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INTERNATIONAL COMPETITION RULES FOR GOVERNMENTS AND FOR PRIVATE BUSINESS: A "TRADE LAW APPROACH" FOR LINKING TRADE AND COMPETITION RULES IN THE WTO

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International state practice has approached international competition problems from at least three different perspectives:

- The intellectual property law approach, notably in the 1883 Paris Convention on Protection of Industrial Property, has focused one-sidedly on "effective protection against unfair competition" (Article 10bis) without providing for international antitrust rules to protect freedom of competition and consumer welfare (e.g., against market segmentation by means of patent rights).

- The competition policy approach relies essentially on the extraterritorial application of domestic competition laws (notably of the United States and EC) to anticompetitive practices abroad and on legally nonbinding multilateral guidelines (e.g., the 1980 UNCTAD Guidelines and 1986 OECD Guidelines) and a few bilateral agreements for the coordination of domestic competition laws. Many national competition laws, however, provide for the exemption of export cartels, import cartels or government-supported restraints of competition, and the divergencies among national competi-

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tion policies continue to generate international conflicts (e.g., in the case of conflicting merger control policies or "blocking statutes" in response to extraterritorial enforcement of U.S. antitrust law).

The trade law approach, notably in EC law and in the EC's "Europe Agreements" with Eastern European countries, integrates trade and competition rules so as to protect international market competition and cross-border transactions against both governmental market access barriers (e.g., in favour of public undertakings and enterprises with privileged positions) and private distortions (e.g., in the case of trade-restricting patent misuse and anticompetitive licensing agreements).

This Paper begins with a brief summary of the main arguments why national and international competition among firms tends to be welfare-increasing, provided there are no trade-distorting market failures and government failures, and why the worldwide trend towards the strengthening of competition laws and policies is to be welcomed (Sections I and II). Also international "competition among different regulatory systems" is likely to be welfare-enhancing unless transnational externalities or international public goods justify government interventions (Section III). Section IV concludes that the existing inconsistencies and "producer biases" of international trade law, intellectual property law and competition laws can be overcome best by integrating trade and competition rules in the framework of the World Trade Organization ("WTO"). It recommends the establishment of a WTO Committee on Trade and Competition at the WTO Ministerial Conference in December 1996, in order to prepare such negotiations.

Section IV then discusses the 1995 EC Expert Group proposal for a "Plurilateral Agreement on Competition and Trade" ("PACT"), as well as the 1993 "Munich Draft" of an "International Antitrust Code," which were both designed as a "Plurilateral Agreement" in terms of Annex 4 of the 1994 WTO Agreement. Section V illustrates the potential "systemic advantages" of integrating competition rules into GATT/WTO law by pointing to the many inconsistencies between trade and competition rules, such as the treatment regarding "predatory pricing" in EC and U.S. antitrust laws, on the one side, and in antidumping laws, on the other. Section VI concludes with the suggestion that liberal trading countries should learn from the experience of the "Tokyo Round" and "Uruguay Round package deal negotia-
tions” by politically linking the various proposals for additional competition, investment, and environmental rules to further reforms of antidumping rules, whose protectionist biases and abuses impede international trade and economic welfare in an arbitrary manner.

While the negotiation of these reforms will require years, initiatives for reducing the obvious inconsistencies between trade and competition rules—such as protectionist antidumping practices, export cartels, restrictive licensing agreements and other private market access barriers—should not be delayed. The legitimate task of governments requires the promotion of the public interest, i.e., of the welfare and equal rights of all domestic citizens, through nondiscriminatory trade and competition rules. Governments must therefore resist protectionist pressures for redistributing consumer income for the benefit of “rent-seeking” group interests by means of anticompetitive antidumping practices, abuses of intellectual property rights (e.g., “patent misuse” in licensing contracts), and monopolistic market positions (e.g., in telecommunication and transport markets).

I. NATIONAL COMPETITION POLICY: WHY AND HOW?

A. Under What Conditions Is Market Competition Among Firms Beneficial?

Competition emerges whenever individual freedoms and property rights are protected so that people (homo economicus) can maximize their individual utility through division of labour, contracts, and exchanges of property rights. Competition enhances individual liberty and welfare in various ways: As a spontaneous information and discovery mechanism, markets reveal individual preferences of consumers and, through market prices, constantly process and convey information on relative scarcities and supplies by producers and traders. As an allocation and coordination mechanism, competition promotes the efficient allocation of scarce resources and coordinates demand and supply in a manner maximizing freedom of choice, satisfaction of consumer preferences, and individual responsibility. As an income-distribution mechanism, market mechanisms reward productivity and innovation. Empirical research into the relationship between “economic freedom” and the economic growth of 102 countries over the period 1975-1995 has confirmed that the more economic free-
dom a country has had, the more economic growth it achieved and the richer its citizens became.¹

TABLE 1: Consumers' Surplus, Producers' Surplus, and Deadweight Welfare Loss in Case of Monopoly Power

<table>
<thead>
<tr>
<th>Price</th>
<th>A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pm</td>
<td>B</td>
</tr>
<tr>
<td>Pc=MC</td>
<td>C</td>
</tr>
</tbody>
</table>

Consumers' Surplus: measures consumer welfare by the excess of social valuation of the product over the price actually paid (= triangle ACPc)

Producers' Surplus: measures the transformation of consumers' surplus into producers' profits in case of monopolistic prices (= quadrangle PmBEPc)

Deadweight Welfare Loss: measures the lost allocative efficiency in case of monopoly prices (= triangle BCE)

Yet, if market prices are distorted (e.g., through monopolies or cartels) and do not reflect all production costs (e.g., due to "external effects"), they are also likely to distort the allocation, coordination, and distribution functions of market competition: consumer welfare

will be reduced by higher prices, less products and fewer freedom of choice; cartel members and monopolists will benefit from scarcity rents at the expense of consumers; and economic efficiency will be further diminished by "deadweight losses" (see Table 1). "Perfect competition" would exist if no single supplier or consumer could influence the market price. This would require:

(a) rational behaviour of market participants (utility maximization);
(b) perfect information (e.g., no asymmetries in information);
(c) perfect mobility of the market ("atomistic competition" without transaction costs).
(d) stable preferences and technologies; and
(e) reflection of all costs in the prices of goods and services (i.e., there are no externalities leading to a divergence of private and social costs, such as pollution externalities due to undervaluation of environmental resources).

In reality, however, market competition is far from "perfect." As a spontaneous discovery mechanism, one major function of market competition consists in reducing existing asymmetries in information and in constantly processing data which, without market prices, might be available only to a few individual market participants. Views among economists on how competitive processes actually work, and to what extent the rivalry between producers and consumers should be regulated by governments, vary significantly. For instance, according to the "structuralist school," market structure (i.e., the degree of concentration) is the main determinant for market performance; monopoly is viewed as bad because it is likely to distort prices and the efficient allocation of resources. Proponents of the "contestability school," by contrast, focus on free entry to a market rather than on market shares; as long as markets remain contestable, the potential entry and competitive pressures of new competitors are likely to prevent the monopolist from raising prices above the competitive level. "Chicago school" economists view monopolies rather as a sign of superior efficiency provided the monopoly is not due to governmental barriers to market entry; as monopoly profits are likely to remain temporary and to operate as an incentive for competitors to become more efficient, their negative economic effects may be minimal.2

Table 2: Illustrative List of Anticompetitive Business Practices Regulated by Competition Policy

**Horizontal restraints:** “Hard core cartels” among firms in an oligopolistic market (e.g., on price fixing, output restrictions, market division, customer allocation, and collusive tendering) and other anticompetitive cooperation between firms selling competing products. While “naked” cartels tend to be prohibited, the anti- and procompetitive effects of other horizontal cooperation need to be balanced (e.g., based on a “rule of reason,” individual exemptions or group exemptions).

**Vertical restraints:** Distribution strategies between manufacturers, suppliers, or distributors such as tying (the sale of one good is conditioned on the purchase of another good), exclusive dealing (the seller requires the buyer to purchase products only from the seller), territorial restraints (the seller requires the buyer/distributor to resell the product within a limited geographical area), and resale price maintenance (the seller requires the buyer to resell the product only at a specified price). While resale price-fixing tends to be generally prohibited, the pro- and anticompetitive effects of other vertical restraints need to be evaluated (e.g., misuse control).

**Abuses of intellectual property rights:** Technology licensing arrangements abusing the monopoly-like position of IPR holders e.g., through non-competition clauses (e.g., “grantback”: the licensee is required to assign inventions made in the course of working the transferred technology back to the licensor) or noncontestation clauses (the licensee is prevented from contesting the validity of the IPR or other rights of the licensor). IPR abuses might be subject to the general competition rules on horizontal and vertical restraints.

**Abuses of market dominance:** Dominant firms accounting for a significant market share (e.g., of forty percent or more) may attempt to monopolize a market, e.g., through excess prices, price discrimination, predatory low prices, refusal to deal, or vertical restraints. Rules against the abuse of a dominant position may be conduct-oriented (e.g., a general prohibition against monopolizing and foreclosure of competition) or result-oriented (e.g., prohibition of predatory pricing only if the losses can be recouped).

**Mergers and acquisition policies:** Horizontal, vertical, or conglomerate mergers may reduce competition or increase efficiency. Merger policies may be designed to ensure the contestability of markets by preventing a monopoly (price-setting by a single seller), monopsony (price-setting by a single buyer), or oligopolistic market power. But acquisition policies may also be used for industrial policy purposes.

**Public undertakings and enterprises with special privileges:** In view of their market power (e.g., financial independence), they may be required to behave according to market principles (Article XVII GATT, Article 90 EC). Exclusive trading rights and monopolies may be prohibited (Article 37 EC).
B. Why Do Countries Need a Competition Policy?

Also, imperfect competition is important (e.g., as a spontaneous discovery, information, and coordination mechanism). But it may produce suboptimal results in case of market failures, such as abuse of market power, information asymmetries, external effects, inadequate protection of property rights, and insufficient supply of public goods (such as clean air) due to their "nonexcludability" and nonrivalrous "joint consumption." The goals of "market contestability" and undistorted competition require therefore a governmental competition policy designed to prevent market failures (such as abuses of market power, cartels, anticompetitive mergers and acquisitions) and to promote public goods.

But economists and policy-makers often disagree on the optimal policy instruments for promoting competition (cf. Table 2). In contrast to the present worldwide consensus of governments and economists on the legal and economic ranking of trade policy instruments which discriminate against foreign products in favour of domestic products (see Table 3), there is no similar consensus on the optimal instruments of domestic competition, investment, or environmental policies, apart from the GATT requirement of "national treatment" of imported and "like" domestic products. This is illustrated by the GATT rules (e.g., in Articles III and VI) authorizing unilateral antidumping measures, countervailing duties or other "border adjustment measures" if foreign dumping practices, subsidies, or divergent foreign product regulations cause injury to producers or consumers in the importing country. But GATT rules do not require such countermeasures or border adjustment measures; and most economists emphasize that a "thank-you note" might be the most efficient response to dumped, subsidized, or otherwise low-priced imports which benefit domestic consumers without endangering competition or other "public goods." The GATT requirements of unconditional most-favoured-nation treatment (Article I:1) and national treatment (Article III) prohibit to make the non-discriminatory access to the domestic market conditional on compliance with the production regulations of the importing country.

If governments intervene to correct market failures or supply public goods, the risks of market failure have to be weighed against the risks of alternative government failure, for example, when government interventions lead to additional distortions. National competition laws and policies differ among countries, for instance regarding the use of per-se-prohibitions (e.g., of horizontal cartels and certain
### Table 3: The Public Choice of Trade Policy Instruments

<table>
<thead>
<tr>
<th>Instruments of Import Protection</th>
<th>Economic Ranking (Efficiency)</th>
<th>Political Ranking (Parliamentary Control)</th>
<th>Legal Ranking (GATT)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Border adjustment measures for nondiscriminatory internal taxes and regulations</td>
<td>Optimal instrument for correcting domestic distortions</td>
<td>Nondiscriminatory measures subject to legislation</td>
<td>Allowed (note to Art. III GATT and not subject to countermeasures)</td>
</tr>
<tr>
<td>Production subsidy</td>
<td>First best (production distortion)</td>
<td>Direct budgetary transfers subject to legislation</td>
<td>Allowed but possibly “countervailable” and “actionable” (Arts. VI, XVI:1, XXIII GATT and 1994 Subsidy Code)</td>
</tr>
<tr>
<td>Import tariff</td>
<td>Second best (production and consumption distortion)</td>
<td>Transparent taxes, government revenue and protection rents subject to legislation</td>
<td>Allowed subject to tariff bindings (Arts. II, XXVIII) and safeguard clauses (e.g., Arts. VI, XIX)</td>
</tr>
<tr>
<td>Import restrictions - global quota - country quotas</td>
<td>Third best (additional distortions of price competition; private protection rents in lieu of tariff revenue; legal insecurity)</td>
<td>Less transparent, administrative distribution of market shares and protection rents to importers and foreign exporters</td>
<td>Prohibited subject to GATT’s safeguard clauses (e.g., Arts. XI, XII, XVIII-XXI) and non-discrimination requirements (e.g., Arts. XIII, XX)</td>
</tr>
<tr>
<td>Voluntary export restraints (VER)</td>
<td>Fourth best (additional transfers of quota rents abroad, additional legal insecurity)</td>
<td>Nontransparent transfers of protection rents at home and abroad without parliamentary and judicial control</td>
<td>Prohibited (Art. XIII GATT) with only temporary exceptions (1994 Safeguards and Textiles Agreements)</td>
</tr>
</tbody>
</table>

vertical restraints) and of rules-of-reason with rebuttable presumptions (e.g., for abuses of market power) or requirements to balance procompetitive and anticompetitive effects (e.g., of mergers). The institutional frameworks of national competition laws (e.g., more private lawsuits before trial courts and less administrative investigations in the United States than in the EC), the available legal remedies (e.g., civil claims of “treble damages” and criminal sanctions in the United States, but not in the EC, in addition to “cease and desist” orders), and the effective enforcement of the “law in the books” also vary considerably among jurisdictions. Some small economies, like Hong Kong and Singapore, have even refrained from adopting competition laws...
on the ground that their liberal trade policies are a sufficient guarantee of the "contestability" of their open economies.

II. INTERNATIONAL COMPETITION POLICY: WHY AND HOW?

A. Why Do Governments Need International Rules on "Competition Among Governments"?

Domestic and international competition among firms differ in various respects (e.g., immobility of the national territory, less international mobility of capital and labour, different monetary, and legal systems). National, as well as international, competition among firms is influenced not only by "natural" production factor endowments but also by government-determined conditions of competition. National legal and economic systems can be viewed as created factor endowments that can affect, positively or negatively, a state's competitiveness in international trade. For instance, the fact that the average per capita income of Singapore increased from about $500 in 1965 to more than $25,000 in 1995, whereas the per capita income of some African developing countries stagnated during the same thirty-year period, seems in large part due to the respective government policies. National rule systems compete among each other with regard to mobile production factors (e.g., scarce international capital, investments, technology) and production costs for traded goods and services. Due to different national factor endowments and preferences, every state has a different regulatory optimum.

Similar to competition among firms, international competition among governments also is likely to maximize information and mutual learning (competition as a discovery process), freedom of choice, a more efficient allocation of scarce resources, and technological innovation (e.g., due to "voting by feet" as an incentive for reducing national government failures). Likewise, market failures at the national or international level, such as cross-border pollution and inadequate protection of property rights in environmental resources, may also distort international competition among governments by misallocating productive resources. There are also concerns that "competition among rules" may trigger a "race to the bottom" and a suboptimal level of lax rules (e.g., similar to the "Delaware problem" concerning fiscal and other competition within the United States). Hence the policy questions, long since discussed in European integration and increasingly also in the preparations for the future work programme of the WTO: Which regulatory differences among countries should be
accepted as legitimate? Which ones call for international harmonization of rules? May, similar to abuses of market power in competition among firms, regulatory competition among governments be distorted also by the dominance of large trading countries?

Economic theory teaches that market competition may be distorted and lead to suboptimal results if there are market failures or governmental "intervention failures" to correct existing market imperfections. Regulatory competition therefore also requires rules on competition among governments, similar to antitrust rules on competition among firms. Competition among governments can help governments in their efforts to attract mobile production factors and to meet citizens' interests effectively (e.g., by maximizing consumer welfare through liberal trade and an optimal level of public goods), to resist protectionist pressures by "rent-seeking" interest groups. The limits of international regulatory competition may be determined by analogy to the theory of market failure.

Thus, international regulatory competition cannot be relied upon in the case of international public goods, or when new property rights have to be established in order to protect "global commons" and to internalize transfrontier pollution. But as long as there are no transnational external effects (including abuses of power and under-supply of international public goods), differences among national rules may be justified in view of different national factor endowments and preferences. Even if there are cross-border market failures, they must be weighed against the risks of alternative government failures, including international harmonization of national rules in disregard of divergent national factor endowments.

B. Which Regulatory Differences Among Countries Are "Unfair Distortions" That Justify International Harmonization?

As indicated above, international regulatory competition among firms and among governments is likely to be suboptimal only if there are cross-border externalities or international public goods. Theoretically, "unfair regulatory differences" could be defined as those resulting from market failures or government failures with transnational trade-distorting effects. In practical terms, however, it will often be impossible to challenge—in objective terms—one government's perception of "market failure," of the need for corrective government interventions, and of the supply of "public goods." As explained above, traditional economic theory often does not offer precise guidelines for identifying "government failures" (e.g., preventing alleged
“eco-dumping”) and for evaluating the political trade-offs (e.g., the opportunity costs of higher national environmental standards). Hence, views among sovereign states on how to distinguish “legitimate comparative advantages” from “unfair regulatory differences,” may legitimately differ.

1. International “External Effects”

As regards external effects, it appears useful to divide them into “nonfinancial externalities” (such as cross-border pollution) and “financial externalities” (such as the lower production costs and competitive benefits due to lower environmental standards). Whether lower production standards, wages, or exchange rates of one country are tantamount to “market failures” or “government failures,” and therefore confer “unfair pecuniary advantages” on its industries competing with producers in other countries, should be decided on the basis of the agreed multilateral subsidy and trade rules notably in WTO and EC law. Outside these agreed multilateral rules for financial contributions by a government for the benefit of specific industries, generally available “regulatory subsidies” and their international “pecuniary externalities” (operating through changes in market prices) are not “actionable” under WTO law and, especially if they benefit foreign consumers, do not justify foreign countermeasures. According to the economic theory of optimal intervention, national market failures or government failures should be corrected directly at their source through national measures. International countermeasures are, at best, suboptimal instruments for the correction of market failures or government failures abroad and for the limitation of their transnational external effects. As governments will tend to reject foreign claims of “unfair” market failures or government failures, the costs and risks of politicized, power-oriented foreign “aggressive unilateralism” are likely to be much higher than their alleged benefits.

As regards nonfinancial externalities, such as cross-border pollution, general international law permits proportionate countermeasures by adversely affected states. But international treaty law (such as GATT/WTO law) may limit the range of permissible countermeasures (e.g., the use of trade sanctions). Economic theory confirms that trade sanctions by an importing country are hardly ever an efficient policy instrument for “internalizing” pollution externalities at the production level in the exporting country, for, apart from the rare case that the polluter sells all his products abroad in the importing country, the im-
port restrictions will not prevent the polluter from continuing his production and selling the products elsewhere.

2. International “Public Goods”

If “international public goods” are not defined through international treaties, unilateral claims that foreign rules (e.g., on the fishing of tuna) are unfairly endangering international public goods (e.g., dolphins in the High Seas) are likely to give rise to controversies among governments and to difficulties of distinguishing “fair” and “unfair” regulatory advantages among sovereign countries. International treaties (such as GATT/WTO law) often include generous safeguard clauses permitting unilateral measures for the protection of national public goods (e.g., human, animal, or plant life and health in the importing country). But these safeguard clauses, and the unconditional most-favoured-nation treatment and national treatment obligations in GATT/WTO law, also imply legal obligations to respect the equal policy autonomy of member countries. As rightly emphasized in a number of GATT dispute settlement reports, they limit the right of importing countries to make the access to their market conditional on changes in the domestic policies of exporting countries. The border adjustment rules in GATT Article III only allow to exempt exports from, and to subject imports to, nondiscriminatory product taxes and product regulations for domestic “like products.” Yet, GATT/WTO law does not allow to make access to the domestic market conditional on compliance of foreign producers with the process and production standards (“PPMs”) in the importing country unless such PPMs are “product-related” as defined in the WTO Agreement on Technical Barriers to Trade.

The preceding discussion suggests that even if transnational externalities and international public goods call for international coordination of divergent national PPMs, governments still can choose among alternative policy instruments. These may differ considerably as regards the flexibility which they leave to national law-makers. For instance, nondiscriminatory border adjustment measures permitted under Article III of GATT and mutual recognition of equivalent national standards allow more flexibility than full international harmonization of national rules. Also, “aggressive unilateralism” to induce other countries to change their domestic policies may be more trade-

distorting than discriminatory trade measures against foreign products based on multilaterally agreed rules (e.g., in case of countervailing duties on subsidized imports causing injury to import-competing domestic producers).

III. INTERNATIONAL RULES FOR "COMPETITION AMONG GOVERNMENTS": PROMOTION OF REGULATORY COMPETITION THROUGH GATT/WTO LAW

As explained above, international competition among different regulatory systems may be suboptimal in case of transnational externalities and international public goods. Hence, there is a need for international rules in order to avoid such transnational "market failures" and "government failures" in intergovernmental relations, similar to the need for competition rules to avoid private market failures in private markets. In the following, cross-border pollution—as one case of transnational market failure (externalities) as well as of government failure (state responsibility for cross-border pollution)—is used as an example for analyzing more precisely whether the legal distinctions in GATT/WTO law (1) between PPMs, and (2) between national public goods (protected by GATT Article XX) and international public goods (protected, e.g., by GATT Articles XXIII and XXV), are consistent with the above-mentioned policy recommendations derived from economic theory.

A. Are the Legal Distinctions in GATT/WTO Law between Product Standards and Process and Production Standards Consistent with Economic Theory?

The rules of GATT, such as the most-favoured-nation treatment (Article I) and national treatment requirements (Article III), primarily aim at the reduction of market access barriers for traded products, without limiting the sovereign freedom of GATT member countries with regard to their domestic policies (e.g., national PPMs and competition policies). The border adjustment rules in GATT Article III (as clarified by the interpretative note to Article III) allow to extend non-discriminatory internal environmental product taxes or other environmental product-related regulations to imported products so as to prevent or "internalize" consumption externalities in the importing country (e.g., health risks and environmental harm). Moreover, GATT's border adjustment rules also allow exemption of export goods from such product taxes or product regulations in the exporting country based on the assumption that the exported goods will be sub-
ject to the product taxes and product regulations in the importing country ("destination principle").

By contrast, GATT's border adjustment rules do not subject imported products to domestic PPMs because PPMs are directed against production externalities, which should be addressed directly at the source in the country of production. As production factor endowments and environmental absorption capacities differ from country to country, different PPMs in the exporting country do not justify trade restrictions in the importing country. GATT's border adjustment rules are therefore widely considered to be consistent with economic theory.


The freedom of each GATT member country to decide on its domestic regulations (Article III) and on the level of its import tariffs (Articles II, XXVIII), and to apply safeguard measures against injurious imports (Articles VI, XIX, XX), enables each country to protect national public goods such as a "conservative welfare function" to protect import-competing industries against wide-spread unemployment caused by low-priced imports. These GATT rules clearly recognize the right of each country to accord more importance to the protection of legitimate national public goods other than liberal trade. But GATT’s unconditional most-favoured-nation treatment obligation also requires respect for the equal domestic policy autonomy of other GATT member countries; it therefore prohibits PPM-based countermeasures discriminating against foreign products if such countermeasures are only designed to raise the costs of foreign producers benefiting from lower foreign PPMs, or to facilitate political support in the importing country for higher domestic PPMs.

The WTO Agreement explicitly recognizes (e.g., in its preamble) the need to protect environmental resources and to promote "sustain-

4. On GATT's border adjustment rules see notably Frieder Roessler, Diverging Domestic Policies and Multilateral Trade Integration, in FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 21, 23 (Jagdish Bhagwati & Robert E. Hudec eds., 1996), who rightly notes that GATT's border adjustment rules leave four options: (1) exempt taxes on products exported from country A to B (taxation in the country of destination); (2) tax exported goods in the country of exportation and exempt them from taxation in the country of importation; (3) double taxation in the countries of exportation and importation; and (4) tax exemptions in both the countries of exportation and importation.
able development." But, as there are legitimate reasons for diversity in environmental regulation across countries and trade restrictions are no efficient policy instrument for dealing with pollution at the production or consumption level, GATT/WTO law does not explicitly authorize departures from GATT/WTO law so as to protect *international environmental resources* outside the national jurisdiction. WTO member countries remain, however, free to protect themselves against transnational pollution caused by low environmental PPMs abroad. They may also grant waivers (e.g., under GATT Article XXV), or conclude multilateral environmental agreements ("MEAs"), authorizing departures from the general GATT/WTO rules so as to protect "global commons" through trade-related environmental measures ("TREMns"). In the absence of transnational externalities and mutually-agreed international public goods, economic theory suggests (as indicated above) that international regulatory competition is likely to operate as a spontaneous discovery and coordination mechanism for inducing countries to apply efficient PPMs.

The "domestic policy autonomy" of WTO member countries is based on the political and economic assumption that differences between environmental PPMs across countries may be legitimate for many reasons (such as different environmental resource endowments, absorption capacities, preferences and opportunity costs). The "sovereign equality" of countries implies not only the right to decide on one's own national environmental standards, as long as they do not cause spillover effects on other countries. It also implies the right to have recourse to the WTO dispute settlement system if foreign TREMs are unnecessarily trade-restrictive or discriminatory. Similar to federal and regional free trade systems, the WTO world trade and legal system requires such a dispute settlement mechanisms so as to protect member countries against discriminatory, unnecessary or otherwise disguised restrictions of trade, which are prohibited in the *WTO Agreements of Technical Barriers to Trade and on Sanitary and Phytosanitary Standards*. The WTO dispute settlement system also prohibits unilateral trade sanctions. Outside the scope of GATT/WTO law, governments dispose of more efficient alternative "carrots and sticks" if they want to induce foreign governments to raise their PPM standards and to join MEAs. The various WTO mechanisms for multilateral surveillance of domestic policy autonomy are thus a necessary procedural complement to the substantive WTO rules on domestic policy autonomy and on "competition among governments."
C. GATT's Trade Law Approach: Why GATT's Focus on Governmental Market Access Barriers Is Justified

Two characteristic features of GATT law, and of the successive "GATT Rounds" of multilateral trade negotiations, have been the priority given to the liberalization of governmental market access barriers, and the progressive extension of the scope of GATT rules not only to all trade policy instruments (i.e., government measures discriminating against imports or exports), but also to internal policy instruments (such as nondiscriminatory technical regulations and standards). This GATT approach, and the WTO as a negotiating forum for future negotiations on the reciprocal liberalization of governmental market access barriers, continues to deserve priority for at least two reasons:

(a) Government-supported market access barriers appear relatively more important than private market access barriers. Hence, the gains from further liberalization of tariffs, nontariff border measures, technical regulations and standards, rules of origin, contingent protection like antidumping and countervailing duties, government procurement, subsidies, etc., are likely to be higher than gains from additional international competition rules for private restraints of competition. There remains a lot of "unfinished business" regarding the liberalization of these and other governmental market access barriers and distortions.

(b) The political economy of GATT negotiations (e.g., reciprocity, package deals, most-favoured-nation and national-treatment requirements, GATT dispute settlement, and enforcement procedures) has enabled "free-riding" to be overcome, and reforms to be achieved that had never been possible in previous sectoral negotiations outside GATT, for example on substantive intellectual property rights standards, competition rules, and dispute settlement mechanisms in the World Intellectual Property Organization ("WIPO"), or on "positive comity" requirements and deregulation of international services in the OECD. The GATT/WTO offers a much more favourable negotiating forum for overcoming protectionist resistance to reforms of trade, competition and intellectual property laws than other worldwide international
organizations. Legal and political reasons suggest that the "interface problems" between governmental and private anticompetitive practices may be overcome, if at all, only in the context of the GATT/WTO system.


The WTO differs from the GATT approach by focusing on broader and integrated market access guarantees. Many WTO provisions explicitly deal with private market access barriers, albeit in an imperfect manner. This broader WTO approach corresponds better to the globalization of production and markets and helps internationally active enterprises to choose between alternative "export strategies," "foreign investment strategies," and "licensing strategies" based on intellectual property rights. It offers additional opportunities for promoting economic welfare and liberty through reciprocal "package deal negotiations" in the WTO. More systematic and more comprehensive WTO rules on private anticompetitive practices in goods trade, services trade, and intellectual property are explicitly called for in many WTO rules as a necessary complement to the existing WTO law.

The broader market access guarantees in WTO law increase the international contestability of markets and the relative importance of the remaining private market access barriers. This is reflected in a large number of provisions in WTO law explicitly addressing private anticompetitive practices. For instance:

(a) The Agreement on Technical Barriers to Trade includes detailed rules designed to ensure that the preparation, adoption, and application of technical regulations, standards and conformity assessment procedures by nongovernmental bodies are not more trade-restrictive than necessary (e.g., Articles 3, 4, and 8).
(b) The Agreement on Preshipment Inspection prescribes rules for the activities of private preshipment inspection entities (e.g., Article 2).

5. For an explanation of this argument, and a detailed analysis of the Uruguay Round negotiations from the point of view of "public choice" and negotiation theories, see Ernst-Ulrich Petersmann, The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization, 6 EUR. J. INT'L LAW 161 (1995).
(c) The *Understanding on the Interpretation of Article XVII of GATT 1994* provides for increased surveillance of state trading enterprises or enterprises with exclusive or special privileges through strengthened notification and review procedures.

(d) The *Agreement on Implementation of Article VI* regulates private injurious dumping and price undertakings in more detail and refers, e.g., to "trade restrictive practices and competition" as relevant factors in the determination of injury (Article 3.5).

(e) The *Agreement on Subsidies* regulates "market displacement," "price undercutting," and "voluntary undertakings" by exporters in more detail (e.g., Articles 6, 18) and also requires the examination of "trade restrictive practices and competition" in determinations of "injury" (Article 15).

(f) The *Agreement on Safeguards* prohibits "voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side", including "compulsory import cartels . . . which afford protection" (Article 11). Member states are required "not to encourage or support the adoption or maintenance by public and private enterprises" of equivalent nongovernmental measures (Article 11:3).

(g) The *General Agreement on Trade in Services* ("GATS") includes rules designed to ensure that "monopolies and exclusive service suppliers" (Article VIII) do not nullify or impair obligations and commitments under the GATS. It also recognizes that other anti-competitive business practices of service suppliers "may restrain competition and thereby trade in services" (Article IX). Much of what governments are negotiating in the on-going GATS market access negotiations (e.g., on telecommunications) consists of commitments to control monopolistic abuses of dominant market positions by existing services suppliers (e.g., of telephone, telex, fax, video and other postal services, radio, TV and satellite monopolies). Some of the GATS market access commitments therefore amount to an internationalization of competition policy. These "specific commitments" (cf. Articles XVI-XVIII of GATS), and the most-favoured-nation and reciprocity requirements of the GATS, may, in turn, also in-
crease the need for developing more general competition rules.

(h) The Agreement on Trade-Related Intellectual Property Rights ("TRIPS") includes "unfair trade rules" (e.g., in Article 17 on exceptions for the "fair use" of trademarks, Articles 22-24 on "misleading" or "unfair" uses of geographical indications, and Article 39 on protection of undisclosed information "against unfair commercial use") as well as anti-trust rules dealing with restraints of competition so as to ensure "that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade" (Preamble). The latter competition rules reflect the general tension between the protection of intellectual property rights as a precondition of market competition (e.g., for the allocation, transfer, and further development of industrial property, competition between individual rights) and the potential restraints of competition as a result of too far-reaching protection of exclusive intellectual property rights (e.g., in the case of monopolistic patent misuse). But the TRIPS provisions on the delimitation of "legitimate trade" and "abuse of intellectual property rights"—notably in Article 8 on the protection of the "public interest" against "practices which unreasonably restrain trade or adversely affect the international transfer of technology," Article 31 on patent uses without authorization of the right holder so as "to correct anticompetitive practices," and Article 40 on anticompetitive licensing practices—are incomplete in many respects (e.g., Article 6 which deliberately does not "address the issue of the exhaustion of intellectual property rights"). Not only developing countries with underdeveloped national competition and intellectual property rights laws, but also developed countries will need more systematic rules on the protection of competition among trade-related intellectual property rights and on the prevention of their anticompetitive abuse. As in domestic competition laws, such international competition rules should form part of an international competition agreement applicable to the various fields of WTO law.


(i) The Agreement on Government Procurement regulates tendering procedures so as to "ensure optimum effective international competition" and "equitable opportunities for suppliers or service providers" (e.g., Article X). It also refers to certain competition problems (such as collusive tendering and "absence of competition," cf. Article XV) and provides for "procedures enabling suppliers and service providers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest" (Article XX).

In addition to this increasing number of WTO provisions regulating private anticompetitive practices, the WTO Agreement also includes several mandates to examine the competition policy aspects of other trade provisions. For instance:

(a) Article 9 of the Agreement on Trade-Related Investment Measures requires the WTO Council on Trade in Goods to "review the operation of this Agreement and . . . consider whether it should be complemented with provisions on investment policy and competition policy." This provision was included at the request of less-developed countries to meet their concern that governmental trade-related investment measures may be necessary in order to counter anticompetitive practices of multinational enterprises.

(b) Review provisions are also included in other WTO Agreements regulating private anticompetitive practices (e.g., Article 6 of the Agreement on Preshipment Inspection) and may provide a basis for future negotiations on additional competition rules.

(c) The accession of Russia, China and other former state-trading countries to the WTO will also make evident that—without more effective competition rules for enterprises with "exclusive or special privileges" (Article XVII of GATT)—many GATT and GATS commitments are easy to circumvent through governmental toleration of dominant market positions and other private anticompetitive practices.

(d) The GATS explicitly recognizes "that certain business practices of services suppliers . . . may restrain competition and thereby restrict trade in services" (Article IX). This may lead to future negotiations on "specific commitments" on the liberalization of such private anticompetitive practices. The various Annexes to the GATS—such as the Annexes on Fi-
nancial Services, Telecommunications, Air Transport and Maritime Transport Services—set out framework rules for the progressive liberalization of services trade through future negotiations that are likely to succeed only if they liberalize and restrict the numerous monopolies and *private anti-competitive practices* in these fields (e.g., bilateral market-sharing agreements for air and maritime transports).

(e) The *TRIPS Agreement* explicitly recognizes that “appropriate measures . . . may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology” (Article 8:2). Since the significance and legal scope of the TRIPS Agreement may depend on what competition rules member countries will adopt so as to ensure “effective protection against unfair competition” (Article 39) and control of “anti-competitive practices” (Article 40), the negotiation of agreed minimum standards for such competition rules is bound to become an important subject in the implementation of the TRIPS Agreement.

IV. RECENT PROPOSALS FOR NEGOTIATING ADDITIONAL INTERNATIONAL COMPETITION RULES IN THE WTO

A. Need for Additional WTO Competition Rules: Legal, Political, and Economic Reasons

The conclusion from the preceding sections is that the WTO—not only with regard to its “constitutional function” as a *code of conduct* for government policies, but also for its additional functions as a *Trade Policy Review Mechanism, Dispute Settlement Body and Negotiating Forum for new rules*—requires a more systematic and more consistent approach to competition policy problems. For instance:

(a) In GATT/WTO practice, the market access rules of GATT/WTO law are construed rather strictly as *competition rules* designed to protect nondiscriminatory *conditions of competition*. For instance, violations of GATT rules with potentially adverse effects on conditions of competition are presumed to cause “nullification or impairment” of treaty

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8. For earlier proposals and comparative legal aspects see the studies cited supra note 1.
9. On these different functions of GATT and the WTO see Petersmann, supra note 5, at 178.
benefits regardless of whether actual trade damage has already occurred. In view of the successful liberalization of tariffs and trade policy border measures, it is only logical to progressively extend the scope of GATT/WTO law to internal policy instruments and to private market access barriers.

(b) Both GATT law and the GATS explicitly recognize, and the increasing number of complaints (e.g., the 1995 U.S. and EC complaints concerning access to the Japanese markets for automobiles, automobile parts and mobile telephony) and of GATT/WTO dispute settlement proceedings against private market access barriers confirms, that the competitive benefits from GATT/WTO rules may be "nullified or impaired" by private market access barriers. GATT/WTO rules could be made more effective by a systematic recognition of these interrelationships in WTO law (e.g., in Article XVII of GATT and Article IX of GATS). This can be achieved more effectively through conduct-oriented competition rules than merely through general result-oriented obligations that the competitive benefits deriving from GATT/WTO law must not be "nullified or impaired" through private market access barriers.10

(c) Over the past decades, it has not been possible to overcome many of the "protectionist biases" of the world trading system through sectoral negotiations, e.g., among air transport authorities in the International Civil Aviation Organization, among shipping authorities in the International Maritime Organization, among competition authorities within the OECD, or among intellectual property right bureaucracies within WIPO. Thus, the widespread cartel arrangements in the international agreements on international air and shipping transports, the lack of competition rules in the various WIPO conventions on protection of intellectual property rights, and/or the widespread exemptions for export

10. Article 46:1 of the 1948 Havana Charter for an International Trade Organization already required that "[e]ach member shall take appropriate measures and shall cooperate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1." This general obligation was then illustrated by a list of such restrictive business practices, which left it to both the ITO and individual member states to further specify the contents of the general obligation on a case-by-case basis.
and import cartels in domestic competition laws continue to impede and distort the worldwide division of labour. Nor could substantive reforms of the protectionist biases of antidumping laws be achieved through GATT negotiations among self-interested antidumping bureaucrats. Only more comprehensive, reciprocal "package deal negotiations," such as future "WTO Rounds," are likely to attract the political support from heads of governments, as well as from export industries, which is necessary for overcoming protectionist pressures for anticompetitive rules on trade, competition and intellectual property. The focus of competition law on general consumer welfare will assist in limiting the arbitrary "producer bias" of antidumping laws and protectionist abuses of intellectual property rights.

(d) The WTO Trade Policy Review Mechanism already covers competition policies and intellectual property rights protection in member countries. It should be used more systematically for examining the manifold interface problems of trade and competition policies.

(e) The negotiation of additional competition rules in the context of the WTO has been suggested as one of the subjects for the future WTO Work Programme. The 1996 WTO Ministerial Conference should set up a WTO Committee on Trade and Competition to examine the interrelationships between WTO rules and competition problems, and the need for negotiating additional WTO rules on competition policies and private market access barriers. The experience with the WTO Committee on Trade and Environment suggests that such a systematic examination of the interface problems of trade and competition policies can contribute to clarifying the problems and the interpretation of the WTO rules, and can facilitate future negotiations on additional WTO rules.

(f) Trade liberalization, deregulation and the worldwide adoption of market-based approaches have led to an increasing interdependence of production and markets in different countries through trade in goods, services and cross-border movements of persons, capital and technology. The Uruguay Round Agreements acknowledge these interrelationships between goods trade, services, know-how transfers and direct investments by extending the legal market access guarantees
beyond trade in goods to services trade, investments and intellectual property rights. The new and broader market access guarantees reduce transaction costs and distortions of complementary international business activities and have important implications for transnational enterprises. Not only should governments reexamine and broaden their competition policies but internationally active enterprises should also reexamine their alternative "internationalization strategies" (e.g., exports, licensing, and/or direct investments) and should support additional market access guarantees against private anticompetitive restraints.


The Report begins with a number of reasons why the worldwide trade liberalization and globalization of business call for a strengthening of domestic competition laws, of their effective enforcement and of cooperation among competition authorities. For instance:

- The lack of national competition laws, or their ineffective enforcement, in more than 100 countries gives rise to market access barriers, concerns over reciprocity, trade conflicts and retaliatory trade sanctions.

- There are more and more competition problems which transcend national boundaries: international cartels, export cartels, restrictive practices in fields which are international by nature (such as air and sea transport), mergers on a worldwide scale, or the abuse of a dominant position in several major markets (e.g., the 1994 Microsoft case).

- The differences and risks of conflict among domestic competition rules (e.g., in the case of a merger or concerted practice being authorized in one country and prohibited in another) generate uncertainty and transaction costs.

- The unilateral extra-territorial enforcement of U.S. antitrust laws and trade laws vis-à-vis foreign anticompetitive prac-
tices leads to international conflicts (e.g., over jurisdiction, unilateral sanctions and counter-measures) and to practical enforcement problems (e.g., in the case of information-gathering abroad and foreign "blocking legislation").

- Developing countries in particular risk being subject to anticompetitive practices (e.g., use of intellectual property rights for limiting domestic competition) and extraterritorial application of other countries' competition laws.

- WTO law should deal more systematically with the acknowledged risk that GATT and GATS commitments may be undermined by private anticompetitive practices.

The integration of trade and competition rules in EC law, and the acceptance of the EC competition law principles by more than twenty-five European countries, offer important lessons for overcoming the limits to present international cooperation in the field of competition. These lessons are, in part, similar to those from the integrated trade and competition rules in the regional free-trade area agreements between Australia and New Zealand, as well as within the North American Free Trade Area. For instance:

- EC competition rules coexist with national competition rules in all EC member states and are applied through intense cooperation between EC and national competition authorities (e.g., exchange of confidential information, agreed allocation of jurisdiction to initiate and carry out investigations, cooperation within the Advisory Committees on Restrictive Practices, Dominant Positions and Merger Control) and through application of EC competition law by EC and national courts.

- The Agreement on the European Economic Area ("EEA") and the EC's cooperation agreements with Central and East European countries, as well as with Russia and the Ukraine, include both substantive competition rules and procedures for cooperation among competition authorities. The EC intends to include similar competition rules and procedures into the "new generation" of association agreements with Mediterranean countries. These arrangements (e.g., on substantive minimum standards, information exchange and co-

12. For a comparative survey of international agreements containing competition rules see ERNST-ULRICH PETERSMANN, COMPETITION ELEMENTS IN INTERNATIONAL INSTRUMENTS (1994).
operation among competition authorities) could serve as a model for additional cooperation agreements with countries outside Europe.

The notification, cooperation, and coordination requirements, notably those regarding "positive comity" (Article V) and "negative comity" (Article VI), in the 1991/1995 EC-U.S. Agreement on cooperation in the field of competition policy could serve as a model for similar agreements with other countries outside Europe (cf. the draft EC-Canada agreement). Yet, the number, contents, and actual application of bilateral antitrust cooperation agreements and bilateral legal assistance agreements remain limited. For instance, there are no effective procedures for the settlement of disputes over private anticompetitive practices. The 1986 OECD Recommendations on cooperation between member countries on restrictive business practices affecting international trade are widely regarded as inadequate.

The Report makes a number of recommendations for improving international cooperation on, and enforcement of, competition rules through a Plurilateral Agreement on Competition and Trade ("PACT"):

(a) A worldwide competition code, providing also for an international competition authority responsible for its implementation, is not a politically realistic short or medium-term option. Bilateral cooperation remains essential for detecting and limiting restrictive practices with transnational effects, and for preventing or settling conflicts resulting from the extraterritorial enforcement of national competition laws. Both the "negative comity" and "positive comity" mechanisms can contribute to a more effective enforcement of competition rules and should be strengthened and extended to other countries (e.g., Japan). However, bilateral agreements cannot replace the need for multilateral substantive minimum competition rules and dispute settlement procedures so as to contain, e.g., the risks of commercial frictions resulting from the absence, ineffectiveness or heterogeneity of national competition rules.

(b) The proposed PACT should be open to all countries and, in its initial phase, should include at least the OECD countries, the central and eastern European countries, as well as
major trading countries in Asia. It could have the legal status of a "plurilateral agreement" in terms of Annex 4 to the Agreement Establishing the WTO so as to make the trade and competition rules, notably their interpretation and judicial enforcement, mutually supportive. It should be based on three sets of rules:

(aa) Procedural notification, cooperation, "negative comity" and "positive comity" obligations, as recognized, e.g., in the EC-U.S. agreement, which could be multilateralized and possibly extended (e.g., by enabling the exchange of confidential information and by strengthening the positive comity obligations).

(bb) A limited number of substantive minimum principles for cross-border cases to be incorporated into the national laws of member countries in much the same way as have been the EC Directives (i.e., obligations to achieve a certain result, without need for amending existing legislation if it already contains these principles or is open to similar interpretation). The common principles could include a prohibition of horizontal cartels relating to the fixing of prices, restriction of supply, or the sharing of markets, including a prohibition of export cartels. "Rules of reason" could be provided for other types of cooperation agreements and vertical restraints, on whose pro- and anticompetitive effects opinions may differ depending on the circumstances; one solution might be to prohibit agreements where their restrictive effect on competition is not offset by an advantage for the consumer and/or where they constitute a barrier to market access. As regards abusive behaviour of enterprises in a dominant position, a rule similar to Article 86 of the EC Treaty could be appropriate. In the field of mergers, priority should be given to a harmonization of procedures to give competition authorities sufficient time to consult each other. GATT Article XVII on state trading enterprises should be strengthened by subjecting monopolies and companies with "exclusive or special privileges" to the same competition rules as other commercial enterprises. In addition, the complementarity of trade and competition policies could be enhanced by inclusion of a provision by which the "nullification or im-
pairment"—through private practices—of market access commitments under WTO law would be actionable, unless appropriate corrective measures are taken by the country concerned.

(cc) An international institutional structure should be entrusted with 3 functions:
- to serve as a forum for analyzing, reviewing and in future, possibly, adapting and extending the common principles, covering all aspects of the relationships between competition and trade;
- to establish a "register of anticompetitive practices" within the contracting parties to the agreement; and
- to provide effective international dispute settlement and enforcement procedures for disputes among member countries over the international procedural obligations, per-se-prohibitions, rules of reason, as well as disputes over "nullification or impairment" of market access as a result of anticompetitive practices.

C. The 1993 Draft International Antitrust Code ("DIAC") as a Plurilateral Trade Agreement in Terms of Annex 4 of the WTO Agreement

The DIAC was elaborated by a private group of academic experts and practitioners and was submitted to GATT and to the press in July 1993. Its authors shared the belief that, even though political consensus on such detailed antitrust provisions may now seem utopian, an ambitious academic model agreement can assist in stimulating worldwide reflection and debate on the need for international competition rules. The proposal to include the international competition rules as a "Plurilateral Trade Agreement" into WTO law was motivated by the concern that even if membership in a DIAC may be limited in the beginning, the agreement must take into account the interrelationships between competition rules and WTO rules on trade in goods, services, intellectual property rights, surveillance, dispute settlement,

and enforcement. The basic principles underlying the DIAC are in part similar to those of GATT law:

(a) International minimum standards for transborder cases based on the three pillars underlying most modern competition laws: \( \text{per se} \) prohibitions and rules of reason with rebuttable presumptions for horizontal and vertical restraints of competition (such as cartels and exclusionary distribution strategies); control of mergers; and control of abuses of market power. The minimum standard principle would allow stricter and divergent national competition laws and experimentation, e.g., in the balancing of the costs and benefits of restraints of competition, or regarding exceptions for "concentrations."

(b) Incorporation of the international rules into domestic laws and their enforcement primarily through domestic competition authorities and courts.

(c) National treatment in the sense that domestic competition laws applicable to national antitrust cases must be applied immediately and unconditionally to all interstate antitrust cases within the scope of the DIAC (e.g., no exemption of export cartels from domestic cartel prohibitions).

(d) Supervision of the effective enforcement of domestic competition laws by an independent "International Antitrust Authority" ("IAA") entitled to request domestic competition authorities and courts to initiate antitrust investigations ("principle of international procedural initiative").

(e) Intergovernmental dispute settlement proceedings before an "International Antitrust Panel" between "injured" and "injuring countries," or between the IAA and a member country which violates its obligations under the DIAC, according to the WTO dispute settlement procedures.

(f) Integration of the DIAC into the WTO world trade and legal system as a "Plurilateral Trade Agreement" in the sense of Annex 4 to the WTO Agreement. This would facilitate the

14 The establishment of such an International Antitrust Authority is one of the major differences between the DIAC and the recommendations of the EC Expert Group Report, which "does not consider this a realistic short or medium-term option." FIKENTSCHER, supra note 13, at 18. The establishment of an "International Competition Policy Office" within the WTO, albeit with less powers, has also been proposed. See F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY (1994).
progressive extension of the initially limited membership to other WTO member countries, as well as take into account many interface problems of trade and competition rules in the field of goods trade, services trade, intellectual property rights, and foreign investments.\textsuperscript{15}

V. Systemic Advantages of Integrating Competition Rules into GATT/WTO Law: The Case for Reforming Antidumping Law

A. Inconsistencies Between Anti-dumping Laws and Competition Laws

Antidumping laws and GATT rules define dumping either as international price discrimination (home market price - export price = dumping margin) or as sales below full costs (including averaged production costs, general and administrative expenses, and a reasonable profit).\textsuperscript{16} Since the introduction of the first antidumping laws in Canada (1905), New Zealand (1905), Australia (1906), the United States (1916, 1921) and Great Britain (1921), import-competing industries have attempted to justify antidumping measures on various grounds of antitrust policy (e.g., risk of monopolization through predatory pricing), trade protection (e.g., of “strategic industries”) or unfairness (e.g., of protected export markets enabling supra-competitive profits and cross-subsidization of exports). However, there is broad agreement among economists that none of these reasons is convincing,\textsuperscript{17} and that antidumping laws distort international trade in an arbitrary and welfare-reducing manner.\textsuperscript{18} For instance:

\textsuperscript{15} For a critical discussion of the DIAC see Hauser, supra note *.
\textsuperscript{16} Both definitions of dumping refer to actual home market prices or actual costs of foreign firms and not to regulatory differences between high-standards countries and low-standards countries. They do therefore not apply to “eco-dumping” or “social dumping,” which refer not to actual international price discrimination or below cost sales by foreign firms, but to allegedly unfair “regulatory subsidies” resulting from lax environmental or labour standards in the exporting country which do not fully reflect all social costs and may confer unfair cost advantages to producers in low-standards countries.
\textsuperscript{17} See J. Viner, Dumping: A Problem in International Trade (1923); For more recent critical studies see Antidumping: How It Works and Who Gets Hurt (J. Michael Finger ed., 1993); Richard Dale, Antidumping Law in a Liberal Trade Order (1980); Down in the Dumps: Administration of the Unfair Trade Laws (Richard Boltuck & Robert E. Litan eds., 1991); B.M. Hoekman & P.C. Mavroidis, Anti-Trust Based Remedies and Dumping in International Trade (1994); R.E. Schöne, Alternatives to Antidumping from an Antitrust Perspective (1996).
\textsuperscript{18} This was confirmed in two recent empirical studies by the United States International Trade Commission. See United States Int’l Trade Comm’n, The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, No.332-344 (June 1995) and by the OECD (a 1995 expert report prepared by Prof. Willig and Prof. Messerlin, not yet published).
(a) As a means to protect import-competing industries against predatory pricing by foreign exporters, antidumping laws are inconsistent with antitrust laws (e.g., in the EC and United States) and go far beyond what might be necessary. Thus, antitrust laws in the EC and the United States are not concerned at discriminatory low-pricing as such. Selling below costs is considered to be prohibited by EC competition law only if a dominant firm (a) sold below average variable costs, which is considered per se abusive and illegal, or (b) it sold below average total costs with the intent to drive a competitor from the market.\(^{19}\) U.S. antitrust law tends to consider below cost sales to be illegal only if the alleged predator has a dominant position and is able to recoup its losses made during the “predatory pricing” period so that competition risks becoming monopolized.\(^{20}\)

Antidumping laws are inconsistent with these antitrust aims: (a) they protect import-competing industries rather

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19. EC competition law does not expressly prohibit price discrimination or dumping per se. Article 86 of the EC Treaty only prohibits the abuse of a dominant position in the EC if it affects trade between EC member states. See Treaty Establishing the European Community ["EEC Treaty"] art. 86. Article 86 has been applied to price discrimination and below cost sales if a dominant position enables a firm (or, in case of a collective dominant position, several firms) to behave to an appreciable extent independently of competitors, customers and ultimately of consumers. A market share above about 50% accounts as such for a dominant market position. Cf. Case 62/86, Akzo Chemiev v. Commission of the European Communities, 1991 E.C.R. 3359, 3453 (1991). However, the prohibition in Article 86(c) of “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,” has been applied only to discriminatory high prices to manufacturers, retailers, or distributors, but not to discriminatory high pricing to consumers, price discrimination between national markets as such, nor to discriminatory low pricing. Selling below costs has been considered an abuse prohibited by Article 86 only in two cases. See Akzo, 1991 E.C.R. 3359; Commission Decision of 18 July 1988 Relating to a Proceeding Under Article 86 of the EEC Treaty; Napier Brown v. British Sugar, 1988 O.J. (L 284/41). The prohibitions were based upon (a) a price-cost comparison (e.g., prices below total costs, but above average variable costs, by the dominant firm Akzo); and (b) the intention of the dumper to drive its competitors from the market. In Akzo, the EC Court considered only prices below average variable costs as abusive and illegal per se and not justifiable by reasons other than the intent to harm competitors. See Akzo, 1991 E.C.R. 3359. For a comparison of EC and U.S. antidumping and antitrust policies see Schone, supra note 17.

20. In A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989), for instance, the court held it was irrelevant that sales were below costs and that the predator's intent was to ruin its competitor. The court affirmed the dismissal of the case on the ground that it was impossible for the predator firm to recoup its losses by subsequent monopoly prices. See id. The impossibility of regaining losses was also discussed by the U.S. Supreme Court in Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), which was part of a series of antidumping, countervailing duty, and antitrust complaints by U.S. television manufacturers competing with Japanese television manufacturers. For detailed references to this U.S. antitrust law case see Schone, supra note 17.
than competition;\(^2\) (b) they use much laxer standards facilitating findings of "dumping" and "like products," in contrast to the strict antitrust standards for determining "predatory pricing" and the "relevant markets;" (c) antidumping remedies (import duties, price undertakings, or quantitative export restraints) often restrict all imports of like products from the country concerned without being limited to investigated firms (in contrast to the prohibitions, cease and desist orders, fines, criminal sanctions, and civil damages of antitrust laws). As a result of these and other protectionist biases in antidumping laws, most antidumping measures are imposed by the EC and the United States under conditions (e.g., small market shares of exporters accused of dumping) which would never justify an antitrust remedy against "predatory pricing." The welfare-reducing consequences for domestic consumers, downstream user industries, and competition of this discrimination in favour of "rent-seeking" producers are essentially arbitrary.

(b) As a means to protect import-competing producers against low-priced imports, the stricter substantive and procedural conditions in the WTO Agreement on Safeguard Measures pursuant to GATT Article XIX (e.g., nondiscrimination requirement so as to avoid trade diversion, public interest requirement taking into account consumer interests, transparency requirement, stricter time limits and regressivity of safeguard measures) should be applied in a nondiscriminatory manner to all domestic producers seeking protection against injury caused by import competition. This would also protect more effectively the balance of rights and obligations under GATT law (e.g., the obligations under Ar-

\(^2\) There seem to be only three cases where EC antidumping decisions were based on antitrust considerations: Council Regulation (EEC) no. 2322/85 of 12 August 1985 Imposing a Definitive Anti-dumping Duty on Imports of Glycine originating in Japan, 1985 O.J. (L 218/1) 1 (the Council limited the antidumping duty to less than the dumping margin so as not to give monopoly power to the single EC producer by eliminating foreign competition completely); Commission Decision of 10 January 1994 Terminating the Anti-Dumping Proceeding Concerning Imports of Gum Rosin Originating in the People’s Republic of China, 1994 O.J. (L 41/50) 50 (the EC Commission discontinued the proceeding since the complainant EC industry would not have been able to supply the demand without significant price increases); Case 358/89, Extramet Industrie SA v. Council of the European Communities, 1992 E.C.R. 3813 (the EC Court found the EC antidumping duties illegal because the EC Commission had failed to take into account the anticompetitive refusal of the petitioner Pechiney, the single EC producer of calcium metal, to supply calcium metal to the processor of calcium metal, Extramet).
articles XIX and XXVIII to grant compensation for the withdrawal of concessions, or to face reciprocal withdrawal of concessions by the exporting country). Again, the discriminatory and protectionist nature of antidumping measures, which are easily renewable and not progressively liberalized, lack any justification.

(c) As a means to put pressure on exporting countries to liberalize their markets to prevent international market segmentation and "level the playing field," antidumping measures are suboptimal compared to alternative policy instruments which remedy the causes of dumping directly at their source. For instance, reciprocal liberalization of governmental market access barriers, and antitrust enforcement against private anticompetitive practices in both the exporting and the importing country, offer welfare-increasing and more equitable alternative instruments of curing the roots of international market segmentation and of rendering "monopolizing dumping" impossible. As explained above, the question of whether the production conditions in the exporting country are "fair" is irrelevant for the economic welfare of the importing country, provided there are no nonfinancial international externalities to the detriment of the importing country.

B. How to Reform Antidumping Laws?

Economic theory suggests that, among the various objectives of antidumping policies, only "monopolizing dumping" deserves action against foreign exporters; but such action should be based on the same antitrust standards applied to predatory pricing by domestic firms. Moreover, empirical evidence demonstrates that, in the modern globally-integrated world economy, there seems to be no documented instance of "monopolizing dumping" where the losses could be recouped by later monopoly profits.\textsuperscript{22} If monopolizing predatory pricing should actually occur, enforcement of antitrust rules in the importing and exporting country concerned, and liberalization of governmental market access barriers to enable "arbitrage" and to render "monopoly prices" impossible, offer more efficient policy alternatives than antidumping laws. As convincingly shown by Schöne,

"neither international substantial harmonization of predatory pricing standards nor an international antitrust authority are required to control predatory pricing practices in international trade;"\textsuperscript{23} an international agreement on cooperation between antitrust authorities could, however, help in the collection of evidence, and in the enforcement of antitrust decisions, in the exporting country concerned.

Reform of antidumping laws will be beneficial to consumers, the national economies at large, and also the legal consistency, transparency, and effectiveness of national and international trade laws. But it will hurt the powerful import-competing industries (such as the U.S. steel lobbies) which currently benefit from the "protection rents" made possible by antidumping measures. Antidumping bureaucracies have also vested self-interests in maintaining their "antidumping empires" and do not care that "the emperor has no clothes."\textsuperscript{24} Individual consumers and the citizens at large tend to act "rationally ignorant" towards the price increases and welfare losses caused by antidumping measures in a manner which is neither transparent nor understandable to the ordinary citizen. Also, export industries in the main "user countries" of antidumping measures (i.e., Australia, Canada, the EC and the United States) see no sufficient advantage in supporting reforms of antidumping laws as long as they suffer less from antidumping measures than many of their competitors (e.g., Japanese and other Asian export industries). For political reasons, unilateral antidumping reform is therefore unlikely. The experience with the 1979 GATT Antidumping Code and the 1994 WTO Antidumping Code suggests that reforms of international antidumping rules through international negotiations in GATT and the WTO among self-interested antidumping bureaucracies may produce only few \textit{procedural} improvements.

Reform of the arbitrary \textit{substantive} antidumping rules might therefore be politically achievable only as part of a broader "package deal negotiation." Notably developing countries should learn from their relatively less successful negotiation strategies in the Tokyo

\textsuperscript{23} See SCHONE, supra note 17, at 172. Enforcement of national antitrust law in the importing country against dumped imports is not likely to produce any adverse effects on competition in the exporting country if markets are segmented. As the diverging national antitrust approaches toward predatory pricing help to discover the most efficient rules, control of dumping in international trade does not require substantial harmonization of national predatory pricing rules. National antitrust authorities in the importing countries can apply national antitrust laws according to the "effects doctrine" or "territoriality principle" to predatory pricing strategies that may harm competition in the importing country and are carried out within the territory of the importing country.

\textsuperscript{24} See N. David Palmeter, \textit{The Antidumping Emperor}, 22 J. WORLD TRADE, August 1988, at 5, 5-7 (1988).
Round and Uruguay Round negotiations such as those regarding on liberalization of agricultural and textiles trade. In order to be more successful, reforms of antidumping rules must be made an agenda item of future "WTO Rounds" subject to a number of conditions such as:

(a) The current proposals for negotiating additional WTO rules on trade-related investment measures, environmental, social, and antitrust rules all have an important "competition dimension"; they should therefore be linked to reforms of antidumping rules as a condicio sine qua non. If announced at an early time, such a negotiating position could become a "credible threat" to the success of future WTO Rounds. As substantial reforms of antidumping laws will require many years of negotiations, and may be achieved only step-by-step, parallel progress on these various agenda items of the future WTO Round should become a negotiating principle.

(b) Reform of antidumping rules will not be politically possible without the strong support from export industries in the EC and the United States. In order to build up such support, other trading countries may have to use "carrots" (e.g., liberalization of governmental market access barriers and enforcement of competition rules against private market access barriers to prevent market segmentation as one precondition for dumping) as well as "sticks" (e.g., reciprocal use of antidumping laws against EC and U.S. exporters).

(c) Abolition of antidumping rules has so far only been achieved as part of common markets (notably in the EC and the European Economic Area) or free trade areas with harmonized competition laws (notably in the Australia-New Zealand Closer Economic Relations Agreement). This confirms that the complete abolishment of antidumping rules will not be possible in one big bang. Further trade liberaliza-

25. While this "competition dimension" is obvious for trade-related investment measures (such as purchase or export requirements) and trade-related environmental measures (such as environmental subsidies, packaging regulations, private deposit-and-return systems, or other waste disposal arrangements), proposals for enforcing ILO prohibitions of forced labour, child labour, or of discrimination against women through the more effective WTO dispute settlement system, rather than through the ILO dispute settlement procedures, are mainly motivated by social rather than competitive concerns. But a "social clause" linking trade rules and trade union rights could raise doubts whether labour laws mandating collective bargaining and "closed shops" are consistent with market-determined bargaining processes.
tion and harmonization of competition laws seem to be political preconditions for reforming antidumping laws.

(d) Gradual reforms of GATT/WTO antidumping rules should focus on the inclusion of antitrust criteria, such as: a preceding antitrust investigation by the antitrust authorities of both the importing and the exporting country into anticompetitive conduct of the dumper in the export and import markets; a preceding antitrust examination of the dumper's dominant market position based on an antitrust definition of the relevant market (which, contrary to the "like product concept" of antidumping law, also takes into account the consumer perspective and the substitutability of products) and on a new de minimis rule regarding the necessary minimum market share of the alleged dumpers; a reform of the protectionist "injury concept" of antidumping laws by taking into account the "public interest" and "injury to competition" as a whole (rather than only injury to the import-competing industry, including loss of their monopoly rents as a result of import competition); procedural reforms such as giving all affected groups legal standing in antidumping investigations and access to judicial review.

VI. MAIN POLICY CONCLUSION: LINKING NEGOTIATIONS ON COMPETITION, INVESTMENT, ENVIRONMENTAL, AND ANTIDUMPING RULES IN THE NEXT WTO ROUND

The preceding analysis leads to two major policy recommendations:

A. Need for Promoting More Consistent WTO Rules on Private Restraints of Competition Through a WTO Committee on Trade and Competition

For legal and political reasons, the existing "protectionist biases" in trade and competition laws (such as anticompetitive antidumping practices, exemptions for export and import cartels)—and the lack of competition rules in the GATS (e.g., for monopolistic service suppliers), in intellectual property conventions (e.g., for patent misuse) and also at the national level in many less-developed countries—can be

26. This has been convincingly shown by SCHÖNE, supra note 17, at 163; see also HOEKMAN, supra note 17, at 23.
overcome best by negotiating additional competition rules as part of
the GATT/WTO world trade and legal system. The WTO Ministerial
Conference in December 1996 at Singapore should, inter alia, estab-
lish a WTO Committee on Trade and Competition with the task of
identifying interface problems of governmental and private market ac-
cess barriers and distortions. On the basis of such preparatory work
and “consensus-building,” a future “WTO Round” should include ne-
gotiations on supplementing the existing GATT, GATS, TRIPS, and
TRIMS disciplines by additional competition rules on trade-related
private market access barriers and distortions. As worldwide consen-
sus among WTO member countries on worldwide competition rules
may be difficult to achieve, a second-best option would be to negotiate
a “Plurilateral Agreement on Trade and Competition,” in terms of
Annex 4 to the WTO Agreement, with substantive and procedural
minimum standards for domestic competition laws and policies re-
grading trade-related private market access barriers and market dis-
tortions. The scope and membership of such a PACT among
interested WTO member countries could be progressively extended
over time.

B. Need for Linking Future WTO Negotiations on Investment,
Competition and Environmental Rules to Reforms of
Antidumping Laws

The various proposals for additional WTO rules on competition,
investment, environmental, social, and labour standards are different
aspects of a general “integration problem” which has long been dis-
cussed in the context of European integration: To what extent do the
regulatory differences among national legal and economic systems re-


tory competition” must be weighed against the risks of intergovernmental harmonization and government failures. Liberal international trade is—from the perspective of consumer welfare, economic efficiency and individual liberty—a mutually beneficial “international public good” that is no less important than other international public goods (such as internationally agreed minimum standards for animal and plant protection). Public-choice theory teaches that the necessary political support for providing international public goods (such as international minimum standards for environmental, labour, and investment protection) will depend on reciprocal “package deal negotiations”; they are likely to succeed only if they offer “carrots” for joining international agreements on the supply of international public goods, as well as “sticks” for the “free-riders.”

The positive experience of the Uruguay Round negotiations—as well as the negative experiences of, e.g., UNCTAD, WIPO, and the OECD with negotiations on enforceable international competition rules—suggest that such “package negotiations” on multilateral minimum standards for environmental, social and investment rules might be more successful if carried out in the framework of the WTO. Hence, contrary to the economic efficiency arguments in favour of separating economic policy instruments, there are political arguments for “package deal negotiations” in the WTO on trade, competition, investment, environmental, and labour rules. Such negotiations should be linked to reforms of antidumping rules which impede and distort international trade and risk to undermine the liberal WTO world trade and legal system. Progressive reforms of antidumping rules should become an agenda item of all future WTO Rounds and should focus on reconciling antidumping rules with antitrust treatment of predatory pricing practices. The progressive inclusion of antitrust criteria into WTO antidumping law should be made a condition for progress in future WTO negotiations on additional WTO investment, competition, and environmental rules.