives the acquired firm access to a broader line of products or greater financial resources thereby making life harder for smaller rivals.

<sup>48</sup> Although such theory had at some point been relied on by the U.S. Supreme Court (*FTC v. Procter & Gamble* —386 U.S. 568 (1967)), it raised concern since such theory had been eliminated as a basis for challenging non-horizontal mergers in 1982 with the new Merger Guidelines and the Statement on Horizontal Mergers of the Federal Trade Commission.

<sup>49</sup> Even if GE is a large diversified company, it has many alternatives for its capital. Hence, committing capital to one project involves opportunity costs since the capital is no longer available for other—perhaps more lucrative—ventures. Once opportunity costs are factored, GE’s cost of capital with respect to any particular project should equal that of competitors.

dangerous since it is limitless. Under the same any concentration involving any company with a leading position in any capital intensive business with entry barriers could be stricken.

As it may be observed from the summarized decisions, the international competition landscape is far from befitting optimal regulation, and, as a result, practical problems have ensued in high profile cases.

**III. EFFORTS TO CO-OPERATE IN COMPETITION LAW AND POLICY****A. HISTORICAL ASPECT****1. *The Havana Charter***

Following World War II the United Nations sought to establish mechanisms to coordinate international trade and avoid the repetition of events that led to the occurrence of the conditions of the 1930's. To such end, efforts focused on establishing multilateral institutions in economic co-operation fields, amongst which the creation of an International Trade Organization ("ITO") took major relevance.

A United Nations Conference on Trade and Employment took place in Havana from November 21, 1947 to March 24, 1948 where fifty-seven nations sought to create what became known as the "Havana Charter"<sup>50</sup> which was to create the ITO as a specialized agency of the UN. The fields encompassed by the ITO were diverse and comprehended not only governmental trade disciplines but also rules involving restrictive business practices. Even though no specific competition law chapter was included, provisions having a positive impact on competition as related to international trade permeated through the entire document. For instance, Article 46.1, in Chapter V of the Havana Charter read:

"Each Member shall take appropriate measures and shall cooperate with the [ITO] to prevent, on the part of private or public commercial enterprises, business practices affecting international trade with restrain to competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives [of the Charter]."

In providing for the above, the Havana Charter established a rebuttable presumption that certain practices would have harmful effects on international trade.<sup>51</sup> In addition to such clear and specific referral to competition matters, other provisions indirectly addressed competition topics.<sup>52</sup> Therefore, the

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<sup>50</sup> Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).

<sup>51</sup> Price fixing, market allocation, boycotts, technology suppression, unauthorized extension of patent monopolies. Article 46(1)-(3)

<sup>52</sup> For instance, canons concerning trade liberalization obligations were established which included the reduction of tariffs and the elimination of trade barriers, subsidies as well as the most-favoured-nation principle as the corner-stone of the proposed trade rules. Relevant provisions were Articles 16, 20, 26, and 34 of the Havana Charter.

Havana Charter indirectly, but clearly, established principles of effective competition in inter-State trade.<sup>53</sup>

Unfortunately, the Havana Charter was unable to muster sufficient number of ratifications.<sup>54</sup> However, not all was lost. Although the Havana Charter formally failed, it made a visible contribution to the development of theory and practice of competition regulation. It laid the foundation for a dual system of international regulation of competition by establishing rules for inter-State trade and rules for State control on restrictive business practices in international business transactions. The foregoing established the beginning of a long and bumpy process of establishing an international system of regulation on competition.

## 2. GATT

Although the Havana Charter was unable to elicit international acceptance, the trade policy chapter survived.<sup>55</sup> It was amended and transformed into the General Agreement on Tariffs and Trade ("GATT") which, although originally conceived to be of provisional application, has effectively managed to survive where others have perished and has remained as the only multilateral institution governing international trade for the second half of the XXI<sup>st</sup> Century. It became known as GATT 1948 to contrast it with later versions.

Like the Havana Charter, GATT did not directly proclaim principles of competition. Nonetheless, the market-oriented competitive character of GATT, with its provisions seeking to eliminate artificial barriers and discriminatory practices,<sup>56</sup> paved the way for the establishment of a code of international competition applicable to inter-State trade.

Since the GATT's inception diverse rounds seeking to improve trade liberalization and elimination of trade distorting practices have taken place, from which the Tokyo Round (1973-1979) and the Uruguay Round (1986-1994)<sup>57</sup> are deemed significant improvements in the international trade landscape.<sup>58</sup> In fact,

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<sup>53</sup> Nataliya Yacheistova. THE INTERNATIONAL COMPETITION REGULATION. A SHORT REVIEW OF A LONG EVOLUTION. World Competition Law and Economics Review, Vol. 18, No. 1, September 1994, at 99.

<sup>54</sup> In the case of the U.S., approval was rejected because of the Senate's concern that it would infringe too deeply on U.S. sovereignty.

<sup>55</sup> Which applied to dumping and trade-distorting subsidies.

<sup>56</sup> MFN treatment (Article I), elimination of quantitative restrictions (Article XI), condemnation of dumping (Article VI) and export subsidies and subsidies to non-primary products (Article XVI).

<sup>57</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature on April 15, 1994, Marrakesh, Morocco, 33 ILM 1140-1272 (1994)

<sup>58</sup> To a great extent because of the tariff cuts implemented during the Tokyo Round, the weighted average tariff on manufactured products in the world's nine major industrial

and borrowing Mr. Peter Sutherland's<sup>59</sup> words, the conclusion of the Uruguay Round is a "*defining moment in modern economic and political history*". The foregoing, coupled with the trade liberalization agreements and codes created in the context of the several rounds and international efforts under the auspices of GATT, has resulted in an internationally agreed-upon set of rules and codes of conduct which have been put in place which, although not directly targeting competition, have indirectly enhanced competitive outcomes because of their market oriented character. To begin with, rules and procedures closely connected to competition were put in place.<sup>60</sup> Also, new areas where included in the scope of the GATT 1994 such as agriculture,<sup>61</sup> textiles,<sup>62</sup> clothing,<sup>63</sup> investment,<sup>64</sup> intellectual property rights,<sup>65</sup> services.<sup>66</sup> But also, a broader application of competition rules has been established. Of particular importance is GATS which establishes multilateral regulation of restrictive business practices by firms which include Article VIII (Monopolies and Exclusive Services Suppliers)<sup>67</sup> and Article IX (Business Practices). In fact, GATS Article IX resembles the Havana Charter.

The importance of the foregoing cannot be overstated. It is the first time in history that mandatory—in contrast to hortatory—rules applicable to restrictive business practices have been put in place.<sup>68</sup>

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markets has fallen from 7 to 4.7 percent. Contrast this with the weighted average of 40 percent in 1947.

59 The GATT Director General.

60 Antidumping, countervailing duties, import licensing systems, technical barriers to trade, etc.

61 Agreement on Agriculture, Agreement on Bovine Meat and the International Dairy Agreement.

62 Agreement on Textiles and Clothing.

63 Agreement on Textiles and Clothing.

64 Agreement on Trade-Related Investment Measures ("TRIMS").

65 Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").

66 Particularly finance, insurance, transport, and telecommunications. This was done through the General Agreement on Trade in Services ("GATS").

67 Pursuant to which participants have to ensure that a monopoly supplier of a service does not act in a manner inconsistent with the principle of MFN.

68 Although it could be said that such outcome existed only after the Tokyo Round, since the "GATT à la Carte" mechanism greatly diminished its effectiveness. The reader will recall that GATT à la Carte was the mechanism whereby Member States would cherry-pick the post-Tokyo Round agreements it wished to enter in. Because of such voluntary approach, the outcome was that the undesirable situation where few countries accepted only some commitments resulting in a less than uniform nor coherent regime.

### 3. The EU

Competition related efforts have also been channeled on another front: the European Union. The European Coal and Steel Community ("ECSC") Treaty prohibited:<sup>69</sup>

- "(a) import and export duties ... and quantitative restrictions on the movement of coal and steel;
- (b) measures or practices discriminating among producers, among buyers, or among consumers ... as well as... practices which hamper the buyer in the free choice of his supplier;
- (c) subsidies or state assistance, or special charges imposed by the state...;
- (d) restrictive practices tending toward the division of markets or the exploitation of the consumer."

Also, Article 65 of said treaty prohibited agreements and concerted practices that tended to "*prevent, restrict, or distort the normal operation of competition*" within the Community. Furthermore, Article 66 established provisions restricting "*unauthorized concentrations*".

Later, the 1957 Treaty of Rome<sup>70</sup> was more definite in its competition measures. It included the establishment of a system to ensure that competition is not distorted in the Common Market (Article 3) and considered inconsistent with the common market "*all agreements between firms ... and all concerted practices likely to affect trade between Member States*" (Article 85), particularly agreements that directly or indirectly fixed prices or other trading terms, limited production or investments, and shared markets. Also, abuse of a dominant position was prohibited by Article 86.

## B. ONGOING EFFORTS

The historical efforts described before have created an inertia on several international fronts which merit independent mention.

### 1. Governmental Initiatives

In 1953 a committee comprising delegates from six industrialized nations and four developing ones<sup>71</sup> elaborated a United Nations Draft Convention on Restrictive Practices that received UN Economic and Social Council endorsement and which was sent to UN member nations for ratification. Seven nations endorsed the Draft Convention. However, the U.S. did not ratify it because of strong opposition from the U.S. business community.<sup>72</sup> This led to its demise

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<sup>69</sup> Article 4 of the formative treaty of the European Coal and Steel Community between France, West Germany, Belgium, Holland, Italy and Luxembourg—1951.

<sup>70</sup> Treaty Establishing the European Economic Community, opened for signature Nov. 23, 1957, pt. 3, tit. 1, ch. 1 §1, arts. 85-86, 298 U.N.T.S. 11 (entered into force on January 1, 1958).

<sup>71</sup> India, Mexico, Pakistan and Uruguay.

because of the requirement that at least the nations accounting for 65% of the world import and export ratify it to enter into force.

Developed countries have displayed a lack of agreement on the question as to how to address competition issues raising international concern and, hence, most efforts have been, to a great extent, independent.

Although the American Bar Association's Special Committee on International Antitrust concluded in 1991 that no worldwide standards for competition law are feasible,<sup>73</sup> in 1994 the U.S. Congress passed the International Antitrust Enforcement Assistance Act<sup>74</sup> which authorizes the Attorney General and the Federal Trade Commission to enter into mutual assistance agreements with foreign competition authorities, to exchange confidential information and the issuing of subpoenas by the Justice Department so as to obtain evidence in assistance of competition authorities in other countries even if the alleged behavior does not violate US law. Under the authority of the said law, the U.S. has entered into many such international agreements, including one with Mexico on July 2000.<sup>75</sup>

On another front, the then U.S. Attorney General, Janet Reno, and Assistant Attorney General, Joel Klein, on November 1997 created the International Competition Policy Advisory Committee ("ICPAC") with the purpose to address the following topics (i) multi-jurisdictional merger review; (ii) interface of trade and competition issues; and (iii) the future directions in enforcement co-operation between U.S. antitrust authorities and their counterparts around the world, particularly in their antitrust prosecution efforts. The ICPAC produced a Final Report on Competition Policy on 2000 with important recommendations in all competition fields warranting international concern.

Across the Atlantic, in 1992 Sir Leon Brittan, the then-EC Competition Commissioner suggested that GATT have a strong role in drafting and enforcing international competition minimum rules covering subsidies, cartels, merger policy and public monopolies. This proposal has been taken up by Mr. Karel

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<sup>72</sup> The argument was that implementation would fall discriminatorily heavily upon companies which reside in the U.S. which already have strong antitrust policies. Also, the one-signatory one-vote provision meant that this UN program would thus stimulate all anticapitalistic participating nations to instigate harassing complaints against the United States and other participating nations whose nationals have the most extensive world trade and will so imperil them in their most vital operations.

<sup>73</sup> American Bar Association, Section of Antitrust Law, Special Committee on International Antitrust Report 294 (1991).

<sup>74</sup> Publ. L. 103-438, 108 Stat. 4597.

<sup>75</sup> Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws, July 11, 2000. (4 Trade Reg. Rpt. (CCH) ¶13,509). Available at [www.usdoj.gov/atr/icpac/5145.htm](http://www.usdoj.gov/atr/icpac/5145.htm).

Van Miert (another former EC Competition Commissioner) and Mr. Mario Monti (the current EC Competition Commissioner).<sup>76</sup>

## 2. *The OECD*

The Organisation for Economic Co-operation and Development (“OECD”) has the mission of promoting policies designed to achieve the highest sustainable growth and employment and a rising standard of living in Member countries while maintaining financial stability and thus contributing to the development of the world economy, contributing to sound economic expansion in Member countries and the expansion of world trade on a multilateral non-discriminatory basis.<sup>77</sup>

In 1967 the OECD issued recommendations for its Member States on the treatment they should give restrictive business practices. The effectiveness of such effort may be questioned to the extent said body lacks enforcement capacity. Nonetheless, the OECD initiatives constitute steps forward in the tackling of international behavior representing competition issues.

Amongst the diverse efforts of the OECD, the following standout:

- a) The initiative to elaborate an International Antitrust Code Working Group, and a Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement which was received with skepticism by the OECD.
- b) The OECD Competition Committee report adopted on 2001 on leniency programs to fight hard core cartels.<sup>78</sup>
- c) The several conferences and recommendations of the OECD’s Joint Group on Trade and Competition.<sup>79</sup>

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<sup>76</sup> Mr. Monti has even stated that he is confident that the “...*Multilateral Competition Agreement can see the day in 2005*”. The statement was made during the first conference of the International Competition Network at Naples, Italy. See MONTI PUSHES FOR WTO COMPETITION AGREEMENT BY 2005. Emma Barraclough —Legal Media Group/Euromoney, September 22, 2002. On another forum Mr. Monti spoke of the necessity of creating a multilateral framework to govern the application of competition laws internationally stating that “*in my view, it is now time to go beyond* [the study of this issue within the WTO Working Group]. *I am convinced that the time is ripe to commence negotiations on the development of a multilateral framework of competition rules, as part of the next Round of trade talks.*” (Mario Monti. CO-OPERATION BETWEEN COMPETITION AUTHORITIES—A VISION FOR THE FUTURE. Remarks before the Japan Foundation Conference, Washington, D.C., June 23, 2000.)

<sup>77</sup> Article 1 of the OECD Convention.

<sup>78</sup> Organisation for Economic Co-operation and Development. FIGHTING HARD-CORE CARTELS. HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES. OECD, 2002.

<sup>79</sup> For instance, see the OECD’s document: TRADE AND COMPETITION POLICIES. EXPLORING THE WAYS FORWARD. OECD Proceedings, 1999.

### 3. UNCTAD

The United Nations Conference on Trade and Development ("UNCTAD") approved on April 1980 the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the "UNCTAD Set")<sup>80</sup> which was adopted on December 5, 1980 by the General Assembly of the United Nations.<sup>81</sup>

The main objective of the UNCTAD Set, which is largely based on the Havana Charter, was to make sure that the liberalization of tariffs and non-tariff barriers pursuant to GATT was not impinged upon by restrictive business practices.

Importantly, the UNCTAD Set takes a double approach. On the one hand, it addresses government action by means of its "Principles and Rules for States at National, Regional and Sub-Regional Levels".<sup>82</sup> On the other, it targets private action through its "Principles and Rules for Enterprises including Transnational Corporations"<sup>83</sup> in accordance to which firms must refrain from engaging in restrictive business practices.<sup>84</sup>

The adoption of the UNCTAD Set, even if not expected to lead to full harmonization of laws, was expected to facilitate the adoption of rules at national and regional levels, establish common approaches and converge views which could help in the better understanding of competition issues and set the groundwork for co-operation among States in this field.

In accordance with the 35<sup>th</sup> General Assembly of the United Nations, an Intergovernmental Group of Experts on restrictive business practices was created within the UNCTAD framework which basic purposes are providing a forum for multilateral consultations and discussions, research, addressing matters involving the UNCTAD Set and making recommendations to States. Although

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<sup>80</sup> Document TD/RBP/CONF/10/Rev.1. It can be obtained in the UNCTAD Competition website : [www.unctad.org/en/subsidies/cpolicy/index.htm](http://www.unctad.org/en/subsidies/cpolicy/index.htm).

<sup>81</sup> Resolution 35/63.

<sup>82</sup> As per government conduct, it establishes that States should enact appropriate legislation with effective enforcement procedures that seek to eliminate private action which could restrain competition.

<sup>83</sup> With regards to firms, the UNCTAD Set includes provisions addressing price fixing, collusive tendering, market, customer or sales/production quota allocation agreements, refusals to deal, and practices which dominant firms must abstain from (predatory pricing, discriminatory pricing and certain terms involving transactions, mergers, takeovers, resale price maintenance, etc.).

<sup>84</sup> "Restrictive business practices" are defined as "*means, acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position or market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade ... or which through formal, informal written or unwritten agreements or arrangements among enterprises have the same impact*".

this Intergovernmental Group of Experts has carried out certain activities, on its Eleventh Session it states that the UNCTAD Set was not being adequately implemented.<sup>85</sup>

During the Tenth UN Conference on Trade and Development held in Bangkok on February 2000, the UNCTAD was given the mandate of acting as facilitator for developing countries and economies in transition. Such broad mandate included assisting developing countries in the creation of a competition law and policy framework, promoting a competition culture, examining issues related to competition which are particular to development and the relationship between competition and competitiveness and trade-related aspects of competition and the possibility of international agreements on competition.<sup>86</sup>

Importantly, UNCTAD is also working on the elaboration of a model law or laws on restrictive business practices.<sup>87</sup>

#### **4. Academic Initiatives**

In 1993 a private group of professors and experts,<sup>88</sup> headed by Professor Wolfgang Fikentscher of Munich, elaborated a proposal for an international agreement they called the “Draft International Antitrust Code”.<sup>89</sup> The document was conceived as an international agreement to be concluded within the aegis of GATT or WTO as a Plurilateral Trade Agreement and under the conviction that private activity that clogs markets has often been outside the realm of regulation. Hence, given the foregoing, the best manner to encourage adequate enforcement to pry-open world markets was through the said initiative.

The Munich Draft sets forth certain minimum standards believed essential to any competition law system. The Munich Draft has eight parts<sup>90</sup> and twenty-one

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<sup>85</sup> TD/B/39(2)/7.

<sup>86</sup> In doing so it declared that “...the international community as a whole has the responsibility to ensure an enabling global environment through enhanced co-operation in the fields of trade, investment, competition and finance... so as to make globalization more efficient and equitable.” (Bangkok Declaration, Global Dialogue and Dynamic Engagement, para. 4.)

<sup>87</sup> The latest version, entitled Model Law on Competition, is available in document TD/RBP.5/7 at UNCTAD’s competition website.

<sup>88</sup> The International Antitrust Code Working Group was comprised by J. Drexel, W. Fikentscher, E.M. Fox, A. Fuchs, A. Heinemann, U. Immenga, H.P. Kunz-Hallstein, E.U. Petersman, W.R. Schleup, A. Shoda, S.J. Soltynski and L.A. Sullivan.

<sup>89</sup> Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), published and released on July 10, 1993, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supplement).

<sup>90</sup> Part One deals with the General Provisions and Basic Principles; Part Two addresses Horizontal and Vertical Restraints; Part Three relates to Control of Concentrations and Restructuring; Part Four regulates Abuse of Dominant Position; Part Five includes Remedies and the procedural provisions; Part Six concerns Public Undertakings and

articles. Three pivotal fields of competition were provided for: horizontal and vertical restraints, mergers and abuse of market power. Also, the Munich Draft contemplates the creation of two institutions: the International Antitrust Panel (an adjudicative body to hear disputes stemming from the Code) and the International Antitrust Authority (with administrative and prosecutorial functions). Amongst the functions of the Authority were to appeal national cases, commence actions against national competition authorities believed to be failing in their competition duties under the Code, bring actions before the International Antitrust Panel, seeking injunctions against private companies and assisting States with the development and enforcement of their competition laws.

A minimalist approach was adopted where 15 principles were chosen as those according to which States would progressively harmonize their competition policies. Aside from the foregoing, a lot of discretion was vested on States.

The Munich Draft was presented before the OECD in 1993. Unfortunately, it was not received with enthusiasm.<sup>91</sup> The U.S. take on it is that it is heavily influenced by European approaches and that it tends to identify prohibited behavior through conceptual, rather than economic approaches, in addition to being overbroadly prohibitive. Also, procedural flaws were deemed to exist and it is thought confer too much power to a group of officials holding office for too many years. Additionally, the ability of exploiting ambiguities inherent in the Code's provisions was feared.<sup>92</sup> As a result, the WTO Charter did not include an international competition law agreement.

Notwithstanding the above, the code is a historic event. It constitutes yet another step towards international enforcement of free and open markets.<sup>93</sup>

##### **5. Bilateral and Regional Cooperative Initiatives**

A number of initiatives have taken place to minimize the jurisdictional conflicts between countries in their competition investigations and proceedings and to increase cooperation between competition authorities. Such initiatives have gone from mutual recognition of competition laws and the application of the negative comity principle,<sup>94</sup> to advanced bilateral and regional arrangements whereby

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State Authorization; Part Seven provides for the Institutional provisions; and, finally, Part Eight sets forth goals as to the Future Development of the Draft Code.

<sup>91</sup> Daniel J. Gifford. THE DRAFT INTERNATIONAL ANTITRUST CODE PROPOSED AT MUNICH: GOOD INTENTIONS GONE AWRY. Minnesota Journal of Global Trade, Summer 1997, vol. 6, issue 2.

<sup>92</sup> Gifford, pgs. 4-5.

<sup>93</sup> Gifford at 4.

<sup>94</sup> The negative comity principle provides that each party will consider the interests of the other party at all stages of competition enforcement. It seeks to minimize conflict by agreeing not to take action that will unnecessarily interfere with the interests of the other party.

Members agree to promote cooperation in the application of competition laws and even contemplate the positive comity principle.<sup>95</sup>

On September 23, 1991 the European Community and the U.S. signed a cooperation Agreement. Also, on July 2000 Mexico and the U.S. signed a similar cooperation agreement,<sup>96</sup> which, as stated, provides for the positive comity principle.

Also, NAFTA Article 1501 requires each party to “*adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto*” and requires the parties to co-operate on “*issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws in the free trade area*”.

## 6. *The WTO*

The WTO marks the beginning of a new era of global economic co-operation. Within the WTO context it has stated been that “*The issue is not whether competition policy questions will be dealt with in the WTO context, but how, and, in particular, how coherent will the framework be within which this will be done*”.<sup>97</sup>

At the 1996 Ministerial Conference several parties sponsored an international competition law within the WTO framework.<sup>98</sup> Even though no consensus was achieved, a working group was created with the goal to examine the interaction between trade and competition policy so as to identify areas that may be

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<sup>95</sup> Which establishes a duty of cooperation and assistance. In six competition cooperation agreements entered by the U.S. with different countries (European Union, Brazil, Canada, Israel, Japan and Mexico) the positive comity principle has been included as allowing a country (the “requesting country”) worried that anticompetitive conduct taking place abroad with effects in its jurisdiction may harm its important national interests, to request the country where the conduct is taking place (the “requested country”) to take action against the said conduct. The requested country is not obligated to take action but to “carefully consider” the request and inform the requesting country of its decision. Under the above mechanism, the conduct should be illegal under the requested country’s laws. However, such requirement has been relaxed. Under the *Draft Agreement between the European Communities and the Government of the United States of America on the Application of their Competition Laws* (of January 24, 1997) the positive comity principle allows a party to request the other party’s competition authorities to take action against anti-competitive conduct taking place in the latter’s territory even if does not violate the requesting party’s competition laws or whether the requesting party plans to take any enforcement action.

<sup>96</sup> Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws, July 11, 2000. (4 Trade Reg. Rpt. (CCH) ¶13,509). Available at [www.usdoj.gov/atr/icpac/5145.htm](http://www.usdoj.gov/atr/icpac/5145.htm).

<sup>97</sup> World Trade Organization. WTO ANNUAL REPORT 1997. (1997) Vol 1, at 32.

<sup>98</sup> Communication from the Commission to the Council, *Towards an International Framework of Competition Rules* (COM(96) 284 final, June 18, 1996).

addressed within the WTO framework.<sup>99</sup> The first report of the working group was presented before the WTO General Council on November 1998 and the matter is to be kept in the WTO agenda.<sup>100</sup>

**C. BALANCE OF INTERNATIONAL COMPETITION REGULATION EFFORTS**

From the preceding discussion it may be observed that the issue of how to effectively address international competition related activity has attracted the interest of many international actors. Unfortunately, no single effort has attracted sufficient persuasion to pass international muster or to gain acceptance as *the* venue of choice.

Notwithstanding the foregoing, efforts continue to take place. To understand the issues involved, the next section will comment on each topic meriting international attention and the problems involved.

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<sup>99</sup> 1996 Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration, December 18, 1996.

<sup>100</sup> WT/WGTCP/2, December 8, 1998.

#### IV. FIELDS OF COMPETITION LAW RAISING INTERNATIONAL CONCERN

In order to analyze the complex issues raised by conduct meriting international competition law attention as well as the possible solutions, I will dissect the topic in the following parts: (a) concentrations; (b) cartels and other horizontal restraints; (c) vertical restraints; (d) anticompetitive practices; and (e) the interface between competition and trade policies.

##### A. CONCENTRATIONS

Concentration review has been characterized as the most important application of competition policy.<sup>101</sup> Contrary to the approach towards cartels and other restraints, which are directed at *conduct* of competitors, concentration policy targets *market structure*, which purpose is the maintaining sufficient sellers so as to create the atmosphere for the taking place of competitive conduct. The foregoing is implemented in two manners: (i) breaking up existing consolidations of monopoly power; and (ii) preventing such consolidations in their incipency. The second is carried out by scrutinizing concentrations.<sup>102</sup>

The breaking up of monopolistic consolidations (structural fragmentation) has taken place for the most in the U.S.<sup>103</sup> Outside the U.S. a few examples exist,<sup>104</sup> but they continue to be the exception rather than the rule.<sup>105</sup>

In contrast, a more frequently used weapon has been merger policy. Instead of waiting for consolidations to take place, merger and acquisition activity is scrutinized, and, should it pose a threat either because of the size of the transaction or because of the structural (both from the industry-side and market perspective) circumstances, the deal may be conditioned or banned. The theory is that it is better to halt consolidations in their incipency than to carry out *ex post facto* remedies which frequently upset the entities and practitioners involved under the argument that you can't unscramble scrambled eggs.

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<sup>101</sup> Edward M. Graham. ECONOMIC CONSIDERATIONS IN MERGER REVIEW, in ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 57.

<sup>102</sup> Scherer – Competition Policies, at 41.

<sup>103</sup> Although divestitures occurred in diverse industries, some of the important breakups involved Standard Oil (1911), American Tobacco (1911), du Pont (1912), The Pullman Company (1944), the most important motion picture producers (late 1940's) and American Telephone and Telegraph (1982). Other less serious divestitures, such as compulsory —and sometimes gratuitous—licensing of patents, were implemented.

<sup>104</sup> For instance the forced spin-offs of more than ten thousand pubs in the U.K. which were owned by the six leading brewers (late 1980's). Also, Canada made an (unsuccessful) effort to have the petroleum companies divest their interprovincial pipelines and half of their wholesale distribution facilities (1986).

<sup>105</sup> Scherer – Competition Policies, pgs. 62-63.

For more than half a century, the U.S. was the only country with active merger laws.<sup>106</sup> Although other countries eventually developed such controls, their initial use was either weak<sup>107</sup> or schizophrenic,<sup>108</sup> and exceptionally enforced with vigor.<sup>109</sup>

Currently, the global merger playing field can be described as a color and tone changing kaleidoscope of merger policy approaches. This landscape ranges from the liberal to the strict, and tends to change over time as competition authorities become more savvy and as a result of the changing ideological composition of the members of both the competition authorities and the organs which review their decision.<sup>110</sup> The foregoing necessarily involves the need to play the same game under different—and sometimes conflicting—rules.

The foregoing describes the situation firms are put in by the current *status quo* of international concentration review. However, it does not tell the whole story. Competition authorities are also put between a rock and a hard place. A set of criteria needs to be found that allows them to find a coherent solution that avoids that they fall in either of the following two pitfalls, which are the two extremes of the same issue: On the one hand, the danger of giving a green light to a concentration which results in a combined entity that does in fact have enough market power to diminish consumer surplus, and, hence, fail to prevent an incipient monopoly or the abuse of a dominant firm position. On the other hand, the risk of granting a red light to a concentration in which the combined entities would have realized sufficient efficiencies that would have increased long-run consumer surplus.<sup>111</sup>

In fact, clearing a multinational merger has become a costly, uncertain, time-consuming and quixotic venture. A clear example of the above is the General

<sup>106</sup> The Sherman Act (with its “*combinations ...in restraint of trade*” language) the 1914 Clayton Act (which included merger control provisions, which, on technical grounds, the Supreme Court rendered ineffective in the 1920’s) and the 1950 Celler-Kefauver Act, reinforced procedurally by the 1976 Hart-Scott Rodino Premerger Notification Act.

<sup>107</sup> Which was the case with France and Japan. In France’s case, the reason appears to be that a belief existed that larger companies would be better equipped to compete with foreign ones. Hence, tolerance ensued. In Japan’s case, initial assertive enforcement was impinged upon by other agencies’ condemnation.

<sup>108</sup> As professor Scherer (Scherer – Competition Policies, at 64) has qualified the United Kingdom’s activities after 1964.

<sup>109</sup> This was the case of West Germany with its 1973 law.

<sup>110</sup> For instance, the U.S. Supreme Court’s approach tends to shift as its ideological composition varies.

<sup>111</sup> This latter scenario also includes the cases where a concentration is challenged but subsequently allowed under restrictive conditions, when these conditions have the effect of reducing net long-run consumer surplus over what would have been realized in the absence of these conditions. Both of these dangers were pointed out by Edward M. Graham. ECONOMIC CONSIDERATIONS IN MERGER REVIEW. Pgs. 68-69.

Electric Company/Honeywell International Inc. merger which was authorized in the U.S.<sup>112</sup> and Mexico<sup>113</sup> but banned in Europe.<sup>114</sup>

Cooperation to alleviate procedural complexities that will yield transaction cost saving and avoid frustrating potentially useful deals is urgently needed.<sup>115</sup>

The ICPAC report notes that certain practices must be encouraged to address concentrations with significant transnational or spillover effects. These are: (a) ensuring non-discriminatory treatment of firms based on nationality; (b) minimizing the imposition of remedies unrelated to competition objectives; (c) minimizing the imposition of remedies based on parochial political concerns and ensuring transparency in the process if non-competition factors play a role in the decision making process; (d) minimizing problems that may arise in competitor-driven processes by recognizing that competitor interest and consumer interests are not necessarily aligned; and (e) in the face of clash, tailoring remedies with extraterritorial effects to cure the domestic problem, taking into account procedures in the foreign jurisdiction.<sup>116</sup>

Also, measures should be taken to ensure that each concentration review regime is transparent and examines only those concentrations that have a nexus and the potential to create appreciable anti-competitive effects within that jurisdiction. The ICPAC suggests that notification thresholds should be amended, where necessary, to include appreciable and objectively-based connection to the reviewing jurisdiction. For instance, by targeting local activity such as sales or assets. The use of sales volume or asset value criteria over market shares is encouraged.<sup>117</sup>

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<sup>112</sup> GE announced its proposed acquisition of Honeywell on October 22, 2000. On May 2, 2001, the U.S. Department of Justice announced that an agreement to resolve the limited competitive concerns with the transaction had been reached and hence would allow the deal to proceed.

<sup>113</sup> File Number CNT-04-2001, Competition Gazette, April 2001, Año 4, No. 9, at 189.

<sup>114</sup> Case No. COMP/M.2220 – General Electric/Honeywell. 03/07/2001. Regulation (EEC) No. 4064/89 Merger Procedure, Article 8(3). The conclusion of the Commission was that (para. 567 of the July 3 decision):

“... the merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine, as a result of which effective competition in the common market would be significantly impeded. The proposed merger should therefore be declared incompatible with the common market pursuant to Article 8(3) of the Merger Regulation.”

<sup>115</sup> Curiously, although the possibility of divergent outcomes has been noted, by and large, multijurisdictional concentration review has resulted in consistent and compatible remedies. (Janow and Lewis at 7.)

<sup>116</sup> Janow and Lewis, pgs. 7-8.

<sup>117</sup> Janow and Lewis at 11.

**B. CARTELS AND OTHER HORIZONTAL RESTRAINTS****1. *Introduction: The Issue***

Cartels are the main trade-distorting monopoly power problem currently arising from international business.<sup>118</sup> In fact, they have been characterized as “the most egregious violations” of competition law<sup>119</sup> inasmuch as they cause billions of dollars of harm to consumers each year.<sup>120</sup> Although countries engage in competition and trade liberalization discourse, experience shows that they tend to erect trade barriers so as to favor cartels benefiting their domestic companies. The reason for this is simple: price fixing and other restrictive practices between exporting companies may contribute to national industrial policy goals by biasing the terms of trade in the exporting nation’s favor and shifting economic rents from importing nations to sellers in the exporting nation.<sup>121</sup>

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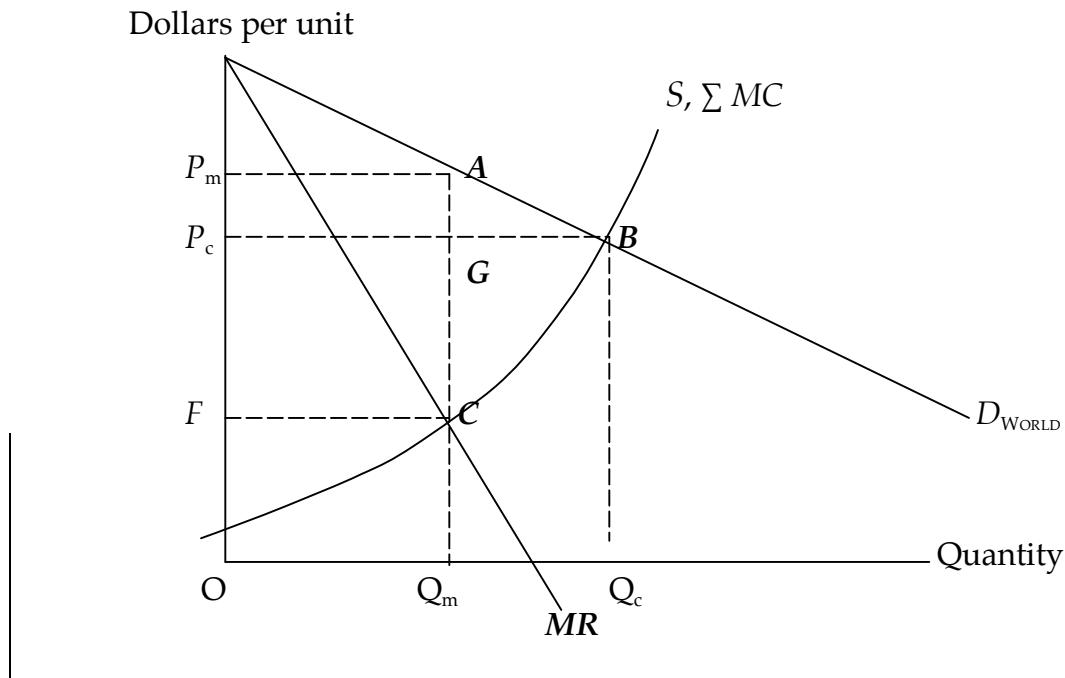
<sup>118</sup> Scherer – Competition Policies, at 89.

<sup>119</sup> Organisation for Economic Co-operation and Development. FIGHTING HARD-CORE CARTELS. HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES. OECD, 2002, at 11.

<sup>120</sup> As concluded in the 2002 OECD Competition Committee report of the Nature and Impact of Hard Core Cartels and the Sanctions Under National Competition Laws. Organisation for Economic Co-operation and Development. FIGHTING HARD-CORE CARTELS. HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES. OECD, 2002, at 3.

<sup>121</sup> Scherer – Competition Policies at 43.

The following graph depicts the point.<sup>122</sup>



The chart takes  $S$  as the domestic competitive industry facing a foreign demand curve of  $D_{WORLD}$ . If the industry is left to price competitively, the price will be  $P_c$  and the output  $Q_c$ . By cartelizing, it can appropriate the foreign market's marginal revenue curve  $MR$ , equate  $S$  (which reflects marginal cost) with  $MR$  and restrict output to the monopolistic level  $Q_m$ , hence selling at the inflated price of  $P_m$ . As a result, by restricting output the domestic industry sacrifices rents measured by the triangular horizontal area found between  $GBC$ , which is more than compensated by the gain comprehended in the area  $P_mAGP_c$ .

Hence a net gain exists to the exporting nation from cartelization, and it is captured by the sellers of the product.

## 2. Export Cartels

An export cartel is an association of exporting firms that regulates price by restricting output or competition and, although they may account for a small portion of trade, they can distort foreign markets if they have the power to influence prices. The most likely effect will be that an increase in the price paid by consumers in the foreign country and a sub-optimal volume of trade in the good or service covered by the export cartel.

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<sup>122</sup> Borrowed from Scherer – Competition Policies at 44.

Export cartels or export associations are formed frequently under the excuse of cost-savings resulting from allowing that a common sales organization handle the transactions multiple domestic products in regards to selling, financing and customs paperwork, particularly small companies which cannot mount their own export campaigns. Achieving such economies of consolidated selling has been the *raison d'être* of laws authorizing export trading associations. In the U.S. the Webb-Pomerene Act of 1918 and the Complementary Export Trading Company Act of 1982 provides of such associations. In Mexico, Article 28 of the Constitution allows for export cartels, as will be discussed later.

Doubts have surged in regards to the alleged cost-savings since the Webb-Pomerene groups have been shown to comprise namely large firms and several of them have originated in highly concentrated industries.<sup>123</sup>

Most nations exempt export associations from the prohibitions of their competition policy laws. In such cases it is frequently required that registries, filings and other continuing requirements be complied with that allow for regulatory oversight so as to prevent the competition-reducing spillover effects therein involved.<sup>124</sup>

Surprisingly, and despite their cost-saving and price fixing potential, only a small fraction of national exports seem to be registered in the form of export trade associations.<sup>125</sup>

Many countries exempt from their cartel prohibitions certain activities considered to be desirable. For instance, the United States exempts from the Sherman Act cartel prohibition most export cartels, agricultural cooperatives, cooperative research and development arrangements, insurance company rate-setting activities, baseball player assignment and labor union collective bargaining efforts. German law tolerates exemptions under "crisis" circumstances –such as recessions– the following: cartels, rationalization and specialization cartels, such as closing plants and reassigning production orders to improve efficiency, export and import cartels, and "conditions" cartels, which include the setting uniform rents for delivery and invoice payment.<sup>126</sup>

Japan allows exemptions, provided certain conditions are met, for depression cartels, rationalization cartels, small and medium sized enterprise cartels, and

<sup>123</sup> Scherer – Competition Policies, at 43, citing a Federal Trade Commission Report of 1967 (Chapters 3 and 4) and similar findings on Japanese export cartels (citing Jacquemin, 1981).

<sup>124</sup> Scherer – Competition Policies at 46.

<sup>125</sup> In the U.S., Webb-Pomerene associations handled approximately 19 percent of U.S. exports in the 1930's, this being their peak time. By 1981 less than two percent remained. In West Germany less than two percent were registered by 1980, and the Japanese also had low and with a downward trend, most cartels formed during the 1980's being in the textile industry. (OECD, 1984 at 30, cited by Scherer – Competition Policies at 46.)

<sup>126</sup> Scherer – Competition Policies, pgs. 52-53.

certain regulated industry activities including import and export cartels and cartels organized under explicit statutory mandates.<sup>127</sup>

In the case of Mexico, a Constitutional<sup>128</sup> and federal (competition) law<sup>129</sup> exemption exists for associations or cooperatives selling abroad, provided the following criteria is met: (a) that the said products are the region's main income source, or first necessity articles; (b) the products are neither sold nor distributed within Mexican territory; (c) membership is voluntary and members are freely allowed to join or leave the association; (d) they do not issue or distribute permits or authorizations being granted by the Federal Public Administration; and (e) that their incorporation is authorized by the State legislation of the place of their incorporation.

### **3. Import Cartels**

Although there are many reasons why a country may allow import cartels, a mayor one is that by allowing domestic purchasers to organize into a cartel, a buying cartel wielding monopsony power will be established restricting purchases until the marginal supply cost has fallen into equality with the marginal value of the commodity thereby appropriating a monopsony rent.<sup>130</sup>

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<sup>127</sup> Idem.

<sup>128</sup> Included in paragraph eighth of Article 28 of the Federal Constitution. Such proviso reads as follows:

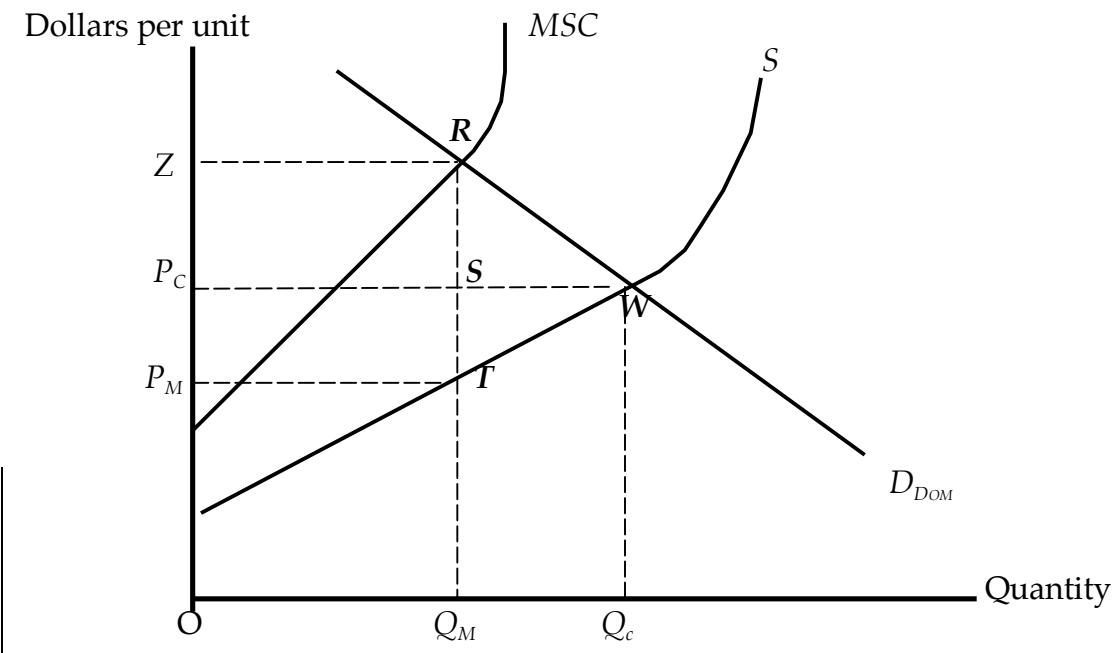
"Labor unions incorporated to protect their own interests and the cooperative associations of producers which purpose is the protection of their interests or the general interest, and directly sell in foreign markets the national or industrial products that are the main source of income of the region where they are produced or articles that are not of basic necessity, as long as such associations are under the surveillance or protection of the Federal Government or of the States, provided prior authorization is obtained from the respective legislatures in each case. The same legislatures, by themselves or through Executive proposal, may derogate, when the public interest so requires, the authorizations granted for the incorporations of such associations."

("No constituyen monopolios las asociaciones de trabajadores formadas para proteger sus propios intereses y las asociaciones o sociedades cooperativas de productores para que, en defensa de sus intereses o del interés general, vendan directamente en los mercados extranjeros los productos nacionales o industriales que sean la principal fuente de riqueza de la región en que se produzcan o que no sean artículos de primera necesidad, siempre que dichas asociaciones estén bajo vigilancia o amparo del Gobierno Federal o de los estados, y previa autorización que al efecto se obtenga de las legislaturas respectivas en cada caso. Las mismas legislaturas, por sí o a propuesta del Ejecutivo, podrán derogar, cuando así lo exijan las necesidades públicas, las autorizaciones concedidas para la formación de las asociaciones de que se trata.")

<sup>129</sup> Article 6 of the Federal Law of Economic Competition ("Ley Federal de Competencia Económica"— "FLEC"). The *Ley Federal de Competencia Económica* is the Mexican competition statute. Should the reader wish to elaborate on the same, I would refer to Francisco González de Cossío, LAW AND ECONOMICS OF THE MEXICAN COMPETITION LAWS, (Doctoral Dissertation), University of Chicago.

<sup>130</sup> Scherer – Competition Policies at 55.

The following graph should illustrate the point.<sup>131</sup>



The graph seeks to depict an upward sloping supply<sup>132</sup> facing a domestic demand of  $D_{DOM}$ . Under competition, the purchase price will be  $P_c$  and output  $Q_c$ . The monopsony created by the buying cartel, taking into account the effect of its purchases on price, will compute the marginal supply cost  $MSC$  of the different quantities purchased. Accordingly, it will restrict its purchases until the price is lowered so that the marginal supply cost equals marginal value of the commodity, i.e., the demand point at  $R$ . Under such scenario, the amount purchased will be  $Q_M$  which the importers will be willing to supply at the price  $P_M$ , which is less than the competitive price  $P_c$ .

The cartel will appropriate —at the supplier's expense— the monopsony rent displayed by the area included in  $P_c S T P_M$ , sacrificing a much smaller triangular surplus  $RWS$  resulting from the output restriction.<sup>133</sup>

<sup>131</sup> Borrowed from Scherer – Competition Policies at 55.

<sup>132</sup> I.e., the country is assumed to be a sufficiently important purchaser of the commodity for the prices charged by competitive suppliers to rise with increased import volume.

<sup>133</sup> Prof. Scherer notes that the plausibility of the reasons arguing in favor of a countries' establishing of export cartels raises the question as to why they are not common. To answer such query he forwards four possible reasons: (i) they might exist but not be reported so as to avoid putting exporting industries on notice; (ii) finance ministers may prefer tariffs to allowing a domestic company appropriate rents from exporters; (iii) domestic firms may find it difficult to muster monopsony power vis-à-vis exporters; and (iv) the exporters may circumvent the cartels (as done with tariffs) by establishing production facilities in the importing countries. (Scherer – Competition Policies at 56.)

Another alleged reason for allowing a buyer's cartel is the desire to keep out imports that may compete with domestic products. However, it is not clear why a group of buyers would want to do so, unless they are vertically integrated into the industry producing the commodity in question.<sup>134</sup>

#### **4. International Cooperation and Enforcement on Cartels**

Instead of cooperating, countries have by and large chosen to go solo on the path of fighting cartels. When researching the cases of cartel prosecution one finds that, with regards to the history of the two major competition blocks (the U.S. and the EU<sup>135</sup>) that the record is vacant when seeking to find instances of cases where it was joint effort, contrary to one-sidedness, what led to the punishment of a cartel which members surpassed national borders.<sup>136</sup> Contrary to such situation, the United States and Canada have cooperated in certain major cartel investigations. The foregoing has been done through treaty implemented competition law provisions and mechanisms which included mutual assistance in substantive and procedural matters.

As a result of the lack of cooperation, the outcomes of investigations have fluctuated from reduced effectiveness to outright failures in some cases. For instance, the lack of cooperation in the U.S. *International Food Additives Cartel* cases led to initial problems in the securing of evidence located abroad.<sup>137</sup> However, in the end guilty pleas were obtained as to the conspiracy to raise prices of an additive called lysine and allocate sales in the worldwide lysine and citric acid markets. Fines for US\$100 million were imposed which were the largest ever at such moment. Another example is the attempt by the U.S. to punish under its competition laws an international industrial diamond producer and distribution cartel against General Electric, DeBeers and several individual defendants,<sup>138</sup> which ended up in failure because of lack of cooperation.

<sup>134</sup> Scherer – Competition Policies at 57.

<sup>135</sup> Importantly, the U.S. and E.U. entered into a competition cooperation agreement on September 23, 1991 (Agreement between the Government of the United States of American and the Commission of the European Communities Regarding the Application of Their Competition Laws) (reprinted in 30 I.L.M. 1491 (1991)).

<sup>136</sup> I am not alone on this assertion. See Spencer Weber Waller. ANTICARTEL COOPERATION, in ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 98.

<sup>137</sup> The trouble in obtaining evidence located abroad that the U.S. Antitrust Division experienced ranged from document destruction in Japan by executives of Ajinomoto, to other less serious violations. (see International Competition Policy Advisory Committee, transcript of meeting, February 26, 1998 ([www.usdoj.gov/atr/icpac/1772.htm](http://www.usdoj.gov/atr/icpac/1772.htm))).

<sup>138</sup> United States v. General Electric Co. (869 F.Supp.1285 (S.D. Ohio 1994)). See also, William M. Carley. FATAL FLAWS: HOW THE FEDERAL CASE AGAINST GE, DEBEERS COLLAPSED SO QUICKLY, Wall Street Journal, December 28, 1998, A1. Spencer Weber Waller. ANTICARTEL COOPERATION. At 104.

However, and to tell the whole story, lack of cooperation has not always led to negative results. The U.S. has successfully investigated and prosecuted international cartels even without the assistance of the EU. For instance, the Justice Department recently prosecuted a decade-long international vitamin cartel which conspired to increase prices of vitamins added to a wide variety of prepared foods. The Justice Department eventually obtained guilty pleas and breathtaking fines which exceeded US\$1 billion for the foreign corporations and jail sentences for the foreign individuals involved.

Another example is the U.S. *graphite electrodes* cases where the conspirators fixed prices in the U.S. and other markets in meetings taking place in Europe. Eventually, the companies participating (Showa Denko Carbon, a U.S. subsidiary of the Japanese firm Showa Financing KK and UCAR International) plead guilty to violating the Sherman Act and agreed to respectively pay US\$29 million and US\$110 million in fines.

Outside cartels, some cooperation has existed. For instance, the Microsoft case, which has been cited as the first test of international coordination of competition activities between two jurisdictions with different competition policies.<sup>139</sup> Also, in the merger context, since firms need a quick decision on the feasibility of the deal they want to strike, they tend to cooperate and even waive confidentiality in order to reach a joint solution which serves both sides, or at least as a coordinated remedy.<sup>140</sup> An example of this is the WorldCom-MCI telecom merger involving two United States firms and which in 1998 divested MCI's internet assets to Cable and Wireless worth US\$1.75 billion, the biggest divestiture in U.S. merger history. Interestingly, EU and U.S. authorities worked closely together, shared analysis, exchanged views, held joint meetings with the companies involved so as to discuss issues and assess the possible solutions, and eventually came to the same conclusions. A similar process, but with different outcome, occurred during the Boeing/McDonnell Douglas merger where the FTC and the EU Commission worked closely together although disagreed as to whether the transaction was legal.

##### **5. Instances of International Cartel Enforcement**

Organized cartelization has taken one of either of the four following species: (i) cross-border cartels among national enterprises; (ii) cross-border cartels among private entities; (iii) export cartels operating from a single country; and (iv) restrictive arrangements formed to resolve international trade policy conflicts.<sup>141</sup> I will now briefly comment on the same.

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<sup>139</sup> Keegan (1996) and Spencer Weber Waller. ANTICARTEL COOPERATION. At 108.

<sup>140</sup> Spencer Weber Waller. ANTICARTEL COOPERATION. At 108.

<sup>141</sup> Scherer – Competition Policies, pgs. 46-47.

*a. Cross-border Cartels among National Enterprises*

The most important cartel in modern world history is the Organization of Petroleum Exporting Countries ("OPEC") formed by national governments' oil-owning authorities.

Efforts have been made to hamper OPEC's activity,<sup>142</sup> however, they have run against the judicial brick-wall of the "act of state doctrine" which qualifies OPEC's activity as "acts of state" and, hence, outside the scope of judicial competence inasmuch as they relate to activity of sovereign states and are deemed better handled by other branches of government: the executive and legislative.

*b. Cross-Border Cartels among Private Entities*

An important precedent is the prosecution by the European Community of an international cartel of wood pulp suppliers to the EC by a group of U.S. firms registered as an export cartel under the Webb-Pomerene Act. The EC Court of Justice held that the act of state doctrine did not shield the activity since the Webb Pomerene associations merely *allowed*, but not *required*, by U.S. law. The reaction of the U.S. Department of Justice to the EC initiative was to make no objections.<sup>143</sup>

In this domain the act of state doctrine has also impinged upon competition law enforcement. Although, further to the "*effects doctrine*" cross-border cartels would *ab initio* be challengeable under the laws of the country whose consumers are affected by the practice, should cartelization take place under active government compulsion it is likely to be exempt from competition liability.<sup>144</sup> However, should it be registered with the host nations' government, *but not actively mandated*, the act of state shield will not obstacle liability.<sup>145</sup>

As in other topics, the issue of extraterritoriality and aggressive/exorbitant jurisdiction by certain countries based on the "*effects doctrine*", of which the U.S. tops the list, has become an issue to which other countries have reacted<sup>146</sup> — sometimes aggressively— by, among other manners, enacting laws that make it

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<sup>142</sup> For instance, in *International Association of Machinists and Aerospace Workers v. The Organization of Petroleum Exporting Countries* (477 F.Supp. 553 (1979), 649 F.2d 1354 (1981)), an attempt was made to enjoin OPEC's price-raising activity and obtain monetary damages.

<sup>143</sup> This position was adopted after consultation with EC competition policy officials. Importantly, the U.S. has also sued to enjoin activities of foreign export cartels under similar legal theories. (Scherer— Competition Policies at 48.)

<sup>144</sup> Scherer – Competition Policies at 48.

<sup>145</sup> See Antitrust Guidelines for International Operations of the U.S. Department of Justice, 53 Fed. Reg. 21595-97 (1988).

<sup>146</sup> For instance, the United Kingdom, Canada, Australia, and France. Protests have been made against the U.S. by the referred countries and have sometimes urged the settling of the matters by the Department of Justice. (Scherer— Competition Policies, pgs. 48-49.)

difficult to subpoena evidence or otherwise elicit the cooperation of cartel members in their home jurisdictions.

*c. Export Cartels Operating from a Single Country*

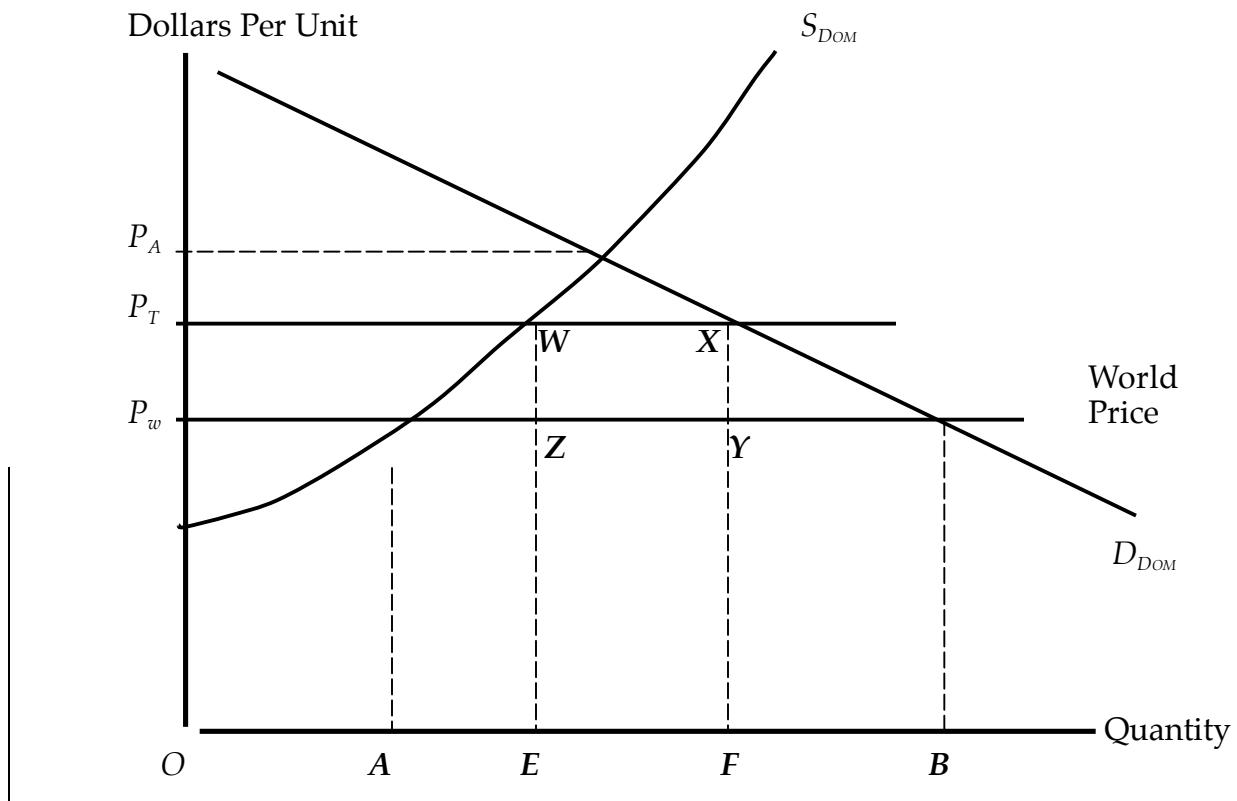
These have been discussed above (Section IV.B.2 of this Paper). The reader is referred to such discussion.

*d. Voluntary Restrictive Arrangements*

Restrictive agreements formed to resolve international trade policy conflicts have taken the form of Voluntary Export Restraints ("VERs").

VERs, also known as Voluntary Restrictive Agreements ("VRAs") or Orderly Marketing Arrangements ("OMAs"), are *sui generis* practices. They depict a scenario where a government of one State asks another to have its producers 'voluntarily' restrain their exports to the extent that they are believed to be dumped, subsidized or otherwise materially injure the importing nation's industry. Such petition is done under the (quiet) threat that not doing so would be accompanied by formal enforcement under the domestic laws of the importing country.

The following graph<sup>147</sup> illustrates the economics behind VRAs:



$S_{DOM}$  is the domestic supply curve and  $D_{DOM}$  is the domestic demand. Without imports the market competitive price would be  $P_A$ . If demand is small relative to world supply, the domestic prices will be competed down to  $P_w$ . Hence, domestic firms will supply  $OA$  and importers will supply  $AB$  output. Should this volume of imports be considered as posing a threat to the domestic industry, or should the applicable multilateral trading system requirements be satisfied, the danger could be rectified by imposing a tariff per unit of  $P_T P_w$  raising the price to  $P_T$ , reducing the quantity of exports to  $EF$ , and increasing domestic output to  $OE$ .

The amount of tariff revenue to be realized by the importing nation's treasury will be the rectangle of  $WXYZ$ . Therefore, an identical increase in domestic prices and output may be obtained by establishing an input quota or having the exporter's of another nation agree to 'voluntarily' limit their shipments to the quantity  $EF$ .

The difference, however, will be that under a VER quota system, the surplus of domestic price over world price ( $P_T P_w$ ) will accrue to the exporting producers and not to the importing nation's tariff collector. Accordingly, exporters capture

<sup>147</sup> Borrowed from Scherer – Competition Policies at 50.

rents of WXYZ that they would not receive from selling at the competitive world price or from having a special tariff levied on the goods.

These measures were popular in the U.S. and EC in the 1970s and 1980s. The reason for their popularity seems to be that, on the one hand, although exporters lose export volume relative to the non-tariff situation, they will be much better off under the VRA scenario than they would be under an equivalent import-limiting tariff since they will appropriate the amounts that would otherwise be paid as tariffs. On the other hand, the reason why the importing nations prefer VRAs to tariffs may be puzzling since it means less revenue. The answer may be that it will minimize international friction.<sup>148</sup> The type of problems eliminated are those that stem from WTO complaints as well as general trading partner anger.

The problem with VRAs is that they are inflexible and hamper the type of changes in import volume that normally result from shifts in domestic demand, world supply and, hence, world price of the imported good. Furthermore, should the domestic industry be competitive, the VRAs will foster greater domestic prices than tariffs eliciting the same restriction of output. This would explain the preference by domestic producers of VRAs *vis-à-vis* tariffs.<sup>149</sup>

An additional problem with VRAs is that, once decided upon, they must be allocated between national producers of the exporting country. A way to do so is for the exporting country's government to auction off the quotas. However, in doing so the exporting nation government will appropriate most of the quota rent (WXYZ) described in the above figure. Another way to do so would be to form a *de facto* cartel among the producers requiring each to limit its exports in congruence with its assigned share of the quota. However, and as the careful reader might already have realized, the problem with this solution is that it may run afoul of the domestic competition laws forbidding output limitations.<sup>150</sup>

An open question is whether VRAs violate GATT/WTO provisions. Interestingly, the answer is: "it depends". These practices fall under what has been called "gray-area" measures which implies that they may not always be clearly inconsistent with international rules (presumably "black") but,

<sup>148</sup> Scherer – Competition Policies at 51.

<sup>149</sup> This conclusion is not without challenge. Prof. Scherer cites the conclusion of Messerlin (1989b) in the sense that high tariffs may be preferred over VRAs by importing producers. (Scherer – Competition Policies, at 51.)

<sup>150</sup> The matter has been litigated. In *Consumers Union of U.S., Inc. v. William Rogers et al*, 352 F.Supp. 1319 (1973) (vacated on appeal in *Consumers Union of U.S., Inc. v. Henry Kissinger et al*, 506 F.2d 136 (1974), cert. den. 421 U.S. 1004 (1975)), which dealt with a VER adopted by the Japanese and European steel producers under instigation of the U.S. government, a federal court analyzed the legality of the restraints under the Sherman Act. The appellate court found that negotiating such restraints was comprehended in the executive foreign policy powers.

nonetheless, do not live up to the basic policy goals of the international economic system.

Although, *ab initio*, VRAs would seem a technical violation of GATT Article XI(1),<sup>151</sup> it may be justified under Article XIX (the “escape clause”), XX (protection of public morals and health exception), XXI (the security exceptions). More importantly, the mechanics of the same pose an enforcement dilemma: no country complains and exporters comply for fear of worse measures.<sup>152</sup> Furthermore, they are hard to tackle since the parties participating have no interest in complaining<sup>153</sup> and third parties would seem to have an uphill battle in establishing injury.<sup>154</sup>

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<sup>151</sup> Which states that “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation ... or on the exportation ... of any product...”.

<sup>152</sup> John H. Jackson. THE JURISPRUDENCE OF GATT AND THE WTO. INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS. Cambridge University Press, 2000, at 66.

<sup>153</sup> Why should the imposing country complain against its own activity?, and the government of the country to which the restrained products are destined could see them as a “safeguards” measure to alleviate “injury”.

<sup>154</sup> Although they could challenge it under the Article XXIII theory of nullification and impairment, shifting the burden of proof against the defending country to show that no nullification or impairment existed.

### C. VERTICAL RESTRAINTS

The reader will recall the explanation offered to understand “vertical restraints”: they are refusals by a firm to transact with “upstream” suppliers or “downstream” customers. I.e., firms located in different levels of the production chain. Vertical arrangements range from transactions between completely independent firms, to the interaction between two or more levels within a single economic group. Between these two extremes fall contractual arrangements which restrict the freedom of action of upstream and downstream firms.<sup>155</sup> The competitive issue stemming from these arrangements is that, while they can be used for pro-competitive purposes, they can be used for anticompetitive purposes. The justifications and consequences of such type of practices are both complex and controversial. Hence, it is foreseeable that different laws take differing—and frequently conflicting—views on the matter. Actually, when it comes to vertical arrangements, analyzing their implications from an international standpoint raises their level of difficulty in two ways: not only are their consequences controversial and apt for abuse, but also, because they are complex and disputed, even informed and reasonable experts take divergent views on the issue of their effects. Hence, from a legal policy standpoint, the same can be—and often are—treated with dissimilar effects in different jurisdictions.

In fact, the differences can be great.<sup>156</sup> Take, for instance, the U.S. and European cases. In a nutshell, whereas European competition policy will strike an arrangement down as anticompetitive upon proof that it may significantly restrict one or more competitors’ ability to access or expand its operations in a market, the U.S. view will require more. Likelihood that the arrangement will ‘substantially lessen competition’ will need to be established. What is more, the U.S. approach will require that the ‘substantiality of any lessening of competition’ be characterized by either an absence of offsetting efficiency benefits or proof of actual harm to efficiency.<sup>157</sup>

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<sup>155</sup> COMPETITION AND TRADE EFFECTS OF VERTICAL RESTRAINTS, in TRADE AND COMPETITION POLICIES FOR TOMORROW. Organisation for Economic Co-operation and Development, 1999, at 43.

<sup>156</sup> So great that an author has qualified the differences as a “Great Divide” (Philip Marsden in ANTITRUST GOES GLOBAL. WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil editors, 2000, at 98).

<sup>157</sup> The differences in approach are the result of a different philosophical backdrop as regards economic freedom. In the U.S. competition policy is conceived as an instrument of economic liberty, free market access, as well as a means to foster efficiency. The European take, on the outset, agrees with the preceding assertions, but is also supported on the notion that competition policy is an engine of market integration. Hence, whereas in the European Union the guiding test to assess the legality of a practice is whether it is consistent with the Common Market—which is used as a proxy for their competition impact—, U.S. competition law looks at the overall effects of a practice on the efficient operation of the market as a whole, measured by output. (Marsden, pgs. 118, 122 and 127.)

As per the Mexican case, and as already dealt with before,<sup>158</sup> a vertical arrangement will be stricken down as illegal and trigger competition liability when the firms engaged in it have market power in a relevant market and any of the following three results occurs: (a) displacement of a competitor from the market; (b) substantially impede the access of competitors into the market; or (c) establish exclusive benefits in favor of one or several persons.<sup>159</sup>

The Mexican approach to verticals seems to be congruent with the approaches taken by both the U.S. and the EU although two circumstances should be noted. To begin with, the standard is lower than that of the “substantially lessen competition” threshold of the U.S. as well as the EU’s “significantly restrict competitors’ ability to access or expand its operations in a market”. However, practice shows that negligible displacements of competitors, or those derived from efficiencies, will generally not trigger sanctioning by the FCC. A second point to note is that, compared to the U.S. and E.U., the circumstances which may trigger vertical restraint liability are clearer. This is both advantageous and disadvantageous at the same time. On the one hand, firm's and practitioners know what to expect and be wary of in investigations. On the other, limiting such causes of action could eventually prove to fall short of business dynamic reality.

Whatever the threshold of acceptance of a vertical restraint is, the concern is that they can exclude interbrand competitors and these competitors may be foreign firms. Combating these practices has thus far generally been made from a unilateral standpoint. Initiatives exist for a multilateral coordinated effort to combat them,<sup>160</sup> although their feasibility is still subject of debate.

Vertical arrangements are a field of competition law and policy that, because of the complex, changing, case-sensitive and controversial nature of their effects, are a neuralgic point inviting disagreement and contradicting approaches in the international level. Uniforming —or at least harmonizing— their effects has been tried (e.g., the Munich Code) but no acceptable solution has been reached.

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<sup>158</sup> Chapter Four this study.

<sup>159</sup> FLEC Article 10.

<sup>160</sup> As described in Section IV of this Chapter.

#### D. ANTI-COMPETITIVE PRACTICES

The issues raised by practices of competition relevance exceeding a single jurisdiction can be analyzed in the following categories: (1) anti-competitive practices occurring in multinational markets; (2) anti-competitive practices in one country affecting markets in other countries; (3) anti-competitive practices in one country affecting market access; and (4) extraterritoriality issues. Each will be discussed.

##### 1. *Anti-Competitive Practices Occurring in Multinational Markets*

Because of trade liberalization a relevant geographic market for a particular good or service will frequently exceed the domestic borders of one country. The consequence of this is that a practice by a firm in one country will have effects not only within such borders but within the relevant market which, as stated, exceeds said country. Hence, more than one competition law —assuming all affected countries have competition regulation<sup>161</sup>— will be applicable, which may lead to inconsistencies in the tackling of the said practice. These inconsistencies may involve simple differences in consequences, to outright conflicting outcomes. Although both scenarios are inconvenient, while the former is regrettable, the latter is tragic and may even lead to a regulatory tug-of-war or beggar-thy-neighbor scenario where a destructive cycle of sanctions, retaliations, trade barriers, blocking statutes,<sup>162</sup> clawback statutes,<sup>163</sup> or other measures will exist in the enforcement of competition laws.

##### 2. *Anti-Competitive Practices in one Country Affecting Markets in Other Countries*

Uncoordinated competition and trade regulation sow the seeds of anticompetitive practices. For instance, export cartels injuring foreign markets, anticompetitive practices (e.g., exclusionary practices) organized and implemented in one market but aimed at foreign markets, and mergers of firms in one market that allow for market power in another.<sup>164</sup>

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<sup>161</sup> Should one of the countries lack competition regulation, the scenario will be worse. It will in all likelihood magnify the international frictions from applying extraterritorially the competition regulation of one country on another. Hence, the absence of competition laws or inappropriate enforcement of the same is a matter of international concern in the case of multilateral markets. (Alan O. Sykes. EXTERNALITIES IN OPEN ECONOMY ANTITRUST AND THEIR IMPLICATIONS FOR INTERNATIONAL COMPETITION POLICY. 23 Harvard Law Journal of Law & Policy, 2000, pgs. 92-93.)

<sup>162</sup> Designed to prevent foreign countries —notably the U.S.— from collecting evidence and testimony on foreign soil.

<sup>163</sup> Which authorize local suits to recover multiple damages already paid in connection with a foreign judgment.

<sup>164</sup> Andrew D. Mitchell. BROADENING THE VISION OF TRADE LIBERALISATION. INTERNATIONAL COMPETITION LAW AND THE WTO. World Competition, Vol. 24, No. 3, at 348.

Lack of co-operation provides the opportunity for firms to act unlawfully. In a way, a “regulatory market failure” provides the ingredients for international competition delinquency. Should once market provide for less stringent competition regulation or enforcement, it could become a “competition-heaven” from where anticompetitive practices may be orchestrated.

### **3. Anti-Competitive Practices in One Country Affecting Market Access**

Firms in one market may engage in practices that affect foreign competitors and which effect resembles import tariffs or other measures impinging upon trade liberalization in that they erect trade barriers in the domestic market so as to obstacle the possibility of entry by foreign competitors. For instance, vertical restraints such as exclusive dealing arrangements, allocation of geographic territories, resale price maintenance, franchise agreements or even vertical integration.<sup>165</sup> All of the foregoing could be implemented to foreclose a market from foreign competition.

### **4. Extraterritoriality Issues**

Concerned with practices generated abroad which affect a domestic market, a country may seek to enforce its domestic competition laws extraterritorially on firms that operate in foreign markets but have some impact on the local economy. A prominent example is the “effects test” followed by U.S. competition authorities which is satisfied when a firm engages in anti-competitive conduct in a multinational market that encompasses the United States.<sup>166</sup> This approach runs several risks, such as generating international friction,<sup>167</sup> that under the cloak of legitimate competition enforcement a country may seek to protect its domestic firms from foreign competition, and less than optimal enforcement.<sup>168</sup>

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<sup>165</sup> Andrew D. Mitchell. BROADENING THE VISION OF TRADE LIBERALISATION. INTERNATIONAL COMPETITION LAW AND THE WTO. World Competition, Vol. 24, No. 3, at 349.

<sup>166</sup> *United States v. Aluminum Co. of America* (148 F.2d 416,444, (2d Cir. 1945); US Department of Justice and Federal Trade Commission. ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS, April 1995, para. 3.1; Karl M. Meessen. ANTITRUST JURISDICTION UNDER CUSTOMARY INTERNATIONAL LAW, in JURISDICTION IN INTERNATIONAL LAW, W. Michael Reisman (editor), Ashgate, Dartmouth, 1999; and Joseph P. Griffin. EXTRATERRITORIALITY IN U.S. AND EU ANTITRUST ENFORCEMENT. Antitrust Law Journal, Vol. 67, Issue 1, 1999.

<sup>167</sup> Again, the beggar-thy-neighbor approach with the ensuing cycle of sanctions, retaliations, trade barriers, blocking statutes, clawback statutes, etc. For instance, during the 1989 US/Japan Structural Impediments Initiative, the U.S. threatened to use its antitrust weaponry to pry open the Japanese market as a result of perceived anti-competitive conduct, including foreign good boycotts. (Department of Justice Releases of April 3, 1993, 7 Trade Reg. Rep., CCH, para. 50,084, April 3, 1992.)

<sup>168</sup> Difficulties can stem from practical problems involving obtaining evidence from abroad, tailoring appropriate remedies and enforcing judgments.

Furthermore, it is quite likely that competition authorities acting independently and uncooperatively may fail to detect and take appropriate action against border-exceeding anti-competitive conduct which concerns both.

Finally, and giving place to more undesired scenarios, it is possible that conduct tolerated under one competition system is repudiated under another. Or, it could happen that conduct in one jurisdiction is deemed *per se* sanctionable whereas on another it is subject to a rule-of-reason standard.

## 5. *A Digression on Price Discrimination, Dumping and Predatory Pricing*

Competition and trade policy have an overlapping (or, perhaps more appropriately qualified, related) topic which I would like to address: price discrimination, dumping and predatory pricing. In all fairness, because of the scope of this work I would probably be well advised to abstain from discussing this matter. However, the flesh is too weak.

### a. *Relation between Economic Price Discrimination, Predation and Dumping*

Price discrimination in the economic sense occurs when a seller realizes different rates of return on sales of the same product to different purchasers. Put differently, a seller who discriminates charges different purchasers prices that are proportionally unequal to his marginal costs. A price difference does not necessarily involve price discrimination and price identity does not rule out discrimination. When a law sets as the triggering event price differences<sup>169</sup> it ignores economic discrimination when prices are the same.<sup>170</sup>

Price discrimination has traditionally been attacked under competition and foreign trade statutes notwithstanding the fact that economic reasons support and justify their existence. When firms operate in different (multiple) markets (whether product or geographic), they will ordinarily maximize profits in each market separately. Their prices will be discriminatory when different markets display different demand curves or rate-of-return schedules. This situation per se should not be a matter of concern. Particularly because price discrimination schemes often increase output and rarely exclude rivals.<sup>171</sup> It is a fact of life, and an economically accepted phenomenon, that different firms with different amounts of market power charge different prices. Furthermore, price discrimination can be socially beneficial insofar as it moves output closer to that obtained under perfectly competitive markets.

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<sup>169</sup> Like the Robinson Patman Act which, although it speaks of price discrimination, in reality it means price differences.

<sup>170</sup> Bork at 383.

<sup>171</sup> Hovenkamp. FEDERAL ANTITRUST POLICY. At 401.

Notwithstanding its initial economic attractiveness, economic analysis advises that we should also be weary of price discrimination, for price discrimination can make predatory pricing less costly,<sup>172</sup> more profitable, and, hence, more plausible.<sup>173</sup> As usual, the trick lies in distinguishing the good from the bad. I.e, predatory from non-predatory price discrimination. Conceptually, a method to do so is the same as for identifying any price as predatory: the challenged price must be below the relevant measure of cost and structural characteristics of the low-price market must show plausible recoupment.<sup>174</sup>

In this sense, price discrimination is like any other tool, it can be used to serve lawful or unlawful goals. Hence, blanket rules prohibiting price discrimination are likely to do more harm than good since they tend to over-prohibit conduct which might or might not be anticompetitive. Worrisomely, and as Judge Bork points out, most of the time that a law orders that discrimination be ended, it is ordering a misallocation of resources.<sup>175</sup> Judge Bork states that a law that makes persistent price discrimination unlawful is not a bad idea provided the following is feasible: (i) identifying the existence of price discrimination with precision; (ii) accurately predicting the long term effect upon the seller's rate of output of a prohibition on discrimination; and (iii) doing these things at a cost in enforcement resources lower than the benefits derived. Because of the impossibility of meeting the three precautions pointed out, in Judge Bork's opinion, price discrimination law should be repealed.<sup>176</sup>

*Dumping* is a species of *price discrimination*. As will be further elaborated, dumping consists of selling at prices below "normal value".

Having mentioned the above, which is by no means exhaustive, I will now turn to the relation between price discrimination, predatory pricing and dumping.

#### *b. Difference between Predatory Pricing and Dumping*

Although both are part of the same "price discrimination family", predatory pricing and dumping differ in their origin, goals and economic foundation.

<sup>172</sup> Price discrimination reduces predation costs most effectively when the predator is able to target precisely those customers served by the victim. Also, price cutting in one market can be used to "send a message" to rivals selling not only in the predicated market but in other markets as well.

<sup>173</sup> The types of injuries unlawful price discrimination is said to create are: (i) "Primary-line injury" which is injury to competition between the discriminating seller and its competitors; (ii) "Secondary-line injury" which is injury to the seller's disfavored purchasers (those paying the higher of the two prices) when compared with other downstream firms not disadvantaged by the price increase. (Areeda and Hovenkamp. ANTITRUST LAW Vol. III, at 431.) and (iii) "Tertiary-line injury" concerns injury to consumers of the disfavored buyers. (TRADE AND COMPETITION POLICIES FOR TOMORROW. Organisation for Economic Co-operation and Development, 1999, at 41.)

<sup>174</sup> Areeda and Hovenkamp. ANTITRUST LAW. Vol. III, at 430.

<sup>175</sup> Bork at 399.

<sup>176</sup> Idem.

Simply put, **price discrimination** means different prices or selling at different rates of profit, **dumping** means selling at prices under “normal value” and **predatory pricing** means prices below cost. I shall elaborate on each in the order mentioned.

i). Price Discrimination

To the extent an entire chapter<sup>177</sup> of this study has been devoted to the analysis of the practice of price discrimination and when it raises competition concerns, at this juncture I shall only recall that a firm engages in price discrimination when it sells a product in different markets at different rates of return, even if prices are the same.

ii). Dumping

1. *Introduction*

Although dumping and competition law are two branches of the same family tree,<sup>178</sup> their constituencies, goals and underlying policy differ.

The political constituency of antidumping law is not an antimonopoly constituency but one for the protection of industries facing weak markets or long-term decline.<sup>179</sup> Contrary to the concern that most modern competition law has displayed with the deadweight costs of market power, antidumping law has shown no movement in such direction.<sup>180</sup> Rather, it has chosen to stick with the good old “fairness” argument and “leveling the playing field” policy it was equipped (or, I should say, cursed) with from its inception.<sup>181</sup>

Both disciplines have different geographical origins. Whereas competition (antitrust) law is by and large a U.S. invention, antidumping came about in Canada in 1904.<sup>182</sup> The first Canadian antidumping law provided that an imported article also manufactured in Canada would be assessed a duty

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<sup>177</sup> See Chapter Four, *supra*.

<sup>178</sup> Alan O. Sykes. ANTIDUMPING AND ANTITRUST: WHAT PROBLEMS DOES EACH ADDRESS? Brookings Trade Forum 1998, Robert Z. Lawrence Editor, Brookings Institution Press, Washington D.C., 1998, at 42.

<sup>179</sup> Sykes. ANTIDUMPING AND ANTITRUST. At 2.

<sup>180</sup> Idem.

<sup>181</sup> I speak of “cursed” since it seems to me that speaking of “leveling the international playing field” is both unrealistic and wrong. Unrealistic because of the obvious practical limitations to doing so. Wrong because of the comparative advantage paradigm first developed by David Ricardo as the economic justification of international trade (international trade occurs *because of* differences among nations—e.g., natural resource endowments, labor skills, consumer tastes/preferences—which makes it worth the while of each country to divide labor and specialize). Hence, cross-border trade is valuable precisely because the playing field is *not* leveled.

<sup>182</sup> Sykes. ANTIDUMPING AND ANTITRUST. At 14.

whenever the price charged for the article in Canada, less the costs of shipment, was less than the price of the article in the home market (the “fair value”).<sup>183</sup>

Although close relatives, competition and antidumping law were designed to pursue fundamentally different ends, despite the antimonopoly rhetoric surrounding both. As stated earlier, Competition law is mostly concerned with avoiding the “antitrust injury” resulting from the deadweight loss inherent in the exercise of market power. In contrast, antidumping law was intended to create a politically popular form of contingent protectionism that has little to do with the prevention of monopoly.<sup>184</sup>

Although competition law is concerned with a vast array of practices which may be catalogued into three general categories (collusionary practices, exclusionary practices and mergers<sup>185</sup>) dumping is only of two types:

- i) Price-Discrimination Dumping: which occurs when the price charged to customers in the home market (e.g., FOB price) is above the price charged to customers in the importing country (adjusted to FOB basis); and
- ii) Sales Below-Cost: sales below a “cost” benchmark constructed from accounting data that includes an allocation of all fixed costs, general selling and administrative expenses, etc.<sup>186</sup>

Since its inception, competition law has developed a rather robust economic and legal theory which more than justifies its existence.<sup>187</sup> Contrary to such situation, antidumping law is missing a concrete sound economic foundation which withstands serious and unbiased economic scrutiny.<sup>188</sup> Notwithstanding the lack

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<sup>183</sup> The special duty was capped at one-half of the duty ordinarily payable under the tariff schedules with some specific exemptions and exceptions. (Sykes. ANTIDUMPING AND ANTITRUST. At 14.)

<sup>184</sup> Sykes. ANTIDUMPING AND ANTITRUST. At 2.

<sup>185</sup> Or *concentrations* under the Mexican legal argot.

<sup>186</sup> The “cost” benchmark (know as “normal value”) for dumping is very different from (and usually higher than) the marginal cost or average variable cost benchmark that is generally used to test allegations of predatory pricing under the competition laws.

<sup>187</sup> True, pitfalls have existed where certain policy-makers and courts have tripped. Nonetheless, by and large the worldwide trend displays deadweight loss as the core concern of competition laws. (see in general, James J. Garrett (General Editor). WORLD ANTITRUST LAW AND PRACTICE. A Comprehensive Manual for Lawyers and Business, Little Brown and Company, Boston/New York/Toronto/London, 1995.)

<sup>188</sup> Granted. Some economic analysis has taken place in regards antidumping and its definition (e.g., Viner, DUMPING; Dale, ANTIDUMPING LAW; Deardoff, ECONOMIC PERSPECTIVES ON ANTIDUMPING LAWS, in Jackson and Vermulst, ANTIDUMPING LAW). However, it is not nearly as serious and abundant as that of competition law in general or predatory pricing in particular.

of serious and convincing theoretical backbone, antidumping continues to spread even to the highest and most modern international laws.<sup>189</sup>

## 2. *Definition of Dumping under the Mexican Foreign Trade Law*

The Mexican Foreign Trade Law ("FTL")<sup>190</sup> includes two types of "unfair International Trade Practices":<sup>191</sup> price discrimination and subsidies. What the FTL legally denominates "price discrimination" is what is commonly known as "*dumping*". The elements of dumping under the FTL are:

- i) **Pricing:** Prices below "normal value". Normal value is defined as the comparable price of an identical or similar good destined to the internal market of the country of origin in the ordinary course of business.<sup>192</sup>
- ii) **Injury:** That imports of the dumped product cause, or threaten to cause, injury to domestic production. Injury is defined as the economic loss or deprivation of any licit and normal profits that the domestic industry<sup>193</sup> of the goods in question may suffer, or the obstacle to the establishment of new industries. Threat to injury is the imminent and clearly foreseeable danger that the domestic industry will suffer injury.<sup>194</sup>
- c) **Link:** A causal link between the pricing and the injury.

In other words, for an imported good to be characterized as dumped, its price must be below the normal value of the country of origin, causing (or threatening to cause) an injury to the industry of the importing country, and the establishment of a causal link between the price and the injury or threat thereof to at least 25% of the industry of the domestic market.

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<sup>189</sup> It has even reached WTO levels. See Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994, usually referred to as the "Antidumping Agreement".

<sup>190</sup> *Ley de Comercio Exterior*, Published in the Federal Official Gazette on July 27, 1993.

<sup>191</sup> Article 28 of the FTL.

<sup>192</sup> Articles 30 and 31 FTL. "Ordinary course of business" is defined as the commercial transactions that reflect market transactions in the country of origin and that are habitually made or within a representative period within independent buyers and sellers (Article 32 of the FTL).

<sup>193</sup> "*Domestic Industry*" is defined as at least 25% of the domestic production of the goods in question (Article 40 of the FTL).

<sup>194</sup> Article 39 of the FTL.

iii). Predation

Under Mexican law (the FLEC), predatory pricing is a rule of reason practice which premises liability on pricing below one of two measures of cost<sup>195</sup> by an economic agent with market power which purpose or effect is the driving another economic agent out of the market so as to engage in supra-competitive pricing once the objective has been achieved.<sup>196</sup>

Hence, the Mexican ingredients for a predatory pricing recipe are:

- a) Pricing below either (i) average variable cost for secular sales or (ii) average total cost for habitual sales;
- b) By a firm with market power; and
- c) Which has the purpose or effect of driving a competitor out of the market.

iv). Dumping and Predation: Two standards, One Reality

Interestingly, the concurrent existence of both dumping and predatory prices means that a related phenomenon will have effects in two legal realms (competition and trade law) but under two different sets of criteria. The following table should illustrate the point:

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<sup>195</sup> Either pricing below either (i) average variable cost for secular sales or (ii) average total cost for habitual sales.

<sup>196</sup> I must confess to the reader that I am a serious skeptic of the soundness of the predation theory, the standard chosen, and its application by (amongst others) Mexican competition authorities. For a discussion on the subject, *confere*, Francisco González de Cossío, LAW AND ECONOMICS OF THE MEXICAN COMPETITION LAWS, Chapter five.

**TABLE C**  
**Comparison of Price Discrimination,  
Dumping, and Predation Cost Thresholds**

PRACTICE→ ELEMENT ↓	PRICE DISCRIMINATION	DUMPING	PREDATION
Price	Different Prices (with same costs) or Same Prices (with different costs)	Below Normal Value	Below:  ATC: habitually AVC: occasionally
Effect	Different Profits	“Injury” (or threat thereof) to domestic industry	Driving competitors out of the market
Other requirements		Causal Link	<ol style="list-style-type: none"> <li>1. Market Power</li> <li>2. Anti-competitive results outweighing pro-competitive results</li> <li>3. Recoupment<sup>197</sup></li> </ol>

The fact that different thresholds exist should not raise too many eyebrows. After all, each law seeks to protect different legal concerns. However, I am more concerned with the substantive point.

Some believe that antidumping law should be substituted by competition law<sup>198</sup> following the experience of the European Union,<sup>199</sup> ANCERTA<sup>200</sup> and the

<sup>197</sup> I include recoupment for thoroughness reasons but would qualify that the Mexican theory and practice of predation does not necessarily require it.

<sup>198</sup> Gabrielle Marceau. ANTI-DUMPING AND ANTI-TRUST ISSUES IN FREE TRADE AREAS, Clarendon Press, Oxford, 1994, at 133 and 310. Also, Marco Horacio Hernández Tracey, pgs. LA SUSTITUCIÓN DEL DERECHO ANTIDUMPING POR EL DERECHO ANTIMONOPOLIOS-COMPETENCIA EN LA ZONA DE LIBRE COMERCIO. Professional Thesis, 1992, pgs., 154-155. I should mention that this research is outdated since it was elaborated before the FLEC or the FTL came to being. Nonetheless, the underlying premises still hold.

<sup>199</sup> The Treaty of Rome excludes the application of antidumping actions between Member States of the European Union. As a result, antidumping law is now only relevant to imports from outside the European Union. (See, Gunnar Niels and Adriaan Ten Kate. TRUSTING ANTITRUST TO DUMP ANTIDUMPING —ABOLISHING ANTIDUMPING IN FREE TRADE AGREEMENTS WITHOUT REPLACING IT WITH COMPETITION LAW. Journal of World Trade, Vol. 31, No. 6, December 1997, at 39.)

Canada–Chile “Cease Fire Agreement”.<sup>201</sup> Others feel the relation between competition policy and trade policy extends well beyond the issue of replacing domestic antidumping laws with harmonized predatory pricing laws.<sup>202</sup>

In my opinion, the entire dumping discipline should be scrapped. It runs against current international trade and welfare theorems/paradigms, lacks a solid economic foundation, and is the result of a protectionist constituency.

Only predation should receive any serious regulation, and, as stated before,<sup>203</sup> in my opinion, for the conduct to be deemed existent and unlawful, it should be required to meet a high legal threshold (not average variable cost nor average total cost), a high standard of proof, and the underlying backdrop be non-interventionist (i.e., competition authorities should intervene in the market only in circumstances of clear and unambiguous existence of the practice).

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<sup>200</sup> In 1990 Australia and New Zealand eliminated antidumping actions on goods originating in each other’s market. This formidable step was implemented through the Protocol on Acceleration of Free Trade in Goods within the framework of the 1983 ANCERTA. (Niels and Ten Kate at 40.)

<sup>201</sup> The Canada-Chile bilateral Free Trade Agreement provides for a mutual, phased-in exemption from the application of antidumping duties. The instrument came into force on July 1997. (Niels and Ten Kate at 41.)

<sup>202</sup> Michael J. Trebilcock and Robert House. THE REGULATION OF INTERNATIONAL TRADE. Routledge, London and New York, 1995, at 122.

<sup>203</sup> Section III of Chapter Five of this study.

## E. INTERFACE BETWEEN COMPETITION AND TRADE POLICIES

Competition and international trade law share an interesting relation. On the one hand, they are complementary (1) and, on the other, they diverge (2). Each facet will be addressed in the order posed.

### 1. *The Theory of Complementarity*

The “Theory of Complementarity” was coined by the WTO Working Group on the Interaction between Trade and Competition Policy<sup>204</sup> and posits that trade law and competition law are complementary and mutually enhancing in that both have the inherent objective of promoting efficiency and consumer welfare in making markets more competitive.<sup>205</sup> Hence, welfare economics theorems indicate that efficient economic outcomes will occur when both free trade and competitive behavior are maintained. Therefore, they can be considered two approaches necessary to the same end.<sup>206</sup>

The starting point of trade liberalization is the theory of comparative advantage. According to the same, a State has a comparative advantage in the production of a good or service if the relative cost of production of the same in that State is low compared to the cost in other States. The rationale is that if each State focuses production on the particular good/service in which it has the comparative advantage, global output will increase and we will all be better off. Hence, by means of trade, consumers can access more goods and services and thus increase their standard of living.<sup>207</sup> Additionally, efficiency improvements are likely to

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204 Established on the basis of the Singapore WTO Ministerial Declaration adopted on December 13, 1996 (WTO Focus No. 15, January 1997, at 7) and responding to the initiative of the European Commission. Paragraph 20 of the Ministerial Declaration (WT/MIN(96)/DEC) reads, in the relevant part: *“Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMS Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.”* (my emphasis)

205 WTO Working Group on the Interaction between Trade and Competition Policy, Report to the General Council, WT/WGTVP/2, 1998, para. 24 et seq.

206 Andrew D. Mitchell. BROADENING THE VISION OF TRADE LIBERALISATION. INTERNATIONAL COMPETITION LAW AND THE WTO. World Competition, Vol. 24, No. 3, at 346.

207 To elaborate on the Theory of Competitive Advantage, the following are suggested: Paul Samuelson and William D. Nordhaus. ECONOMICS. McGraw-Hill, Inc., Fifteenth Edition, 1995, pgs. 678-701; Steven Husted and Michael Melvin. INTERNATIONAL ECONOMICS. Addison-Wesley Educational Publishers, Inc. Fourth Edition, 1998, at 66; Paul R. Krugman and Maurice Obstfeld. INTERNATIONAL ECONOMICS. THEORY AND POLICY. Addison-Wesley, Fourth Edition, 1997, at 14; and Miltiades Chacholiades. ECONOMIA INTERNACIONAL. McGraw Hill, México, D.F., Second Edition, 1992 at 14.

result from the increased competition. For instance, specialization encouraged by the theory of comparative advantage and economies of scale.<sup>208</sup>

The starting point of competition law is that free market behavior is desirable and, even though some interference is necessary to maintain competitive pressures and promote competition amongst producers, it will obtain an efficient allocation of resources. In this context, efficiency refers to *productive efficiency* (whereby the cheapest producers undersell and replace less efficient producers) and *allocative efficiency* (whereby transactions in the market-place direct production away from goods and services that consumers value less and towards goods and services that consumers value more). By limiting private market power, competition law aims to protect consumers from anti-competitive behavior of firms seeking to raise prices for their products above the prices that would prevail in a competitive market.

Although both disciplines have a different origin and economic backbone, they are mutually reinforcing in that the economic effects of both are aimed at the same bulls-eye: *an undistorted, competitive and accessible market*.

Both disciplines play a crucial role in the pro-consumer welfare drama. On the one hand, trade law complements competition law in that the former reduces market power by increasing contestability as a result of its market access provisions. Market access assists in the goals of competition law in that market power is scarcely present when entry is easily achieved inasmuch as a positive correlation exists between the height of entry barriers and market power. Put simply, where contestability exists, market power is questionable—at best. Once market power is eliminated, the possibility of anticompetitive practices is taken out of the equation since market power is a precondition of the same. I.e., by eliminating market power, the possibility that firms wielding market power engage in anticompetitive practices is nullified.

On the other hand, competition law complements trade law by disallowing that private conduct replace the preexisting governmental measures clogging market access. The foregoing may be particularly important since, when government measures limiting market access are removed, collusion to engage in anticompetitive practices is likely since the concentrated market structure created by the pre-existing government measures is fertile soil for such types of collusionary conduct. Hence, in the absence of adequate competition law enforcement, the success of trade liberalization efforts may be frustrated by private collusion seeking to split the market-cake in the same—or even better—manner than the market had before the tariff or non-tariff measures shielded the same from external competition.

Competition and trade policy are also complementary in that competition policy promotes market entry where a mere reduction or elimination of border barriers

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<sup>208</sup> When the marginal increase in the cost of supplying a good or service is less than the marginal increase in production.

would be insufficient. This may happen under different situations.<sup>209</sup> Hence, *when markets are imperfectly competitive, it cannot be presumed that preferential trade liberalization will achieve its stated objectives.*<sup>210</sup>

## **2. Conflicting Side to the Competition Law/Trade Law Interface**

Although, for the most part, trade and competition policies are broadly compatible or at least mutually supportive,<sup>211</sup> some differences exist: (a) the territorial scope; (b) their personal scope; and (c) their source of regulation. Each is now briefly discussed.

### *a) “Border/Non Border”*

Trade negotiations have traditionally focused on the liberalization of “at the border” governmental measures that may, or actually do, distort trade flows or impinge upon the general “market access” goal of international trade laws. In contrast, competition policy has traditionally focused on “behind the border” competitive conditions and attacking practices which effects are felt in national markets.

The foregoing distinction is a general one. However, examples blurring said apparent clear distinction can be found. For instance, since 1947 GATT has provided for the principle of national treatment obligating governments to maintain conditions of competition between “domestic” and “foreign” goods.<sup>212</sup> Another example are domestic subsidies which could affect competition and have been recently addressed in the 1994 WTO Agreement on Subsidies and Countervailing Measures.

### *b) Public/Private*

Another distinction between trade and competition relates to the entities which conduct it targets. Whereas trade law addresses public conduct (governmental measures) competition law addresses private conduct (firms or economic agents).

Again, the initial distinction is valid on a general basis, but it cannot be said to be all-applicable. For instance, competition law does address public entities when their measures are anti-competitive. Likewise, private conduct is also addressed

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<sup>209</sup> For instance, the elimination of border barriers may only reveal the existence of further barriers, even if distant from the border. This could happen because a cartelized home industry or monopoly enjoys trade protection as well or a cartelized distribution network.

<sup>210</sup> Nicolaides, Phedon. FOR A WORLD COMPETITION AUTHORITY. THE ROLE OF COMPETITION POLICY IN ECONOMIC INTEGRATION AND THE ROLE OF REGIONAL BLOCS IN INTERNATIONALIZING COMPETITION POLICY. Journal of World Trade, Vol. 30, No. 4, 1996, at 135.

<sup>211</sup> TRADE AND COMPETITION POLICIES FOR TOMORROW. Organisation for Economic Co-operation and Development, 1999, at. 31

<sup>212</sup> Article III, GATT 1947.

by trade law. Take, for instance, the “injurious sales below normal value” by firms which concern motivates anti-dumping discipline. Also, the GATS Agreement on Basic Telecommunication Services deals with private conduct in addition to government measures.

c) *Domestic vs. International Regulation*

While trade liberalization has thus far been implemented through multilateral agreements, competition law remains by and large the realm of domestic law. The parochiality of competition regulation has resulted in conflicts in the international sphere since different States have overlapping, conflicting or no competition laws.<sup>213</sup>

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<sup>213</sup> Approximately 60 members of the WTO have no competition regulation.

## V. REGULATION OF COMPETITION ON AN INTERNATIONAL LEVEL

### A. INTRODUCTION

The concept, goals and regulation of competition vary significantly. Even though a consensus exists that competition law should stick to welfare and efficiency considerations, each country adds its own spice to the competition recipe. For instance, while the United States and Mexican approach policy is predominantly consumer-oriented –and, hence, a predominant factor in competition analysis will be output–; in the EU the same analysis will include protection of small and medium-sized enterprises and integration of the internal/common market<sup>214</sup> (inter-State trade).<sup>215</sup>

A brief comparison between U.S. and EU competition laws may prove useful. While both laws aim at improving economic efficiency, they differ substantially in the way they attempt to achieve it. For instance:<sup>216</sup>

- Both laws define different activities as per se illegal;
- Each law applies different thresholds for the size of the firms that fall within their scope;
- Each law exempts different industries from the scope of its application;
- Each law allows different defences to infringements;<sup>217</sup>
- Each law attaches more or less importance to different infringements of competition law;<sup>218</sup>
- Competition authorities tend to develop their own ethos, tradition, preferences and working practices. Hence, it is unlikely that two authorities will analyze the same case in the same fashion;
- Some competition authorities may be allowed —or required— to factor in their reasoning non-competition considerations such as national interest;<sup>219</sup>
- Acts of State may fall completely outside the scope of competition law, as is the case in the U.S.

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<sup>214</sup> For instance, see *Consten & Grundig v. Commission*, Case Nos. 56 & 58/64, July 13, 1966, ECR, 299; *Commercial Solvents v. Commission*, Case Nos. 6 & 7/73, March 6, 1974, ECR 223.

<sup>215</sup> The foregoing assertion could be qualified in the sense that even the U.S. antitrust policy has, at some point, entertained small business protection notions. See, for instance, *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (359 U.S. 207, 79 S.Ct. 705); *Business Electronics Corporation v. Sharp Electronics Corp.* (485 U.S., 717m 108 S.Ct. 1515); *Federal Trade Commission v. Morton Salt Co.* (334 U.S. 37, 68 S.Ct. 822).

<sup>216</sup> Nicolaides at 137.

<sup>217</sup> For example, the EU provides for block exemptions.

<sup>218</sup> For instance, in the U.S. a more relaxed view of vertical restraints is adopted by case law whereas in the EU the opposite happens with respect to control of mergers and acquisitions —at least until very recently.

<sup>219</sup> Although this is not the case in Mexico, the EU and the U.S.

The foregoing has given way to varying approaches to international aspects of competition law which range from congruent approaches to incongruent ones. Within such horizon, diverse scenarios appear, such as overlapping solutions,<sup>220</sup> conflicting solutions, and scenarios creating loopholes where anticompetitive activity may occur and remain unaddressed.<sup>221</sup>

The foregoing discussion argues in favor of cooperation. However, cooperation is not a monolithic or single concept. Rather, it comes in different shapes, flavors and forms, as I will now explain.

#### B. DEGREES OF COOPERATION

The Brookings Project on Integrating National Economies has identified six levels of cooperation which I will now summarize so as to provide a framework upon which the reader will be able to assess the ensuing discussion.

- a). National Autonomy: This scenario depicts decentralized decision-making by national governments with little or no consultation and no explicit cooperation. It is the extreme case of zero cooperation which reflects political sovereignty at its strongest unaffected by international management of convergence.
- b). Mutual Recognition: This level of cooperation involves exchanges of information and consultations between governments to channel the formation of national regulations and policies. It involves explicit acceptance by each member nation of the regulations, standards and certification procedure of other members.
- c). Monitored Decentralization: This level of cooperation involves agreeing on rules that restrict the freedom to set policy or that promote gradual convergence in the structure of policy.
- d). Coordination: This scenario contemplates a more advanced and ambitious scheme than the previous ones in that it involves jointly

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<sup>220</sup> For instance, merger control laws provide for competition notifications in an important number of countries. These laws frequently overlap and become burdensome and costly to companies and sometimes frictions to states. As an example, recall the Boeing/McDonnell Douglas merger (EU-Commission, Boeing/McDonnell Douglas Decision, IV/M 877 of July 30, 1997, OJ L336 of December 8, 1997), and the GE/Honeywell saga.

<sup>221</sup> Export cartels are the prime example of anticompetitive behavior which escapes control since, to the extent that the domestic market of the export cartel is unaffected—or even benefited—by the same, domestic competition authorities have neither competence nor interest in pursuing them. On the other hand, the importing country where the harm occurs may only have competence to address the same if national legislation allows the national competition authorities to apply the law extraterritorially. Should this be the case, interstate frictions could ensue. Should it not be the case, a loophole will exist leaving the conduct and its anticompetitive effects unaddressed. (Grewlich, Alexandre S. GLOBALISATION AND CONFLICT IN COMPETITION LAW. ELEMENTS OF POSSIBLE SOLUTIONS. World Competition, Vol. 24, No. 3, 2001, pgs. 377-378.)

designed mutual adjustments of national policies and promoting intergovernmental cooperation. It includes coordination and bargaining where governments will agree to behave differently from the approach they would otherwise have taken without the agreement.

- e). Explicit Harmonization: This degree of cooperation entails high levels of intergovernmental cooperation and requires the agreement on regional standards or world standards. It involves greater departures from decentralization in decision-making and more strengthening of international institutions.
- f). Federalist Mutual Governance: This level of development entails a continuous bargaining and joint centralized decision-making as well as robust supranational institutions. This is the end of the spectrum.

### C. APPROACHES THUS FAR SUGGESTED

In general, the following approaches are identifiable concerning the regulation of competition law at an international level:<sup>222</sup> (1) Cooperation; (2) The Minimum Standards Approach; (3) Parochial Regulation with an International Check; (4) The Beginning-from-the-Bottom Approach; (5) Harmonization; (6) Plurilateral Approach; and (7) Universal Regulation Approach. Each will now be summarized.

#### 1. *Cooperation*

Cooperation seems unproblematic and has taken place between competition authorities in matters such as providing information. Without some form of cooperation it would be impossible for competition authorities individually to effectively address transnational anticompetitive conduct.

Cooperation has been the approach that has gained more acceptance and has been followed the most in practice. Important progress in increasing cooperation between competition authorities has been made particularly in fields such as international cartel enforcement and cooperation in concentration review.

Although cooperative efforts may take place without formal commitments, several competition cooperation agreements have been entered into which extent varies significantly. Whereas some merely restate each party's commitment to apply their competition laws and provide information,<sup>223</sup> others have gone as far as providing for positive comity duties.<sup>224</sup>

#### 2. *The Minimum Standards Approach*

The minimum standards approach encourages following the steps of the Paris and Berne Conventions on the protection of intellectual property.<sup>225</sup> Under such approach, minimum standards create only an obligation to protect foreign firms and markets according to certain standards. However, the national legislator may go beyond said minimum standards and provide additional protection. To implement the foregoing a limited number of core principles and approaches

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<sup>222</sup> Although I have borrowed the categorization provided by Alexandre S. Grewlich (GLOBALISATION AND CONFLICT IN COMPETITION LAW. ELEMENTS OF POSSIBLE SOLUTIONS. World Competition, Vol. 24, No. 3, 2001, pgs. 397-398) the characterization is mine. Hence, any disagreement as to the manner in which I have chosen to baptize the same is solely my responsibility.

<sup>223</sup> For instance, as provided for in Chapter VIII of the Mexico-Israel Free Trade Agreement (signed on April 10, 2000 and published in the Daily Official Gazette on June 30, 2000), and Chapter 14 of the Mexico-Chile Free Trade Agreement (signed on March 23, 2000 and published in the Daily Official Gazette on January 1, 1995).

<sup>224</sup> As is the case with the Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws, and the Mexico-Europe Free Trade Agreement (signed on March 23, 2000 and published in the Daily Official Gazette on July 1, 2000).

<sup>225</sup> Alexandre S. Grewlich. GLOBALISATION AND CONFLICT IN COMPETITION LAW. ELEMENTS OF POSSIBLE SOLUTIONS. World Competition, Vol. 24, No. 3, 2001, at 400 et seq.

(minimum standards) would need to be agreed upon. Having done so enforcement would be effected through moral persuasion (by, for instance, "soft sanctions" such as mandatory consultations or publication of questionable measures) or even a more zealous granting of standing to private individuals to sue for damages and injunctions, or the creation of an "international antitrust agency" with authority to initiate domestic procedures (the "principle of international procedural initiative").

This initiative has even suggested that WTO dispute settlement procedures could be opened to complaints by and against private enterprises and persons. This revolutionary idea is believed appropriate with regard to large economic actors that may escape the influence of national authorities. This is still very controversial and part of the reluctance to give WTO competence over competition matters seems grounded on concerns about the WTO panels dealing with the substance of competition decisions.<sup>226</sup> Some believe quite fervently that not all competition issues of a global nature are trade matters and, hence, WTO is not the natural home for all global competition policy initiatives.<sup>227</sup>

### ***3. Parochial Regulation with an International Check***

Another current of thought rejects supranational centralistic courses of action and prefers to put the onus on a careful evolution of substantive law. It puts the burden on nations to assure that their markets are free from artificial private and public restraints (including export cartels).

The pivotal reasoning supporting this approach is that an internationalized competition system should not entail international rules as such but rather principles that should be transposed into national law through national formulations that carry out the stated objectives. The proposal may remind the reader of the EC directives framework in that each nation would be responsible for implementing the principles in its national law.

The scheme would be developed as a "plurilateral framework" in the framework of the WTO. Binding "positive comity" and a dispute resolution instrument could be added to the framework principles. Nations would also agree to the principle that there should be no market blockage by public or private action since the goal will not be one nation's welfare over or versus another but national welfare versus global welfare.<sup>228</sup>

### ***4. The Beginning-from-the-Bottom Approach***

This approach reflects skepticism about the ability of multinational efforts reaching an effective bargain-based solution. Rather, it believes that a "bottom-up" approach is more desirable where enforcement agencies are more important

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<sup>226</sup> Grewlich at 402.

<sup>227</sup> Janow and Lewis at 14.

<sup>228</sup> The theory is advanced by Professor Eleanor Fox in NATIONAL LAW, GLOBAL MARKETS, AND HARTFORD IN EYES WIDE SHUT. 68 Antitrust L.J., (2000), at 73.

to supranational or international institutions or the prospective “constitutionalisation” of international law and diplomacy.<sup>229</sup> This position is included in the majority opinion report of the International Competition Policy Advisory Committee (ICPAC).

### **5. Harmonization**

The harmonization of national competition laws has also been suggested in a manner similar to the U.S. Uniform Commercial Code or the “Model Law” approach that has succeeded in other fields.

An evident problem with this solution is that the international discussion about harmonizing competition laws has the challenge that participants are likely to approach the subject with preconceptions arising out of their differing cultural experiences.

### **6. Plurilateral Approach**

This proposition advances the creation of a set of international competition rules envisaged as a Plurilateral Agreement in the WTO framework which includes a combination of minimum standards and a mechanism called “international procedural initiative” whereupon a supervision mechanism to oversee the enforcement of domestic competition laws by an independent “International Antitrust Authority”<sup>230</sup> is envisaged

Examples of initiatives included in this approach are the (already discussed) Munich Code and the work of the 1995 EU Expert Group Report on Competition Policy in the New Trade Order advocating the creation of a Plurilateral Agreement on Competition and Trade (“PACT”).

### **7. Universal Regulation Approach**

An ambitious initiative relates to a public international law agreement on a binding and universal code with a supranational world antitrust authority enforcing the same.

An interesting proposal has been made by Eleanor M. Fox for the internationalization of competition law advocating a “borderless” conception of the world where “*the treatment of a market problem [is] as if there were no national boundaries, or conceived differently, as if all harms and benefits fell within the geographical boundaries of the same polity*”.<sup>231</sup>

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<sup>229</sup> Anne-Marie Slaughter. GOVERNING THE GLOBAL ECONOMY THROUGH GOVERNMENT NETWORKS. in Michael Beyers (ed.) THE ROLE OF LAW IN INTERNATIONAL POLITICS—ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW. New York, 2000, at 177.

<sup>230</sup> A proposal also endorsed by F.M. Scherer as an “International Competition Policy Office” within the WTO, albeit with less powers. (See, Scherer —Competition Policies at 92.)

<sup>231</sup> Eleanor M. Fox. ANTITRUST LAW ON A GLOBAL SCALE-RACES UP, DOWN, AND SIDEWAYS. School of law, New York University, 1999 (Cited by Simon J. Evenett, Alexander Lehmann, and Benn Steil. ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE, in ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J.

**D. DEVELOPMENT OF ACCEPTANCE OF THE APPROACHES**

Although all the approaches mentioned above are valuable, their acceptance—as might be expected—differs importantly.

**1. *The Divide***

To begin with, no consensus exists as to what steps should be taken. By and large, the route preferred to date has been cooperation either under the auspices of treaties executed to such end, or without such framework, simply out of the desire to effectively address conduct of international transcendence. Nonetheless, and as explained before, efforts to edify a more solid and effective international competition framework continue to take place. At this juncture, the question is: what course of action to pursue?

Interestingly, while the EU is a strong defender of WTO-related efforts on international competition, the U.S. has been adamant to such initiative (a WTO competition code). The foregoing has raised many eyebrows inasmuch as the U.S. has been trying to export the notion of competition for quite some time, and U.S. negotiations have pushed hard to create competition codes at the UN and the OECD. Furthermore, it is the U.S. who brought the first two competition matters before the WTO: the *Auto* case and the *Kodak* case.

The U.S. reluctance in establishing the WTO as the appropriate international competition forum is apparently grounded on the following reasons:<sup>232</sup> (a) nations continue to differ too much in competition policy or expertise to produce a coherent, meaningful code or system; (b) to the extent that U.S. enforcement is the toughest and most extraterritorial and, hence, the most controversial, it might well be the most likely subject of WTO dispute settlement proceedings; (c) a WTO code is not needed to set a TRIPS-like floor for competition law since World Bank/IMF pressures are doing that anyway; (d) the topic of using multinational competition as a substitute for anti-dumping laws, though adopted in the EU, ANZCERTA<sup>233</sup> and favored in Japan is politically unpopular in the

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Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 22.) Apparently, and as discussed later on, several important fora, including the OECD, have dismissed this alternative as unrealistic. (Organisation for Economic Co-operation and Development. TRADE AND COMPETITION POLICIES. OPTIONS FOR A GREATER COHERENCE. OECD, 2001, at 15.)

<sup>232</sup> Joel Davidow. UNITED STATES ANTITRUST DEVELOPMENTS IN THE NEW MILLENNIUM. World Competition, Vol. 24, No. 3, 2001, at 439.

<sup>233</sup> Under the Australia New Zealand Closer Economic Relations-Trade Agreement (“ANZCERTA”) Australia and New Zealand eliminated anti-dumping actions on goods originating in each other’s markets. They also reviewed their competition laws so as to extend to prohibiting certain anti-competitive behavior by firms in one country that have market power in the other country or in the combined Australia/New Zealand market. Importantly, they also agreed to give each country’s enforcement agency the power to obtain information and documents in the other country and to allow each country’s court to sit in the other jurisdiction. (Organisation for Economic Co-operation and Development. TRADE AND COMPETITION POLICIES. OPTIONS FOR A GREATER COHERENCE. OECD, 2001, at 77.)

U.S.; (e) European Competition law—which is highly regulatory—is the most copied law, not that of the U.S.; (f) market access impeding cases, particularly vertical practices, are more liberal in the international realm than in the U.S.; and (g) monitoring systems would be close to impossible.<sup>234</sup>

## **2. Cooperation as the Path of Choice**

Because of the above, the cooperation route has been the venue of choice. Several bilateral competition cooperation agreements have been entered into.<sup>235</sup> From these, two instruments merit particular mentioning because of the importance of the agreements provided for therein:<sup>236</sup> (a) NAFTA; and (b) the Mexico-US Competition Cooperation Agreement.

### *a) NAFTA*

Chapter XV of the North American Free Trade Agreement<sup>237</sup> includes commitments by its members to establish and maintain a competition framework that prohibits anticompetitive business practices,<sup>238</sup> recognizes the importance of cooperation and coordination between authorities and agree to act accordingly,<sup>239</sup> that, should a state monopoly<sup>240</sup> or enterprise<sup>241</sup> be created, notice shall be given (where possible), and it is agreed that such monopolies should not constitute an annulment or impairment of benefits,<sup>242</sup> nor shall they act in a manner that is incompatible with other NAFTA obligations.<sup>243</sup> Also, a working group is established to inform and make recommendations to the NAFTA Commission.<sup>244</sup>

### *b) Mexico-US Competition Cooperation Agreement*

The Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their

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<sup>234</sup> Reasons (a), (e), (f), and (g) have been put forth by Judge Diane Wood, conference on international antitrust, University of Chicago Law School, 1999.

<sup>235</sup> To date, Mexico has entered into eight competition cooperation treaties: with Venezuela and Colombia, with Chile, two with Europe, and two with the U.S. and Canada.

<sup>236</sup> Obviously, concentrating on the Mexican perspective.

<sup>237</sup> Published in the Mexican Daily Official Gazette on December 20, 1993 and which entered into force on January 1, 1994.

<sup>238</sup> NAFTA Article 1501(1).

<sup>239</sup> NAFTA Article 1501(2).

<sup>240</sup> NAFTA Article 1501(2).

<sup>241</sup> NAFTA Article 1503(2).

<sup>242</sup> NAFTA Article 1501(2)(b) and Annex 2004.

<sup>243</sup> NAFTA Article 1502(3)(a).

<sup>244</sup> NAFTA Article 1501(4).

Competition Laws<sup>245</sup> has established a detailed cooperation and mutual assistance regime which regulates the following disciplines: (i) notification, (ii) enforcement cooperation, (iii) coordination with regard to related matters, (iv) cooperation regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party, (v) avoidance of conflicts, (vi) technical cooperation, (vii) consultations, and (viii) periodic meetings.

As per notification,<sup>246</sup> the parties agreed to notify each other when any enforcement activities affect “important interests of the other party”<sup>247</sup> with sufficient time so as to allow the home-country competition authorities to provide their views and the notifying competition authorities to take them into account. Also, notice must be provided when requested information, documents, records, are located in the territory of the notified country or oral testimony is to be provided by a person located in the said territory. Also, notice shall be given when competition authorities visit the other country or when they intervene or publicly participate in proceedings where the issue addressed may affect the other party’s important interests.

Enforcement cooperation<sup>248</sup> requires that parties assist in obtaining evidence and witnesses, provide information, and/or provide enforcement activity information. Also, parties agreed to coordinate with regard to related matters so as to take into consideration enforcement activities, objectives, capabilities and effectiveness of relief sought as well as cost reductions of the other party’s enforcement activities in their own activities.<sup>249</sup> With regards to the avoidance of conflicts compromise<sup>250</sup> parties acknowledge that the other party’s important interests may be affected by enforcement activity by the other party and agreed to consider the same so as to minimize any adverse effects.

Of particular interest is the agreement to cooperate regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party.<sup>251</sup> A positive comity commitment has been provided for. Hence, in

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<sup>245</sup> Published in the Mexican Daily Official Gazette on January 24, 2001 (“*Acuerdo entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre la aplicación de sus leyes de competencia*”—the “Competition Cooperation Agreement”).

<sup>246</sup> Article II of the Competition Cooperation Agreement.

<sup>247</sup> Topics considered to be “important interests of the other party” are anticompetitive practices, mergers and acquisitions carried out in whole or in substantial part in the territory of the other party, concentrations where either one of the parties to the transaction or the controlling entity is incorporated in the country other than that instituting the enforcement action, relate to conduct required, encouraged or approved by the other party; involve remedies to take place or be directed at conduct of the other party; or involve seeking information located in the territory of the other party. (Article II(2)(a)-(f) of the Competition Cooperation Agreement).

<sup>248</sup> Article III of the Competition Cooperation Agreement.

<sup>249</sup> Article IV of the Competition Cooperation Agreement.

<sup>250</sup> Article VI of the Competition Cooperation Agreement.

<sup>251</sup> Article V of the Competition Cooperation Agreement.

the event a party to the Competition Cooperation Agreement believes that anticompetitive activities are taking place in the territory of the other party that adversely affect the former's important interests (the "Requesting Party") it may request that the latter (the "Requested Party") initiate enforcement activities.<sup>252</sup> The Requested Party's competition authorities have the duty of carefully considering whether to initiate enforcement activities or expanding ongoing ones as identified in the request, promptly informing the Requesting Party of the former's decision and keeping the latter abreast with any developments as to the same, should the answer be positive. A qualification is in place, the duty extends to carefully analyzing and informing. The discretion inherent on whether to commence performance proceedings remains unaltered.

### ***3. The Result***

When compared with the analytical framework provided for by the Brookings Project, the current level of competition development falls in the "Mutual Recognition" category. I.e., exchanges of information, consultations, assistance and the acceptance of each member's regulations, standards and procedures takes place by means of the notification, positive comity, and no-conflicts commitments. However, the next level of cooperation ("Monitored Decentralization") is not reached simply because no restriction to the freedom to unilaterally set policy without factoring other countries' interests, has been achieved nor is there a convergence in the structure of policies.

## **E. MY OPINION**

I confess allegiance to the Plurilateral Approach, but with a few qualifications or extras which I will discuss. Thereafter, I will provide the reasons behind the approach I suggest.

### ***1. My Take on the Plurilateral Approach: An Enriched Plurilateralism***

I have stated that I am persuaded by the Plurilateral Approach. However, and to be more accurate, I believe the best approach is actually one where elements of the Plurilateral Approach are implemented with the following adjustments: (a) that certain fields must be sanctioned by all domestic laws (core principles); (b) that certain areas be considered as discretionary but subject to the scrutiny of the International Competition Authority; and (c) that a dispute settlement mechanism, such as the DSU, review the enforcement activities of domestic competition authorities in cases where either externalities exist or the matter is an international one.

#### *a) Core Principles*

The plurilateral instrument (which I shall henceforth call the "Multilateral Agreement on Competition") would specify certain areas or activities which must be regulated in a specific manner, and where once determined to exist, competition authorities would have little discretion in whether to sanction or not. The enforcement level of analysis would stop at the factual determination of

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<sup>252</sup> Article V(2) of the Competition Cooperation Agreement.

whether a specific conduct occurred or not. Once proven, a sanction must ensue. Some leeway could be provided for in the severity of the sanction (e.g., the amount of the fine) in domestic laws since countries differ on such regards, and such margin of maneuver does not seem to create any problems nor contradict the general plurilateral scheme.<sup>253</sup>

Behavior apt to be considered within this category are practices considered *per se* illegal by all or substantially all modern competition laws. For instance, horizontal price fixing, horizontal output restrictions, bid rigging, horizontal market divisions.<sup>254</sup>

The level of scrutiny by the International Competition Authority ("ICA") would be a *rational basis test*. In other words, the ICA would determine whether the factual evidence supporting the findings is by a preponderance of the evidence, and whether no unreasonable situation existed which militated against such measures, such as discrimination.

#### *b) Discretionary Fields*

The Multilateral Agreement on Competition would also provide for other areas where differences in treatment exist in different jurisdictions. Instead of wrangling over what practices should or should not merit competition repudiation and what sanction should be established for the same, in my opinion *competition authorities should agree that they disagree*, and tailor an agreement that is tolerant of their differences. After all, the fields in question are controversial inasmuch as economic experts and —one could add— reasonable minds differ as to whether certain practices are pro- or anti-competitive. Hence, authorities should be allowed to differ as to the same and address them in the manner they believe most appropriate given the circumstances. To do so, the Multilateral Agreement on Competition would establish certain matters where States (through regulation) or competition authorities (by means of the margin of discretion inherent in enforcement proceedings) are allowed to be more or less liberal as to the manner in which they address the conduct, provided a legal and economic rational basis exists for the sanctioning of the conduct and the severity of the sanction.

Candidates for these types of practices are vertical restraints, conditions imposed upon international entities concentrating, tie-ins, conditioned sales, exclusive arrangements, refusals to deal, cross-subsidization, predatory practices, price discrimination, discounts conditioned on exclusivity, etcetera.<sup>255</sup>

<sup>253</sup> The fact that certain conduct, although sanctioned everywhere, may be more harshly sanctioned in some jurisdictions than in others is not anathema to the Plurilateral Approach, current state of affairs nor should it raise any material issues.

<sup>254</sup> This laundry list is not exhaustive, it is merely suggestive. I would not forcefully advocate that all be included, nor that more should not be included.

<sup>255</sup> Again, as before, the list is propositive.

The level of scrutiny by the ICA would be restricted to whether the factual findings were reasonably supported by the evidence and whether the economic and legal arguments supporting the sanctions imposed are rationally related to the severity of the sanction.

c) *The International Competition Authority as an Appellate Organ*

The International Competition Authority, either functioning independently or benefiting from the WTO Dispute Settlement Understanding, would be restricted to assessing whether, from the facts and the file, the competition authority's decision is, as to its facts, reasonably supported by the evidence produced, and whether the legal arguments are rationally related to the conclusion, including its sanction.

i) Conditioned Jurisdiction

The ICA's jurisdiction should be conditioned on the following: (1) that the conduct in question be "international", or (2) the practices generate externalities which raise concern on other jurisdictions.

I would propose that "international" mean that the economic agents have places of business in different States or that the country which competition authorities are involved be other than the country where the economic agents have their places of business.

As per "externalities", I would not define the same but reduce the concept to its economic definition and qualify it to mean "*material* externalities". Not doing so could leave out externalities which should be factored in. I realize that plenty of litigation would ensue since claimants anxious to have the case fall under the ICA umbrella would surely find arguments or speculations they would call "externalities". It is to address this concern that I suggest that the externalities be "material".

ii) The Level of Scrutiny of the International Competition Authority

A word on the level of scrutiny is warranted. In arguing in favor of the foregoing architecture, I have borrowed the United States Constitutional theory of the levels of scrutiny.<sup>256</sup> Under U.S. Constitutionalism three levels of scrutiny exist to determine whether a law is constitutional:<sup>257</sup> (i) rational basis test; (ii) intermediate scrutiny; and (iii) strict scrutiny. Under the **rational basis test**, a law will be upheld if it is *rationally related to a legitimate government purpose*. Under **intermediate scrutiny** a law will be upheld if it is *substantially related to an important government purpose*. Under **strict scrutiny**, a law will be upheld if it is *necessary to achieve a compelling government purpose*. The foregoing levels of

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<sup>256</sup> Although U.S. attorneys are familiar with the concept, I will summarize the concept for the benefit of non-U.S. readers.

<sup>257</sup> The source of the theory is the famous footnote four of the case *United States v. Carolene Products Co.* (304 U.S. 144 (1938)).

scrutiny are put in an order of increasing levels of scrutiny. Hence, the first is the less demanding and the last is the most intense.<sup>258</sup>

Although my summary is simplistic it need not be more detailed. The point in the discussion is that I have taken the lowest level of analysis as the scrutiny benchmark for analysis of domestic competition law activity. The reason for my doing so is to provide a great deal of deference to findings and decisions of domestic competition authorities. Only where the domestic measures are questionable as to their factual underpinnings, legal basis or reasons for implementing them,<sup>259</sup> should they be stricken or rejected by the ICA.

Perhaps coupling the foregoing with a “sliding scale” approach could prove useful. The higher the sanction, the higher the threshold of scrutiny the ICA will be vested with and the economic and legal reasons the measure in question would need to be grounded upon.

## 2. Reasons

The reasons motivating my arguing in favor of a Plurilateral Approach are that: (a) other more ambitious approaches seem unrealistic; (b) a common ground exists on sufficient basic points; (c) by providing for only minimum or core elements, nations are allowed to be more or less liberal as to their position on competition without impinging upon the multilateral architecture; (d) a dispute settlement mechanism is indispensable; and (e) the WTO scheme is an adequate and convenient infrastructure to address international competition law. I will now elaborate on each reason.

### a) Other more Ambitious Approaches seem Unrealistic

Competition law is too sensitive a topic, commanding too many differences as to its concepts and paradigms, and too politically influenced, to realistically believe that an agreement of the type proposed by the Universal Regulation Approach will be reached, at least in the near future.

Unlike other fields of law<sup>260</sup> which have achieved a uniform regulation either by international treaties<sup>261</sup> providing for uniform provisions and/or Model Law<sup>262</sup>

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<sup>258</sup> Chemerinsky, Erwin. CONSTITUTIONAL LAW. Principles and Policies. Aspen Law and Business, 1997, pgs. 414-417.

<sup>259</sup> For instance, that they be an excuse for protectionism. Another example would be discrimination, i.e., that the measures implemented on their face have economic justifications, but that in reality are an elaborate excuse to discriminate against foreign economic agents.

<sup>260</sup> For instance, international commercial arbitration.

<sup>261</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, published in 330 United Nations Treaty Series, pg. 38, no. 4739 (1958). To date, the New York Convention has been approved by 132 jurisdictions.

<sup>262</sup> The UNCITRAL Model Law on International Commercial Arbitration, adopted by the General Assembly of the United Nations on December 11, 1985, where said organ

methods of their implementation, competition law has displayed an enormous ability to touch upon sensitive nerves of (sometimes powerful) constituencies. Hence, the feasibility of said field of law commanding the same level of acceptance as international commercial arbitration<sup>263</sup> is (at best) questionable in the near future.

History shows us that other treaties, with less obstacles and with a more palpable need of achieving global regulation, have failed to be ratified by crucial Members of the international community. For instance, the 1969 Vienna Convention on the Law of Treaties<sup>264</sup> has been in the U.S. Senate docket since 1971 notwithstanding that the U.S. Government has always recognized said Convention as a correct statement of customary international law on the subject.<sup>265</sup> Other more politicized examples are the U.S. failure to become party to the Kyoto Protocol and the ICC Rome Statute<sup>266</sup> as well as the denunciation of the 1972 Anti-Ballistic Missile Treaty.<sup>267</sup> As it may be observed, the U.S.'s attitude *vis-à-vis* treaties is disturbingly unfriendly.<sup>268</sup> In all fairness, the United States is not the only country that can be criticized for said type of undercomings. The Mexican government also has such type of misfits<sup>269</sup> and I am sure other countries can also be cited for the same naught.

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recommended that all States give due consideration to the said model law in view of the desirability of uniformity of the law of arbitral procedures (General Assembly Resolution 40/72, 40 GAOR Supp. No. 53, A/40/53, at 308). To date, the Model Law on International Commercial Arbitration has been approved by at least 40 jurisdictions. I say 'at least' since such data is hard to verify because of the lack of obligation upon States to notify the enactment of the same, contrary to the situation of treaties.

<sup>263</sup> Or, for that matter, other fields of law achieving international levels of uniform regulation, such as, to some extent, electronic commerce, private international law (in general), law applicable to international agreements (in particular), etcetera.

<sup>264</sup> Vienna Convention on the Law of Treaties, opened for signature on May 23, 1969, 1155 U.N.T.S. 331, 339.

<sup>265</sup> President Nixon transmitted the Vienna Convention to the Senate for its advice and consent on November 22, 1971. See Message to the Senate Transmitting the Vienna Convention on the Law of Treaties, Public Papers of the Presidents: Richard Nixon 1132 (Nov. 22, 1971), reprinted in 65 Dep't St. Bull. 684 (1971).

<sup>266</sup> Rome Statute of the International Criminal Court, available at [www.un.org/law/icc](http://www.un.org/law/icc).

<sup>267</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change in [www.unescap.org/enrd/energy/compend/ceccpart5chapter2.htm](http://www.unescap.org/enrd/energy/compend/ceccpart5chapter2.htm).

<sup>268</sup> The comment applies to the Executive Branch and Congress alike.

<sup>269</sup> For instance an (embarrassing —in my opinion) failure of the Mexican government to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Although the reader may wonder the source of my comment since said treaty is not an *essential* international law instrument, my criticism stems from the fact that Mexico, in over 19 investment protection treaties and several free trade agreements, has established the ICSID Mechanism as an option for arbitrating investment disputes. However, such commitment is, to a great extent, nullified in practice since the Mexican government has failed to ratify the ICSID Convention (it has not been totally nullified since the ICSID Additional Facility still remains as an option, even if a diminished one). The contradiction is absurd and unexplained. (For an analysis on the

Given this backdrop, it is difficult to realistically foresee that measures of the robustness of the Universal Regulation Approach will be materialized in the near future. However, I would love to be proven wrong.

*b) Common ground exists on sufficient basic points*

In my opinion, an *opinion iuris communis* **does** exist with regards to a cataloging certain practices as meriting outright repudiation, in contrast to others which must be analyzed in light of the circumstances so as to gauge their competitive effect before sanctioning the firms involved. The foregoing because the same conduct, given certain circumstances, may be pro-competitive, and, when faced with others, may be anti-competitive. The first type of practices refer to *per se* illegal practices. The second are subject to the rule-of-reason litmus test.

Given such (almost unanimous) legislative policy,<sup>270</sup> elements exist for countries to build on the same and to construct an international competition scheme where the internationally-repudiated practices are universally cataloged as core principles or minimum standards, and the remaining practices are left to domestic (legislative or judicial) discretion.

Of course differences would exist. However, the same should not be comprehended as part of the core points. Rather, they should be amongst the areas where differences would be tolerated.

*c) By Providing for Only Minimum or Core Elements Nations are Allowed to be More or Less Liberal as to their Position on Competition without Impinging upon the Multilateral Architecture*

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matter, see Francisco González de Cossío. THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES —THE MEXICAN EXPERIENCE. Journal of International Arbitration 19(3): 227-244, 2002; and Francisco González de Cossío. THE MEXICAN EXPERIENCE WITH INVESTMENT ARBITRATION. A COMMENT. Journal of World Investment, Vol. 3, No. 3, June 2002, at 473.)

270 From the review of the following competition regimes it follows that, albeit with varying degrees and methods, each of the following countries establishes a different approach and severity of sanction for some practices than for others, under the theory that some merit outright prohibition whereas others need to be carefully assessed as to their competitive effects taking into consideration other factors, particularly economic ones: the Argentina, Australia, Brazil, Canada, Chile, Denmark, Czech Republic, the European Union, France, Germany, Hong Kong, Hungary, Indonesia, Italy, Japan, Korea, Malaysia, Mexico, New Zealand, Norway, The People's Republic of China, the Philippines, Poland, Russia, Singapore, Spain, Sweden, Taiwan (Republic of China), Thailand, the United Kingdom, United States of America, Ukraine, and Venezuela. (See James J. Garrett (General Editor) WORLD ANTITRUST LAW AND PRACTICE. A Comprehensive Manual for Lawyers and Business, Little Brown and Company, Boston/New York/Toronto/London, 1995.)

Although, as explained before, a glance at the different domestic laws shows that a tendency exists to regulate certain behavior as untolerable (*per se* anticompetitive) in contrast to other conduct which acceptance may depend on the circumstances (rule of reason analysis), no all-applicable categorization of which-is-which exists. Hence, instead of allowing that such difference constitute an obstacle for the implementation of an international regime, each jurisdiction's concerns and preferences may be catered by elaborating a limitative list of disciplines meriting *per se* sanction. The rest, by definition, would be considered activities which different countries can treat as they prefer, either by including as subject to rule of reason analysis or *per se* illegal.

The benefit of taking the above step is that a problem is turned into an opportunity. What constituted a source of discrepancy becomes the bridge of (what used to be) an unsurmountable gap.

*d) A Dispute Settlement Mechanism is Indispensable*

It is an axiom of legal theory that naked rights amount to little. In other words, a right, without a measure to procure its respect, amounts to the non-existence of the same.

I do not envisage an effective scheme without some method of adjudicating differences. Recent experience shows us that the differences should be channeled to arrive to a legally-grounded final, binding, decision resolving the same. In this regard I believe that the efforts already invested in designing the WTO Dispute Settlement Understanding, coupled with the success it has commanded, militate in favor of not reinventing the wheel but rather using the DSU as the forum for competition law disputes.

*e) WTO Scheme is an Adequate and Convenient Infrastructure to Address International Competition Law*

I believe the multilateral trading system is an adequate and convenient infrastructure for sowing the seeds of international competition law. Although including competition regulation in a framework dealing with a different subject (trade law) might seem inappropriate, I believe it isn't and that doing so is advantageous because: (i) competition related provisions already exist in the WTO-scheme; (ii) the efforts invested in the WTO-scheme and its success should be taken advantage of in establishing a multilateral competition framework; (iii) the interface between competition and trade law warrants doing so; (iv) the differences between competition and trade law do not persuasively argue against such measure; and (v) the characteristics of the current international adjudication system would prove useful in the envisaged international competition scheme. I shall elaborate.

i) Competition-Related Provisions already exist in the WTO Scheme

The architects of the multilateral trading system have already provided for competition-related regulation in several of the instruments supporting the international trade edification. I will now mention them.

1. **GATT:** The General Agreement on Tariffs and Trade has several provisions relating to competition: Articles II:4,<sup>271</sup> III,<sup>272</sup> XI,<sup>273</sup> XVII,<sup>274</sup> XX,<sup>275</sup> XXIII,<sup>276</sup> and XXIII:1(b).<sup>277</sup>

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<sup>271</sup> Which provides that "*If any contracting party establishes, maintains or authorises, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule.*"

<sup>272</sup> Article III:2, first sentence, obligates contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other GATT provisions, it does not refer to trade effects.

<sup>273</sup> Article XI prohibits governmental use of most quantitative import and export restrictions and prohibitions. As such it does not discipline purely private actions or measures. However, it would be interesting to see whether there are any possible implications of this discipline for how certain private practices are treated.

<sup>274</sup> Article XVII which deals with State-Trading Enterprises, imposes certain obligations with respect to the conduct of firms that are either state-owned or state-controlled or have been granted by the State "exclusive or special privileges".

<sup>275</sup> Article XX(d) sets out the general exceptions to the GATT 1994. It provides that, as long as governmental measures are not applied in a manner: (1) constituting a means of arbitrary or unjustifiable discrimination; or (2) a disguised restriction on international trade, then WTO Members may adopt or enforce them where "*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ... the enforcement of monopolies operated under (Articles II:4 and XVII)...*".

<sup>276</sup> The concept of non-violation nullification and impairment, based on Article XXIII of the GATT, may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. It has been argued that it is not precluded that restrictive business parties could be a factor in such situations.

<sup>277</sup> Article XXIII:1(b) may be deemed to have competition implications inasmuch as when it deals with the scope of governmental "measures", a "...Member's industrial policy could in some circumstances upset the competitive relationship in the market place between domestic and imported products in a way that could give rise to a cause of action..." as was the belief of the 1998 Panel Report on Japanese Measures Affecting Consumer Photographic Film and Paper as it considered the competitive relationship of the market so as to arrive to the meaning of government measures.

2. Agreement on Safeguards: The following provisions of the Agreement on Safeguards have competition implications: Articles 11:1(b)<sup>278</sup> and 11:3.<sup>279</sup>
3. The General Agreement on Trade in Services: The General Agreement on Trade in Services (“GATS”) establishes general obligations and disciplines binding all Members from which the following bear on competition matters: Article 7 (“Recognition”),<sup>280</sup> Article 8 (“Monopolies and Exclusive Service Suppliers”)<sup>281</sup> and Article 9 (Business Practices)<sup>282</sup> contain a number of competition-related provisions. Articles 7 and 3 on Domestic Regulation and Transparency may also be relevant.
4. Understanding on Commitments in Financial Services: The Understanding on Commitments in Financial Services provides for a framework that supplements GATS with respect to measures on financial services. Competition-related provisions in this text are:
  - a) Paragraph 1 requires each member to list in its schedule existing monopoly rights, which members “*shall endeavour to eliminate ... or reduce*”.
  - b) Paragraph 10.1 states that each Member “*shall endeavour to remove or to limit any adverse effects*” on other Members of a range of non-

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<sup>278</sup> Which provides that “... a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.” Furthermore, the concept “similar measures” are specified to include: “*export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection*” **to the importing country’s industry**.

<sup>279</sup> Article 11:3 provides that “*Members shall not encourage or support the adoption or maintenance by public and private enterprises or non-governmental measures equivalent to those referred to in paragraph 1.*”

<sup>280</sup> Article 7 has the objective of preventing the use of licensing, certification or related requirements as a barrier to entry for foreign providers. It permits recognition of another Member’s licensing or certification on a bilateral or plurilateral basis provided that “adequate opportunity” is afforded to other Members to negotiate their accession, and that the arrangements are not used as a means of discrimination between countries. Article 7 also states that “wherever appropriate” multilaterally agreed criteria are to be employed for recognition and harmonization of these requirements.

<sup>281</sup> Article 8 requires that monopolies, whether public or private, respect, *inter alia*, the Most-Favoured-Nation obligation in Article 2 of the GATS. Also, with respect to sectors covered in a Member’s schedule, Article 8 requires the Member to ensure that a monopoly supplier does not “abuse its monopoly position” when it competes in the supply of services outside its monopoly rights.

<sup>282</sup> Article 9(1) requires that “*Members recognize that certain business practices of service providers, other than those falling under Article 8, may restrain competition and thereby restrict trade in services.*” Article 9 mandates Members to accede to any request for consultation with any other Member concerning such practices “with a view to eliminating them”. It also imposes a duty to co-operate in the provision of non-confidential information of relevance to the matter in question.

discriminatory measure, including restrictions on the range of services a given entity may provide, territorial limits on expansion into the entire territory of the Member, and, very generally, "other measures that ... affect adversely the ability of financial service suppliers of any other Member to operate compete or enter the Member's market".

- c) Paragraph 10.2 obligates Members to ensure that self-regulatory bodies, securities or other exchanges or markets, "*or any other organization or association*" accord national treatment to foreign financial service providers, whenever membership in these bodies is *required* in order to deliver financial services within the Members state in question.
- 5. Annex on Telecommunications: The Annex on Telecommunications contains an obligation to allow service providers of other Members access to public telecommunications networks "*on reasonable and non-discriminatory terms and conditions*" for the supply of any service included in the Member's schedule.
- 6. Reference Paper on Basic Telecommunications: This document establishes a general commitment of Members to maintain adequate measures to prevent anti-competitive practices of major suppliers. It gives several specific examples of anti-competitive practices, such as: (i) Anti-competitive cross-subsidization; (ii) use of information obtained from competitors; and (iii) withholding technical and commercial information.
- 7. Agreement on Trade-Related Intellectual Property Rights: TRIPS Article 8 provides that: "*Appropriate measures provided they are consistent with the provisions of this Agreement, may be needed 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.*"
- 8. Agreement on Technical Barriers to Trade: This Agreement includes rules to ensure that the preparation, adoption and application of technical regulations, standards and conformity assessment procedures *by non-governmental bodies* are not more trade restrictive than necessary (e.g Articles 3, 4, 8).
- 9. Agreement on Preshipment Inspection: This instrument includes detailed rules for the activities of preshipment inspection entities (Article 2).
- 10. Agreement on Subsidies: This Agreement regulates "market displacement", "price undercutting" and "voluntary undertakings" by exporters in detail (Articles 6 and 18) and explicitly requires the examination of "trade restrictive practices and competition between foreign and domestic producers" in determinations of "injury". (Article 15)

11. Agreement on Trade-Related Investment Measures: Competition policy rationales may be invoked for other provisions/agreements. For example dumping, which is “condemned” under Article VI, and against which anti-dumping duties may be imposed subject to conditions defined in the Agreement Implementation of Article VI of the GATT 1994, may reflect, in some instances, a strategy of predatory pricing.

This Agreement provides for a review by the Council for Trade in Goods of its operation not later than five years after the entry into force of the WTO Agreement. In the course of this review “...[t]he Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.”

12. Agreement on Government Procurement: This Agreement may be relevant when it comes to certain anti-competitive private practices. For instance, by requiring transparency in government procurement decisions.

- ii) The efforts invested in the WTO-scheme and its success should be taken advantage of in establishing a multilateral competition framework

The multilateral trading system is the result of more than 50 years of negotiations, concessions, legal and political victories over protectionism, discrimination, and other practices which run against current economic and welfare paradigms. In my opinion, instead of re-inventing and constructing from zero a new infrastructure, the multilateral trading system edifice should be taken advantage of. In doing so, two benefits would ensue: the competition regulation to be implemented will benefit from the legal and political inertia behind the WTO scheme, and economies of scale can be secured from taking advantage of such theoretical (and physical!) structure.

- iii) The Interface Between Competition and Trade Law Warrants Competition Regulation in the WTO-Scheme

The already discussed interface between competition and trade law also militates in favor of addressing both disciplines in the WTO. Independently regulating each on different fora invites less than optimal solutions which could easily diminish the effectiveness of each other. Coordinated joint regulation is not only possibly but plausible. The Theory of Complementarity can lead to fruitful results if the said complementarity is taken advantage of instead of tripping over the same.

iv) The Differences Between Competition and Trade Law Do Not Persuasively Argue Against Competition Regulation in the WTO-Scheme

The fact that certain differences exist between competition and trade law do not persuasively obstacle the envisaged scheme. The fact that the latter has focused on “without-border” measures, whereas the former has traditionally sought to address “within-border” measures does not pose any problems, nor does the fact that the former usually addresses private conduct and the latter governmental measures. The same comment applies to the domestic vs. international source of regulation.

v) The Characteristics of the current International Adjudication System would prove useful in the envisaged International Competition Scheme

An important elite of professionals trained in international law, trade, dispute resolution and economics has emerged on several fronts<sup>283</sup> which could nurture the DSU on competition (as well as other) matters, which should be taken advantage of, particularly given the fact that the said milieu is premised on the following qualifications which have commanded almost global acceptance, and which could prove useful in the ICA scheme: expertise, independence and impartiality.

The international dispute resolution practice has trained certain highly qualified professionals in the (complicated) ins-and-outs of dispute resolution of an international dimension. The human capital inherent in such phenomenon should be tapped into to solve disputes of an international dimension. Because it would work as a reputational market, and because such professionals are not elected, designated nor form part of a bureaucracy, they need not be sensitive to political or other influences which may (and frequently do) impinge upon their quality of judgment. Their guiding star would be correctly solving the dispute, not being reelected. Hence, the chances of the said adjudication system from working would improve.

### ***3. Conclusion: An apparent –but favorable— Paradox***

As the careful reader has certainly noticed, my arguing in favor of the Plurilateral Approach poses an interesting paradox which I do not want to leave unaddressed: by militating in favor of a Plurilateral scheme where differences are tolerated and a lot of deference is left to the determinations of domestic authorities, the outcome would seem to resemble the current state of affairs: *lack of uniformity*. Hence, the reader could ask: what is gained? Why go to the trouble to establishing the envisaged regime if, at the end of the day, different approaches *will* continue to exist?

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<sup>283</sup> For instance, the rosters of arbitrators in the Hague Permanent Court of Arbitration; the International Court of Arbitration of the International Chamber of Commerce; the London Court of International Arbitration; the American Arbitration Association; the Regional Centre for Arbitration of Kuala Lumpur; the International Centre for Settlement of Investment Disputes, to state a few.

The answer, although not immediately apparent, is conclusive: *the end of dislocative effects*. Although differences would continue to exist on the details and outer coatings of international competition, the core aspects and infrastructure erected would iron-out current wrinkles between law and policies of different jurisdictions. They would now be congruent with each other. To elaborate, I foresee the following benefits from the adjusted Plurilateral Approach:

- a) A spinal cord will finally be established on a (thus far) legally spineless international topic.
- b) The most egregious practices will be outlawed on a world-wide basis.
- c) The dislocative effects stemming from the fact that different (and frequently conflicting) approaches are taken by different domestic authorities will be eliminated and replaced by a cooperative and congruent scheme.
- d) A regime where countries come to terms as to certain agreed behavior meriting joint international rejection will pave the way for further understanding to occur and will allow for the cooperation and measures required to efficiently address other activities having externalities.
- e) Conflicts between competition authorities will be channeled and handled in a constructive manner. This will eradicate the wrangling displayed in past sensitive cases.<sup>284</sup>

Therefore, the outcome, albeit apparently the same, would be fundamentally different. In a way, it would resemble the international financial regime which goes unnoticed to the average citizen unless and until something goes wrong. It is at such point —when the international financial regime fails— that the benefits of a well-oiled and efficient international financial machinery become apparent.<sup>285</sup>

In the same fashion, the benefits of a well tailored and functioning Plurilateral Approach I have defended would initially seem not too different than current state of affairs. However, as time passes and as universal problems begin to be given congruent solutions fostering mutual enrichment and encouraging uniformity, the results will become notorious.

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<sup>284</sup> For instance, the GE/Honeywell, Boeing/McDonnell Douglas and WorldCom/Sprint (in)famous cases.

<sup>285</sup> If not, ask an Indonesian citizen after the 1996 crisis or an Argentinean after the 2001-2002 financial debacle.