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## From World Trade Law to World Competition Law

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Freidl Weiss

## **Abstract**

The WTO has become the chosen forum for various trade-related additional policies and provisions such as Trade Related Environmental Measures ('TREMS'), TRIMS, TRIPS, and possibly in the future, competition and investment rules. The TRIPS, as is well known, owes its existence to trade-offs with DCs, which have still not been fully implemented. Future additional policies, if controversial, would need to be justified separately on economic grounds, or risk failure. Detailed multilateral competition rules will undoubtedly be adopted one day. I believe, however, that the time is not yet ripe for a comprehensive agreement, except perhaps on the most abstract of principles. In the meantime, it will be due to the very processes of regionalization and globalization that enterprises will increasingly be subject to national competition laws.

# FROM WORLD TRADE LAW TO WORLD COMPETITION LAW

*Prof. Friedl Weiss\**

## INTRODUCTION

I have approached this ubiquitous subject with considerable trepidation, looking up at mountains of scientific as well as popular literature on the subject and staring down into the abyss of my own ignorance.

But I think that I also have good news. First, I feel sufficiently uninhibited and unbiased to chance a fresh look at some relevant contemporary developments, without being instantly trapped by any currently fashionable discourse, let alone ideological or religious wars, past or present. In any case, in choosing a painful but prudent place on the fence, as it were, I have, I hope, discarded facile opining out of deference to the daunting and multi-layered complexity of the subject assigned to me. Another positive factor is my trust in the experts here present who would undoubtedly prevent me from re-inventing the wheel, any wheel.

To place the discussion in its inevitably broader contextual habitat I would like to recall Klaus Hopt's memorable phrase that *Wettbewerb ist eine staatliche Veranstaltung* (competition is a state event).<sup>1</sup> The same can be said of the so-called "competition culture," whatever that might mean. It is a national culture, or at best a regional one. Indeed, state-centered thinking has dominated Western political philosophy of international relations since the sixteenth century, which recorded the creation, rise to near absolute levels, and then relative decline of state power. The demise of national boundaries, however, and of nation states as artificial, as advocated and predicted by the nineteenth century *laissez-faire* and Marxist ideologies, respectively,<sup>2</sup> appears still premature today and a long way off.<sup>3</sup>

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1. KLAUS J. HOPT, *WETTBEWERBSBESCHRÄNKUNGEN UND VERRECHTLICHUNG* 229, 287 (Von Friedrich Kübler ed., 1985).

2. In Karl Marx's hegelian dialectic, states oppress the masses of impoverished, destitute workers, and the liberal free market philosophy is a potentially disruptive agent in society.

3. DAVID ARMSTRONG, *REVOLUTION AND WORLD ORDER: THE REVOLUTIONARY STATE*

Worldwide debates about the nature of the unfolding post-Cold War world, especially regarding the international politics of economic development and the environment, comprise at least three strands. One strand concerns the future role of nation states; a second, the related role of various non-state actors, particularly corporations and non-governmental organizations ("NGOs"); and a third, the foundations, common values, rules, and institutions of a civilized international polity.

As to the first, there are certain processes of disintegration within<sup>4</sup> and between resurgent nation states,<sup>5</sup> possibly compounded by forms of international deregulation such as the reassertion of "subsidiarity" in relations between states and supranational institutions<sup>6</sup> and by restrictions on the independent role of international organizations.<sup>7</sup> Interpretations of these

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IN INTERNATIONAL SOCIETY 301-02 (1993). For an interesting discussion of the elements of diversity in the traditional state system, see Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447 (1993).

4. Examples include the division of Czechoslovakia into two separate independent states, and different forms of regionalism in Western Europe, e.g., in Belgium, Spain, and Italy.

5. Note the failure and break-up of multicultural and multiethnic federations, e.g., Yugoslavia and the Soviet Union.

6. Treaty establishing the European Community, Feb. 7, 1992, art. 3b, O.J. C 224/1, at 9 (1992), [1992] 1 C.M.L.R. 573, 590 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]. The principle of "subsidiarity" was already implicit in the Treaty establishing the European Coal and Steel Community ("ECSC Treaty") and the Treaty establishing the European Economic Community ("EEC Treaty"). Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, art. 5, 261 U.N.T.S. 140, 149 [hereinafter ECSC Treaty]; EEC Treaty, *supra*, art. 235, at 91. Regarding the EEC Treaty, one may cite the instrument of the directive, which is binding as to the result to be achieved, but leaves the choice of form and methods to national authorities. *Id.* The principle was, however, given explicit formulation at first in the Single European Act ("SEA") in connection with European Economic Community action relating to the environment. SEA, *supra*, art. 130r(4), O.J. L 169/1, at 12 (1987), [1987] 2 C.M.L.R. at 755.

7. U.N. actions in the Persian Gulf, Somalia, and former Yugoslavia were apparently driven more by the interest of certain powers, or the absence thereof, rather than by the collective will of the U.N. pursuant to principle and law. The General Agreement on Tariffs and Trade ("GATT"), under the sway of the consensus principle, has labored for seven years to complete the Uruguay Round of negotiations; the Conference on Security and Cooperation in Europe ("CSCE") has likewise enjoyed only modest success.

processes vary. Some commentators point to the spectacular record of failure of states in providing peace and security for their populations and in preventing the degradation of their social environments and the dereliction of natural habitats. Others stress, more generally, their character as repositories of potentially oppressive regulatory power or simply their incompetence in regard to achieving stated goals, especially those promoting development and satisfactory standards of living for the masses, i.e., to implement the peoples' right to development.<sup>8</sup>

The second strand, the participation of non-state actors in international decision-making, is, of course, closely linked to that of the role of states. Among them, corporate business decisions will, for better or worse,<sup>9</sup> decisively influence the shape and socioeconomic content of the global economy, including sustainable development.<sup>10</sup>

The third strand, debates on values, rules, and institutions, appears distinctly non-radical. It may be called a third liberal revival, consisting of attempts to re-equip and reconstruct liberalism within its existing edifice of philosophical foundations and property relationships. This revival is to be achieved by superimposing some kind of scientific-managerial role for the state. That role is to be exercised pursuant to an ostensibly ideologically neutral scientific logic of intervention in order to protect an emerging new balance between ecological interdependence and political independence, between market and communitarian or collective views, and indeed between environmental concerns and economic development and trade objectives.<sup>11</sup> In short, whatever their shortcomings, states are but instruments

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8. ADAM SWIFT, *GLOBAL POLITICAL ECOLOGY: THE CRISIS IN ECONOMY AND GOVERNMENT* 67 (1993).

9. Stephan Schmidheiny, *The Business of Sustainable Development*, *FIN. & DEV.*, Dec. 1992, at 24.

10. See U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, ENVIRONMENTAL SERIES NO. 2: TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT, U.N. Doc. ST/CTC/89, U.N. Sales No. E.88.II.A.7 (1988); U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, ENVIRONMENTAL SERIES NO. 2: CLIMATE CHANGE AND TRANSNATIONAL CORPORATIONS, U.N. Doc. ST/CTC/112, U.N. Sales No. E.92.II.A.7 (1992); U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, ENVIRONMENTAL SERIES NO. 4: ENVIRONMENTAL MANAGEMENT IN TRANSNATIONAL CORPORATIONS: REPORT ON THE BENCHMARK CORPORATE ENVIRONMENTAL SURVEY, U.N. Doc. ST/CTC/149, U.N. Sales No. E.94.II.A.2 (1993).

11. A "second revival," in response to the rise of totalitarianism, was based on the works of Keynes (reconstruction of economics), Schumpeter (reformulation of democratic theory), Mannheim (program for the social sciences), and Popper (logic of scien-

for the achievement of communal goals and objectives, and for the provision of various other public goods, including regulatory frameworks containing rules of the game to steer, guide, or enforce socioeconomically desirable conduct by market participants.

Paradoxically, far reaching trade liberalization, deregulation, and globalization—and the resulting relative decline of state power to influence or steer national economic development—have spurned efforts to seek multilateral standard setting or at least greater approximation or harmonization in domestic practices regarding the principles, law, and policy, both substantive and procedural, governing trade and competition in Europe as well as worldwide.

## I. SINGAPORE ET APRÈS

### A. *Working Group on the Interaction Between Trade and Competition Policy*

At the Singapore Ministerial Conference, a declaration (“Singapore Ministerial Declaration”) was made that established a Working Group on the Interaction Between Trade and Competition Policy (“Working Group”). The Working Group’s mandate was to study issues raised by World Trade Organization (“WTO”) Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that might merit further consideration. The Singapore Ministerial Declaration also stipulated that the Working Group should have regard for the existing WTO provisions in this area, including those under the Agreement on Trade-Related Investment Measures<sup>12</sup> (“TRIMS”), and should ensure that the development dimension is taken fully into account.

The establishment of the Working Group was welcomed, *inter alia*, by the European Community (or “EC”) and its Member States both taking the following positions:

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tific discovery). See 1 KEYNES PUBLIC POLICY AFTER FIFTY YEARS: ECONOMICS AND POLICY 15 (Omar F. Hamouda & John N. Smithin eds., 1988).

12. Agreement on Trade-Related Investment Measures, art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*) [hereinafter TRIMS].

- There is a role for the WTO to encourage its Members, irrespective of their level of development, to enact and effectively apply a domestic competition law.
- The WTO could identify core principles common to competition laws of different Members, if any.
- The WTO could examine how effectiveness and coherence of national competition policies of different Members, as well as cooperation between national competition authorities, could best be enhanced.
- Work in the WTO could contribute to the avoidance of conflicts of law and jurisdiction between Members and to the promotion of gradual convergence of competition laws, thereby increasing the legal security of firms operating in different jurisdictions, as well as reducing their costs of compliance with competition laws.
- The WTO could explore the scope for a future consensus on the adoption of certain common binding principles of competition law and procedure, and examine whether the WTO approach to competition policy might be global to all sectors—goods, services, and public undertakings—or rather sectoral.

### B. *Interaction Between Trade and Competition Policy*

This juxtaposition of competition and trade policy does not necessarily amount to a stable relationship. While competition policy focuses primarily on the goals of efficiency and consumer welfare, trade policy often seeks to protect the interests of a country's individual producers.

Over the last fifty years, the General Agreement on Tariffs and Trade<sup>13</sup> ("GATT") has led to an effective reduction of governmental barriers to trade. Tariff and non-tariff barriers as well as regulatory obstacles have been either reduced or eliminated. In contrast, while the benefits of rules for business behavior are generally recognized, none have as yet been developed at the international level. Trade liberalization and globalization of business activities, however, also resulted in concomitant globalization of anti-competitive practices. More and more countries, consequently, have come to adopt national competition policies

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13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, A-23-25, A-52-53, 55 U.N.T.S. 194, 212-16, 250-51 [hereinafter GATT].

so as to prevent the fruits of governmental trade liberalization and deregulation from being nullified by the establishment of barriers set up by business having the same effect.<sup>14</sup> Thus, national competition laws may effectively tackle anti-competitive practices that are exclusively implemented on a domestic market, but are carried out by firms operating from third countries. But national competition laws and law enforcement institutions, especially those of developing countries (“DCs”), are not always fully equipped to deal with transboundary anti-competitive practices.

This situation prompted the United Nations Conference on Trade and Development (“UNCTAD”) to adopt a comprehensive code on restrictive business practices on December 5, 1980.<sup>15</sup> Known as the U.N. Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (“Set”), it is hitherto the sole fully multilateral instrument in this field. Its primary objective is to ensure that restrictive business practices (“RBPs”) do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade of DCs. The Set is universally applicable to all enterprises, all countries, all regional groupings, and all transactions in goods and services, but is voluntary in nature.<sup>16</sup> It has been suggested in this respect that the WTO could, in many ways, take this initiative further, for instance, by examining how best to build upon the Set, by adding binding elements

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14. Horst G. Krenzler, *Globalisation and Multilateral Rules*, 4 INT’L TRADE L. & REG. 144, 149 (1998). Some 70 countries have introduced antitrust laws; some 35 developing countries have introduced competition laws since 1990. *Id.*

15. U.N. CONFERENCE ON RESTRICTIVE BUSINESS PRACTICES, U.N. SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES at 1, U.N. Doc. TD/RBP/CONF/10, U.N. Sales No. E.81.II.D.5 (1980). The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the “Set”) was adopted by a resolution of the U.N. General Assembly on December 5, 1980. *See* G.A. Res. 35/63, U.N. GAOR, 35th Sess., Supp. No. 48, at 123, U.N. Doc. A/35/48 (1980); *see also* Joel Davidow, *The UNCTAD Restrictive Business Practices Code*, in 1 LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 193 (Norbert Horn ed., 1980).

16. The Third U.N. Review Conference held in November 1995 affirmed the fundamental role of competition law and policy, and recommended to the General Assembly to convene a fourth such Conference under U.N. Conference on Trade and Development (“UNCTAD”) auspices in the year 2000.



to agreed principles and by considering new issues such as international cooperation.

### 1. Interdependence I: Convergence

There appears to be agreement on at least two points. The first is that trade liberalization and competition policy share broadly similar goals, are interrelated, and are partially overlapping. The second is that both affect access to markets by seeking greater efficiency in the production and allocation of goods and services through the removal of barriers to the competitive process. Indeed, the common goal of market access represents an important confluence between trade and competition policy. While the removal of external governmental trade barriers facilitates market entry, the control of anti-competitive conduct by market operators opens access to competitive markets. In combination, potential welfare gains derived from comparative advantage are made safe against anti-competitive erosion.

This common goal of market access also coincides with the central function of the WTO, which is to ensure equality of competitive opportunities for Members in the world trading system. As was noted by the GATT Oilseeds panel, "the CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition."<sup>17</sup>

This established GATT panel practice illustrates the interdependence of trade and competition policy. Both are complementary in the sense of being mutually supportive, so that neither could fully achieve its objectives without the other. Such interdependence, however, is multi-faceted and includes elements of both conflict and convergence. Furthermore, a perception of interdependence should not obscure the fact that the application of existing trade instruments could be inconsistent with the goals of competition policy. In fact, closer analysis of that interdependence reveals three aspects. The first is one of

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17. See European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991); see also United States—Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990). According to the GATT panel report on Section 337 of the Tariff Act of 1930, the first sentence in Article III(2) protects "expectations on the competitive relationship between imported and domestic products." United States—Section 337, *supra*, at 387, ¶ 5.13.

*complementarity*,<sup>18</sup> an example of which would be the prohibition, under competition law, of predatory practices that deter market access after the elimination of the conventional trade barriers of tariffs and quotas. The second is one of *antagonism*, an example of which would be the application of anti-dumping measures triggered by prices that were not actually harmful to competition in the importing country. The third aspect is one of actual or potential *substitutability*, where provisions of competition law relating to price discrimination might in some instances serve as a substitute for anti-dumping measures.

## 2. Interdependence II: Divergence

GATT/WTO law also differs in several ways from competition laws. While the latter typically covers at least potential restrictions relating to horizontal and vertical restraints, abuses of a dominant position, and, increasingly, merger control, some of the former aim to protect import-competing producers rather than competition and consumer welfare. Thus, provisions on safeguards, anti-dumping, and countervailing duties are notoriously used to restrict import competition without due regard to the objectives of open markets, undistorted competition, and consumer welfare. GATT/WTO law is also intergovernmental law, notwithstanding persistent arguments by some untiring academic campaigners that many of its provisions appear to be directly applicable.<sup>19</sup> By contrast, both national and some international competition rules, such as those of the European Community, have been interpreted as conferring directly applicable rights upon producers, traders, and consumers and are enforceable through domestic courts. Furthermore, some regional arrangements protect free trade and undistorted competition through prohibitions of both governmental and private trade restrictions and competitive distortions.<sup>20</sup> They have also replaced

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18. P.K.M. Tharakan & P.J. Lloyd, *Competition Policy in a Changing International Economic Environment: An Overview*, 21 *WORLD ECON.* 997 (1998).

19. For critical reviews of that academic debate, see Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 *J. INT'L ECON. L.* 83 (1998), and Judson Osterhoudt Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, 9 *EUR. J. INT'L L.* 626 (1998).

20. EC Treaty, *supra* note 6, arts. 85-94, O.J. C 224/1, at 28-31 (1992), [1992] 1 *C.M.L.R.* at 626-32; North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., arts. 1902-04, 32 *I.L.M.* 605, 682-84 (entered into force Jan. 1, 1994)

their trade protection rules, such as anti-dumping rules, with competition rules. GATT/WTO law, on the other hand, does not require mutually consistent trade and competition rules and includes only a few rules on private restraints.<sup>21</sup> Notwithstanding these differences, the issue arises whether it necessarily follows that the GATT/WTO approach is ineffective or obsolete.

### C. *Interaction Between Trade and Competition Policy: The GATT/WTO Approach*

#### 1. Types of Approach

The issue of “stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy,” on the Chairman of the Working Group’s Checklist of Issues Suggested for Study,<sup>22</sup> comprised three topics: national competition policies, laws, and instruments as they relate to trade; bilateral, regional, plurilateral, and multilateral agree-

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[hereinafter NAFTA]; Agreement on the European Economic Area of May 2, 1992, arts. 53-60 & Protocol 21, O.J. L 1/3, 15-17, 181 (1994) [hereinafter EEA]; see Friedl Weiss, *The Oporto Agreement on the European Economic Area—A Legal Still Life*, 12 Y.B. EUR. L. 385, 415 (1992); Phedon Nicolaides, *For a World Competition Authority: The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy*, 30 J. WORLD TRADE 131 (1996). For a discussion of the idea of a Transatlantic Free Trade Area (“TAFTA”) between the European Community and the United States, see Jürgen B. Donges, et al., *TAFTA: Assuring its Compatibility with Global Free Trade*, 20 WORLD ECON. 567 (1997). TAFTA may be superseded by the EC Commission’s Draft Action Plan for Transatlantic Economic Partnership (“TEP”), of September 1998. See Directorate General for Trade, Transatlantic Economic Partnership, Action Plan, Nov. 9, 1998 (visited on Aug. 25, 1999) <<http://europa.eu.int/comm/dg01/1109tep.htm>> (on file with the *Fordham International Law Journal*); EU Foreign Ministers Endorse EU-US Action Plan for Transatlantic Economic Partnership, Commission Press Release, IP/98/974 (Nov. 9, 1998); see also European Parliament Resolution on the Transatlantic Economic Partnership between the European Union and the United States, O.J. C 379/94 (1998). For principled opposition to such plans, see Brian Hindley, *New Institutions for Transatlantic Trade?*, 75 INT’L AFFAIRS 45 (1999).

21. GATT, *supra* note 13, arts. VI, XVII; General Agreement on Trade in Services, arts. 8, 9, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, reprinted in LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 44, 54-55 (1994) [hereinafter GATS]; Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services), Feb. 15, 1997, 36 I.L.M. 354 (1997) [hereinafter Telecommunications Services Agreement]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 40, WTO Agreement, *supra* note 12, Annex 1C, reprinted in LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81, 98-99 (1994) [hereinafter TRIPS].

22. WTO Secretariat, *Working Group on the Interaction Between Trade and Competition Policy: 1997 Report to the General Council*, WT/WGTCP/1, Annex 1 (Nov. 28, 1997).

ments and initiatives, and existing WTO provisions.<sup>23</sup>

## 2. Antecedent Approaches

Ernst-Ulrich Petersmann demonstrated that early state practice dealing with international competition problems followed different approaches.<sup>24</sup> One is the *intellectual property law approach*, as laid down in the 1883 Paris Convention on the Protection of Industrial Property, which merely envisaged “effective protection against unfair competition,”<sup>25</sup> but did not attempt to protect freedom of competition and consumer welfare—for instance against market segmentation through patents. Another approach, the *competition policy approach*, is evident in the extraterritorial application of domestic competition law to anti-competitive practices abroad, as in the EC and the United States, and in non-binding multilateral guidelines like the Set and the Organization for Economic Co-operation and Development (“OECD”) Council Recommendation Concerning Restrictive Business Practices Affecting International Trade,<sup>26</sup> and a number of bilateral agreements for the coordination of domestic competition laws. This approach must be considered flawed for at least two reasons. First, many domestic competition laws exempt export/import cartels as well as governmental restraints of competition. Second, differences between national competition laws<sup>27</sup> and their extraterritorial application have given rise to international conflict, including blocking statutes. A third approach, the *regional integration law approach*, seeks to protect international market integration and cross-border transactions against both governmental barriers to market access—public undertakings, enterprises with privileged status—and private restrictive practices distorting trade—trade restricting patent mis-

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23. *Id.*

24. ERNST-ULRICH PETERSMANN, THE NEED FOR INTEGRATING TRADE AND COMPETITION RULES IN THE WTO WORLD TRADE AND LEGAL SYSTEM 7, Occasional Paper (The Graduate Institute of International Studies, Geneva, WTO Series No. 3, (1996).

25. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised at Stockholm, July 14, 1967, art. 10 bis, 21 U.S.T. 1583, 1648, 828 U.N.T.S. 305, 337.

26. Council Recommendation Concerning Restrictive Business Practices Affecting International Trade, O.E.C.D. Doc. C(86) 44 (Final), June 5, 1986, *reprinted in* 25 I.L.M. 1629 (1986).

27. These are mainly due to different views among economists on how competition works and how governmental regulation should approach conflicting interests between producers, traders, and consumers.

use, anti-competitive licensing agreements.<sup>28</sup>

Last, the *world trade law*, GATT/WTO approach seeks to ensure non-discriminatory market access to foreign markets through the progressive liberalization of governmental barriers to market access and by means of its inter-governmental system for the settlement of disputes. So far the GATT/WTO approach has been based upon the premise that in order to establish non-discriminatory international conditions for competition, one must first focus on and give priority to the liberalization of governmental market access barriers and market distortions. After fifty years of activity, it would appear that much unfinished business remains to be done. While there is only scant empirical evidence of the relative importance of private as opposed to governmental market access barriers,<sup>29</sup> it would appear, nonetheless, that the latter constitute more important obstacles to further growth of welfare through trade than the former, a view shared by many DCs.<sup>30</sup> Consequently, in its discussions of "interaction issues" between trade and competition policies, the Working Group has given priority to governmental market access barriers and trade-related aspects thereof, rather than to country-specific internal non-discriminatory competition policies that differ from country to country without impairing the market access commitments under WTO law. These trade-related provisions and their antecedents in the Havana Charter for an International Trade Organization<sup>31</sup> ("Havana Charter") will be summarily reviewed in the next section.

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28. The case for a regional approach to competition policy is made by Sanoussi Bilal & Marcelo Olarreaga, *Regionalism, Competition Policy and Abuse of Dominant Position*, 32 J. WORLD TRADE 153 (1998).

29. The members of a Group of Experts on Restrictive Business Practices ("Group of Experts") "felt that sufficient evidence was not available to judge the extent of the actual damage to world trade which results from these practices." Restrictive Business Practices—Arrangements for Consultations, June 2, 1960, GATT B.I.S.D. (9th Supp.) at 170, 170-71, ¶ 4 (1961) [hereinafter Group of Experts Report].

30. Areas where governmental measures continue to be more serious impediments to trade than purely private restrictive practices include: textiles, clothing, certain agricultural products, and anti-dumping measures against competitive low-cost imports especially from newly industrializing economies. See, e.g. GATT, *supra* note 13, arts. VI, XVI, XVII.

31. Havana Charter for an International Trade Organization, U.N. Conference on Trade & Employment, Final Act and Related Documents, U.N. Doc. E/CONF. 2/78, U.N. Sales No. I.I.D.4 (1948) [hereinafter Havana Charter].

### 3. Antecedent World Trade Law Approach: Havana Charter

Article 46.1 of the Havana Charter's Chapter V on Restrictive Business Practices stipulated that:

[e]ach Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain 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 set forth in Article 1.<sup>32</sup>

Article 1 sets out a comprehensive program for, *inter alia*, problem solving in a number of trade-related fields.<sup>33</sup> As is clear from this provision, the object of protection is not trade liberalization alone, but also a variety of trade-related socio-economic objectives such as employment, economic development, commercial policy, business practices, and commodity policy. This provision, however, reflects a certain ambivalence. Neither competition policies nor trade policies appear in an undiluted form. Nonetheless, this approach accords with the practice of many countries where competition policies pursue not only economic objectives, such as the maximization of economic efficiency, but also additional socio-political objectives, such as policies for Small and Medium Size Enterprises ("SMEs") or strategic industry support. Conversely, trade policies are not only aimed at trade liberalization but also at other objectives, such as the prevention of serious injury to domestic producers as reflected in the GATT Safeguard's clause.<sup>34</sup>

#### D. The GATT Connection

##### 1. GATT Provisions

GATT rules appear to confirm this assessment. On the one hand, these rules accord each contracting party the freedom to

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32. *Id.* art. 46.

33. *Id.* art. 1.

34. See, however, para. 7(iii) of the Ministerial Declaration of 1982, according to which contracting parties undertook "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the [GATT]." Ministerial Declaration, Nov. 29, 1982, GATT B.I.S.D. (29th Supp.) at 9, 11, ¶ 7(iii) (1983).

shape its own domestic regulations,<sup>35</sup> to decide on the level of import tariffs,<sup>36</sup> and to apply safeguard measures against injurious imports.<sup>37</sup> On the other hand, these rules enable contracting parties to protect various national public goods, e.g., import-competing industries, against unemployment caused by competitively priced imports. It follows that GATT rules recognize the right and liberty of contracting parties to accord greater importance to the protection of certain legitimate national public goods or interests than to more liberal trade practice.

GATT contracting parties have explicitly recognized that the "activities of international cartels and trusts may hamper the expansion of world trade . . . and thereby frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement."<sup>38</sup> Nevertheless, proposals made repeatedly between 1948 and 1986 for introducing into GATT law supplementary rules on restrictive business practices, including a supranational body with broad powers of investigation and control, were never adopted by the GATT contracting parties.

## 2. Panel Practice

As was mentioned before, the GATT/WTO approach focuses on the progressive liberalization of governmental barriers to market access and on the inter-governmental system of dispute settlement. This is also confirmed by GATT panel practice. Just as GATT and WTO law has always focused on governmental market access barriers and market access distortions, GATT and WTO dispute settlement procedures have been used almost exclusively for reviewing governmental trade restrictions and distortions.

Although classification of GATT/WTO disputes according to the type of trade measure targeted by a complaint is rarely

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35. See GATT, *supra* note 13, art. III.

36. *Id.*, arts. II, XXVIII.

37. *Id.*, arts. VI, XIX, XX.

38. The Group of Experts reported on harmful restrictive business practices in international trade and considered it "unrealistic to recommend at present a multilateral agreement for the control of international restrictive business practices." Groups of Experts Report, *supra* note 29, at 171, ¶ 7; see Extract from a Speech by Sir Leon Brittan to the Centre for European Policy Studies: The Future of EC Competition Policy, Commission Press Release, IP/92/1009 (Dec. 7, 1992).

clear or easy,<sup>39</sup> it would seem, nonetheless, that private anti-competitive business practices—with the alleged support of the government concerned—have only rarely been challenged. For example, the 1988 Panel Report on Japan's export restrictions and "voluntary imports expansion commitments," pursuant to the Japan-U.S. Semiconductor Agreement, described the close relationship between the private cartel of Japanese producers and exporters of semiconductors and the supplementary governmental export restrictions.<sup>40</sup> Yet, dismissing the European Economic Community's non-violation complaint, the panel stated that "the evidence submitted by the EEC relating to access to the Japanese market did not permit it to identify any measure by the Japanese Government that put EEC exporters of semi-conductors at a competitive disadvantage vis-à-vis those of the United States . . . ."<sup>41</sup> Consequently, it only found the governmental export restrictions to be inconsistent with Article XI:1 of the GATT.<sup>42</sup> A decade later, the Kodak-Fuji Panel Report on Japan's measures affecting consumer photographic films and paper painstakingly illustrated the close relationships between governmental and private market distortions, stating that WTO rules are applicable to measures by private actors when there is a sufficient degree of government involvement.<sup>43</sup> Yet, once again, it focused on the governmental measures.<sup>44</sup>

## II. THE WTO CONNECTION: CONTINUITY OR ADDITIONAL DISCIPLINES?

### A. Economics of Globalization

It has been said that in a globalized world economy, RBPs

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39. See Robert E. Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases, 1948-1989*, 2 MINN. J. GLOBAL TRADE 1 (1993).

40. See Japan—Trade in Semiconductors, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 116.

41. *Id.* at 162, ¶ 131.

42. *Id.* at 161-63, ¶ 131-32.

43. WTO Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, Mar. 31, 1998, WTO Doc. WT/DS44/R, at 385, ¶ 10.49 (visited on Sept. 21, 1999) <<http://www.wto.org/wto/dispute/distab.htm>> (on file with the *Fordham International Law Journal*).

44. *Id.*; Mark Furse, *Japan—Measures Affecting Consumer Photographic Film and Paper*, 1 EUR. COMPETITION L. REV. 9 (1999); Mark R. Joelson, *The Kodak-Fuji Trade Dispute: A U.S. View*, INT'L TRADE L. & REG. 34-39 (1998); Norio Komuro, *WTO Panel Ruling on the Kodak-Fuji Film Case*, INT'L. TRADE L. & REG. 136-43, 177-87 (1998).



have assumed increasing importance as a source of distortion to international trade and competition. There is mounting evidence that these developments are being taken seriously. It is perhaps for that reason that the 1997 Fourth Protocol to the General Agreement on Trade in Services<sup>45</sup> (“GATS”), on the Liberalization of Telecommunications Services<sup>46</sup> (“Telecommunications Services Agreement”), includes commitments on members’ regulatory disciplines relating to such matters as competition safeguards, interconnection guarantees, licensing, and independence of regulators.<sup>47</sup> This pattern might obviously be seen as a model for negotiations of future GATS protocols on the liberalization of, for example, transport services. The need for WTO rules on monopolies and anti-competitive practices has also been raised in accession negotiations with some former state-trading economies. However, before considering particular negotiations strategies—sectoral GATS protocols, economy-specific accession protocols, additional general WTO rules, and plurilateral trade agreements under Annex 4 to the WTO Agreement—it is essential that the various trade-related competition problems will be more clearly identified. In any event, the focus should be on “interaction problems” of trade and competition policies rather than on national competition policies and their international coordination.

### B. *The New Look “WTO Approach”*

The WTO approach differs from that of the GATT by its much greater emphasis on broader and integrated market access guarantees. As a result, the relative importance of private market access barriers has increased. This approach is reflected in a considerable number of WTO provisions, which may be divided into two groups. There are those provisions that in fact deal with private market access barriers, albeit somewhat perfuncto-

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45. GATS, *supra* note 21.

46. Telecommunications Services Agreement, *supra* note 21.

47. *Id.*; see also WALDEMAR HUMMER & FRIEDL WEISS, DOKUMENTE ZUR ALTEN UND ZUR NEUEN WELTHANDELSORDNUNG 1067 (1997); Paragraph 1.1 of an informal Reference Paper on regulatory disciplines refers to the “prevention of anti-competitive practices in telecommunications.” *Fourth Protocol to the General Agreement on Trade in Services: Reference Paper*, 36 I.L.M. 354, 367 ¶ 1.1 (1997); see also Marco C.E.J. Bronckers & Pierre Larouche, *Telecommunications Services and the World Trade Organization*, 31 J. WORLD TRADE 5 (1997); Colin D. Long, *WTO Basic Telecommunications Agreement*, 5 INT’L TRADE L. & REG. 151-54 (1997).

rily. In addition, there are provisions that mandatorily require members to examine the competition policy aspects of other trade provisions.

### 1. Provisions Addressing Aspects of RBPs

Almost all WTO agreements contain provisions dealing with private market access barriers.<sup>48</sup> For instance, several provisions of the GATS address problems of RBPs. Most importantly, Article VIII on Monopolies and Exclusive Service Suppliers requires members to ensure that monopolies and exclusive service suppliers do not operate in a manner inconsistent with their Most Favored Nation<sup>49</sup> ("MFN") obligations and specific commitments under the GATS.<sup>50</sup> Members also recognize that certain other business practices of service suppliers may restrain competition and thereby restrict trade in services.<sup>51</sup> It may also be anticipated that the "specific commitments" on market access<sup>52</sup> and national treatment,<sup>53</sup> in combination with the requirements of MFN-treatment and reciprocity, may, over time, strengthen claims to develop more general competition rules. Some such rules are already contained in the Telecommunications Services Agreement,<sup>54</sup> which includes a set of pro-competitive regulatory principles. These principles relate to anti-competitive behavior, interconnection, universal service, transparency of licensing criteria, independence of the regulator, and allocation of scarce resources and apply largely to monopoly service suppliers that previously dominated this sector. These rules had to be incorporated in members' schedules as "additional commitments."<sup>55</sup>

The Agreement on Trade-Related Intellectual Property Rights<sup>56</sup> ("TRIPS") contains several examples of incomplete provisions on RBPs. On the one hand, TRIPS does contain provisions dealing with examples of "unfair trade"<sup>57</sup> as well as anti-

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48. See Maria-Chiara Malaguti, *Restrictive Business Practices in International Trade and the Role of the World Trade Organization*, 32 J. WORLD TRADE 117, 123 (1998).

49. See GATS, *supra* note 21, art. 2.

50. *Id.* art. 8.

51. *Id.* art. 9.

52. *Id.* art. 16.

53. *Id.* art. 17.

54. Telecommunications Services Agreement, *supra* note 21.

55. GATS, *supra* note 21, art. 18.

56. TRIPS, *supra* note 21.

57. Examples of these provisions include "fair use of descriptive terms" of a trade-

trust rules combating restraints of competition,<sup>58</sup> in order to “ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”<sup>59</sup> On the other hand, some of its other provisions distinguishing “legitimate trade” from “abuse of intellectual property rights”<sup>60</sup> fail to provide effective tools against anti-competitive practices. Here too, it is argued, there is ample scope for improvement so as to provide a more systematic set of principles on the protection of competition between trade-related intellectual property rights and on the prevention of their anti-competitive abuse.<sup>61</sup>

A few relevant provisions are also to be found in the Agreement on Government Procurement<sup>62</sup> (“Procurement Agreement”) in particular those “to ensure optimum international competition” and “equitable opportunities for suppliers or service providers.”<sup>63</sup> Reference is also made to problems caused by certain anti-competitive practices such as “collusive tendering”<sup>64</sup> and “absence of competition”<sup>65</sup> and to the challenge procedures “enabling suppliers and service providers to challenge breaches of the Procurement Agreement arising in the context of procurements in which they have or have had, an interest.”<sup>66</sup>

Cognate references are also contained in the Agreement on Implementation of Article VI of GATT 1994<sup>67</sup> and in the Agree-

mark, TRIPS, *supra* note 21, art. 17; “misleading” or “unfair” uses of geographical indications, *id.* arts. 22-24; and protection of undisclosed information “against unfair commercial use.” *Id.* art. 39.

58. *See, e.g., id.* art. 40 (describing methods to control anti-competitive practices in contractual licenses).

59. *Id.* pmb1.

60. *Id.* art. 8. Article 8 was aimed at protecting the public interest against “the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.” *Id.* Article 31 on patent uses without authority of the right holder was designed to “correct anti-competitive practices.” *Id.* art. 31(k).

61. Petersmann advocates international competition rules as part of an international competition agreement applicable to the various World Trade Organization (“WTO”) fields. *See* Petersmann, *supra* note 24, at 22.

62. Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, *supra* note 12, Annex 4 (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*).

63. *Id.* art. 10.

64. *Id.* art. 15.

65. *Id.*

66. *Id.* art. 20.

67. Agreement on Article VI, Apr. 15, 1994, sect. III, ¶ 5, WTO Agreement, *supra*

ment on Subsidies.<sup>68</sup> The former identifies “trade restrictive practices of and competition between the foreign and domestic producers” as one of several factors in the determination of injury.<sup>69</sup> The latter makes detailed provisions on “market displacement” and “price undercutting” in connection with the determination of serious prejudice caused by actionable subsidies,<sup>70</sup> and on “satisfactory voluntary undertakings” by exporters apt to lead to a termination of suspension of proceedings<sup>71</sup> and again on “trade restrictive practices of and competition between the foreign and domestic producers” as a factor in the determination of injury.<sup>72</sup>

The Agreement on Technical Barriers to Trade<sup>73</sup> (“TBT”) provides detailed rules aiming 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 to fulfill legitimate objectives. These objectives include national security requirements, the prevention of deceptive practices, the protection of human health or safety, the protection of animal or plant life and health, and the protection of the environment.<sup>74</sup>

The Agreement on Preshipment Inspection<sup>75</sup> contains rules governing the activities of private pre-shipment entities in a non-discriminatory manner.<sup>76</sup>

Lastly, the Agreement on Safeguards<sup>77</sup> prohibits certain

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note 12, Annex 1A (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*) [hereinafter Anti-Dumping Agreement].

68. Agreement on Subsidies, Apr. 15, 1994, WTO Agreement, *supra* note 12, Annex 1A (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*) [hereinafter Agreement on Subsidies].

69. Anti-Dumping Agreement, *supra* note 67, art. 3.5.

70. Agreement on Subsidies, *supra* note 68, art. 6.3.

71. *Id.* art. 18.

72. *Id.* art. 15.

73. Agreement on Technical Barriers to Trade, Apr. 15, 1994, arts. 3, 4, 8, WTO Agreement, *supra* note 12, Annex 1A (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*) [hereinafter TBT].

74. *Id.*

75. Agreement on Preshipment Inspection, Apr. 15, 1994, art. 2, WTO Agreement, *supra* note 12, Annex 1A (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*).

76. *Id.*

77. Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, *supra* note 12, An-

measures outright, namely “voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.”<sup>78</sup> Regarding others, it enjoins members not to “encourage or support the adoption or maintenance by public and private enterprises” of equivalent non-governmental measures.<sup>79</sup>

## 2. Provisions Mandating Further Review or Negotiation

Several WTO Agreements provide for review of their operation with a view to adding some competition rules. Thus, the TRIMS mandates the Council for Trade in Goods, not later than five years after its entry into force, to “consider whether it should be complemented with provisions on investment policy and competition policy.”<sup>80</sup> This provision, which was requested by DCs, should make it possible to confront anti-competitive practices by multinational enterprises. Review is also envisaged by the Agreement on Preshipment Inspection, possibly leading to future negotiations on additional competition rules.<sup>81</sup>

The GATS, as has been shown, recognizes “that certain business practices of service suppliers may restrain competition and thereby restrict trade in services.”<sup>82</sup> This provision may well give rise to future negotiations on “specific commitments” regarding the liberalization of such private RBPs, an issue that is also likely to make or break future negotiations on Sectoral Agreements on—for example, air and maritime transport services.

All the above mentioned provisions may appear feeble or simply inadequate. Yet they also comprise dynamic elements that may be activated if required. Admittedly, their intrinsic ambiguities and weaknesses will continue to fuel demands for world competition rules of some kind or another, be that in the form of an agreement on Trade-Related Aspects of Antitrust Measures<sup>83</sup> (“TRAMS”), by some set of mandatory minimum competi-

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nex 1A (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*).

78. *Id.* § 6, ¶ 22(b).

79. *Id.* § 6, ¶ 24.

80. TRIMS, *supra* note 12, art. 9.

81. Agreement on Preshipment Inspection, *supra* note 75, art. 6.

82. GATS, *supra* note 21, art. 9.

83. See, e.g., Ernst-Ulrich Petersmann, *The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System*, in THE LEGAL AND MORAL ASPECTS OF INTERNATIONAL TRADE (Geraint Parry, et al., eds., 1998); Ernst-Ulrich Petersmann, *Inter-*

tion principles,<sup>84</sup> or by means of a combination of both.<sup>85</sup> Such demands, however, cannot easily be justified on the basis that the WTO has no competition rules. It is true, of course, that there are only a few provisions in WTO law relating to private restrictive business practices, such as on dumping, state trading enterprises, and private monopolies under the GATT. WTO law, therefore, does not yet provide a firm basis for an international competition law and lacks the necessary institutional infrastructure.<sup>86</sup>

### C. *Staying on the Straight, Narrow, and Trusted WTO Course*

It would seem premature, therefore, to rush into multilateral negotiations without adequate preparation. That proposition may be underpinned by several considerations deriving from the long-standing focus in GATT and WTO law and practice on governmental restraints and distortions of competition. First, governmental market access barriers are of incomparably greater importance than purely private RBPs. In addition, a substantial number of high tariffs and non-tariff barriers will remain in place even after the full implementation of the Uruguay Round, especially in areas of particular importance to DCs such as agricultural trade, textiles and clothing, footwear, and leather

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*national Competition Rules for Governments and for Private Business: The Case for Linking Future WTO Negotiations on Investment, Competition and Environmental Rules to Reforms of Anti-Dumping Laws*, 30 J. WORLD TRADE 5 (1996); WOLFGANG FIKENTSCHER & ULRICH IMMENGA, DRAFT INTERNATIONAL ANTITRUST CODE (1995). For critical comment on the Draft International Antitrust Code (the "Code"), see Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1 (1997); Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393 (1994); and Wolfgang Fikentscher, *Competition Rules for Private Agents in the GATT/WTO System*, 49 AUSSENWIRTSCHAFT 281-325 (1994).

84. See, e.g., Claus-Dieter Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833 (1994); Bernard Hoekman, *Competition Policy and the Global Trading System*, 20 WORLD ECON. 383 (1997).

85. See, e.g., Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 23-24 (1997); see also Merit E. Janow, *International Competition Policy*, in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOUR OF ARTHUR DUNKEL 279-91 (Jagdish Bhagwati & Mathias Hirsch eds., 1998).

86. P.J. Lloyd, *Multilateral Rules for International Competition Law?*, 21 WORLD ECON. 1129, 1143 (1998). The prospects for negotiations on competition rules during the "millennium" Round of trade negotiations, are assessed by P. Arhel, *Droit International de Concurrence, s'orienté-t-on vers des négociations?*, 425 REVUE DU MARCHÉ COMMUN 84 (1999).

goods.<sup>87</sup> Second, despite a decreasing importance of border barriers relative to entry barriers behind the customs border, internal governmental market access barriers appear to be much more important—e.g., regarding product standards, services, trade, and commercial presence in the importing country—than purely private restraints of competition.

Third, there are still many areas in which international trade and competition continue to be impaired by discriminatory governmental distortions. For example, discriminatory rules of origin distort competition among like products and competing suppliers. Other examples include discriminatory government procurement practices, discriminatory anti-dumping duties and price undertakings that restrict and distort competition between foreign and domestic products and competitors, and discriminatory state-trading practices and special privileges granted by governments to domestic suppliers and trade discriminations resulting from regional agreements. In all these cases, it would appear that further liberalization and the strengthening of the WTO non-discrimination requirements would constitute a more effective means of reducing governmental distortions and promoting non-discriminatory competition.

Fourth, it is noteworthy that most WTO provisions on trade-related competition problems already recognize members' sovereign right to regulate and limit RBPs without prescribing obligations for the adoption of substantive competition rules.<sup>88</sup> Such a sensibly decentralized and flexible approach is justified by the lack of economic consensus on optimal worldwide competition policy rules.<sup>89</sup> By contrast, there has always been complete and durable consensus among economists and governments on the mutually beneficial welfare effects of further liberalization of governmental trade barriers as envisaged under the traditional GATT/WTO approach.

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87. See Agreement on Textiles and Clothing, Apr. 15, 1994, WTO Agreement, *supra* note 12, Annex 1A (visited on Aug. 24, 1999) <<http://www.wto.org/wto/legal/finalact.htm>> (on file with the *Fordham International Law Journal*). In Article 1(5) of the WTO Agreement on Textiles and Clothing ("Textiles Agreement"), Members agree on the need for "increased competition in their markets," but pursue this objective through liberalization of governmental trade barriers. *Id.* art. 1(5).

88. See, e.g., GATS, *supra* note 21, art. 40; TRIPS, *supra* note 21; TRIMS, *supra* note 12.

89. JÜRGEN BASEDOW, SOUVERAINETÉ TERRITORIALE ET GLOBALISATION DES MARCHÉS: LE DOMAINE D'APPLICATION DES LOIS CONTRE LES RESTRICTIONS DE LA CONCURRENCE 164.

Fifth, some WTO provisions explicitly refer to possible anti-competitive effects of trade policy measures,<sup>90</sup> while some others also recognize that trade restrictions should be “in the public interest.”<sup>91</sup> Such references to potential “interaction problems” of trade and competition policies deserve priority attention, given the consensus among economists that anti-dumping and other safeguard measures reduce competition and economic welfare for the benefit of rent-seeking lobbies.

The 1997 WTO Report takes the view that competition policy is needed even in conjunction with trade liberalization. But nothing in that WTO Report militates against the validity of a WTO approach in addressing competition issues. In fact, the WTO Report concludes that “there is a strong presumption, based on theoretical considerations, as well as practical experience, that trade liberalization in the form of reduced tariffs, the elimination of QRs and so on, has pro-competitive effects.”<sup>92</sup> Considering, further, that there is little support for the idea of harmonizing competition laws and policies, and no consensus, politically and intellectually, on any but the most rudimentary of specific international norms and that even supporters of multi-lateral competition rules recognize the difficulties and pitfalls of a long and difficult negotiating process ahead,<sup>93</sup> it would seem that there is yet some more mileage left in the “WTO approach.”

### CONCLUSION

The WTO has become the chosen forum for various trade-related additional policies and provisions such as Trade Related Environmental Measures (“TREMS”), TRIMS, TRIPS, and possibly in the future, competition and investment rules. The TRIPS, as is well known, owes its existence to trade-offs with DCs, which have still not been fully implemented. Future additional policies, if controversial, would need to be justified separately on economic grounds, or risk failure. Detailed multilateral competition rules will undoubtedly be adopted one day. I believe, how-

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90. See, e.g., Anti-Dumping Agreement, *supra* note 67, § III, ¶ 5; Agreement on Safeguards, *supra* note 77, § II, ¶ 11.

91. Agreement on Safeguards, *supra* note 77, § II, ¶ 3(a).

92. 1 WORLD TRADE ORGANIZATION, 1997 WTO ANNUAL REPORT, SPECIAL TOPIC: TRADE AND COMPETITION POLICY 50 (1998).

93. See Hugo Paemen, *Trade and Competition in the Transatlantic Area*, 21 FORDHAM INT'L L.J. 637, 649 (1998); Krenzler, *supra* note 14, at 148.



ever, that the time is not yet ripe for a comprehensive agreement, except perhaps on the most abstract of principles. In the meantime, it will be due to the very processes of regionalization and globalization that enterprises will increasingly be subject to national competition laws.<sup>94</sup>

In 1852, Alexis de Tocqueville observed that it is “unbelievable how many systems of morals and politics have been successively found, forgotten, rediscovered, forgotten again, to reappear a little later, always charming and surprising the world as if they were new, and bearing witness, not to the fecundity of the human spirit, but to the ignorance of men.”<sup>95</sup> Perhaps this can be explained both by the world’s indomitable will to achieve something new, to make progress, and by an apparent proclivity of ideologies, all ideologies, towards periodic collapse.<sup>96</sup>

The proclaimed end of the Cold War induced both an age of uncertainty about basic goals and a shift in “world views” or simply in “the mood of the time.” It also prompted new enthusiasm for socioeconomic engineering aimed at changing the socioeconomic and socioecological context of a more complex and interdependent, international economic order. Yet, there is some sense of *dejà vu* as far as the basic elements of a future world competition order are concerned, namely globalization, and attempts to establish multilateral competition rules. As one prominent economist recently asked rhetorically: “Why do we imagine that the global market is something new?” His own answer was “because politics killed that first global market” since “between 1914 and 1945 wars and protectionism tore up the dense web of trade and investment.”<sup>97</sup> World competition conferences in the 1920s likewise failed, as did later soft law codifications,<sup>98</sup> and treaty projects,<sup>99</sup> which, as Karl Meessen and Wolf-

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94. Note the Commission Decision of July 17, 1996 authorizing the merger of Ciba-Geigy and Sandoz to create a new company called Novartis, Ciba-Geigy/Sandoz, E.U. BULL., no. 7/8, at 28, ¶ 1.3.44 (1996).

95. David S. Yost, *Political Philosophy and the Theory of International Relations*, 70 INT’L AFFAIRS 263, 265 (1994).

96. ROBERT MUSIL, *DAS HILFLOSE EUROPA* 9, 26 (1961).

97. He also said that “world trade as a share of world production did not return to its 1913 level until about 1970,” and “is not much bigger now, as a share of world output, than it was a century ago.” See PAUL R. KRUGMAN, *POP INTERNATIONALISM* 208, 212 (1996); Alberto Tita, *Globalization: A New Political and Economic Space Requiring Supranational Governance*, 32 J. WORLD TRADE 47 (1998).

98. The U.N. Economic and Social Council abandoned a project of harmonizing international antitrust rules in 1955, See Dale P. Furnish, *A Transnational Approach to*

gang Fikentscher had already predicted in the 1980s,<sup>100</sup> triggered an unquenchable thirst for more rules—*Verrechtlichung*—amidst tendencies of deregulation.

Thus, from the evidence at hand to date, I have come to the prudent and tentative conclusion that it would be premature as yet to embark on major negotiations for multilateral standard setting on world competition rules. My conclusion is based on the following considerations:

First, the WTO approach, although an expanded continuation of the GATT approach, is still fresh, largely untried, and capable of development.

Second, to my mind, the Kodak-Fuji case does not constitute a vindication of those who impatiently push for global competition rules. On the contrary, in the light of settled GATT panel practice, it was, perhaps, a “bad case,” which would probably not normally have been brought, but for enterprising attorneys.

Third, unlike in the case of TRIPS, which is crafted around provisions incorporated from pre-existing intellectual property rights agreements, a multilateral competition agreement would have no such pre-existing standards to fall back on.

Fourth, WTO Members and countries engaged in or contemplating entering accession proceedings who do not currently have competition laws on their books should first be encouraged to adopt effective legislation and, even more importantly, to enforce it.

Last, according to standard practice, international law rule making normally requires a critical mass of state practice from which to extract common principles, standards, or rules for codification. Indeed, international multilateral standard setting or treaty making needs to be firmly based on relevant state practice or risk failure, ineffectiveness, or just softness will follow.

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*Restrictive Business Practices*, 4 INT'L LAW. 317, 326-27 (1969). On international economic soft law, see IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 42-45 (1989).

99. In March 1951, the Council of Ministers of the Council of Europe dropped the “Convention Européenne pur le contrôle des ententes internationales,” which was based on the Havana Charter. See 2 WIRTSCHAFT UND WETTBEWERB 296-302 (1952).

100. Karl M. Meessen, *Internationale Verhaltenskodizes und Sittenwidrigkeitsklauseln*, 34 NEUE JURISTISCHE WOCHENSCHRIFT 1131 (1981); WOLFGANG FIKENTSCHER, WIRTSCHAFTSRECHT Bd. 1: WELTWIRTSCHAFTSRECHT, EUROPÄISCHES WIRTSCHAFTSRECHT 68 (1983).