INTERACTION BETWEEN TRADE AND COMPETITION: WHY A MULTILATERAL APPROACH FOR THE UNITED STATES?

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I. INTRODUCTION

Competition law is no longer a strictly domestic law that deals with monopolies in internal markets only. For instance, megamergers between two foreign companies often tend to be subject to a third country's antitrust investigation. In the case where an antitrust authority assesses whether transborder activities are anticompetitive, the relevant geographic markets normally extend beyond national geographical borders.[1] This international conception of "relevant markets" indicates that competition law is very often closely related to international trade. As a result, international economic institutions such as the Organization for Economic Cooperation and Development (OECD) have discussed competition law and policy and its interaction with international trade law and policy.[2]

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1. For example, during the investigation of international graphite electrode cartels in which six companies from Japan, the United States and Germany were involved, the United States' antitrust authorities had to assess anticompetitive effects in the worldwide market beyond U.S. territorial limits. *See* Press Release, U.S. Dep't of Justice, Japanese Subsidiary Charged with International Conspiracy to Fix Prices for Graphite Electrodes in U.S. (Feb. 23, 1998), *at* http://www.usdoj.gov/atr/public/press_releases/1998/1372.htm (last visited Jan. 10, 2004); INT'L COMPETITION POL'Y ADVISORY COMM., U.S. DEP'T OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND THE ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 172–73 (2000), *at* http://www.usdoj.gov/atr/icpac/finalreport.htm (last visited Jan. 10, 2004) [hereinafter FINAL REPORT].

2. *See generally* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), COMPETITION AND TRADE POLICIES: THEIR INTERACTION (1984), *available at*

The General Agreement on Tariffs and Trade (GATT)[3] was born in 1947 with the purpose of liberalizing international trade and reducing or eliminating tariffs and non-tariff barriers. The GATT successfully performed its mission, eventually consigning that mission to the World Trade Organization (WTO),[4] which has significantly contributed to reducing or eliminating "public" trade barriers.[5] The WTO continues to liberalize trade through a series of multilateral trade negotiations in various sectors.[6] Nonetheless, anticompetitive activities committed by private companies have recently emerged as a new type of serious trade barrier.[7] These barriers are called "private" trade barriers due to the fact that they are not set by governments, but rather by private actors. This phenomenon has triggered a discussion of whether the WTO should have an agreement on competition policy and thereby contribute to the removal of trade distortion created by private trade barriers in international markets.

At its Singapore Ministerial Conference held in December 1996, the WTO decided for the first time to discuss the interaction between

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http://www.oecd.org/dataoecd/7/51/2375610.pdf (last visited Jan. 10, 2004) [hereinafter COMPETITION AND TRADE POLICIES]; OECD, Directorate for Financial, Fiscal & Enterprise Affairs, *Reflections on the Interaction between Trade Policy and Competition Policy: A Contribution to the Development of A Conceptual Framework*, OECD Doc. COM/TD/DAFFE/CLP(93)16 (Feb. 17, 1993); OECD Trade Commission, *Interrelationship Between Competition and Trade Policies*, OECD Doc. TD/TC/WP(92)20/REV2 (Apr. 20, 1993). For a work of the United Nations Conference on Trade and Development (UNCTAD), see generally UNCTAD, CLOSER MULTILATERAL COOPERATION ON COMPETITION POLICY: THE DEVELOPMENT DIMENSION (2002), a "Consolidated Report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy held between 21 March and 26 April 2002."

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *reprinted in* GATT B.I.S.D. (Vol. IV) at 1 (1969) [hereinafter GATT]. Most of the legal documents and agreements establishing the GATT and the World Trade Organization (WTO) and relating to their substance may be found at http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Feb. 1, 2004).

4. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 13 [hereinafter WTO Agreement].

5. For a general history, see WTO, UNDERSTANDING THE WTO 15–19 (2003), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited Jan. 10, 2004).

6. For an understanding of the general trend, see WTO, THE WORLD TRADE ORGANIZATION IN BRIEF 2 (2003), http://www.wto.org/english/res_e/doload_e/inbr_e.pdf (last visited Jan. 10, 2004).

7. For a summary of discussions in this matter, see WTO, *Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WT/WGTCP/2, §§ 81–89 (Dec. 8, 1998) [hereinafter *1998 Working Group Report*]; *see also* WTO Working Group on the Interaction between Trade and Competition Policy, *Report on the Meeting of 11–13 March 1998*, WT/WGTCP/M/4, ¶¶ 21–46 (June 24, 1998).

trade and competition policy.[8] The Ministerial Conference established the WTO Working Group on the Interaction between Trade and Competition (WTO Competition Working Group), which has discussed issues of interaction at a theoretical level, without producing any definite agreement. The Fourth Session of the Ministerial Conference held in November and December 2001 in Doha, Qatar, set the legal basis for launching negotiations on the interaction between trade and competition policy, which is considerable progress from the merely theoretical discussion existing under the WTO Competition Working Group.[9] Paragraph 23 of the Doha Ministerial Declaration authorized the WTO Members to negotiate on the interaction between trade and competition policy for a multilateral framework to enhance the contribution of competition policy to international trade and development after the Fifth Session of the Ministerial Conference, held in summer of 2003. Paragraph 23 required the launching of negotiations on the interaction between trade and competition policy based upon a decision to be taken, by explicit consensus, at the Cancun Ministerial Conference on the modalities of negotiations. In addition, during the period leading up to the Fifth Session, the WTO Competition Working Group was authorized to work on the clarification of "core principles, including transparency, nondiscrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building."[10] The WTO Competition Working Group made substantial progress on these issues.[11] Unfortunately, however, the Cancun Ministerial Conference held in Sep-

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8. *See* WTO Ministerial Conference, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC, ¶ 20 (Dec. 18, 1996), *available at* http://www.wto.org/english/thewto_e/minist_e/ min96_e/wtodec_e.htm (last visited Jan. 10, 2004) [hereinafter *Singapore Ministerial Declaration*].

9. *See* WTO Ministerial Conference, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Jan. 10, 2004) [hereinafter *Doha Ministerial Declaration*]. Paragraph 23 of the Doha Ministerial Declaration states:

> Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area . . . , we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

10. *Id.* ¶ 25.

11. For a summary of this work, see WTO Working Group on Interaction Between Trade and Competition Policy, *Report (2002) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WT/WGTCP/6, ¶¶ 9–103 (Dec. 9, 2002).

tember 2003 failed to reach an explicit consensus on the modalities of such negotiations, as is required under Paragraph 23 of the Doha Ministerial Declaration. Such failure to agree on the modalities of negotiations on the interaction between trade and competition policy, as well as for other Singapore issues,[12] led to the collapse of the whole package of the Cancun Ministerial Conference.[13] Hence, any further progress to negotiate for a multilateral framework on the interaction between trade and competition policy has currently been suspended. It was hoped that the General Council, held in December 2003, would create political momentum to revive the move towards negotiations for such a multilateral framework. It did not produce any positive results, however.

Why did WTO Members fail to reach an agreement to launch negotiations for a multilateral framework to enhance the contribution of competition policy to international trade? At least two plausible reasons can be pointed out. First, the proponents of such negotiations—specifically, the European Community (EC) and the so-called Like-Minded Countries—failed to persuade developing countries that a multilateral framework agreement on interaction between trade and competition policy is beneficial to their national interests.[14] In addition, the United States was passive in this matter and basically took a pessimistic stance on a further move towards a multilateral framework agreement on interaction between trade and competition policy.[15] Given the fact that the developing countries are currently hesitant to negotiate a multilateral framework agreement on competition policy at the WTO, it is not difficult to predict that the WTO option to address the interaction issues through a formal negotiation will not materialize unless the United States changes its position and supports this move. However, the United States traditionally has believed that non-WTO policy tools, such as unilateral and bilateral channels, may better address trade concerns arising from competition-related matters.[16] Such alternative, non-WTO policy tools include the extraterritorial application of U.S. antitrust law, United States Section 301's

12. The so-called Singapore issues are (1) trade and investment, (2) trade and competition, (3) transparency in government procurement, and (4) trade facilitation. *See Singapore Ministerial Declaration*, *supra* note 8, ¶¶ 19–21.

13. *Cancun Ministerial Collapses over Singapore Issues*, INSIDE U.S. TRADE, Sept. 15, 2003, at 1, 6–8.

14. *Id.*

15. *See Latest Declaration Unbundles Singapore Issues, Proceeds To Negotiations On Two*, INSIDE U.S. TRADE, Sept. 13, 2003 [hereinafter *Latest Declaration*].

16. *See infra* Part II.B.

competition-related clause, the WTO dispute settlement process, and positive comity.[17]

This paper is organized as follows: Part II examines a theoretical underpinning of the interaction between trade and competition policy. It first discusses whether trade law and policy can be harmonized with competition law and policy or whether they must necessarily conflict. Part II also demonstrates how trade law and policy and competition law and policy have interacted over the course of their historical development, describing their origins and the expansion of their coverage and observing that the current competition law, as well as the WTO Agreement, are ill-equipped and unable to tackle new trade concerns arising at the interface between trade and competition policy.

Part III provides a historical background demonstrating how this issue of the interaction between trade and competition has emerged under international institutional settings. At the same time, Part III shows how the EC and Like-Minded Countries have pursued their attempt to address competition-related matters at the WTO and how the United States and developing countries have responded. In particular, Part III describes why the United States has been hesitant to follow in the WTO's move towards multilateral negotiations on competition policy.

Part IV analyzes individual issues arising at the interface between trade law and policy and competition law and policy. The major focus of Part IV is to show why non-WTO options, which the United States has relied upon thus far, are theoretically or practically unwarranted, and therefore cannot be valid alternatives to the WTO option for a multilateral framework agreement on the interaction between trade and competition. Individual issues to be discussed will include the extraterritorial application of U.S. antitrust law, United States Section 301's competition-related clause, WTO dispute settlement, and positive comity.[18]

On the basis of this analysis, Part V supports the proposed formal WTO negotiations for the framework agreement on the interaction between trade and competition, and suggests some options for modalities of future negotiations. It concludes with a recommendation that the United States come forward and assume a leadership

17. *See infra* Part IV.

18. The antidumping issue is another important topic from the perspective of competition policy. Nonetheless, this paper does not address antidumping for the practical reason that this issue has sunk below the surface of WTO negotiations, as noted in Part III.

role in the launching of negotiations for a multilateral framework to enhance the contribution of competition policy to international trade and development.

II. INTERACTION BETWEEN TRADE AND COMPETITION POLICY

A. A Theoretical Dimension: Objectives of Trade and Competition Law & Policy

What is the general objective of trade policy? While there may be many possible answers, it is generally accepted that the main purpose of a state's trade policy is to regulate international trade for the purpose of furthering the economic interests of its own citizens.[19] The principal means to accomplish such an objective are free trade and market liberalization. Free trade means the elimination, or at least the reduction, of private and public barriers to market access—the introduction of foreign competition into domestic markets which ultimately results in an increase in consumer welfare and a more efficient allocation of the world's resources. At least theoretically, therefore, trade policy contributes to an increase in consumer welfare and economic efficiency.

Meanwhile, the objective of competition policy is to protect consumers and to promote "competition."[20] Historically, there has been much debate as to what end result one would actually accomplish through the protection of competition. An age-old disagreement regarding the ultimate goal of competition policy seems to have been generally narrowed down to economic efficiency or consumer welfare.[21] Promoting economic efficiency and consumer welfare through competition requires an open market free from entry barriers and the safeguarding of free trade and effective competition. In this sense, competition policy basically supports free trade and market liberalization.

In sum, trade policy enhances economic efficiency and consumer welfare through free trade and market liberalization, while competition policy advocates an open market and free trade in order to

19. *See 1998 Working Group Report*, *supra* note 7, ¶¶ 22–23.

20. *Cf. id.* ¶ 50.

21. *See id.* ¶ 48. For an in depth discussion of this issue, see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 90–115 (2d ed. 1993); Philip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 534–37 (1983).

achieve economic efficiency and consumer welfare. Accordingly, it can be said that both policies, by their nature, pursue identical goals and are mutually supportive of the other.[22]

In reality, however, conflicts may arise between trade law and policy and competition law and policy. As for trade policy, its objective—for example, protecting national welfare—should embrace the protection of both consumer and producer interests. Nevertheless, producers' interests are normally more politically influential and better organized than those of consumers and thus more evident in the actual implementation of trade policy tools. In contrast, the objective of competition law is not the protection of "producers." Rather, the protection of consumer welfare through competition is the overriding objective of competition law. Although there seems to be some debate regarding the definition of which "consumers" deserve protection under competition policy, one can safely say that it would clearly be contrary to the objective of competition policy to sacrifice the interests of individual consumers so as to promote the producers' interests only. In other words, the objective of competition policy is to protect "competition," not "competitors."[23] Thus, in practice, trade law and policy tends to be implemented so as to protect producers' interests, whereas competition law and policy primarily promotes consumers' interests. Of necessity, conflicts arise between these two policies.

There are other sources of conflict. First, if legal or policy measures are enforced in a way that deviates from their basic objectives, conflicts may arise. For example, export or import cartels are usually exempt from the application of national competition laws for certain

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22. *See 1998 Working Group Report*, *supra* note 7, ¶ 46.

23. *See* Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 320 (1962) (noting that "the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*"); *see also* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("[The objective of antitrust law] is not to protect businesses from the working of the market; it is to protect the public from failure of the market."). The current U.S. Department of Justice (DOJ) Antitrust Division also accepts this as a prevailing antitrust principle. *See* Deborah P. Majoras, Antitrust Going Global in the 21st Century, Speech Presented at the Federal Bar Association, Corporate and Association Counsels Division and American Corporation Counsel Association, Northeast Ohio Chapter (Oct. 17, 2002) (stating the need to "[p]rotect competition, not competitors."), *available at* http://www.usdoj.gov/atr/public/speeches/200418.htm (last visited Jan. 10, 2004); Charles A. James, International Antitrust in the 21st Century: Cooperation and Convergence, Speech Before the OECD Global Forum on Competition (Oct. 17, 2001) (stating that "no principle is more central to U.S. law that that antitrust protects competition, not competitors"), *available at* http://www.usdoj.gov/atr/public/speeches/9330.htm (last visited Jan. 10, 2004).

purposes, even though they might be anticompetitive.[24] However, such export or import cartels normally have a serious trade-restrictive effect, suggesting that they should be condemned from a trade policy perspective. Thus, a conflict arises between trade policy and competition laws that exempt such anticompetitive behaviors from their application. Another example on the trade policy side is antidumping measures. Antidumping measures, although explicitly allowable under certain conditions, may be perceived as a violation of the nondiscrimination principle that forms a fundamental cornerstone of the multilateral trade system. These antidumping measures, which are permitted under express conditions, may have anticompetitive effects on importing markets, and thus may be problematic when viewed under competition policy standards.[25]

Finally, conflict may arise because trade law and policy and competition law and policy each provide different standards for determining the legality of certain measures. For instance, vertical restraints that restrict the market entry of foreign exports, and as a result have trade-restrictive effects, are normally condemned under trade policy standards. In many cases, however, such vertical restraints may have procompetitive effects, and, as a result, may be lawful under competition policy standards.[26] In light of the foregoing, it can be said that trade law and policy and competition law and policy can be mutually supportive, but in practice may conflict with each other for many different reasons.[27]

B. A Historical Dimension: Coverage of Trade and Competition Law and Policy

1. *Historical Evolution of Competition Law.* This section shows how both competition law and policy and trade law and policy historically have developed along their own paths as well as how they have interacted with each other. Competition law has its roots in the

24. WTO Working Group on the Interaction between Trade and Competition Policy, *Report on the Meeting of 11–13 March 1998*, WT/WGTCP/M/4, ¶ 31 (June 24, 1998).

25. *See* Harvey M. Applebaum, *The Antidumping Laws—Impact on the Competitve Process*, 43 ANTITRUST L.J. 590, 600–02 (1974); Robert D. Willig, *Economic Effects of Antidumping Policy*, *in* BROOKINGS TRADE FORUM 57–79 (Robert Z. Lawrence ed., 1998).

26. *See 1998 Working Group Report*, *supra* note 7, ¶ 86.

27. For details on the theoretical relationship between trade and competition policies discussed in the WTO Competition Working Group, see WTO Working Group on the Interaction between Trade and Competition Policy, *Report on the Meeting of 27 and 28 November 1997*, WT/WGTCP/M/3, ¶¶ 4–7, 18–19 (Feb. 26, 1998).

Sherman Antitrust Act of 1890.[28] The Sherman Act was later supplemented by the Federal Trade Commission Act[29] and the Clayton Act.[30] U.S. citizens usually perceive antitrust law as a genuinely American law since it was first developed in the United States and has had an impact on the competition laws of virtually all other major trading partners. Up until the 1970s, U.S. antitrust law was mainly regarded as domestic law, and the antitrust authorities normally did not seek an international application of antitrust laws.[31] As the United States started suffering from trade deficits in the early to mid-1970s, U.S. antitrust authorities began to change their attitude toward the jurisdictional reach of antitrust law. In particular, with the sudden increase of Japanese exports into U.S. markets, U.S. antitrust authorities began to take a serious interest in the activities of foreign companies in foreign territories. This was due to then rising concerns that the U.S. trade deficit might be at least partially a result of the wrongdoings of foreign exporters within their own territories.[32] For instance, it was assumed that Japanese exporters colluded in price fixing within Japan, and that their collusive price fixing had an adverse impact on the U.S. market. As a result, there was a perceived need for U.S. antitrust authorities to enforce their own antitrust law against such foreign activities. This is a classic feature of the extraterritorial application of antitrust law.[33] Because extraterritorial application of antitrust law normally applies to activities involving exports or imports, one can describe such a phenomenon as the expansion of competition law into areas traditionally covered by trade law and policy.

More explicit interaction between competition law and policy and trade law and policy began to occur during the 1990s. The tradi-

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28. Sherman Act, 15 U.S.C. §§ 1–7 (2000).

29. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2000).

30. Clayton Act, 15 U.S.C. §§ 12, 13, 14–19, 20, 21, 22–27 (2000).

31. This can be evidenced by the fact that the U.S. Congress had not taken any legislative action for an international application of antitrust law until it enacted Foreign Trade Antitrust Improvement Act (FTAIA) in 1982, which set out the outer limit of US court jurisdiction on competition issues involving foreign commerce. *See* Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3) (2000).

32. This concern coincides with the legislative background for Section 301 of the Trade Act of 1974. Trade Act of 1974 §§ 301–310, 19 U.S.C. § 2411–31 (2000) (as amended) [hereinafter Section 301]. For background, *see generally* Seung Wha Chang, *Taming Unilateralism under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on United States Sections 301–310 of the Trade Act of 1974*, 31 L. & POL'Y INT'L BUS. 1151, 1153–58 (2000).

33. The *Alcoa* Case, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), was the first attempt at extraterritorial application. However, it was in the 1980s that extraterritorial application of antitrust law began drawing attention in connection with trade issues.

tional extraterritorial application of antitrust law as described above is typically aimed at preserving competition inside the U.S. market and therefore does not significantly differ from domestic antitrust enforcement in its goals. However, in the early 1990s U.S. antitrust authorities began to proclaim that the United States would apply its antitrust law to anticompetitive practices within foreign jurisdictions that restrict the access of U.S. exporters to foreign markets—the so-called "export-restraint" or "market access restraint" problem.[34] This clearly revealed U.S. antitrust authorities' willingness to use antitrust legislation for the purpose of furthering U.S. trade interests. The level of interaction between competition law and policy and trade law and policy intensified as antitrust law began functioning in a manner normally reserved for trade law. Nevertheless, due to the theoretical and practical limitations underlying this particular type of extraterritorial application of antitrust law, as discussed in Part IV of this paper, the United States appeared to resort to alternative policy tools as well.

First, the United States inserted a competition-related clause when amending Section 301 of the Trade Act of 1974,[35] which is traditionally regarded as representative of U.S. trade law for opening foreign markets.[36] This attempt can be viewed as having imbued Section 301 with "competition law and policy," thus fashioning it as a new weapon to open foreign markets. Nevertheless, the *Kodak-Fuji Film* dispute is a good illustration of the theoretical and practical limits of such an exercise.[37] In addition, the United States tried to set up international fora to discuss possible international cooperation to facilitate the extraterritorial application of antitrust law. These efforts culminated in the adoption by the OECD of a recommendation for cooperation on the international application of antitrust law.[38] In the same

34. The DOJ and the Federal Trade Commission (FTC) formally articulated this position in April of 1995. *See generally* DEP'T OF JUSTICE & FED'L TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, *at* http://www.usdoj.gov/atr/public/guidelines/internat.htm (last visited Jan. 10, 2004) [hereinafter 1995 DOJ/FTC GUIDELINES].

35. Section 301, 19 U.S.C. § 2411. *See supra* note 32.

36. *See* U.S. TRADE REPRESENTATIVE (USTR), THE PRESIDENT'S 1994 ANNUAL REPORT ON THE TRADE AGREEMENTS PROGRAM, *in* 1995 TRADE POLICY AGENDA AND 1994 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 17, 95–97 (1995) [hereinafter USTR, 1994 ANNUAL REPORT].

37. *See* discussion *infra* Part IV.C.

38. *See, e.g.*, OECD, *Draft Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade*, OECD Doc. C(95)130 (1995) (recommending "notification, exchange of information and co-

vein, the United States made efforts to enter into bilateral agreements with its major trading partners in order to secure assistance for the extraterritorial application of its antitrust law.[39] Nonetheless, due to the unilateral nature of the extraterritorial application, these efforts were often met with claims of infringement upon the other state's sovereignty and ultimately proved to be unproductive.[40]

As the foregoing unilateral efforts generally have proved to be unsatisfactory, the United States appears to have advocated the principle of "positive comity."[41] "Positive comity" generally refers to a form of cooperation where a country gives full and sympathetic consideration to another country's request that the former initiate an antitrust law enforcement in order to remedy conduct in its territory that is substantially and adversely affecting the latter's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests.[42] The United States in fact recently entered into a bilateral agreement concerning positive comity with the European Union (EU).[43] This agreement seems to be aimed at taking over the role of extraterritorial application of antitrust law, in particular, for export-restraint cases.[44] In addition, the United States recently took the initiative by leading discussions of positive comity in-

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ordination of action," in the extraterritorial application of Member countries' competition law and encouraging "consultation and conciliation" to deal with complaints of anticompetitive practices through indigenous competition law).

39. Such bilateral agreements were concluded with, for instance, Australia, Brazil, Canada, the European Commission, Germany, Israel, Japan, and Mexico. *See, e.g.*, Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956; Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 34 U.S.T. 388.

40. In fact, bilateral cooperation occurred in a few cases between the United States and other trading partners, *e.g.*, the European Union (EU) and Canada. In these cases, however, both parties had a mutual interest in resolving the dispute. Thus, these are not cases where the United States successfully sought cooperation from other trading partners in regard to a unilateral application of U.S. antitrust law to foreign activities. For a summary of these examples, see OECD Committee on Competition Law and Policy, *CLP Report on Positive Comity*, OECD Doc. DAFFE/CLP(99)19, ¶¶ 46–49 (June 14, 1999) [hereinafter *Report on Positive Comity*].

41. *See* discussion *infra* Part IV.D.

42. For an overview and definition of "positive comity," see generally *Report on Positive Comity*, *supra* note 40.

43. Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, 1998 O.J. (L173) 28 [hereinafter Positive Comity Agreement].

44. Press Release, FTC, United States and European Communities Sign Agreement on "Positive Comity" in Antitrust Enforcement (June 4, 1998), *at* http://www.ftc.gov/opa/1998/06/positive.htm (last visited Jan. 10, 2004).

side the OECD and has tried to build consensus for an international agreement on positive comity.[45]

What is the underlying reason for the United States' persistence in seeking extraterritorial application or arrangements for the international enforcement of antitrust law? Most fundamentally, this persistence is due to the divergent features characterizing substantive standards and enforcement levels of antitrust laws in individual countries. If all countries had identical substantive rules and levels of antitrust enforcement pursuant to a multilaterally agreed upon norm, no country would have any reason to apply its own antitrust law or to resort to positive comity. It strongly suggests that the United States should take a serious interest in pursuing a multilateral framework agreement on competition policy, even if just for the sake of addressing its own trade-related competition concerns.

2. *Historical Evolution of Trade Law.* It is generally accepted that the first trade-related multilateral legal instrument in the modern sense is the GATT 1947, which was born under the Bretton Woods system. This system originally envisioned the International Trade Organization (ITO) as an institution dealing with trade liberalization.[46] The so-called Havana Charter of the ITO not only dealt with public trade barriers but also addressed restrictive business practices functioning as private trade barriers.[47] Nevertheless, the Havana Charter did not enter into force, as there were only a few countries that actually ratified it. Thus, the GATT 1947, which was originally intended for only provisional application until the birth of the ITO, began to form the basis of the new multilateral trading system. The GATT 1947 was mainly concerned with the lowering of tariffs and the abolition of non-tariff trade barriers.[48] These concerns were addressed to a great extent throughout a series of trade negotiations, especially in the Uruguay Round (UR).[49]

However, the GATT system addressed only public trade barriers, not private trade barriers arising from anticompetitive practices

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45. *See, e.g.*, *Report on Positive Comity*, *supra* note 40.

46. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 278–84, 293–98 (3d ed. 1995).

47. Havana Charter for an International Trade Organization, Mar. 24, 1948, 1948 Can. T.S. No. 32, at 3, *available at* http://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm (last visited Jan. 10, 2004). The Havana Charter Chapter 5 has 9 Articles (arts. 46–54) under the title of "Restrictive Business Practices."

48. *See* JACKSON ET AL., *supra* note 46, at 298.

49. *See supra* note 5.

by private businesses. For instance, international cartels or anticompetitive practices by multinational companies were not addressed under the GATT system. Now that the UR has established the WTO and has expanded its scope of trade norms, the issue of private trade barriers has emerged once again. Assume that tariffs and non-tariff barriers had been abolished. Even so, if private enterprises collectively engaged in exclusionary practices against foreign competition without any governmental regulations, the success of the WTO/GATT system in eliminating public trade barriers would become meaningless. This is why the issue of how to address private trade barriers has drawn special attention. In other words, with increasing concerns regarding restrictive business practices functioning as trade barriers, trade law and policy began to show a special interest regarding the private restrictive business practices that had formerly been the exclusive domain of competition law and policy.[50]

Here one can raise the question of whether, and to what extent, the current WTO system can contribute to eliminating private trade barriers. First, this question can be rephrased as whether, and to what extent, current disciplines under the WTO Agreement can address anticompetitive business practices. Obviously, there is no special agreement under the WTO that deals exclusively and directly with restrictive business practices. It is true that a few provisions of some individual agreements under the WTO address restrictive business practices to some extent.[51] However, such provisions are normally declaratory in their legal nature, and therefore it is generally regarded as difficult to invoke such provisions in WTO dispute settlement. Thus, the WTO system as it currently exists appears to be an ineffective option to address restrictive business practices.[52]

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50. For a discussion of this trend, see *infra* Part IV.B–C.

51. Relevant provisions of the covered agreements include: Article 8.1 of the Agreement on Technical Barriers to Trade; Article 2 of the Agreement on Pre-shipment Inspection; Article 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Article 15.5 of the Agreement on Subsidies and Countervailing Measures; Articles 11.1(b) and 11.3 of the Agreement on Safeguards; Articles 8 and 9 of the General Agreement on Trade in Services; Article 40 of the Agreement on Trade-Related Aspects of Intellectual Property; and Article 9 of the Agreement on Trade-Related Aspects of Investment Measures. For a discussion of these provisions, see generally OECD Joint Group on Trade and Competition, *Competition Elements in International Trade Agreements: A Post Uruguay Round Overview of WTO Agreements*, OECD Doc. COM/TD/DAFFE/CLP(98)26/FINAL (Jan. 29, 1999).

52. The WTO Competition Working Group discussed this option and reached a similar conclusion. *See* WTO Working Group on the Interaction Between Trade and Competition, *Competition-Related Provisions in Existing WTO Agreements*, WGTC2RV1 (June 17, 1997).

Another possibility would be to apply WTO disciplines to the governmental measures that promote restrictive business practices. This possibility was tested in the *Kodak–Fuji Film* dispute.[53] Arguably, such practices or measures could be violations of required WTO obligations. In practice, however, as the WTO panel in the *Kodak–Fuji Film* dispute illustrates, there are still many obstacles to overcome in order to challenge anticompetitive practices under the GATT/WTO dispute settlement procedures.[54]

Because of such difficulties and the limits of the present WTO system in dealing with private trade barriers, establishing a new WTO agreement that would directly address anticompetitive practices would be a better approach. An example of such an agreement may be called a Market Access Code or a Trade-Related Competition Code that directly and explicitly deals with the anticompetitive practices that have restrictive effects on market access, possibly modeled on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[55]

The foregoing analysis illustrates how trade law and policy have theoretically and historically interacted with competition law. What follows is a historical overview showing how the issue of the interaction between trade and competition policy has actually emerged below the surface of relevant international institutional settings.

III. A HISTORICAL SURVEY OF INTERNATIONAL DEBATES ON THE INTERACTION ISSUE

The OECD began the discussion on the interaction between trade and competition laws and policies in the early 1980s.[56] At that time, the discussion focused on how to facilitate bilateral cooperation for the international application of competition law.[57] Thereafter, the

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53. *See generally* Dispute Settlement Body Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (Mar. 31, 1998), *reprinted in* 5 BERNAN'S ANNOTATED REP. 27 (1999) [hereinafter Japan—Film and Paper].

54. *See* discussion *infra* Part IV.C.

55. For discussions of these models, see generally Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 14, n.72 (1997).

56. *See generally* COMPETITION AND TRADE POLICIES, *supra* note 2; *see also* WTO Competition Working Group, *Communication from the OECD*, WT/WGTCP/W/21, ¶ 2 (July 29, 1997).

57. For a general description of this move, see Maria-Chiara Malaguti, *Restrictive Business Practices in International Trade and the Role of the World Trade Organization*, J. WORLD TRADE, Vol. 32, No. 3, June 1998, at 117 (1998).

discussion subjects were expanded to include the interaction between trade law and policy and competition law and policy.

In the middle of the Uruguay Round negotiations, which began in the late 1980s, the EC for the first time officially voiced the need for the discussion of competition-related matters.[58] In effect, the EC claimed that the absence of an agreement on competition-related issues would only lead to a partial fulfillment of the goal of liberalizing trade under the multilateral trading system. To that end, the EC proposed addressing competition issues under the umbrella of the WTO, pointing to the fact that anticompetitive practices may function as private trade barriers.[59] In addition, a scholarly group, called the Munich Group, submitted a draft International Antitrust Code to the Uruguay Round negotiation forum for consideration as a draft plurilateral agreement to be incorporated into the WTO Agreement.[60] Yet this draft code was never put on any official negotiation table, and any gains in the Uruguay Round negotiations *vis-à-vis* competition policy were limited to a few provisions addressing competition-related matters that were individually inserted into the covered agreements of the WTO.[61]

The EC's efforts have continued, however, after the birth of the WTO. While preparing for the Singapore Ministerial Conference held in December 1996, the EC again argued for discussing competition-related issues in the WTO and, ultimately, for formulating a multilateral agreement on trade-related competition policies.[62] The so-called "Like-Minded Countries" supported the EC's position.[63] The Like-Minded Countries include—in addition to the EC—Japan, Ko-

58. Leon Brittan, A Framework for International Competition, Address at World Competition Forum (Feb. 3, 1992), *reprinted in* 3 INT'L ECON. INSIGHTS 21 (1992).

59. For a similar proposal, see WTO Competition Working Group, *Communication by the European Community and its Member States*, WT/WGTCP/W/62, ¶¶ 12–13 (Mar. 5, 1998).

60. For further elaboration of this "Munich Code" see *Special Report: International Antitrust Code Will be Studied by GATT Members*, 65 ANTITRUST & TRADE REG. REP. (BNA) 259 (1993). *See also* Ernst-Ulrich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System—Proposals and Trade Options*, *in* TOWARDS WTO COMPETITION RULES 43, 48–49 (Roger Zäch ed., 1999).

61. *See supra* note 51 and accompanying text.

62. WTO Competition Working Group, *Communication from the European Community and Its Member States*, WT/WGTCP/W/152, ¶¶ 1–4 (Sept. 25, 2000).

63. *See generally* WTO Competition Working Group, *Communication from the European Community and Its Member States*, WT/WGTCP/W/78 (July 7, 1998); WTO Competition Working Group, *Communication from Japan*, WT/WGTCP/W/92 (Sept. 21, 1998); WTO Competition Working Group, *Communication from the Republic of Korea*, WT/WGTCP/W/90 (Sept. 3, 1998); WTO Competition Working Group, *Communication from Hong Kong, China*, WT/WGTCP/W/85 (Aug. 27, 1998).

rea, Switzerland, Norway, Canada, and Hungary. The Like-Minded Countries, however, did not share the same view on whether to deal with antidumping measures in the same forum where the interaction between trade and competition policy would be discussed or how such a discussion should proceed. In other words, whereas the EC took the modest view that this issue need not be included in the working agenda for the WTO Competition Working Group, other Like-Minded Countries—such as Japan, Korea, and Hong Kong, in particular—aggressively argued for the inclusion of antidumping issues among the items to be included in the WTO Competition Working Group's mandate.[64] Essentially, the latter countries attempted to take advantage of this forum to implement fundamental reform in the current antidumping regimes under the WTO by addressing the anti-competitive aspects of antidumping measures.[65]

The United States has not ruled out the possibility of the WTO's role in the area of competition policy, but is very hesitant to engage in negotiations on competition policy as a separate item for a possible future agreement under the WTO system.[66] This hesitancy on the part of the United States is not without reason. Above all, if antidumping issues were to be included in the discussion items, this inclusion would not necessarily benefit the United States in light of the well-known fact that the United States has traditionally enforced antidumping measures more than any other WTO Member.[67] In addition, the United States seems to be concerned that the codification of competition rules at the WTO level would result in the contamination of antitrust "purity" and a compromise in substantive standards for antitrust regulations so as to make them available for other develop-

64. *See generally* documents referenced *supra* note 63.

65. *See* Seung Wha Chang, *Like Father, Like Son: A Progeny of the Antidumping Model for the Shipbuilding Industry*, 24 MICH. J. INT'L L. 807, 819 (2003).

66. The then Acting Assistant Attorney General for Antitrust, Joel Klein, made this position clear in his speech right before the opening of the Singapore Ministerial Conference. *See* Joel I. Klein, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Remarks before the Royal Institute of International Affairs (Nov. 18, 1996), *available at* http://www.usdoj.gov/atr/public/speeches/jikspch.htm (last visited Jan. 10, 2004); *see also* WTO Competition Working Group, *Communication from the United States*, WT/WGTCP/W/88 (Aug. 28, 1998).

67. From 1995 to the first half of 2003, the United States has reported 308 Antidumping Notifications to the WTO. This is more than any other member except India, which reported 344 Antidumping Notifications during that period. Statistics on Antidumping Notifications are available at the World Trade Organization's website, http://www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.xls (last visited Jan. 10, 2004).

ing countries.[68] Many developing countries have no competition law at all or adopt relatively lenient standards for domestic competition law.[69] Further, the United States appears to take the position that, compared to multilateral negotiations at the WTO, alternative legal tools, all either unilateral or bilateral in nature, can more realistically and effectively resolve competition-related trade concerns.[70] Such tools include the extraterritorial application of antitrust law, the competition clause of Section 301 of the 1974 Trade Act,[71] the WTO dispute settlement procedures, and bilateral cooperation for international enforcement—for instance, positive comity.[72] As shown in Part IV, U.S. antitrust authorities actually have implemented such tools, without much success.

Developing countries appear to be in agreement with the United States in their stance on the negotiation of competition policy at the WTO, but for differing reasons. In general, developing countries believe that it is too early for them to participate in multilateral negotiations on competition policy at a time when most have not yet enacted domestic competition law, and the limited body that does exist in these countries is at an early, incipient stage.[73] On the other side of the coin, however, developing countries could take advantage of this opportunity to discuss competition issues at the WTO in order to set the legal framework for regulating anticompetitive activities of those multinational corporations that have had an adverse effect on their domestic markets.[74] In any event, developing countries seem to have

68. *See* Klein, *supra* note 66. Klein also stated that "we must guard against a lowest-common-denominator outcome in the development of competition rules by the WTO." *Id.*

69. Among the WTO members, around eighty members have adopted some type of competition law. *See* Julian L. Clarke & Simon J. Evenett, *A Multilateral Framework for Competition Policy*, *in* THE SINGAPORE ISSUES AND THE WORLD TRADING SYSTEM: THE ROAD TO CANCUN AND BEYOND 77, 84–87 (State Secretariat of Economic Affairs & Simon J. Evenett eds., 2003), http://www.worldtradeinstitute.ch/research/The%20Singapore%20Issues.pdf (last visited Jan. 10, 2004).

70. For more recent speeches of U.S. antitrust officials that reconfirmed this position, see generally Fox, *supra* note 55.

71. *See supra* note 32 and accompanying text.

72. *See infra* Part IV.

73. *See, e.g.*, WTO Competition Working Group, *Report on the Meeting of 10–11 June 1999*, WT/WGTCP/M/9, ¶¶ 30–31 (Aug. 4, 1999).

74. *See, e.g.*, WTO Competition Working Group, *Report on the Meeting of 27 and 28 November 1997*, WT/WGTCP/M/3, ¶ 22 (Feb. 26, 1998); WTO Competition Working Group, *Submission by the European Community and Its Member States*, WT/WGTCP/W/45, ¶¶ 6–7 (Nov. 24, 1997).

some reservations at the moment about moving towards the negotiation of a multilateral agreement on competition law and policy.[75]

Against this background, issues on the interaction between trade and competition policy at the WTO were the subject of heated debate at the Doha Ministerial Conference.[76] Not surprisingly, the EC had submitted various proposals to the WTO Competition Working Group and took a leading role.[77] The Like-Minded Countries basically agreed with the EC, but argued for the inclusion of antidumping issues.[78] The United States obviously disagreed and reconfirmed its pessimistic view of the WTO's ability to effectively deal with competition policy matters as an independent subject for future negotiations.[79] During the final stage in its preparation for the Doha Ministerial Conference, the United States conceded somewhat and agreed to discuss the interaction between trade and competition policy at the WTO, while assuming that antidumping issues would not be discussed at this competition-related negotiation.[80] Japan and other Like-Minded Countries took a more flexible approach and accepted the U.S. proposal that the Doha Declaration not explicitly mention antidumping issues under the negotiation item Interaction Between Trade and Policy. This compromise made it possible for WTO Members to agree on the language of the Ministerial Conference, in particular, Interaction Between Trade and Competition Policy.[81]

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75. *See, e.g.*, WTO Competition Working Group, *Communication from Colombia*, WT/WGTCP/W/162, ¶¶ 3–6, 9–12 (July 3, 2001).

76. *See Investment, Competition Proposals from EU and Japan Face New Attack*, INSIDE U.S. TRADE, Nov. 11, 2001.

77. *See generally* WTO Competition Working Group, *Communication from the European Community and Its Member States*, *supra* note 62.

78. *See* WTO Competition Working Group, *Communication from the European Community and Its Member States*, *supra* note 63; *WTO Stalled in Effort to Resolve Declaration Differences*, INSIDE U.S. TRADE, Nov. 13, 2001.

79. *See U.S. Official Downplays EU Priority Issues in New WTO Negotiations*, INSIDE U.S. TRADE, Nov. 9, 2001.

80. U.S. opinion on antidumping and competition policy can be found at USTR, THE PRESIDENT'S 1999 ANNUAL REPORT ON THE TRADE AGREEMENTS PROGRAM, *in* 2000 TRADE POLICY AGENDA AND 1999 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 27, 135–37 (2000), http://www.ustr.gov/wto/99ustrrpt/ustr99_wgtcp.pdf (last visited Jan. 10, 2004).

81. In addition, the U.S. successfully inserted into a section of the Doha Ministerial Declaration on WTO Rules the following language:

> In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while *preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives,* and taking into account the needs of developing and least-developed participants.

As with recent progress in the WTO Competition Working Group's work under the Doha mandate, the United States seems to realize that there is some merit to the WTO's work on competition policy matters.[82] Nevertheless, the United States still appears to perceive the role of the WTO in this regard as a supplementary means to facilitate unilateral or bilateral efforts to enforce U.S. antitrust laws. In the Cancun Ministerial Conference, the United States clearly took a pessimistic view on building WTO Member consensus on the modalities of future negotiations on the interaction between trade and competition policy.[83] This position can also be observed in recent U.S. activities relating to international competition policy outside the WTO context. While arguing that the "competition culture" is a precondition for negotiating any competition-related rules in a multilateral setting, in 2001 the United States established, outside the purview of the WTO, an international forum called the International Competition Network (ICN), under which international competition issues are discussed.[84] The International Competition Policy Advisory Committee, established in 1997 as an advisory body to the Antitrust Division of the Department of Justice (DOJ), conducted a two year research program and submitted a lengthy report on competition policy for international operations.[85] It recommended establishing an international body under U.S. leadership.[86] The ICN is aimed at discussing purely antitrust matters and is a project- and result-oriented forum. The result of such discussions would normally be in the form

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Doha Ministerial Declaration, *supra* note 9, ¶ 28 (emphasis added). This language makes it very difficult to provide a voice for the fundamental reform of antidumping regimes even in the negotiation forum for interaction between trade and competition policy.

82. *See* WTO Competition Working Group, *Communication from the United States*, WT/WGTCP/W/204, ¶ 8 (Aug. 15, 2002); *see also* Alexander Schaub, Cooperation in Competition Policy Enforcement between the EU and the U.S. and New Concepts Evolving at the World Trade Organization and the International Competition Network, Speech before the Mentor Group of the European Commission (Apr. 4, 2002), at 4–5, *at* http://europa.eu.int/comm/competition/speeches/text/sp2002_013_en.pdf (last visited Jan. 10, 2004).

83. *See Latest Declaration*, *supra* note 15.

84. The International Competition Network (ICN), Network of Competition Law Authorities established in 2001, will seek to provide antitrust authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition issues. The focus will be on improving world-wide cooperation and on enhancing convergence through focussed dialogue. The ICN website includes information about the Network, Working Group details, Member information, Conference information, news and events, and a subscription service at http://www.internationalcompetitionnetwork.org/ (last visited Jan. 10, 2004).

85. *See* Merit E. Janow et al., Open letter of February 28, 2000, introducing the FINAL REPORT, *supra* note 1.

86. *See* FINAL REPORT, *supra* note 1, at 281–85.

of non-binding guidelines or recommendations of model practices.[87] Currently, the ICN is focusing on the convergence of transborder merger review mechanisms and the antitrust agency's competition advocacy role.[88] Although the ICN's mission would not appear to cover trade issues, the prominent role of the United States in the ICN clearly indicates that it would prefer solving international competition issues outside the purview of the WTO.

The foregoing analysis indicates that, unless the United States changes its negative or passive attitude towards a multilateral negotiation on the interaction between trade and competition policy, it would be unrealistic for the WTO to successfully move forward to launch such a multilateral negotiation. In order to persuade the United States to change its position, it is first necessary to show why other non-WTO alternative policy tools, which the United States has relied upon thus far, cannot be valid options to effectively address U.S. trade concerns arising at the interface between trade and competition policy. Part IV takes on such a mission.

IV. ALTERNATIVE APPROACHES AND THEIR LIMITATIONS

A. Extraterritorial Application of U.S. Antitrust Law

Until recently, the United States' extraterritorial application of antitrust law had been based on two jurisdictional rules, one being the "effects doctrine"[89] and the other being the "jurisdictional rule of reason."[90] However, the majority opinion of the Supreme Court in the *Hartford Insurance* case seemed to adopt the effects doctrine, with

87. For a summary of the ICN's goal and its progress by the present Deputy Assistant Attorney General for Antitrust, *see* Majoras *supra* note 23.

88. President's Council of Economic Advisers, *Economic Organization and Competition Policy*, 19 YALE J. ON REG. 541, 580 (2002). *See also supra* note 87.

89. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443–44 (2d Cir. 1945) ("[It] is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other sates will ordinarily recognize.").

90. *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613–15 (9th Cir. 1976), *aff'd*, 749 F.2d 1378, 1382–86 (9th Cir. 1984). The core element of this jurisdictional rule of reason is that it requires the U.S. court to consider not only the U.S. interest in exercising jurisdiction, but also foreign interests that may be adversely affected by the U.S. court's exercise of its jurisdiction. *See* James G. Park, *Extraterritorial Impact of the United States Antitrust Laws and Commercial Bribery Considerations*, 1 DICK. J. INT'L L. 105, 108 (1982).

strong dissenting opinions.[91] In any event, the currently prevailing rule is that even if the illegal act occurs outside U.S. jurisdiction, if it has a direct, serious and foreseeable effect on U.S. trade, and the actor intended this consequence, U.S. courts can exercise jurisdiction over such actions.[92]

Extraterritorial application of antitrust law normally occurs in cases where anticompetitive practices within foreign jurisdictions adversely affect U.S. markets and U.S. consumers. The DOJ, in its Antitrust Enforcement Guidelines for International Operations of 1988 declared in a footnote that "the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices."[93] However, in 1992 the DOJ dropped footnote 159 and declared that extraterritorial application would also be possible in cases where an anticompetitive activity harms U.S exporters' interests, for example, when the activity functions as a private trade barrier to U.S. exports into a foreign market, whether or not there is direct harm to U.S. consumers.[94] The 1995 DOJ/FTC Guidelines also confirmed this position.[95] In this connection, one needs to look at the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA).[96] The FTAIA set the outer limit of U.S. court jurisdiction over competition-related conduct involving trade or commerce. In the case of a U.S. enterprises' exports, U.S. antitrust law would apply if the anticompetitive conduct has a direct, substantial, and reasonably foreseeable effect on such export trade.[97] It

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91. *See* Hartford Fire Ins. Co. v. Cal., 509 U.S. 764 (1993). Some scholars take the view that this Supreme Court decision did not exclude the possibility to apply jurisdictional rule of reason in different future cases. *See* Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 49 (1995).

92. *See Alcoa*, 148 F.2d at 443–44. The 1995 DOJ/FTC GUIDELINES also state that if the concerned action (1) has a "direct, serious and reasonably foreseeable effect" on U.S. exports of goods and services, and (2) is subject to the jurisdiction of U.S. courts, the U.S. will apply its own antitrust law. 1995 DOJ/FTC GUIDELINES, *supra* note 34, § 3.122.

93. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, *reprinted in* 55 ANTITRUST & TRADE REG. REP. (BNA), at S-21 n.159 (Spec. Supp. 1988) [hereinafter 1988 GUIDELINES].

94. Press Release, Dep't of Justice, Department of Justice Policy Statement Regarding Anticompetitive Conduct That Restricts U.S. Exports: Statement of Antitrust Policy (Apr. 3, 1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,108.

95. 1995 DOJ/FTC GUIDELINES, *supra* note 34, § 3.112.

96. FTAIA, 15 U.S.C. § 6a (2000).

97. FTAIA Section 6a provides as follows:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect: (A) on trade or commerce which is not

should be noted, however, that the FTAIA deals with jurisdictional matters only, not the substantive rules for determining the illegality of contested activities.[98]

When addressing market-restraint cases involving U.S. exporters' interests, the 1995 DOJ/FTC Guidelines do not make a distinction between jurisdictional rules and substantive rules.[99] In other words, U.S. antitrust authorities seem to take the position that the substantive rules of U.S. antitrust law can successfully apply to export-restraint cases without difficulty. In the author's view, the position of the U.S. antitrust authorities is wrong. There arise serious theoretical and practical problems when extraterritorial application is to be undertaken with the purpose of safeguarding the interests of U.S. exporting companies rather than U.S. consumers.

First, this position is not consistent with the objective of U.S. antitrust laws to preserve and to foster competition and thereby promote consumers' interests.[100] In this context, "consumers" mean U.S. consumers. Should the U.S. antitrust law apply to conduct affecting U.S. export commerce for the purpose of opening foreign markets, it would be inconsistent with the basic objective of U.S. antitrust law, since relevant consumers in such cases are normally foreign consumers in foreign markets. U.S. consumers are normally irrelevant in this export-restraint context.[101] The only relevant U.S. interest is an opportunity for U.S. enterprises to increase their export activity in foreign markets. However, U.S. antitrust law is intended to protect consumers' interests by promoting competition; yet it would not serve that purpose when it is used solely to protect U.S. businesses in international competition.[102] Therefore, it can be concluded that extraterritorial application of U.S. antitrust law cannot be legitimately sustained when it is applied to export-restraint cases, unless the interests

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> trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; (2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.

The FTAIA also amended the jurisdictional rules of the Federal Trade Commission Act. *See* 15 U.S.C. 45(a)(3) (2000).

98. *See* H.R. REP. No. 97-686, at 13 (1982).

99. *See* 1995 DOJ/FTC GUIDELINES, *supra* note 34, § 3.112.

100. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); *see also* Spectrum Sports, Inc. v. McQuillan, 506 U.S 447, 458 (1993).

101. For the same criticism of the 1995 DOJ/FTC GUIDELINES, see *Report on Positive Comity*, *supra* note 40, ¶ 41.

102. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

of U.S. consumers are affected.[103] Should the U.S. court change its traditional rules and affirmatively apply U.S. antitrust law to export-restraint cases in order to protect U.S. exporters' access to foreign markets, it would not be able to avoid criticism that it has adopted double standards in antitrust enforcement. The 1995 DOJ/FTC Guidelines do not explicitly address this point, however, it is worth noting that they do declare the following principles:

> The Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further non-antitrust goals. Once jurisdictional requirements, comity, and doctrines of foreign governmental involvement have been considered and satisfied, the same substantive rules apply to all cases.[104]

According to the principles above, there should not be double standards for domestic and extraterritorial applications. In addition, it should be noted that Diane Wood, then Deputy Assistant Attorney General for DOJ, Antitrust Division, stated that although antitrust enforcement may contribute to opening foreign markets in the long run, this effect is only an incidental result and should be differentiated from the basic objectives of antitrust law.[105] In her own words, the ultimate goal of antitrust law is to serve "consumer welfare, allocative efficiency, or the protection of competitive process, not particular competitors."[106] More recently, Wood's successors reconfirmed this position, while declaring that the purpose of antitrust law is to "[p]rotect competition, not competitors."[107] Lastly, one should note

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103. In practice, it would seem extremely unlikely for export-restraint cases to involve the interests of U.S. consumers.

104. 1995 DOJ/FTC GUIDELINES, *supra* note 34, § 2, pmbl. It is interesting that these principles were added to the final text of the 1995 DOJ/FTC GUIDELINES after receiving comments on the draft Guidelines that they might serve non-antitrust goals, for instance, protecting U.S. exporters' trade interest.

105. Diane P. Wood, Antitrust: A Remedy for Trade Barriers?, Address at the International Conference sponsored by the University of Washington Asian Law Program and Japan Information Access Project (Mar. 24, 1995), *at* http://www.usdoj.gov/atr/public/speeches/950324dw.txt (last visited Jan. 10, 2004).

106. *Id*. Wood confirmed her position in another place. *See* Diane P. Wood, The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, Address at the ABA Antitrust Section Spring Meeting (Apr. 5, 1995) ("Speculation or assumptions that antitrust enforcement can somehow incorporate non-antitrust goals are either misguided or wrong. Only when we believe that a substantive antitrust violation has occurred—either in domestic or foreign commerce—do we act."), *at* http://www.usdoj.gov/atr/public/speeches/950405dw.htm (last visited Jan. 10, 2004).

107. *See* Majoras, *supra* note 23. While citing relevant Supreme Court Decisions, such as *Northern Pacific Railway*, 356 U.S. 1 (1958) and *Spectrum Sports*, 506 U.S. 447 (1993), the former Assistant Attorney General for Antitrust Division, Charles A. James also expressed the

that the 1995 DOJ/FTC Guidelines are exactly that—mere guidelines. They are not the law itself, and therefore, they are not binding upon the court.[108] The foregoing analysis suggests that although the United States has jurisdiction over export-restraint cases under the FTAIA, contested conduct would rarely violate U.S. antitrust law since such conduct normally does not affect U.S. consumers' interests.

As a practical matter, foreign governments would likely be unwilling to cooperate with U.S. antitrust authorities in such matters as export-restraint cases that involve their own consumers' interests.[109] It would be very difficult for the extraterritorial application of antitrust law to be successful without cooperation on the part of the foreign countries in which anticompetitive practices occurred. For instance, relevant evidence is normally within the territories of foreign countries. Moreover, even after obtaining favorable court judgments in the United States, it would likely be impossible to enforce such judgments within the foreign jurisdiction without the cooperation of foreign governments.

In light of the theoretical and practical limitations discussed above, it is not surprising that one can hardly find an example of the extraterritorial application of antitrust law to export-restraint cases.[110] Although the United States did not openly admit such limitations, it has resorted to other policy options. The *Kodak–Fuji Film* dispute is a typical example of an export-restraint case where the United States actually resorted to the use of Section 301 rather than the extraterritorial application of its antitrust law.

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same position. *See supra* note 23 (stating that "no principle is more central to U.S. law than that antitrust protects competition, not competitors" and that "the purpose of the antitrust laws 'is not to protect business from the working of the market; it is to protect the public from failure of the market'").

108. 1995 DOJ/FTC GUIDELINES, *supra* note 34, § 1 ("[The 1995 Guidelines] are intended to provide antitrust guidance to businesses engaged in international operations on questions that relate specifically to the Agencies' international enforcement policy.").

109. For instance, there are many countries that have legislation which blocks extraterritorial application of foreign laws. The United Kingdom, France, Netherlands, Switzerland, Canada, New Zealand, and Australia have such blocking statutes. For a more detailed review of these statutes, see generally Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982).

110. Some cite the *Pilkington* Case, United States v. Pilkington PLC, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994), as an example. However, it is not an appropriate example because the anticompetitive practices at issue in this case directly affected the U.S. market as well, and consequently the protection of U.S. exports was not the sole purpose of the extraterritorial application of antitrust law in this case. In other words, in this case, the relevant market was the worldwide market.

B. The Competition Clause of Section 301

U.S. Section 301 of the Trade Act of 1974 is the United States' most powerful weapon to open foreign markets when it perceives that unfair foreign trade practices are restricting U.S. exports.[111] Section 301 had been reinforced by a series of amendments until the 1994 Uruguay Round Agreement Act. The basic structure of Section 301 may be summarized as follows: First, if a foreign state denies the rights of the United States arising from a trade agreement, or if a foreign act, policy or practice violates or is not in conformity with trade agreements or denies the interests of the United States, or is unjustifiable and burdens or restricts U.S. trade, the U.S. Trade Representative (USTR) is required to take action under Section 301.[112] Second, if a foreign act, policy or practice is unreasonable or discriminatory and burdens or restricts U.S. commerce, the USTR may take action under Section 301.[113]

The wording in Section 301 that has relevance to competition policy is "unreasonable" foreign actions, policies or practices. In an attempt to utilize Section 301 to supplement antitrust law as a way of eliminating restrictive business practices and thereby opening foreign markets, a 1988 amendment expanded the scope of the definition of "unreasonable." The definition now includes toleration by foreign governments of systematic anticompetitive activities by private enterprises in the foreign country that have the effect of restricting access of U.S. exports to a foreign market.[114] In a recent amendment under

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111. *See* Section 301 of the 1974 Trade Act, 19 U.S.C. § 2411 (2000).

112. *Id*. 19 U.S.C. § 2411(a). There are of course exceptions to this mandate. Therefore, the USTR does retain some discretion in applying measures under Section 301.

113. *Id*. 19 U.S.C. § 2411(b).

114. *Id.* 19 U.S.C. § 2411(d)(3)(B) reads in relevant part:

> (B) Acts, policies and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which
>
> (i) denies fair and equitable
>
> . . . .
>
> (IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market.

One of the proposals for the 1988 amendment was to define anticompetitive activities by private enterprises as violations of Section 301. However, facing criticisms that this would impair the nature of Section 301 as a trade norm, such a proposal failed to reach Congress. *See* Judith Hippler Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendment to Section 301*, *in* AGGRESSIVE UNILATERALISM 49, 73–74 (Jagdish Bhagwati & Hugh Patrick eds., 1990).

the 1994 Uruguay Round Agreement Act, the Clinton administration further strengthened this aspect of the competition clause.[115]

Nonetheless, the competition clause of Section 301 had not actually been invoked until the 1994 *Japan–U.S. Auto Parts* case.[116] Shortly after the resolution of this case in July of 1995, the USTR invoked Section 301 on the ground that the Japanese government had tolerated anticompetitive actions by Fuji, such as restricting distribution channels that limited the access of Kodak film exports into the Japanese market.[117] In the end, this Section 301 investigation was frustrated because the Japanese government argued that since the WTO system did not directly address competition policy matters, such issues remained a matter of domestic sovereignty. In the same vein, because the United States touched on domestic Japanese issues with unilateral measures such as Section 301, the Japanese government decided not to respond to any requests from the United States under the Section 301 procedures.[118] At the same time, the Japanese government initiated antitrust investigation procedures under its own antitrust law, concluding that the challenged practices did not violate its antitrust law.[119] As noted, the competition clause of Section 301 can be invoked only when there is "toleration" by the foreign government of activities in violation of such foreign country's antitrust law. Since the Japanese government formally investigated and then concluded that no violation of Japanese antitrust law existed, it was difficult to interpret such a situation as "toleration" under the compe-

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115. *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. DOC. NO. 103-316, at 656, 1027–36 (Sept. 27, 1994), *available at* http://www.ipmall.info/hosted_resources/lipa/copyrights/Selected%20Provisions%20of%20the %20Statement%20of%20Administrative%20Act.pdf (last visited Jan. 10 2004).

116. Initiation of Section 302 Investigation and Request for Public Comment: Barriers to Access to the Auto Parts Replacement Market in Japan, 59 Fed. Reg. 52,034 (Oct. 13, 1994) ("[Japanese regulations] support and work in combination with market restrictive practices by Japanese auto companies and parts distributors substantially to limit foreign access . . . ."). *See also* USTR, 1994 ANNUAL REPORT, *supra* note 36, at 97; U.S. DEP'T OF STATE, JAPAN: 1994 COUNTRY REPORT ON ECONOMIC POLICY AND TRADE PRACTICES BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, *at* http://dosfan.lib.uic.edu/ERC/economics/trade_reports/1994/ Japan.html (last visited Jan. 10, 2004).

117. *See* Section 304 Determinations: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 61 Fed. Reg. 30,929 (June 18, 1996); Initiation of Investigation Pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 60 Fed. Reg. 35,447 (July 7, 1995).

118. *See Japan Will Not Negotiate Fuji Case Under Section 301, Hashimoto Says*, INSIDE U.S. TRADE, Sept. 20, 1995.

119. *See JFTC Report Finds Japan Film Market Free of Anticompetitive Practices*, INSIDE U.S. TRADE, July, 25, 1997, at 10–11.

tition clause unless the Japanese government decision was clearly contrary to its own law.

This case illustrates the inherent weakness of the competition clause of Section 301 in addressing U.S. exporters' market access concerns. Faced with the inadequacy of the Section 301 competition clause, the United States turned to another option—the WTO dispute settlement procedures.[120]

C. WTO Dispute Settlement and Competition Issues

As noted, the extraterritorial application of antitrust law and the Section 301 competition clause were found to be ineffective tools for the resolution of export-restraint cases. The United States then resorted to the WTO dispute settlement process, hoping to effectively address private anticompetitive practices in the *Kodak–Fuji Film* dispute.

The most critical issue in this case was whether a "non-violation complaint" under GATT Article XXIII.1(b)[121] could be a valid channel for subjecting competition-related governmental measures to WTO dispute settlement in general. This legal question remains vital because no agreement under the WTO framework directly addresses competition policy and thus there are no legally binding WTO obligations for Members to preserve competition.[122] The WTO panel made

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120. For the history and legal issues of the *Kodak–Fuji Film* dispute, see William H. Barringer, *Competition Policy and Cross-Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute*, 6 GEO. MASON L. REV. 459 (1998).

121. Article XXIII.1(b) of the GATT, *supra* note 3, at 39, states as follows:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> . . . .
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, . . .

This action is called "non-violation complaint," since it does not require proving a violation of certain obligations under the GATT. For a general explanation of the meaning of non-violation complaints, see generally JACKSON, *supra* note 46, at 357–64.

122. In this case, the U.S. also invoked violation complaints pursuant to Article XXIII:1(a) of the GATT, claiming inconsistencies of contested measures with Article III.4 and Article X:1 of the GATT. Nonetheless, in the process of the panel proceedings, both parties noticed that the violation complaints would not fit competition-related measures, and instead devoted "the lion's share of their arguments" to non-violation complaints. *See generally Japan—Film and Paper*, *supra* note 53, ¶ 10.27. Not surprisingly, the panel found that the United States failed to demonstrate that the contested measures were inconsistent with Article III:4 (requiring that imported products receive "treatment no less favourable" than domestic products) and Article X:1 (requiring publication and effective administration of "[l]aws, regulations, judicial decisions and

it clear that there was no legal reason to disallow the invocation of non-violation complaints against competition-related governmental measures.[123] The text of Article XXIII:1(b) of GATT requires a complaining party to demonstrate three elements in order to prevail on non-violation claims: (1) application of a measure by a WTO Member, (2) a benefit accruing under the relevant agreement, and (3) nullification or impairment of the benefit as a result of the application of the measure.[124]

For the first element, the complaining party is required to prove the existence of an "application by [a WTO Member] of any measure,"—a *governmental* measure.[125] Thus, the textual language of Article XXIII:1(b) makes it clear that a purely private measure is not subject to the WTO dispute settlement procedures. For this reason, the United States argued that Fuji's anticompetitive activities originated from government measures, or that at the very least the government intervened in such activities.[126] The United States pointed largely to three types of policies characteristic of the Japanese film market: the distribution system; the large store law; and sales restriction measures. The panel considered that the mere fact that an action is taken by a private party does not necessarily rule out the possibility that there exists a governmental measure for purposes of Article XXIII:1(b) if there is a sufficient degree of governmental intervention.[127] Although the panel tried to envision some objective criteria for this determination while endorsing the *Japan—Semiconductor* panel's ruling, it ultimately held that it was difficult to establish bright-line rules in this regard, and suggested examination on a case-by-case basis.[128] The panel's application of this case-by-case approach

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administrative rulings of general application" relating to trade) of the GATT. *Id.* ¶¶ 10.402–10.404.

123. *Id*. ¶¶ 10.38–10.39.

124. *Id*. ¶ 10.61. The Report cites GATT Dispute Panel Report on 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 (1990); GATT Dispute Panel Report on Australian Subsidy on Ammonium Sulphate, GATT B.I.S.D. (Vol. II) at 188, 192–93 (1952). *Id.* ¶ 10.61.

125. GATT art. XXIII:1(b).

126. *Japan—Film and Paper*, *supra* note 53, ¶¶ 10.41–10.42.

127. *See id*. ¶¶ 10.52–10.56.

128. *See id*. ¶ 10.56; *see also* GATT Dispute Panel Report on Japan—Trade in Semi-Conductors, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 116 (1989) [hereinafter Japan—Semi-Conductors]. Under this *Japan—Semi-Conductors* test, a government measure would exist if an anticompetitive activity of a private entity depends upon a governmental decision, and the government provided an incentive for a private entity to carry out such activities. *See Japan—Semi-Conductors*, GATT B.I.S.D. (35th Supp.), at ¶ 117. Even if such two-fold standards were not

resulted in the failure of the United States to demonstrate the necessary existence of a government measure in many of the eighteen contested measures.[129]

Most fundamentally, the complaining party is not allowed to challenge private anticompetitive practices under the WTO dispute settlement. In many cases, anticompetitive practices may occur without any governmental intervention at all, suggesting that the WTO dispute settlement regime cannot sufficiently address the origin and core elements of trade concerns arising from competition-related matters.

The "governmental measure" requirement of Article XXIII:1(b) is merely one example of the inherent limitations of the WTO dispute settlement process in addressing competition concerns. For the second element under Article XXIII:1(b), the complaining party is required to prove that it had legitimate expectations of benefits accruing under the GATT. Normally, the claimed benefits are those of legitimate expectations of improved market-access opportunities arising from relevant tariff concessions.[130] In the *Kodak–Fuji Film* dispute, the question of this element was complicated by the fact that the United States claimed to have had expectations of improved market access benefits with respect to several products, granted during three successive rounds of multilateral trade negotiations.[131]

Finally, the complaining party in a non-violation complaint is required to demonstrate that contested government measures nullified or impaired benefits or impeded the attainment of the WTO Agreement's objective. Competition-related government measures tend to be long-term measures of general application not intended to target a specific action, similar to those at issue in the *Kodak–Fuji Film* dispute.[132] Therefore, it is often practically very difficult to prove the causal link between such measures and the nullification or impairment of benefits accruing under the GATT/WTO Agreement. The presumption of nullification or impairment of benefits for violation complaints is not applicable to non-violation complaints. Rather, the

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met, when the government, while providing the incentive to carry out anticompetitive activities, endorses such activities or the activities are attributable to the government, a "government measure" would be deemed to exist. *See Japan—Film and Paper, supra* note 53, ¶ 10.52.

129. *See, e.g.*, *Japan—Film and Paper*, *supra* note 53, ¶¶ 10.122, 10.136, 10.148, 10.194 (finding that several U.S. claims did not constitute governmental "measures").

130. *Id.* ¶ 10.61.

131. *Id.* ¶ 10.63.

132. *Id.* ¶ 10.23.

complaining party in non-violation complaints is required to "present a detailed justification in support of any complaint relating to a measure . . . ."[133] The burden of proof in this regard is considerably high.[134] Not surprisingly, despite successfully satisfying aspects of the second legitimate expectation of benefits requirements, the United States in the *Kodak-Fuji Film* case failed in its efforts to prove the requisite causal link for all contested measures.[135] In short, one can safely conclude that it is practically difficult for the complaining party on non-violation claims against competition-related governmental measures to satisfy all three of the burdensome requirements.[136]

As a related matter, it is worth noting that the remedies for this non-violation complaint differ from those for violation complaints. Even if the complaining party prevails on a non-violation claim, there would be no obligation for the defending party to withdraw the measure at issue.[137] This means that non-violation complaints have inherent limitations with respect to remedies and therefore will arguably not eliminate governmental measures relating to anticompetitive practices. In light of the foregoing, the United States was forced to search for another option to address trade concerns arising from restrictive business practices impeding access to export markets. As discussed in the next section, positive comity is an example of such an option.

D. Positive Comity

A country, rather than unilaterally applying its own laws in an extraterritorial manner, may choose to request a foreign country to investigate and regulate anticompetitive activities within its jurisdiction according to its domestic laws. If the foreign country complies with this request, it does so according to "positive comity."[138] Traditionally, "comity" means refraining from applying one's own competition laws in an extraterritorial manner, and in this sense it is also re-

133. Understanding on Rules and Procedures Governing the Settlement of Disputes with Appendices (1 to 4), Apr. 15, 1994, art. XXVI.1(a), 33 I.L.M. 112 (1994) [hereinafter DSU]. The DSU was annexed to the WTO Agreement, *supra* note 4, as Annex 2.

134. *See Japan—Film and Paper*, *supra* note 53, ¶¶ 10.82–10.89.

135. *Id.* ¶ 10.402.

136. Since the United States did not appeal this panel's ruling, the Appellate Body did not have an opportunity to review the legal rulings of the panel in this case, in particular, on non-violation complaints. In this sense, it is hard to predict whether and to what extent this panel's rulings will serve as a precedent for future cases involving competition-related measures.

137. DSU, art. XXVI.1(b).

138. For the definition of the term "positive comity," see s*upra* Part II.B.1.

ferred to as "negative comity." Positive comity would appear to contribute to the effective enforcement of antitrust law as well as to reducing or eliminating jurisdictional conflicts arising between two different sovereigns.

Although bilateral agreements addressing positive comity appeared for the first time between the United States and the EU in 1991,[139] one can hardly find an instance where positive comity actually comes into play. Recently, however, the United States has expressed some interest in positive comity as an effective solution for the international application of antitrust law.[140] The United States entered into a new agreement concerning positive comity with the EU in June 1998. This agreement took the form of a side agreement to the above 1991 bilateral agreement between the two parties.[141] The core substance of this side agreement is that, under certain conditions, a requesting party would refrain from enforcing its own competition laws and would agree to request the other party to apply its domestic laws. In such instances, the requesting party agrees not to apply its domestic laws extraterritorially—if it wishes to do so, it is required to explain the reasons for such action. The requested party must thoroughly investigate the matter and report the results to the other party, and also comply with the other party's request to the extent reasonable. Among the conditions potentially triggering such a request are cases in which the anticompetitive activity at issue does not affect the consumers of the requesting party[142]—for instance, in export-restraint cases.[143]

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139. *See* Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1491 (1991) [hereinafter Competition Laws Agreement].

140. For instance, Joel Klein stated that "positive comity" agreements are the best way to ensure effective antitrust enforcement in cases involving market access problems. *See* Klein, *supra* note 66.

141. For an overview of this side agreement, see *supra* notes 40, 43.

142. Article IV:2 of the Positive Comity Agreement signed in 1998 provides as follows:

> The competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favour of enforcement activities by the competition authorities of the Requested Party when the following conditions are satisfied:
>
> (a) The anticompetitive activities at issue:
>
> (i) do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party territory, or
>
> (ii) where the anticompetitive activities do have such an impact on the Requesting Party consumers, they occur principally in and are directed principally towards the other Party territory;

Positive Comity Agreement, *supra* note 43, at 29.

143. *See Report on Positive Comity*, *supra* note 40, ¶ 60.

The underlying motivation for the United States to resort to positive comity seems to be that all other policy options for the same purpose—the extraterritorial application of antitrust law, Section 301 or the reliance on the WTO dispute settlement mechanism—have demonstrated serious limitations *vis-à-vis* actual enforcement.[144] As for the EU, such an agreement would lower the risk of unilateral application by the United States of U.S. antitrust law, while securing the same benefit of U.S. cooperation in a reciprocal manner.[145] As a result, a question arises as to whether the United States' other trading partners would be willing to enter into similar agreements on positive comity. If so, positive comity might be a viable policy option to help the United States resolve antitrust concerns in export restraint cases. Yet, one must consider the practical problems of positive comity. A report by the OECD Secretariat in May 1998 pointed out several problems concerning positive comity and made an assessment of its limits.[146] A few of those points are worth considering here.

First of all, positive comity is generally only applicable in cases where there is a violation of the antitrust law of the requested party. Thus, if the anticompetitive activity at issue was exempt from the laws of the requested party (for example in export/import cartels) or fell under exceptions under such laws, positive comity would fail.[147] In the author's view, what is often more troublesome is the application of the rule of reason to contested practices. In the eyes of the requested country, a certain practice may not be in violation of its own antitrust law since such a practice can be saved when the rule of reason applies. In contrast, the requesting party may view such a practice as being anticompetitive, and thus it might once again have incentive to apply its own laws extraterritorially.

In addition, there is the problem of mutual trust.[148] If the requesting party does not trust the competence, willingness, and enforcement level of the requested party's competition authorities, it would seem logically difficult to rely on the requested party's diligence in investigation and regulation. As a result, the requesting party would potentially be tempted to engage in the extraterritorial application of its own antitrust law, suggesting that positive comity is feasible only between countries that have comparable levels of com-

144. *Id.* ¶¶ 9–10.
145. *Id.* ¶ 59.
146. *See id.* ¶¶ 48–56.
147. *Id.* ¶ 49.
148. *Id.* ¶ 51.

petition law enforcement—for example, between the United States and the EU.

Finally and most importantly, one must look at the kinds of cases to which positive comity can actually apply.[149] As noted in the bilateral agreement between the United States and the EU, the United States would be most interested in applying positive comity to export-restraint cases.[150] This indicates a situation where the requesting party's exports face market access difficulty due to restrictive business practices within the importing country.[151] In the eyes of the United States, positive comity could overcome the theoretical and practical limitations of extraterritorial application of its antitrust law in export-restraint cases. Nevertheless, theoretical and practical concerns may again arise in this context. On the theoretical side, except for horizontal restraints such as group boycott, export restraints are more often than not subject to the rule of reason.[152] Therefore, even if such practices produced trade-restrictive effects, the importing country's antitrust authority may still determine that the rule of reason justifies non-regulation of such practices on the basis of the finding that procompetitive effects outweigh anticompetitive effects. In other words, a certain activity may harm the interests of foreign traders, but it is still considered "procompetitive" under the importing market's antitrust law.[153] If the exporting country requested that the importing country regulate such activities on the basis of a positive comity agreement, such a request would not normally be served since such activities may not be violations of the requested country's antitrust law.[154]

This suggests that positive comity would not be an effective option for export-restraint cases. On the practical side, if a bilateral agreement were to be entered into between the United States and a

149. *Id.* ¶¶ 57–61.

150. *See id.* ¶ 60.

151. The *Report on Positive Comity* also states that it is hard to find examples, other than market restraint cases, to which the U.S.-EU bilateral agreement would apply. *Id.* ¶¶ 59–61.

152. For a more elaborate analysis of several examples of market restraints, see Fox, *supra* note 55, at 19–23.

153. This scenario often takes place in vertical restraints, in particular. The OECD has studied this issue for the last several years. *See generally* OECD, Joint Group on Trade and Competition, *Competition and Trade Effects of Vertical Restraints*, OECD Doc. COM/DAFFE/CLP/TD(99)54 (May 23, 1997) (concluding that some vertical restraints are detrimental to efficiency, while others enhance efficiency to the extent that it is more than enough to offset any detrimental effects).

154. Moreover, some developing countries might not have any competition law at all. *See supra* note 69.

developing country, the former would very often be the requesting party, whereas the latter would normally serve as the requested party, potentially leading to difficulties of reciprocity. If reciprocity between two relevant countries cannot be maintained, many problems, including cost considerations, may arise and create strong disincentives for other countries to sign a bilateral agreement on positive comity with the United States.

In light of the foregoing, it can be concluded that positive comity may not be a workable policy option for the Untied States to resolve competition-related trade concerns in all types of situations. In that sense, positive comity will not preempt the need to resort to a multilateral framework.

V. CONCLUSION

From the perspective of trade law and policy, restrictive business practices, which function as private trade barriers, need to be addressed under the WTO system. The conflict between trade and competition law and policy that has arisen due to different substantive standards may lead to a difficult situation where certain activities have trade-restrictive effects but are pro-competitive in importing markets. Due to their theoretical and practical limits, the current set of policy options which the United States has relied upon to address competition-related trade concerns does not provide a workable means to address trade-restrictive measures in foreign markets. The extraterritorial application of antitrust law is not an effective tool for export-restraint cases, and Section 301 or positive comity are not viable alternative options to address market access-related competition concerns due to their inherent weaknesses. In addition, the WTO system currently does not provide a solution to U.S. concerns. In other words, the current WTO Agreement does not have legally binding rules that effectively address trade-restrictive anticompetitive practices. Further, a non-violation complaint under the WTO dispute settlement process is still far from an effective option to address competition-related measures.

In light of the foregoing analysis, the author strongly suggests that the United States refrain from engaging in unilateral or bilateral policy options in an effort to address issues arising from the interaction between trade and competition law and policy, as such options are theoretically unsound and practically unworkable, while producing unnecessary tensions between nations. Instead, it is recommended that the United States more seriously participate in the WTO

work on the interaction between trade and competition and, furthermore, take a leadership role in pushing for formal negotiations on a multilateral framework agreement on competition policy. Of course, the author deeply appreciates the possible difficulties that a WTO option to address the issues arising between trade and competition may entail. For instance, harmonizing competition laws for the entire WTO Membership is an unrealistic approach at this moment. As noted, however, neither current proposals by WTO Members nor initiatives at the WTO Competition Working Group have progressed that far.[155] It is outside the scope of this paper to examine whether, and to what extent, such proposals and current WTO works are desirable and workable. Such an examination would surely require further independent research and writing.

As previously noted, the WTO initiatives on the interaction between trade and competition policy are legally in limbo, due to the failure to reach a consensus on the modalities of negotiations. The United States is urged to lead the effort in building this consensus at an appropriate WTO forum in the future. This paper concludes with some suggestions for the substantive aspects of such negotiation modalities, taking into consideration the disappointing results of the Cancun Ministerial Conference. The author believes that the formal negotiations on the interaction should at least include the following items:

(1) The title of the relevant Doha mandate is "Interaction on Trade and Competition." The WTO Members should always keep in mind that the main mission of work in this area is to deal with issues arising at the interface of these two policies, rather than to draft a competition code at an international level. Thus, Members are recommended to start with a more elaborate study of how trade law and policy interacts with competition law and policy. This seems to be a theoretical exercise, but needs to be addressed first. Part II of this paper would be useful for this purpose.

(2) The Doha mandate indicates that the debate on the interaction between trade and competition is aimed at examining how competition policy can contribute to international trade and development. In this connection, Members need to study carefully how already existing competition policy-related provisions under the current WTO agreements can contribute to this goal. This paper noted the lack of

155. Robert Anderson & Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5(2) J. INT'L ECON. L. 531, 557–60 (2002).

legally binding effect in such provisions. Nonetheless, should there be such limits, Members should start discussing how to improve the current existing competition-related provisions. Logically, this should be a starting point for the WTO work on the interaction between trade and competition. For instance, such provisions could be modified so as to be workable under the dispute settlement framework.

(3) Finally, it should be recalled that any final outcome of the future negotiations on trade and competition policy would be incorporated into the WTO system as an annexed agreement, rather than be a stand-alone agreement outside the purview of the WTO. Therefore, such a future agreement should fit within the framework of the current WTO system and its annexed agreements. In this regard, Members need to determine which model would be adopted for such an agreement on trade and competition policy. Three models, drawn from the current WTO-annexed agreements, may be considered: the TRIPS Agreement model, the GATS Agreement model, and the Market Access Code model. The TRIPS model would set minimum standards for competition policy and affirmatively require Members to equip themselves with competition law and enforcement mechanisms. Given the lack of consensus on substantive rules of competition laws among the WTO Members, this model could be considered as strictly a long-term goal.[156] A GATS model would declare general principles that allow some flexibility for different Members, e.g., exceptions or special and differential treatment for developing Members. At the same time, building a consensus on substantive rules would be deferred to future negotiations.[157] Lastly, a Market Access Code is a third option that could potentially leverage the WTO's expertise and resources in skillfully dealing with market access-related concerns, such as private trade barriers. Although this model seems to provide a partial solution only, it could be a viable initial step to address market-restraint practices, in light of the fact that this model most closely resembles the original work of the GATT, the WTO's predecessor. Of course, these proposed models should be further evaluated and elaborated upon in the process of further negotiations at the WTO.

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156. The TRIPS Agreement sets minimum standards for the protection of intellectual property rights, which are binding upon WTO Members. *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, arts. 12, 18 & 33, Marrakesh Agreement Establishing the World Trade Organization, *supra* note 4, 33 I.L.M. 81, 88–96.

157. *See generally* General Agreement on Trade in Services (GATS), Apr. 15, 1994, 33 I.L.M. 44.

The long journey toward a cohesive multilateral WTO framework agreement on the interaction between trade and competition of course will not be in the mode of a honeymoon. However, it is the correct direction for the United States as well as for its trading partners. Maintaining the status quo or embarking on an alternative route present valid options to address troublesome issues arising from the interaction between trade and competition.