

## **The Globalization of Competition Policy**

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The rapid globalization of business has propelled competition policy to a high place on the international governance agenda. WTO Ministerial discussions in 1996 made trade and competition policy one of the four “Singapore Issues” demanding urgent attention by those charting the course of international economic cooperation (Hoekman and Kostecki, 2001:4). The case for greater attention to competition in individual markets appeared to grow along with the rapidly integrating world economy. Formal trade barriers have been lowered multilaterally or negotiated completely away in for a large part of international trade. Those who bargained for lowered trade barriers did so with the expectation that foreign goods – and some services as well – would otherwise be available in the newly opened markets on essentially the same terms as those of local provenance. The substitution of private restraints for official barriers clearly frustrates those expectations. This is one kind of competition policy issue in the current global economy: *nationalism*. In some cases this nationalism rests on the same obvious official favoritism that underlies traditional trade protection, but some nationalism may be subtler

and indeed may never actually be provable. As an example, many point to the advantage-blunting conditions that the EU successfully set on Boeing's acquisition of McDonnell-Douglas in 1997.

Another dimension of international competition policy made frequent headlines in the 1990s. Even very experienced business people (particularly in the United States) were surprised by the huge volume of cartel behavior uncovered by U.S., EU, and other authorities. Among many other firms, U.S.-based Archer-Daniels Midland was fined \$100 million for price-fixing in a lysine cartel and Swiss-based Hoffman LaRoche \$500 million for participation in six global cartels for bulk vitamins (Connor, 2004:254-255). Such cartel behavior is a violation of nearly all national competition laws in the hundred or so jurisdictions that now have them. This problem can be called *global private abuse*.

A third competition policy problem area is illustrated by the current conflict between Microsoft and the European Commission over just what may be sold by Microsoft under what conditions. This might be called *strategic constraint*. Such constraint may vary from the requirements that a firm modify its sales or distribution practices to meet the varying legal requirements of particular markets to the far more serious threat that one jurisdiction may effectively veto a multinational firm's global strategic choices, such as the EU's thwarting of General Electric's acquisition of Honeywell in 2001.

As international business surveys its policy environment, the competition policy practices of various states and attempts by those states to coordinate, harmonize, or centralize their content and enforcement appear in three broad clusters with blurred and overlapping bases: issues connected with government practices that advantage firms of a

certain nationality, issues related to business practices that abuse of the competitive system in global markets, and issues connected with constraints on a multinational firm's competitive strategy.<sup>1</sup>

### **What is Competition Policy?**

Some writers use the terms “competition policy” to refer to virtually all government actions that aim to assist or retard firms in their market endeavors at home or abroad. This would include, among many concerns, much of trade policy, and the usage is highly defensible.<sup>2</sup> Nonetheless, to provide a clearer focus, the term will be used here synonymously with what Americans call “the antitrust laws,” defined by Dennis Carlton and Jeffrey Perloff as intended to “limit the market power exercised by firms and to limit how firms compete with each other.” (Carlton and Perloff, 2000, 601).

A few simple ideas underlie most of modern policy to promote competition. In perfect competition, producers are “price takers” who simply extend their production until the cost of the last unit sold (including a competitive rate of return on the capital employed) equals the market price for which it is exchanged. If demand changes, the number of firms participating in the market changes as well. Imperfect markets in which firms sell identical or nearly identical goods must have characteristics that prevent

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<sup>1</sup> Overlaps can be seen in the examples chosen. Both GE-Honeywell and Boeing-McDonnell Douglas are seen by many as attempts by the EU to bolster Airbus; they also both clearly constrained and shaped firm strategies. The laws of some states, most notably the United States and Canada, have long banned price fixing, and firms from those countries clearly recognized the illegality and illegitimacy of cartels. Firms based in other countries may see such activity in less stark terms and even regard it as an important part of their overall strategy. Moreover, the U.S. government continues to approve cartel behavior for purposes of penetrating foreign markets (Dick, 1992) and employs antidumping laws that encourage cartel-like behavior by both domestic and foreign firms (Hoekman and Kostecki, 2001:324-325).

<sup>2</sup> The prominent industrial economist F.M. Scherer stresses the commonality of trade and competition policy by characterizing the ideal goals of the latter as “the removal of restraints upon and barriers to competitive transacting.” (Scherer, 1994:2).

newcomers from competing (excess) profits away.<sup>3</sup> Whatever those characteristics are, they typically allow incumbent firms a sufficient share of the market so that each firm operating independently faces a downward-sloping demand curve. Depending on the interaction among the firms, substantial market shares usually yield outcomes with at least some (excess) profit. Where the output of a seller differs non-negligibly from that of others, the process is roughly similar.

Gifford and Kudrle (2002, 2003) have argued that virtually all competition policy – construed as policy to direct competition and not necessarily to promote it – over the past century or so can be understood in terms of several goals, not always consciously articulated or pursued by those in charge of drafting, passing, enforcing, or adjudicating the law. One strand appears to privilege the protection of competitors over the promotion of the competitive process. Remaining border controls on the entry of foreign goods and firms do this, but so too do various laws that place roadblocks in the path of more efficient domestic firms in their market struggles with weaker incumbents. Another goal, sometimes difficult to discern in practice from the previous one, is the preservation of market rivalry. But while the first goal, when clearly identified, has typically inspired derision from economists for nearly two centuries, the second would have been widely accepted in the United States until a few decades ago. It could be summarized as: “Competition is the process and many competing firms is the policy objective” largely because such a strategy was believed to be the most reliable approach to the ultimate goal of consumer welfare.

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<sup>3</sup> The usual barriers to entry include economies of scale, cost advantages, and consumer preference (see Carlton and Perloff, 2000: 76-82).

Not until the so called “antitrust revolution” based on Chicago School economics in the 1970s did U.S. policy move away from a prejudice against the claim that successful firms were eliminating their rivals because of superior products or efficiency rather than antisocial behavior. That revolution, largely confined to the United States, shifted the focus of both policy administrators and the courts towards the goal of what is usually called “consumer welfare,” the maximization of consumer surplus. In short, what matters is not what the market looks like but how it functions. Specifically, if one structure appears to deliver higher quality goods at lower prices than another, it should be allowed to develop even if the number of competitors becomes quite small. This goal might be summarized as “Competition is the process; consumer welfare is the goal.”

For many lawyers and business people, the goal just stated would appear to be the obvious resting point for sound policy, but most economists would demur. If the merger of two firms promises to lower costs but also to increase market power considerably, each unit of the good sold might reflect a smaller amount of society’s resources but might still be sold to purchasers at higher price. Inefficiency results when consumers are unable to expand their purchases until price matches the resource cost of a good, but if the value of that inefficiency is overbalanced by the value of resource saving, the total welfare criterion for an economic change is satisfied. The goal of competition policy using this criterion is simply to make the pie as big as possible without attention to who gets pieces of various sizes. The rationale for inattention to distribution rests on essentially the same ground as in traditional cost-benefit analysis: the resource savings are there to compensate market losers if society chooses to do so. Cost-benefit analysis in government decision making typically rests on the hope that a set of projects will

approximately match payers and beneficiaries. In competition policy, it might be assumed that price rises would be randomly distributed across purchasers and that the tax system could be adjusted for any non-negligible increase in the overall rate of return on capital from adopting the efficiency principle. Here “Competition is the process, efficiency is the goal.”

There is evidence that this “total surplus” principle applied to competition policy may be one that only an economist can love. The recent retreat of Canadian policy from essentially this criterion attests to its failure to capture popular support (Commissioner of Competition v. Superior Propane, 2001; Ross, 1997)). It should be noted immediately that very few competition policy cases turn on the distinction between consumer and total surplus, yet the difference looms large at the level of principle.<sup>4</sup>

### **Competition Policy Problems and Their Seriousness**

The literature reveals considerable agreement about what scholars and policymakers regard as the major international competition policy problems. Cartels are probably the major example of private abuse.<sup>5</sup> Most states with any competition policy place severe legal restrictions on firm collusion on prices and other conditions of sale. Where such behavior is governed by an explicit agreement, a cartel results, and cartels appear to play a significant role in the world economy. When the U.S. Justice

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<sup>4</sup> For a vigorous defense of the basic Canadian approach, allowing for some attention to distributional concerns, see Ross and Winter, 2004.

<sup>5</sup> Many have complained that firms also practice international price discrimination and prevent arbitrage with what some regard as “abusive” intellectual property claims. But the pattern of such discrimination typically has lower prices in poorer countries and higher ones in rich because of differences in price elasticity. From a global perspective the solution of single price would likely lower welfare from sales in many industries including pharmaceuticals (Danzon, 1997). The relation between varying intellectual property rules and competition policy, including its international congruence, lies beyond the scope of this paper. For an excellent discussion of the several dimensions of the intellectual property – competition policy interface, see Maskus 2000.

Department tried three lysine cases in the mid-nineties, it had been decades since a global cartel had been nailed, yet between 1998 and 2001, more than \$2 billion was collected in criminal pricing fines in the U.S., and the EU collected 1.84 billion Euros in fines in 2001 alone (Connor, 2004: 253, 255). Despite these numbers, one expert has estimated that the current chances of a cartel being detected is between 10 and 20 percent if it operates in Europe or the United States, and it is negligible elsewhere (Connor, 2004:273).

Nationalism also impedes competition. Nationalist policies restrict trade, but to an extent that varies widely by country. They also restrict the ability of firms to enter and operate in a market on the same terms as domestic firms. These problems appear to be ones of trade and investment rather than competition policy, but this is a question of language and not of logic. For most industries in most countries, a full embrace of global sources of supply would be most effective way of assuring minimum prices for domestic buyers. Although tariffs in most states are lower now than at previous time in modern history, much trade is still restricted. Additionally, foreign direct investment is banned from many sectors in nearly all countries and is sometimes subject to case by case review. Finally, even where ongoing barriers to trade have been removed, discretionary “administered” protection mechanisms exist in virtually every country to provide at least temporary respite from global competition-beleaguered local firms.<sup>6</sup>

Many observers have pointed out that the laws restricting trade – both traditional barriers and schemes based on administered trade – as well as most restrictions on foreign direct investment – are based on a logic that turns the goals of enlightened competition

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<sup>6</sup> One well known, but now dated, estimate found the 1984 cost to consumers of such protection in 31 U.S. industries to be \$53 billion with additional losses to society from increased inefficiency of \$8 billion more (Hufbauer and Rosen, 1986).

policy on its head. Instead of maintaining a steady focus on consumer welfare (even when in some cases allowing prices to go up would actually be associated with greater national income) these laws routinely give essentially no weight to consumer and all weight to producer interests. For reasons that cannot be explored here, dominant political opinion typically sees foreign competition as less legitimate than that stemming from domestic sources. This analytically indefensible bias is worldwide, and much remaining protection, including administered protection, has robust political support. Indeed, this is the major problem facing those attempting to restart the Doha Round. Both rich and poor countries as groups face great difficulty assembling concessions that can withstand a domestic political test (Schott, 2004: 2). So political perception must be added to common parlance as a barrier to looking at trade and investment barriers as “competition policy.”

Some national distribution systems have proved largely impervious to foreign penetration, and this is widely regarded as an important issue of competition policy. The minor role played by foreign goods and services in many sectors of the Japanese economy, for example, is assigned to some combination of controlled distributorships, exclusive dealing, and land use controls that discourage the use of large retail outlets. Similar complaints have been made about the substantial Korean market and many others. Would-be foreign sellers seek to replace apparent official acquiescence in restrictive practices with a vigorous attack and favor outside pressure to gain that outcome. In fact, any official connivance in the use of such barriers would constitute “nullification and impairment” of trade concessions made under the GATT, Article

XXIV. Kodak attempted to make such a case against Japan's Fuji in the mid-nineties, but it failed.<sup>7</sup>

Finally, states present differing constraints on firm behavior that sometimes thwart global strategy. Each unit of the Triad, the U.S., the EU, and Japan, now makes extraterritorial claims, and if only one major state disapproves of a merger, the more restrictive preference prevails.<sup>8</sup> The most important and best known of these conflicts have involved the U.S. and the EU, but, in addition, scores of other states now use extraterritorial claims to review mergers under their competition policies and the expense, delay and uncertainty of these filings have generated considerable interest in reform (Wood, 2004:183).<sup>9</sup>

### **Three Approaches Forward: Cooperation, Harmonization, and Centralization**

This paper will examine three major approaches for dealing with outstanding competition policy problems. The categories present somewhat fuzzy boundaries, and they are obviously not mutually exclusive. Cooperation stresses communication, consultation, and information sharing. Harmonization considers convergent policy movement among jurisdictions, while centralization looks at what a formal multinational structure could add to the effectiveness of the policy regime, either now or in the future.

This paper concludes that the impulse for international action in the competition policy area should, and likely will, move principally through greater cooperation with

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<sup>7</sup> The WTO found no convincing evidence that Japanese government acts of omission or commission disadvantaged foreign sellers including Kodak. (Hoekman and Kostecki, 2001: 86-87).

<sup>8</sup> Japan has not yet acted in this way, but it has claimed extraterritoriality in competition policy only since the late nineties.

<sup>9</sup> Canada's is the most highly developed competition policy that does not make extraterritorial claims based on the effects of foreign action in the home market (Goldman, Bodrug, and Warner, 1997:64).

increasing harmonization over time. In fact, a high priority on a minimum international agreement seems likely to squander energy with little likely payout.

### **The Variety of Competition Policies**

As business confronts competition laws around the world, problems relating to the variety of practice almost certainly dominate all others. Any consideration of the prospects for global governance must first establish the extent of current policy harmony and the pace and direction of any current harmonization. That vantage point can provide perspective on the likely content of greater cooperation, the most promising areas for more determined harmonization, and the utility of any central governance.

Prior to World War II, only the United States and Canada had competition policies that resemble those of today. Germany and Japan gained such policies during the post-war occupation, and the EEC drew on German experience as well as U.S. practice in the competition sections of the Treaty of Rome. Most poor countries first considered competition policy as means of controlling foreign firms as part of the “New International Economic Order” of the 1970s. As *dirigisme* gave way to liberalization in the eighties and nineties, the UNCTAD assistance that was first sought to bring MNCs to heel was redirected to the devising of policies to direct competition more broadly in the domestic market.<sup>10</sup> In addition, virtually all of the political entities that escaped dominance from the Soviet Union in the 1980s soon developed competition policies (Kovacic, 1998). By the early years of the new century, over a hundred competition policy regimes were in place (von Finckenstein, 2002b:1).

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<sup>10</sup> For an excellent account of the two phases of policy among poor countries and the development of the transition between them, see Sell, 1996: 141-173; 198-212. For a discussion of the variegated content of the policies developed in the second period, see Kudrle and Bobrow, 1998.

Despite the rich variety of global competition policy development, this paper will focus on the Triad for three major reasons. First, the three areas account for over half of all world output. Second, each has a competition policy that differs considerably from the other two. Finally, no other established competition policy of a substantial state differs radically from some combination of the features of these three jurisdictions.<sup>11</sup>

### Policy Concerns

At a sufficient level of abstraction Triad competition policies present some major similarities. All deal in one way or another with the three major concerns that have animated modern competition policy: *collusion* among firms that would allow “monopoloid” behavior in making product and pricing decisions, *amalgamation* that would create such power directly, and *exclusion*, which refers to firm behavior designed to disadvantage other participants or to deter entrants.

Most commentators find it remarkable that the Sherman Act of 1890 has remained the backbone of American antitrust. It passed as a largely atheoretical reaction to the impact of big business on small firms and particularly on agriculturalists in the West (Scherer and Ross, 1990: 12), but was fortuitously written with broad and open-textured language that has allowed for continual refinement (Gifford and Kudrle, 2003: 755). Section 1 aims at collusion: the banning of cartels and other forms of price fixing while Section 2 forbids the monopolization of a market by exclusion or amalgamation. Monopolization could include, *inter alia*, various actions to thwart entry by new competitors and predatory behavior towards established competitors or a permanent combination with them by takeover or merger. Other suspect single firm practices along

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<sup>11</sup> Canada stands as an arguable exception in two dimensions: it partially embraces the total surplus principle, and it rejects extraterritoriality. (See Gifford and Kudrle, 2002: 226-230). Regrettably neither Canadian policy nor that of the individual European states can be considered systematically here.

with a more explicit treatment of mergers were spelled out in the Clayton Act of 1914 (which has seen some subsequent amendment) (Fox and Pitofsky, 1997).

Sections 81 and 82 of the Treaty of Rome and the Merger Regulation of 1989 nominally include so many of the same concerns as U.S. law that many reading them for the first time infer that they were more closely modeled on the U.S. experience than careful scholarship suggests they actually were (Gerber, 1998: 337-399). EEC and later EU policy attacked collusion such as price fixing, exclusion through the “abuse of a dominant position” and amalgamation through merger.<sup>12</sup>

The immediate political sources of European competition policy differ dramatically from those of the U.S; instead of populist suspicion of big business, the central motive was the forging of a unified market. And EU policy largely filled a vacuum rather than superseding or complementing established national practice. At the signing of the Treaty of Rome in 1954, only Germany had a well-developed national competition law. It had been devised as part of the post-war political and economic establishment’s rejection of the cartelized world of the National Socialists. For most of Europe up to that time, antitrust had appeared too bourgeois for much of the left and too liberal for much of the right to generate a serious and consistent national effort.

As in Germany, Japanese competition policy was introduced during the occupation, but with no indigenous credentials.<sup>13</sup> The Antimonopoly Law of 1947 resulted from negotiations between Japanese and Occupation officials; it banned holding

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<sup>12</sup> Mergers now need to be reviewed at the EU level when the firms’ worldwide sales are over 5 billion Euros with European sales of at least 250 million Euros (European Commission, 2001).

<sup>13</sup> In Germany, the *Ordoliberalismus*, nurtured by the Freiberg School during the Nazi period, was embraced almost immediately thereafter by the long-dominant Christian Democratic Party. It provided the intellectual foundation for much of German economic policy including policy towards competition. (Gerber, 1998: 232-265). For a detailed discussion of the antitrust zeal of the occupation authority in both Germany and Japan under the direction of Assistant Attorney General Thurman Arnold, see Wells, 2002.

companies and cartels as well as forbidding many collusive practices. Although the law therefore appeared to deal with collusion and exclusion, the reality was otherwise. The Fair Trade Commission of Japan pursued its first criminal price fixing case in 1974, and the Ministry of Trade and Industry provided much administrative guidance over most of the postwar period through officially recognized cartels.<sup>14</sup>

The four large Zaibatsu that dominated the prewar economy were abolished shortly after the Japanese defeat, but to preserve Japanese strength for the gathering Cold War the U.S. soon shelved plans to continue deconcentration by dismembering hundreds of other major firms (Gifford and Kudrle 2002: 235). Moreover, no mergers were blocked for more than twenty years after 1969. The merger guidelines issued in 1997 signaled a possible new departure (Rosenthal and Matsushita, 1997: 322-323).

Both EU and Japanese competition policies contain language that aims to control collusion, amalgamation, and exclusion, yet the record suggests great differences in the objectives actually pursued by authorities. In sharp contrast to Japan, the EU, even quite recently, has often banned mergers that would have been approved in the U.S. This is often interpreted as at least partial adherence to the rivalry view of competition policy that the U.S. abandoned the seventies. The contrast between Japan and Europe also looms in “vertical restraints:” agreements between manufacturers and those bringing the product to the final purchaser. Europe moved less rapidly and less far than the U.S. did to abandon the view, generally held as late the mid-seventies, that any such restrictions

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<sup>14</sup> The Fair Trade Commission has tried to combat the impact of industry cooperation on prices with a system of fines aimed to remove the profit from collusion. This approach has been generally criticized as ineffective and has recently been slated for modification largely by increasing penalties (Uesegi, 2004; 4).

served to support an umbrella over the final sales price.<sup>15</sup> Again in contrast, Japan is dominated by highly restrictive distributive practices that have gone largely untouched by the authorities despite the success of the United States in persuading the Fair Trade Commission of Japan to produce an impressive looking set of guidelines on vertical restrictions in 1991 as a part of the “Structural Impediments Initiative” (Matsushita, 1997: 184-192).

### Patterns of Enforcement

Beyond policies towards specific market practices, the French antitrust expert Frederic Jenny has suggested three major patterns of antitrust enforcement. Most national practice falls into one category far more than the other two (Jenny, 2003: 985). Despite its long history, the U.S. system remains nearly unique in lodging most enforcement with the civil and criminal courts. Europe’s basic practice has been far more influential: administrative rather than criminal sanctions are enforced by an independent body whose decisions can be appealed through the courts. Finally, Japan follows the Asian model by lodging enforcement with the executive and relying heavily on warnings rather than immediate sanctions.

Outside of Asia, EU policy in both content and administration has been more widely imitated by countries adopting competition policies for the first time than has the U.S. system (Foster, 2001). This probably results from some combination of the appeal of tighter direct political control, more emphasis on cooperation than conflict, and greater concern for the welfare of market participants other than the final purchaser.

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<sup>15</sup> Careful examination of actual practices suggests that vertical agreements are often based mainly on such motives as the encouragement of dealer promotion efforts that increase sales for that dealership rather than for “free-riders.”

The U.S. system contrasts with virtually all others in a least four major dimensions. First, major changes in policy direction - both towards greater stringency and greater tolerance - can actually be traced to scholarship. Within a setting of largely unaltered basic law, the courts, the administering agencies, expert witnesses and commentators have interacted to drive policy. Thus U.S. policy has developed with greater political insulation than has been the case almost anywhere else. In fact, antitrust policy change has more closely tracked intellectual argument and evidence with less partisan politics than perhaps any other major area of U.S. public policy. In Europe and Japan, the effective policy, largely based on written law and administered largely by political and bureaucratic actors, has innovated largely by imitating the U.S.

Second, the right of private parties to sue for triple damages under of the Sherman Act means that the actual size of American competition enforcement is much larger than the combined size of the Antitrust Division and the Federal Trade Commission (which now share enforcement through cooperative non-duplication) would suggest. Private cases were 93 percent of all antitrust cases brought before federal district courts between 1970 and 1989 (Viscusi, et al, 1995: 65).<sup>16</sup> Third, largely as a result of the first two factors, competition law and policy loom large in the curricula and research agendas of American law, business and public policy schools, and economics department. This academic activity together with the size of the sector and its relative sequestration from partisan politics has helped create and sustain the United States as the leader in argument and evidence about competition policy. Finally, the U.S. treats most antitrust matters as criminal violations, and individuals are sometimes charged with felonies, although

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<sup>16</sup> Of course private litigation brings risks of its own: potential legal adversaries may be “bought off” by reduced competitive pressure.

imprisonment is rare. This severity of penalty puts the U.S. at the most stringent end of punishment, a difference that greatly complicates international cooperation. For example, individuals cannot be sanctioned for competition law violations under EU law (although they may be under national statutes. Evenett, *et.al.*, 2001:19).

### **Harmony: level and change**

Mario Monti, the EU Competition Commissioner until late 2004, made numerous statements stressing strong and growing competition commonalities across the Atlantic (Monti, 2001a, 2001b, 2002a, 2002b). Gifford and Kudrle (2002, 2003) have concluded, however, that such convergence remains largely aspirational. This can be seen most clearly in two major competition policy areas, mergers and vertical restraints. The former controls amalgamation, and the latter strongly affects both collusion and exclusion.

The differences in merger policy appear in two cases that created headlines on both sides of the Atlantic. When Boeing proposed to acquire McDonnell-Douglas, U.S. authorities regarded the latter as a “failing firm,” and not a viable competitor; hence the acquisition gained easy approval. In sharp contrast, the EU Commission, exercising extraterritorial claims based on effects in the European market, insisted that Boeing void long term purchase contracts with several major airlines as a *quid pro quo* for approval (among several demands).

Many observers, both then and since, saw the EU conditions as an attempt to bolster the fortunes of Boeing’s EU rival, Airbus. But the logic rather than the motive of the action demands attention here. Boeing’s argument was that the contracts, which were

supported by the airline purchasers, gave Boeing an advantage based on real economic savings, i.e. greater efficiency (Gifford and Sullivan, 2000). In 2001, the Commission blocked the acquisition of Honeywell by General Electric, once again after U.S. authorities had cleared it, because the ability to combine avionics and propulsion units in sales to airlines appeared to promise lower prices that would disadvantage competing sellers.<sup>17</sup> To an outsider these cases look more like a “rivalry” than a “consumer surplus” standard. They bring to mind proposed U.S. mergers in the sixties and seventies when merging firms went out their way to deny efficiencies that might threaten competitors and hence create trouble in the courts.<sup>18</sup>

Japan has recently clarified what had been the least easily interpreted merger guidelines of the Triad. Rosenthal and Matsushita concluded that the Merger Guidelines of 1997 intended greater stringency than practiced in some other national markets – and that this is appropriate given the greater difficulty of entry in Japan, partly due to tightly controlled distribution channels (Rosenthal and Matsushita, 323). There have been so few known blocked mergers in Japan, however, that the actual criteria employed and the weight given to them cannot be known. A recent Tokyo law firm report notes that in controlling mergers “. . . the JFTC may (and does) takes into consideration relevant public and industrial policy issues. Among the various government Ministries, it is generally considered that the Ministry of Economy Trade and Industry (METI) has a strong influence over competition policy.” (Ezaki et al, 2004).

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<sup>17</sup> Just what the Commission believed would cause the lower prices seemed to change over the Commission’s consideration of the case, but a concern about the impact of those lower prices on rivals remained the focus (Nalebuff, 2004: 391, 410). Another major example of a fear of the impact of lower prices can be seen in the de Havilland merger case which was approved by the Canadian government but blocked by EU authorities because the new firm was judged likely to benefit from exchange rate movements relative to its rivals (Gifford and Kudrle, 2003:759-760).

<sup>18</sup> For a discussion of these cases that stresses their economic perversity, see Williamson, 1985: 367.

According to the 1997 Guidelines, an efficiency defense will count only if the merger is “expected to promote increased competition.” (Gifford and Kudrle, 2000: 237). While this could be interpreted as permission only for weak firms to increase their potential to provide more serious rivalry to market leaders, this is not the likely intention in a polity traditionally lax on mergers. Instead, the Guidelines appear to have been consistent with the thinking associated with U.S. and EU practice: the higher the level of concentration achieved by the merger, the higher must be the promise of efficiencies to avoid a price increase.<sup>19</sup> This interpretation is consistent with the revised Guidelines released in the summer of 2004. They embrace the American approach to market definition and, in general, quite closely parallel their U.S. counterpart (Amemiya, 2004: 1-2).<sup>20</sup>

Approaches to distribution control also differ sharply among the three large jurisdictions. A sharp change in U.S. policy can be seen in two Supreme Court cases. *Schwinn* of 1967, banned exclusive territories, and *Sylvania*, only a decade later, reversed *Schwinn* and credited efficiency motives for vertical restrictions (Carlton and Perloff, 2000:638-639). Since that time, most U.S. courts have given a green light to virtually all distribution agreements freely struck by producers and resellers, leading to what some have judged to be the least restrictive vertical legal regime in the world (Wood, 2004: 184).

In Europe the situation remains sharply different from that in the U.S. Those writing and administering the competition policy sections of the original Treaty of Rome

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<sup>19</sup> “Anticompetitive effect” is a frequent synonym for a price increase in both the U.S. and the EU, so one might hazard that the Japanese intend “increased competition” simply to mean a price decrease.

<sup>20</sup> As this is written in late 2004, the Japanese Diet has before it a set of measures to strengthen the Anti-Monopoly Act. Among other measures, it would give the JFTC search powers to assist with the documentation of criminal complaints (Uesugi, 2004:4)

saw tightly controlled distribution, especially at the national level, as a threat to the *raison d'être* for the entire enterprise: a common market. National distributorships were banned and, more generally, the ability of goods to reach final buyers through a variety of channels was favored. This was based partly on the notion of a right of maximum commercial participation that one sees elsewhere in EU competition policy.<sup>21</sup> And EU distribution cases reveal another pervasive European thread: the idea of “fairness” as the absence of commercial surprise and disappointment. Once a reseller becomes well established, the producer’s right to alter the relation diminishes.

The operating presumption in the EU remains that any diminished welfare of other firms should weigh negatively unless the strategy of the firm in question unambiguously increases consumer welfare. In the United States the welfare of other firms is generally not an issue unless harming them also harms the consumer. This apparently minor difference in approach can make substantial differences in policy. And it links EU policy not just to rivalry but to producer protection as well.

Japan has a global reputation for impenetrable distribution, and part of this stems from the complex pattern of retailing that has historically exceeded even that of Europe and has only recently begun substantially changing in the direction of larger outlets. Japan’s trading partners found market entry so difficult that the United States in the late 1980s launched the “Structural Impediments Initiative” that resulted, among other outcomes, in a strengthening of the Anti-Monopoly Law by the promulgation of

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<sup>21</sup> An example of the difference between the U.S. and Europe can be found in recent OECD report on fidelity discounts. The U.S. finds them generally acceptable as promoting efficiency while EU authorities are concerned about the “discrimination” among dealers that results from using cumulative sales as a criterion for the profitability of a marginal sale (among those who have the same current level of sales and quality of service) and finds the practice “abusive.” (OECD, 2003: 198). For a broad early discussion that touches on this issue, see Fox, 1986.

Distribution Guidelines. These guidelines put virtually all of the major vertical restrictions, including resale price maintenance and all forms of exclusivity, under a burden to demonstrate to the Fair Trade Commission of Japan that they neither unduly hinder entrants nor raise final prices. Yet as a leading commentator notes, “the relationship between enterprises is more sociological than contractual. Challenges to such sociological entities under the AML would be difficult.”<sup>22</sup> (Matsushita, 1997: 192). Any second-guessing of Japanese market supervision by foreigners would presumably be more difficult still.

Although differences in the structure of the Japanese economy may justify some special policy controls on vertical restrictions from the standpoint of the welfare of the final consumer, much of the U.S. pressure on Japan appears somewhat akin to the European penchant for promoting a right of participation. The high tide of business pressure on the U.S. government to assist in penetration of Japan seems to have passed, partly due to Japan’s economic stagnation in recent years as well as the success of some U.S. firms.. Overall, however, U.S. complaints about Japan and Europe tend to differ dramatically. U.S. firms and officials complain about the extent to which their firms’ strategies are constrained by the stringency of EU rules. In Japan, they complain that the law insufficiently controls the distribution strategies of incumbent Japanese firms. After the Structural Impediments Initiative successfully pressured Japan for legal changes that spelled out the limits of incumbent control without much subsequent change in foreign penetration, the Americans often asserted that the new rules were not really being enforced.

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<sup>22</sup> As an example, many resellers maintain extracontractual loyalty to producers with the expectation of financial protection in difficult times (Matsushita, 1997: 192)

Differing merger standards pose the most innately intractable problem for international business because the major jurisdiction with the most stringent regulation will prevail, regardless of the strength of the merging firm's case and the possible efficiencies and lower prices that might be experienced all over the world. And this presents an area in which only the really large players can veto mergers with a truly "global reach." If Australia or Korea alone objected to a merger and were simply ignored, their only recourse would be an attempt to collect fines from the offending firms, a move that would predictably lead to the withdrawal of firm assets and sales from the penalizing jurisdiction. This action, in turn, would almost certainly leave that jurisdiction worse off than before, destroying the credibility of the threat. Many economists would doubt that this apparent inequity is worth trying to solve, however. From a global welfare point of view, it is hard to construct a plausible merger scenario with net global losses that would not be scotched by one or more of the U.S., the EU or Japan. It is much more likely that one of the three will block a merger with widespread benefits.

Disagreements about specific merger cases among various jurisdictions could be clarified by putting them into a common framework. Well-trained analysts can come to different conclusions in at least four major areas: what, when, for whom, and with what degree of certainty. The outcome of allowing or forbidding some market practice or structural change in terms of prices and quantities may be subject to differing best estimates, there may be disagreement about when those changes will take place; gainers and losers may have their outcomes differentially weighted; and the best point estimates of outcomes may be surrounded by varying levels of subjective uncertainty.

A new analytic packaging might appear to accomplish little, but reams of confused findings and argument from multiple jurisdictions suggest otherwise. Some means of clarifying how various jurisdictions come to different conclusions (different short term scenarios, different distributional preferences, different forecasts, and different treatments of uncertainty) could help sort out why overall judgments on a particular case diverge between or among authorities. A series of case comparisons could greatly clarify similarities and differences among national practices (Gifford and Kudrle, 2004).

Despite the persistent differences within the Triad just noted, there are nonetheless some signs of convergence of both Europe and Japan with the United States. Both now employ a market definition based on demand and production substitution drawn from the U.S. Merger Guidelines first promulgated in 1982. And both have considerably increased not only the size of their competition enforcement staffs, but, far more importantly for long-run compatibility, the number of highly qualified economists employed in considering all aspects of enforcement (Ezaki *et. al*, 2004). In addition, the EU has introduced the concept of “shared dominance” as its characterization of oligopoly to replace the previous dichotomy between “dominant” firms and all others.<sup>23</sup> The Japanese stagnation of the 1990s shook confidence in the traditional concept of a “harmonization culture” and increased the appeal of the “competition culture” championed by the Japan Fair Trade Commission to a part (though perhaps not a majority part) of the Japanese business community (Uesugi: 2004:2). The JFTC is now part of the Cabinet Office rather than farther down in the bureaucracy in the Ministry of General Affairs, a change consistent with Prime Minister Koizumi’s slogan: “No growth without

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<sup>23</sup> Since the 1992 Guidelines the Americans have also been paying increasing attention to the effects of increased concentration on the market power of the merged firms itself rather than increased ease of tacit collusion with others (Kwoka and White, 2004: 19).

structural reform.” According to the Secretary General of the Fair Trade Commission of Japan, “Enhancement of competition policy is the core of [the] Koizumi structural reform.” (Uesugi: 2004: 1,2)

## **Cooperation**

International antitrust cooperation has deep roots and has blossomed into a profusion of activity in the last few years. Perhaps the most useful distinction is between case-specific and policy cooperation.

Case specific cooperation involves varying kinds of information sharing and the gaining of advice relevant to a specific matter under review in one or more jurisdictions. Such cooperation certainly grew substantially in the 1990s, but the precise extent is difficult to track because so much cooperation has been informal. (Jenny, 2003).

The United States signed an agreement with the EU in 1991 that provided for positive comity in competition policy. This means that both jurisdictions are expected to make serious and commitments to assist the other in gathering information of interest to the requesting party even if the activity under review is not offensive to the cooperating party. By 2000 there had been only one case handled under the auspices of the agreement. On the other hand, informal cooperation outside of the agreement grew substantially over the same period, particularly on merger and cartel cases of interest to both jurisdictions. The United States also has bilateral agreements for formal cooperation with Canada and Japan and a very thorough “International Enforcement Agreement” with Australia. But many jurisdictions shun formal ties with the U.S. because of its criminal provisions and treble damages in civil cases. The EU and Japan struck an agreement in 2000 (Kyodo News Service, 2000).

Most authorities agree that informal consultation between any two states rather than the exact nature of any agreement on competition has been central to the growth of cooperation. In particular, it appears that one state can be extremely helpful to the efforts of another without revealing confidential information. While enforcers may have political motives for putting the most positive face on extent and quality of current cooperation and it may be difficult to pinpoint cases in which cooperative was clearly necessary for the resolution of a case (Jenny, 2003: 988), there seems little reason to doubt that the swelling sea of contact offers many advantages and few serious drawbacks.

The other major strand of cooperation concerns general policy, and case specific linkages obviously contribute to such a broader understanding as well. The OECD has sponsored competition policy discussion and policy for decades. As in other major policy areas, it attempts to bring high-income country competition policy officials together to share experiences. Frederic Jenny has pointed out that the OECD's practices in competition policy shifted in the 1990s from an evaluation of various countries' efforts to careful and non-judgmental accounts of varying practice on a wide variety of competition topics. This apparently minimized friction and greatly increased mutual learning. (Jenny, 2003: 987). Thirty-nine major "Roundtables on Competition Policy" were held between 1996 and 2002 (OECD, 2002: 3).

Another cooperative institution developed in the new millennium to increase the international sharing of competition policy information: the International Competition Network. The Network was formed in 2001 following a recommendation by the U.S. International Competition Policy Advisory Committee (IPAC), a group set up by the U.S. Justice Department to consider international competition problems (Janow, 2000).

It was specifically asked to consider multijurisdictional merger review, the trade-competition interface, and the future of international competition agency cooperation.

The EU Commission also officially endorsed the founding of the ICN (von Finckenstein, 2002b: 2).

Those establishing the ICN were particularly anxious to distinguish the new group from the OECD. The differences are considerable. The most obvious is focus: the ICN is “all competition all the time.” (von Finckenstein, 2002a:3). In addition, while the OECD is an intergovernmental organization of mainly rich countries, the ICN is open on equal terms to all states with functioning competition agencies; non-governmental participation in OECD activities is by invitation, whereas the ICN embraces legal, academic, consumer and business participation; the OECD is funded by governments and has a permanent secretariat while the ICN has neither secretariat nor permanent financing but is mainly manifest as a website; the OECD makes recommendations while the ICN aims only to produce “best practice” proposals and reports; the OECD’s imprimatur creates some member obligation while the ICN aims only at peer pressure (von Finckenstein, 2002a, 2002b, 2003).

Those devising the ICN see it as a complement rather than a competitor for the OECD. Konrad von Finckenstein, the Canadian jurist who chaired the ICN Steering Group during the organization first two years and served its chief spokesman simultaneously chaired the OECD’s working party on International Cooperation. The WTO, UNCTAD, and the OECD along with private practitioners play a role as Non-Governmental Advisors in preparing work products on an equal footing with other participants (von Finckenstein 2002b).

Although the “ultimate goal is to facilitate procedural and substantive convergence,” the product of the ICN so far is almost entirely informational and procedural.<sup>24</sup> And in these areas, the ICN has sponsored a large amount of substantive activity. Much exchange and discussion has aimed to clarify, coordinate and lower the cost of multijurisdictional merger review. And, reflecting the universal character of the organization, much attention has been devoted to “competition advocacy,” i.e. making the case of the use of markets among government decisionmakers, including many from newly liberalized low income countries. Considerable attention has been paid to “capacity building” in developing countries (von Finkenstein, 2003).

The volume and quality of ICN output so far bodes well, but nothing done yet shows promise of bringing substantive policy convergence. And part of this problem grows naturally from the very nature of the network. As noted, the basic competition laws of many states constrain convergence, and the U.S. allows more enforcement autonomy than is found elsewhere. The ICN’s discussion paper on the analysis of mergers illustrates the situation: it is far more skeptical of non-economic criteria for merger control than is the public policy of many members of the ICN, yet other considerations are often written into law (International Competition Network, 2002). The true of significance of the ICN’s “competition advocacy” becomes clear from such examples. One can imagine that the ICN will develop ever-greater commonality among global competition policy officials as the “epistemic community” approach to global networks predicts (Haas, 1992; Slaughter, 2000). But this very commonality could either

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<sup>24</sup> A conference is held once a year, hosted by a national competition authority. A somewhat more extensive core organization has been proposed partly to raise sufficient funding for conference participation by a larger number of agency representatives from low income countries (von Finkenstein, 2003: 8)

increase the capacity of competition authorities to influence domestic policy or isolate and estrange them from the general thrust of governance. The outcome will likely differ widely across states.

### **Centralization**

National competition policy is highly varied in many dimensions and is almost everywhere deeply embedded in domestic law and practice. The various policies show only partial and halting signs of convergence, much of which is driven by the demonstration effect of other states. What role, is any, is left for competition policy in a formal organization with real penalty power such as the World Trade Organization?

The idea of global governance for competition policy goes back a long way. The International Trade Organization, rejected by the U.S. Senate in 1947 as a threat to U.S. sovereignty (Eichengreen and Odell, 2000:168), included language from the Havana Charter that obliged states to counter “. . . business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control . . .” (U.S. Department of State, 1948). The U.S. withdrew support from a 1952 U.N attempt to gain agreement on the competition policy sections of the Charter on the grounds that it was premature: too few states had such policies that effective implementation was problematic (Sell, 1998: 143). Given that virtually all major and scores of lesser states now have competition policies, that domestic competition policy now pervasively affects foreign firms, and, more broadly, that foreign value added in the domestic commerce of

most states is at historic highs, can a case be made for the revival of such a formal multilateral commitment?<sup>25</sup>

In his attempt to position antitrust in policy space, Scherer argues that ideal competition policy and ideal trade policy have similar basic objectives, ultimately, to “maximize real income.” (Scherer: 1994: 2). As history clearly shows, however, actual trade policy moves toward this goal only with much backing and filling, and the closest competition policy typically comes is consumer surplus maximization. While free traders see unimpeded free trade as their ideal, many, perhaps most, advocates of a vigorous – and non-nationalistic—competition policy balk at the total surplus principle, the goal that would really “maximize real income.” Beyond this, however, the bracketing of competition with trade policy in the context of the evolution of international governance misleads for two reasons. First, any shift of WTO attention from removing government trade barriers to mandating government action towards private business would move the young organization into largely uncharted territory. Second, as this work documents, there is far more to competition policy and international disputes over it than the market access-related issues that now command nearly all of the WTO’s attention.

Skepticism about the appropriateness of a major role for the WTO in competition policy rests on five major observations. First, the function of trade policy is overwhelming to *control* access to the domestic market while much competition policy in the major high-income countries attempts to *balance* competing arguments about the structure and conduct of business firms. Second, trade policy focuses mostly on *government* action, while competition policy deals mainly with *firm* action. This

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<sup>25</sup> To continue the earlier argument about the role of scholarly argument in the development of American antitrust, it might be noted that the ITO was an American idea, and its competition policy provisions were anticipated by the Harvard economist Edward S. Mason (1946).

difference implies a third: competition policy necessarily involves continuous non-routine processes while much of trade policy simply aims to remove official interference with market forces. Fourth, open trade is a fairly clear concept; wise competition policy in many dimensions remains changing and contested both within countries and among them. Finally, even where competition policy was grafted on to the rest of domestic policy only in recent decades, as in much of Europe, Japan, and all transition and developing countries, both its exact content and its procedures are intertwined with highly idiosyncratic national legal variations.

The possible short-term role of the WTO can be considered in the three problem categories noted earlier: abuse, discrimination, and strategically relevant substantive variety.

In 1999 the EU proposed that all WTO members be required to have at least a “bare bones” competition policy that banned cartels and “monopolization” or the “abuse of a dominant position,” that provided for non-discriminatory enforcement, that embraced cooperation among authorities, and that envisioned ultimate convergence of policy (World Trade Organization, 1999).

Abhorrence of price fixing as antisocial goes back to Adam Smith. Yet some kinds of horizontal agreement involving prices have been found to increase the efficiency of the industry as a whole such as fixed fees for the use of copyrighted music. Far more importantly, nearly every state employs cartel-like arrangements somewhere: in agriculture, to restructure declining industries, to respond effectively to foreign antidumping judgments, or to charge higher prices to foreigners. Most of these official practices have been condemned by economists as hostile to an economy based on well

functioning markets, but such cartelization seem unlikely to be handled effectively by the WTO. Anti-dumping practices, however abhorrent, are now in place in scores of countries that have typically based their laws on apparently unshiftable U.S. practice. Disinterested professionals everywhere are strongly opposed to penalizing foreign sellers by using different criteria than those for domestic sellers. Low prices can sometimes have predatory intent, but as an empirical matter in international trade, this a rare phenomenon<sup>26</sup> and does not warrant a different standard based on the national provenance of goods involved. In this case a bad policy (antidumping) breeds more bad policy (a cartel to respond). Similarly, agricultural protection is a major problem facing the WTO, not the cartel-like measures often used to maintain high domestic prices by protectionist states. On the other hand, legally sanctioned cartels to promote exports have never been shown to have an important role in international trade (Dick, 1992).

If such cartels as those just sketched are not dealt with, this still leaves a great deal of “hard core” cartel activity in the world economy (Evenett, Levenstein, and Suslow, 2001). Yet the connection between WTO institutionalization and a substantially more effective assault on such cartels remains to be made. Sufficient cooperation has already been established among authorities in the U.S., the EU, and Japan, to pursue nearly all suspected global cartels. There is no substantial cartel equivalent of “tax havens,” where lax local regulation allows for flagrant system abuse.

The path to elimination of the cartel problem apparently lies more than anything with the deterrence that could be achieved only by greatly strengthened penalties. For

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<sup>26</sup> Willig, 1998. An exception is provided by the case of Archer Daniels Midland, whose first objective when entering the world Lysine market in 1991 was apparently to drive at least one other major participant out of business with prices below the long run competitive level. The firm subsequently entered into a cartel with other major producers. (Connor, 2004:267).

example, careful research has demonstrated that the triple damages provided by the U.S. antitrust laws effectively leave cartelization as a rationally attractive strategy in many industries (Connor, 2004:274). More leverage would certainly be gained by a high likelihood of jail time for perpetrators, but even the U.S. is quite sparing about incarceration, and this option is not available in most other jurisdictions.

The lion's share of international business experiences cartels just as final purchasers do: as a cost rather than a benefit.<sup>27</sup> The absence of national treatment is more complex. This problem divides into at least four: trade discrimination, FDI discrimination, discrimination in the general legal process, and discrimination in the application of competition policy. International firms certainly suffer from the fourth, but the first three appear overwhelmingly more important for most firms most of the time.

The liberalization of trade is the WTO's principal domain, and as this written, a deadlock continues that pits the North's desire for greater access to Southern markets against the South's determination to yield no more access without far more definite progress on the removal of barriers to its agricultural exports and on administered protection (especially antidumping) (Schott, 2004). E. M. Graham conducted interviews with important officials from both North and South and found little ground for advance on competition policy. While the EU supports the universal adoption of some kind of barebones agreement, it envisioned no substantial enforcement power and rejected a role for the WTO's Dispute Settlement Mechanism on substantive issues. The South,

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<sup>27</sup> A good example is the impact of the aluminum cartel of the 1990s on all of the users of that product as an intermediate good. The complication is that the U.S. government cooperated in the multinational cartel aimed at countering the depressing influence on price of a surge in exports from Russia and Ukraine. (UNCTAD, 2003: 15).

however, still reacting to what it sees as excessive concessions on the Trade Related Intellectual Property (TRIPS) agreement, the most tangible outcome of which appears to have been higher pharmaceutical prices, suspects that the North wants nothing more than less restricted entry into Southern markets. (Graham 2003: 952-53). While some trade progress is eventually inevitable, pushing competition policy issues higher on the WTO agenda now would likely increase complexity and confusion rather than provide any ingredients for constructive compromise.<sup>28</sup>

The ill-fated Multilateral Agreement on Investment (MAI) held under OECD auspices promised right of establishment and national treatment for foreign firms until talks collapsed in 1998. Although leftish NGOs claim credit for sinking the MAI and the proceeding ranked low in legitimacy by being conducted almost entirely below the radar of the political processes of the affected states (Graham, 2003: 966), any agreement that might have emerged would likely have been so full of reservations and exceptions as to leave a document of uncertain value for business anyway. This explains the virtual abandonment of a quest for general agreement on this subject in the period since. Most countries want more foreign investment and make its attraction a high priority; piecemeal liberalization continues.

Both business and government policymakers have doubted the payoff from the major investment of political capital necessary to attain a general international agreement

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<sup>28</sup> The treatment of intellectual property rights affects competition in many markets, and the global intellectual property regime is therefore relevant to one in competition policy. As Maskus explains, the policy interface is most important in three areas: regulating monopoly prices, overseeing licensing restrictions that can serve as powerful barriers to entry, and controlling “parallel” imports, i.e. imports of identical or similar goods from the same source but through unapproved channels. States vary greatly in their approaches in the first two areas, and those hoping for a world-wide standard on the third as part of the Trade Related Intellectual Property (TRIPS) section of the Uruguay Round Agreement were disappointed (Maskus, 2000: 205-216). Susan Sell (1998) documents how low income countries traditionally viewed the two policy areas as strongly overlapping because of their focus multinational corporations. The text reports how disappointed much of the South has been with TRIPS.

on direct investment in either the OECD or the WTO (Graham, 2000: 198-200). If this is true of investment, it would appear to be even truer of competition policy where the feasibility of agreement would be compounded by even more difficult enforcement challenges. Unlike the case of trade policy, domestic legal administration in all modern countries is predicated on impartiality. At the very least, the system can be made to appear impartial, and the prospect of persuasive second-guessing by the WTO, an organization with virtually no competition policy competence or experience, does not inspire confidence.<sup>29</sup>

In short, the WTO appears to offer little prospect for improved governance of international competition policy even in those areas that seems closest to its basic mission.<sup>30</sup> Moreover, the ICN has picked up on some activity that had been advocated for the WTO. The ICN is providing substantial technical expertise to low-income countries, and its willingness to do so may be attracting more of them to adopt and strengthen basic competition laws.

Substantive issues beyond cartels and national treatment appear even less suited to any WTO role. This includes the range of issues related to the competitive legitimacy of various horizontal and vertical firm practices that preoccupy most enforcement attention in most countries, that differ sharply among them, and that must importantly condition the competitive strategies of multinational firms. The terrain here is varied

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<sup>29</sup> In fact, the WTO working group on these matters has focused on process: transparency, non-discrimination, procedural fairness and cooperation among authorities, along with some consideration of action against cartels (Graham 2003:955).

<sup>30</sup> For a strong statement of the case for a WTO role that still recognizes the difficulties, see Hoekman and Kostecki, 2001: 425-434.

and complex, and few scholars have identified a pressing need for immediate international agreement.<sup>31</sup>

Consistent with the arguments above, regional trade agreements have typically treaded lightly in the competition policy field. NAFTA is both brief and cautious: it stresses cooperation to support domestic enforcement and indefinitely postpones substantive harmonization. Competition issues are explicitly omitted from dispute settlement procedures. Several other agreements within the Americas are identical or similar. (Tavares de Araujo and Tineo, 1999: 446-460).<sup>32</sup>

## **Conclusion**

The integrating world economy needs clearer and more predictable competition policy. Improvements in both areas would lower transactions costs, improve business planning, and counter abusive practices. This paper argued that progress is being made, and that the best way forward should largely avoid entanglement with well established, highly structured bodies such as the World Trade Organization. Instead, institutional competition policy progress, in the short run at least, should focus on modest but immediately valuable initiatives such as the International Competition Network.

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<sup>31</sup> Andrew Guzman has been an exception. He has argued that national interests, driven by the structure of production and trade, distort decision-making in competition policy on matters with important international spillovers such as mergers (Guzman, 1998). The empirical evidence for the tendencies deduced by Guzman is very weak, however, and in a recent article he has advocated only very modest first steps towards a centralized competition policy (Guzman, 2004: 118-120).

<sup>32</sup> The greatest departure is the Andean Pact, where prior to the five nation agreement, only one state, Colombia, had a competition policy. The founders apparently saw the chance for competition policy to grow along with the integrating market as was the case with uniting Europe, and the competition policy sections were based on the Treaty of Rome (Tavares de Araujo and Tineo, 1999: 446-460). Despite their long shared history and the Closer Economic Relations Trade Agreement of 1983, Australia and New Zealand still have largely separate competition policy regimes (Thomson, 1997: 385-404) that will likely come closer as the result of a ministerial agreement on harmonization of August, 2003 (New Zealand Ministry of Economic Development, 2004).

Nationalist economic policies harm both the perpetrating state and others, but nationalism in competition policy is a small part of economic nationalism and would be especially difficult to monitor by outsiders. At the same time, private system abuse can be fought quite effectively by strengthening national laws and extending the cooperation that is currently practiced. Finally, the international variations in policy that so complicate business strategy can only be effaced through growing mutual understanding within an epistemic community that already exists and is rapidly increasing its level of communication. Harmony will increase slowly and uncertainly through cooperation and demonstration. Substantial central authority appears neither feasible nor desirable now.

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