About the Coalition for Open Trade (COT)

COT and its affiliate, the Labor/Industry Coalition for International Trade (LICIT), bring companies and unions together in support of increased and equitable international trade. COT has been a leader in the debate over trade-and-competition policy. Among other activities, COT published *The Limits of the GATT: Private Practices in Restraint of Trade* in 1992 and a follow up study, *Dealing with Japan*, in 1994.

Companies and unions which support this paper without necessarily endorsing every statement or recommendation include:

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AMT - The Association for Manufacturing Technology

Bethlehem Steel

The Boeing Company

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Addressing Private Restraints of Trade

Industries and Governments Search for Answers Regarding Trade-And-Competition Policy

Coalition for Open Trade (COT)

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EXECUTIVE SUMMARY

Anticompetitive practices are a major and growing problem in international trade. Of all the policy domains once considered to be exclusively domestic, but now increasingly raised in trade negotiations, competition policy has perhaps the most direct impact on market access and trade flows. In many cases, anticompetitive practices – whether tolerated, enabled or actually promoted by official government policies – can completely close a country's markets to inbound trade and investment, nullifying the benefits of negotiated trade concessions. Government-to-government discussions have so far yielded very little progress on this thorny issue. More and more, a rationale is emerging in favor of making governments strictly liable for impairment of their trade concessions, whether caused by public or private restraints.

Recognizing the growing importance of trade-and-competition policy, Members of the World Trade Organization (WTO) in December 1996 established a new working group with a two-year mandate to study the subject. The issue has also been raised in regional and bilateral discussions in Asia, Europe and the Americas. COT, which for several years has sought to draw attention to the market access and trade diversion problems caused by foreign anticompetitive practices, welcomes the increased governmental focus. At the same time, COT's members are deeply concerned that the discussions not be highjacked by governments that have no interest in solving the market access problems described above and instead seek to the use the discussions to pursue other, unrelated and unworthy, trade policy agendas. This paper, the third produced by COT in the 1990s, provides a context for evaluating and responding to recent trade-and-competition developments in the WTO and elsewhere.

Causes and consequences of inadequate discipline on foreign anticompetitive practices. Causes include uneven antitrust enforcement at the national level, the inherent limitations of antitrust as a policy tool, and the lack of direct multilateral discipline on anticompetitive practices. Negative consequences for the international trading system include impairment of market access, endemic dumping in the world's open markets such as that of the United States, cartelization of international markets, "interface" problems between the United States and key trading partners such as Japan, and weakening of the WTO system.

Bilateral/sectoral negotiations as a policy response. In the 1990s, the U.S. Government has taken trade policy actions in several sectors affected by anticompetitive practices occurring in Japan. These actions have led to bilateral/sectoral agreements on paper, flat glass, insurance, and autos/auto parts, each addressing (among other things) Japanese antitrust enforcement. However, broader approaches continue to have considerable appeal.

Treatment in multilateral negotiating fora. Trade-and-competition, now an active WTO agenda item, has also been explored in the Organization for Economic Cooperation and Development, in Asia-Pacific Economic Cooperation exercises, in bilateral U.S.-EU discussions, in a North American Free Trade Agreement working group, and in negotiations for a

Free Trade Area of the Americas. Regrettably, there has been little progress so far in disciplining foreign anticompetitive practices or addressing the resulting trade problems. One major risk connected to these discussions, particularly in the WTO, is the effort by some governments to re-direct the focus away from private trade restraints and toward the supposedly "anticompetitive" behavior of governments. What these countries seek is a "second bite at the apple," a forum in which they can renew old grievances about unfair trade remedies and the WTO rules authorizing those remedies. As a matter of WTO housekeeping, proposals to reform particular agreements should be debated only in the relevant committees established by the Uruguay Round. More importantly, the target of these attacks – WTO-sanctioned trade measures such as safeguards and antidumping duties -- do not present a "competition policy" problem. Should this attempted highjacking succeed, it will rob the trade-and-competition initiative of its already-slender political support and ensure failure.

Positions of private sector organizations. Commentary, if not consensus, has been plentiful on this subject. A review of statements from business organizations, U.S. trade policy advisory committees, bar groups, think tanks and other commentators, reveals only a few common themes. (1) There is a general nervousness about whether a WTO work program on competition policy should be launched at this time – particularly one that could lead to dilution of existing U.S. standards. (2) There is broad concern about the possible excesses of cooperative antitrust enforcement approaches ("positive comity"), and skepticism regarding the efficacy of such approaches in solving the trade problems described above. (3) There is no detectable appetite for negotiating rules within the WTO, least of all for re-negotiating rules (such as those on antidumping) that were just recently and rather painfully updated during the Uruguay Round.

COT's recommendations. Based on several years' careful study of the issue, COT recommends that the U.S. Government:

- initiate an empirical and analytical study to determine which price and trade flow anomalies in international markets reflect foreign anticompetitive practices that could become a topic of government-to-government discussions;

- enact improvements to U.S. law authorizing an appropriate agency – USTR or the Federal Trade Commission acting on USTR's factual findings – to issue court-enforceable "cease and desist" orders to deter foreign anticompetitive practices;

- consider pursuing a "strict liability" regime under which governments in effect become guarantors of their market access commitments; and

- avoid domestic measures and international agreements that could weaken the existing U.S. antidumping and countervailing duty remedies.

Addressing Private Restraints of Trade:
Industries and Governments Search for Answers Regarding Trade-and-Competition Policy

I. INTRODUCTION

The impact of restrictive business practices on international trade flows has risen a notch on the official agenda of the multilateral trading system with the creation, in December 1996, of a new working group in the World Trade Organization (WTO) with a two-year mandate to study the subject. This is an important development for the WTO system. COT has sought for years to draw attention to the market access and trade diversion problems caused by anticompetitive practices, and to spur debate on possible solutions. COT's members urge that serious attention be paid by governments, business, and scholars to the progress made in the new working group.

The purpose of this paper is to provide a context for evaluating and responding to recent developments both in the WTO and in other international fora. The paper begins by briefly summarizing the causes and the consequences of inadequate discipline on foreign anticompetitive practices. It then reviews the treatment of the issue to date in international negotiating fora, summarizes views articulated by major industry groups and U.S. Government agencies, and concludes by proposing some concrete steps that might help move the debate forward.

II. THE PROBLEM

Anticompetitive practices are private activities that restrict commerce and alter market outcomes. Anticompetitive practices distort the domestic economy in which they occur and, frequently, international commerce as well. There are several categories, including "horizontal" practices (e.g., among fellow producers of the same type of good), "vertical" practices (e.g., between producers and distributors), and monopolization or abuse of a dominant market position. Private-sector anticompetitive practices are prevalent in many countries, despite the existence of national antitrust laws. These laws differ widely -- in coverage and especially in enforcement -- from country to country.

Anticompetitive practices significantly affect international trade. Indeed, of all the policy domains once considered to be exclusively domestic, but now increasingly raised in trade negotiations, competition policy has perhaps the most direct impact on market access and trade flows. In many cases, anticompetitive practices completely close a country's markets to inbound trade and investment. Governments, despite having agreed to eliminate official trade protections, can "privatize" protection by tolerating anticompetitive practices and allowing favored domestic companies to block out competing foreign goods or services. This strategy can wholly or partially nullify the benefits of negotiated trade concessions.

The problem of anticompetitive practices has accordingly surfaced in several international trade fora -- not just the WTO, but also regional discussions in Asia, Europe and the Americas. Whether governments have yet reached the point where they can treat this problem effectively at the regional or multilateral level, however, is questionable. The record of

performance under the few international agreements that have been reached in this area is not encouraging. More and more, a rationale is emerging in favor of making governments strictly liable for impairment of their trade concessions, whether caused by public or private restraints.

A. Circumstances Which Contribute to Inadequate Discipline on Anticompetitive Practices

Uneven antitrust enforcement at the national level. Traditions of antitrust enforcement differ sharply among the world's major trading economies. In the United States, concern over private economic concentrations (trusts) developed organically into a powerful political force which has led to the enactment, expansion, and vigorous enforcement of the Sherman and Clayton antitrust acts. In many other countries, however, the cultural background for effective antitrust enforcement has never existed. For example, notwithstanding the Anti-Monopoly Law (AML) enacted during the post-war U.S. occupation of Japan, weak enforcement by the supposed watch-dog agency, the Japan Fair Trade Commission (JFTC), remains one of the central problems in the two countries' bilateral economic relationship.

Companies domiciled in open markets that are subject to aggressive antitrust enforcement often find themselves in a difficult competitive position relative to foreign rivals operating with few constraints. The flexibility of manufacturers to engage in, for example, the following types of activity varies sharply from jurisdiction to jurisdiction:

- buying up smaller local competitors and their production facilities;
- integrating vertically, forging ownership links "upstream" with input suppliers and "downstream" with wholesalers and retailers;
- threatening -- either alone or in concert with fellow domestic manufacturers -- to cut off supplies to distributors who cut prices too aggressively or traffic too extensively in imported goods;
- monopolizing essential port facilities or distribution networks in a manner that denies foreign suppliers access and thereby effectively keeps them out of the market;
- entering into reciprocal "nonaggression" (territorial exclusivity) agreements with certain like-minded foreign competitors.

The ability of some firms, but not others, to engage in these types of activities has obvious implications for market access and international competition.

Limits of antitrust. The principal tool for combatting anticompetitive practices – the antitrust action -- faces severe limitations in the international context. Antitrust plaintiffs, whether private litigants or government enforcement agencies, encounter significant obstacles in seeking remedies against defendants who reside or act abroad. The doctrine of "international comity" leads many courts to decline to exercise jurisdiction over foreign conduct or parties where asserting jurisdiction might strain diplomatic relations. Even in the absence of jurisdictional problems, collecting evidence through discovery abroad is a costly and uncertain process, further complicated by "blocking" statutes in several countries that penalize compliance with

U.S. antitrust discovery requests. Finally, governments frequently acquiesce in or even orchestrate anticompetitive practices, thereby allowing the private parties involved to assert a "sovereign compulsion" defense to antitrust liability.

Lack of multilateral discipline. While national and "extraterritorial" disciplines over anticompetitive practices are inadequate, multilateral discipline is non-existent. There is no multilateral agreement -- like the TRIPs (Trade-Related Aspects of Intellectual Property Rights) Code for intellectual property -- obligating national governments to enforce a set of minimum or "core" antitrust rules. Indeed, there is at best a limited degree of agreement internationally on what topics competition policy ought to cover and what kinds of conduct it ought to reprehend.

B. International Trade Consequences of Private Anticompetitive Practices

Besides permitting market access to be blocked and trade concessions undermined, governments' inability to effectively deal with anticompetitive practices has several adverse consequences for the international trading system and the companies operating within it.

Dumping and distortion of investment patterns. Anticompetitive practices create home-market profit sanctuaries, which are classically linked to dumping abroad and maintenance of uneconomic production in the protected market.

International cartels. No natural force limits anticompetitive practices to one country or region of the world. Unchecked, they can lead to a global system of privately managed trade, as has happened for many steel products. International cartel arrangements, once in place, are difficult for any one country to combat.

Japan problem. Trade and investment between any pair of countries can lead to an "interface" problem if there are major dissimilarities in the way the two regulate their economies. Where a major player in the international economy charts, as Japan has done, a starkly different course on competition policy from that of its partners, the interface problem is bound to be severe and to affect numerous economic sectors and interests. Ultimately, resentments generated in the economic sphere can spread to and undermine political relationships.

Weakening of GATT/WTO system. Long-term political support for multilateral trade liberalization, in the United States and abroad, depends on the degree to which trading partners are seen to have effectively opened their markets and extended meaningful, reciprocal trade benefits. By tolerating or encouraging anticompetitive practices, governments can avoid the adjustments that freer trade would otherwise require; markets never become truly contestable, and trade patterns do not improve. The GATT/WTO system cannot thrive if its putative benefits are undermined in this manner.

III. ONE APPROACH TESTED IN THE 1990s: USING TRADE TOOLS BILATERALLY ON A SECTOR-BY-SECTOR BASIS

Anticompetitive practices affect U.S. trade in many sectors and with many different trading partners -- hence the intuitive appeal of "generic" solutions. Nonetheless, the problem has surfaced in particular cases and has occasionally been addressed on that basis. In the 1990s, in particular, the U.S. Government has taken trade policy actions in a number of sectors seriously affected by anticompetitive practices occurring in Japan. These actions have resulted in bilateral agreements on paper products (1992), flat glass (1994), insurance (1994), and autos/auto parts (1995).

Each of these agreements addresses Japanese competition policy for the sector at issue, although they contain few actual commitments by the Government of Japan (GOJ) and instead rely primarily on the drafting technique of "noting" or "affirming" existing circumstances and legal obligations.[1/] The more recent agreements have shown a modest evolution in the direction of stronger and more specific GOJ commitments. Under the insurance agreement, for example, Japanese and U.S. firms were able to choose an independent research firm to prepare a study of the Japanese market to supplement the Japan Fair Trade Commission's (JFTC's) own study. The auto agreement went even further:

- It noted that the JFTC office handling reports of Anti-Monopoly Law (AML) violations has been strengthened.

- It emphasized the important safeguards afforded AML complainants, including the ability to provide information anonymously, either orally or in writing, and with appropriate guarantees of confidential treatment.

- It committed the GOJ to write to auto dealers, attaching portions of its 1991 AML enforcement guidelines and assuring the dealers that they are free to sell imported motor vehicles.

In addition, as discussed further below, USTR has launched a section 301[2/] investigation of public/private barriers to Japan's market for photographic materials. This investigation has

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1/ For example, the agreements take note of the JFTC's obligation to prevent anticompetitive practices in all industries and to provide effective AML enforcement. They also note that meeting this obligation will require some degree of political independence for the JFTC. Some agreements also note that any party, Japanese or foreign, may report suspected AML violations to the JFTC, which, if so informed, would be expected to review the information and take appropriate action. In addition, each agreement references a study of the sector concerned, which the JFTC was about to undertake or had recently completed at the time the agreement was executed. In the case of completed studies, the agreements note that the JFTC found no violations of the AML, although it did find several practices "to be addressed" by voluntary efforts on the part of the Japanese industry with monitoring by the JFTC.

2/ Section 301 of the Trade Act of 1974 is the principal U.S. market-opening trade statute and has the potential to be an effective weapon in the fight against anticompetitve practices. Section 301 authorizes the President to threaten or take a wide array of retaliatory measures in attempting to secure the elimination of "unreasonable" or "unjustifiable" foreign government practices that "burden or restrict" U.S. commerce. Among the practices defined in the statute to be "unreasonable" is a foreign government's toleration of systematic anticompetitive practices where the result is to exclude U.S. suppliers from the market. The

not yet resulted in a market access agreement. A case regarding Japanese Government measures blocking access to its photographic film and paper market has been taken to a WTO panel. The United States during the 1990s has also twice renewed a bilateral arrangement with Japan regarding trade in semiconductors, which grew out of a section 301 case from the 1980s.

In principle, approaching the problem as a market access issue, using trade policy tools, can yield some improvements. Yet, at least in the case of Japan, the record is mixed. The American Chamber of Commerce in Japan (ACCJ) recently published a report evaluating 45 trade agreements between the United States and Japan.[3/] Among the agreements judged successful (yielding a clear improvement in market access) are those involving beef, citrus, cellular telephones, and semiconductors. Agreements judged to be unsuccessful in improving market access include those on apples, insurance, and government procurement of telecommunications equipment. In the ACCJ's view, the failures can be attributed to the lack of:

- a "detailed, comprehensive, well-coordinated [U.S.] strategy for trade negotiations with Japan,";
- adequate U.S. Government-industry coordination;
- development and nurturing of allies, both within Japan and in third countries;
- clear objectives and terminology;
- "specific terms, goals, and objective measurement criteria for how agreements will be implemented and reviewed;" and
- adequate pressure on Japan to implement the agreement and uphold its commitments.[4/]

While the United States has had some success in using trade tools on a sectoral basis, the effectiveness of such a sector-by-sector approach can be (and is) debated. Broader approaches continue to have considerable appeal, whether limited to Japan (Structural Impediments Initiative, "deregulation" discussions under the current U.S.-Japan Framework) or multilateral in scope (WTO working group). The remainder of this study addresses the prospects for a broader solution.

Uruguay Round Agreements Act (URAA) clarifies that this portion of the statute applies to anticompetitive practices that have the effect of restricting sales of U.S. goods or services to a foreign market as a whole, rather than simply to the foreign firms that engage in anticompetitive practices.

3/ See Jeanmaine Todd, ed., ACCJ Director of Publications, *Making Trade Talks Work: Lessons from Recent History* (Japan: Sato Printing, Inc., 1997).

4/ The "*keiretsu* problem" which partially underlies this ongoing friction appears to be spreading. "By extending their tightly knit production networks to Southeast Asia, Japanese multinationals are making it difficult for outsiders to break into key markets in that region." "Study Says Japanese Production System Blocking Outsiders in Southeast Asia," *The Wall Street Journal*, April 18, 1997, p. B7.

IV. TREATMENT TO DATE IN MULTILATERAL FORA

A. World Trade Organization (WTO)

The original charter for an International Trade Organization (ITO), drafted in the aftermath of World War II, contained a chapter on competition policy that would have imposed a binding obligation on members to have and enforce remedies against anticompetitive business conduct. The charter and the ITO failed at the ratification stage, however, and the General Agreement on Trade and Tariffs which governed trade for the ensuing 47 years contained no provisions in this area. Other than a 1960 decision in which the Contracting Parties agreed to consult in good faith over claims that private restraints were undermining market access, progress within the GATT system on this issue remained out of reach.

This situation may change as a result of the first WTO Ministerial in December 1996, at which Ministers agreed to establish a new WTO Working Group on Trade and Competition Policy. Specifically, they agreed to "establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework." The group is to study proposals raised by participating Members and report to Ministers after two years. Frederic Jenny, a French competition policy expert, has been selected to chair the group, whose first meetings occurred on May 7, 1997 and July 7-8, 1997.

There has been a good deal of initial difficulty regarding the group's work plan and terms of reference.[5/] The main point of contention is whether this will be a forum for WTO Members who dislike antidumping to air their grievances or a forum more appropriately focused, like the initial EU proposal which led to the group's creation, on restrictive business practices that impair market access. U.S. and EU authorities confirmed the latter interpretation through press releases issued following the Singapore Ministerial. The USTR press release, for example, stated:

5/ Indicative of the difficulties associated with getting the working group off the ground is a *U.S. Paper on WTO Agenda for 1998 Ministerial*, submitted to the so-called "Invisibles" group on April 10, 1997:

> ***D. Issues Raised At Singapore***
>
> ***1. Competition, Investment and Transparency in Procurement***
>
> *These subjects were amongst the most contentious dealt with in the Singapore Declaration. We all know that because of the extreme sensitivities associated with these topics, progress could easily be frustrated or blocked if we do not proceed cautiously.*
>
> *Questions for Discussion*
>
> *1. Can we agree that the number of meetings of these working groups in 1997 should be limited (e.g., 2-3) and that controversial topics should be avoided while Members gain confidence with the process?*
>
> *2. How can we avoid a lengthy debate on terms of reference for these various groups that will further polarize the possibility for information exchange and confidence building?*

The United States' position on this issue ensures that work on competition will not threaten our laws which protect the principles of fair pricing and fair competition. We should not undo work within the WTO on anti-dumping issues that has barely begun. The work plan must focus on the problems of cartels and other anticompetitive behavior which can impede U.S. exporters' access to foreign markets.[6/]

In connection with her confirmation hearing, in response to a question submitted for the record by Sen. Rockefeller (D-VA), USTR-designate Charlene Barshefsky stated:

[T]his is not an appropriate forum in which to discuss the legitimacy or application of WTO-sanctioned trade remedies, such as antidumping. . . . I can assure you that we will make every effort to see that the group focuses on appropriate topics, and we will block any attempt to use this as a vehicle to

renegotiate or weaken the WTO's rules against dumping. The EU shares our view.[7/]

Nevertheless, a number of delegations, including Hong Kong, Korea and Japan, having sought and failed to get confirmation of their position in the Ministerial Declaration, have raised antidumping issues in the new working group anyway. Other Members should continue to refuse to discuss antidumping outside the Anti-Dumping Committee -- not least because there is so much important work for the group to do on anticompetitive practices.[8/]

6/ *United States Praises Sweeping Information Technology Agreement, WTO Process*, USTR Press Release, December 13, 1996, p. 3.

7/ *Written Response to Questions from Senator Rockefeller: WTO Trade and Competition Policy Working Party*, February 1997. See also *U.S. Government Comments on the Transatlantic Business Dialogue Progress Report of May 23, 1996*, November 8, 1996 (emphasis added):

> *The United States may, as part of a balanced package of new work to be agreed upon at Singapore, be prepared to join a consensus to begin a limited, educative program in the WTO. . . . [S]uch a work program could best advance thinking in this area by reporting on the results of the studies and inquiries it performs. Its purpose should not be to make recommendations to Ministers about whether negotiations on competition should be commenced, nor would the United States support work which would alter our antitrust or antidumping laws or other U.S. trade remedy laws.*

A third agenda for the working group, reportedly advanced by some developing countries led by India, is to use the working group as a means to attack perceived objectionable conduct by large multinational corporations headquartered in the United States and Europe.

8/ See also General Accounting Office, *World Trade Organization: Observations on the Ministerial Meeting in Singapore*: Testimony of JayEtta Z. Hecker before the House Ways & Means Subcommittee on Trade, February 26, 1997:

> *[T]he United States was concerned that any working group not focus on antidumping rules, but instead on issues concerning cartels and other private anticompetitive practices. Some WTO members, including Japan, Korea, and Hong Kong, had proposed that any working group consider the relationship of trade remedies, especially antidumping measures, and competition. . . . Following the ministerial, the EU and USTR issued a joint statement to clarify this language, which emphasized that the working group*

In light of this background, the working group is not off to an encouraging start. At its first organizational meeting, the group reportedly agreed to move forward on the basis of a proposal forwarded by Pakistan, under which an inventory was to be prepared by June 15, 1997, of WTO-authorized government measures that have an effect on competition. There are many such measures, of course -- from tariffs to balance-of-payments restrictions to WTO-authorized safeguard measures, and more -- but while such measures affect competition, they do not fall within the ambit of competition policy. The working group announced no plans for moving forward on its core mandate: the problem of restrictive private practices that impair market access and affect competition between firms in different national jurisdictions.[9/]

U.S. and EU authorities subsequently provided written submissions outlining how discussions within the working group might proceed (Appendix C). Both submissions emphasized that subsidies, as well as countervailing duties and other trade remedies (including antidumping), are dealt with elsewhere in the WTO system and are not eligible for parallel consideration within the new working group. Additionally, the U.S. and EU submissions set out largely congruent suggestions for what the working group might occupy itself with in the field of competition policy. Regrettably, these suggestions focussed too much on competition policy responses, and too little on the underlying private restraints of international trade (a subject on which a major educational exercise in the WTO would be most valuable).

The core concern of the WTO is market access. To achieve improved market access the focus must be on removal of barriers rather than a study of national tools available to promote competition. Moreover, it is important to note that this is a study effort, not a rule-oriented negotiation. It will likely be several years, or more, before WTO Members agree to begin negotiating over actual competition rules.

In a separate WTO development, as part of a market access dispute with Japan in the photographic materials sector, in 1996 the United States invoked the consultative mechanism created by the above-mentioned 1960 decision of the GATT Contracting Parties. Japan so far has not honored its obligation to consult.

To date, the question whether a government's toleration of market-closing anticompetitive practices should be actionable under the WTO's "nullification or impairment" rules has not been addressed. The Transatlantic Business Dialogue Progress Report of May 15, 1996 contained the following suggestion:

> *should not cover issues already dealt with in the WTO, including antidumping measures. However, members did not reach a clear consensus at Singapore on the future scope of the working group's mission. . . . Some observers expect the debate over the terms of reference for this working group to continue until the next scheduled ministerial in 1998. Some WTO members, including the United States, are discussing and studying competition policy issues in several other forums including APEC, FTAA, NAFTA, OECD, and UNCTAD.*

9/ At their May 1997 meeting in Canada, "Quad" Ministers confirmed that the goal of the WTO exercise is a "broader understanding of the benefits and key elements of an effective competition regime." "Quad Chair's Statement," *Washington Trade Daily*, May 5, 1997, p. 3.

The EU and the U.S. should, where appropriate, use the WTO Understanding on Dispute Settlement to attack non-enforcement of competition law against anti-competitive practices on the basis of nullification or impairment of WTO benefits. Although WTO rules in this area are not clear, the creation of some legal precedents could help to focus the discussion of a WTO Committee on Trade and Competition Policy.

B. Organization for Economic Cooperation and Development (OECD)

The OECD is an important forum for study and negotiation of economic issues among the world's major developed economies. Joint exercises of the OECD's Trade and Competition committees in recent years have led to a better international understanding of the "competition policy" problem and begun to provide the conceptual -- if not the empirical -- basis for further progress. The 1995 "report to Ministers" resulting from these discussions is particularly helpful, proposing a new and broader definition of "market access" focused on actual contestability rather than on more formal concepts such as national treatment.[10/]

The OECD renewed its focus on this issue in 1996 with the formation of a joint trade-competition committee. This committee has undertaken a significant educational effort, focusing on a number of "case studies," but has not yet produced concrete results. In 1997, the joint working group agreed to conduct a study of the

> *extent to which foreign firms can pursue remedies under the competition laws of the country in which they have an access problem due to alleged anticompetitive practices by domestic firms of such country. The focus will be on transparency of individual decisions and on any aspects whereby the treatment of foreign firms might be less favourable than that of domestic ones. The project will cover the legal rights and remedies of foreign as compared to domestic firms in a given jurisdiction. It will cover all Members, and observers willing to participate.*[11/]

Meanwhile, the U.S. Government in 1996 proposed an OECD agreement on hard-core cartel practices. The proposed agreement would contain the following features: (1) adoption of a principle condemning cartels; (2) a commitment by member countries to have and enforce effective laws that prohibit cartels; and (3) a commitment to co-operate with the competition authorities of other countries in the enforcement of competition laws against cartels.[12/]

C. Asia-Pacific Economic Cooperation (APEC)

APEC was launched in November 1989 with the meeting of foreign and economic ministers of 12 Asia-Pacific countries. APEC's stated objectives are to sustain the growth and

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10/ OECD, *After the Uruguay Round: The Way Ahead (Report to the OECD Council at Ministerial Level)*, 1995, p. 3-5.

11/ OECD, *Joint Group on Trade and Competition: Programme of Work*, February 14, 1997, p. 2.

12/ OECD, *The Problems of Cartels: Effective Approach, Note by the United States Delegation*, October 22, 1996.

development of the region, to enhance the gains resulting from economic interdependence, to develop and strengthen the open multilateral trading system, and to reduce barriers to international flows of goods, services and investment.

At an APEC meeting in February 1994, New Zealand was tasked with collecting information on participants' competition laws and policies, and then outlining a work program on the basis of that inventory. There followed, in late 1994, a detailed proposal by the APEC Committee on Trade and Investment. While useful in that it clearly recognizes the need for discipline on anticompetitive business behavior as a key part of "economic cooperation" in the Asia-Pacific region, this document is marred by inappropriate language on antidumping measures which, when legitimately applied, do not undermine economic cooperation or present a competition policy problem.

Progress on this work plan has been slow and has, perhaps inevitably, been over-shadowed by the WTO developments described above. The chairman's statement from the May 1997 APEC session in Montreal said nothing on the subject, although Mexico's delegation reportedly stressed during the Montreal meetings its desire for progress on the "impact of antidumping activities on competition."[13/]

D. North American Free Trade Agreement (NAFTA)

The NAFTA contains no binding rules on competition policy but, rather, a purely hortatory provision in Chapter 15 stating that parties ought to have and enforce competition laws. NAFTA Article 1504 does establish a government-to-government working group, however, with a five-year mandate to consider what further steps the NAFTA parties might take on this issue. Beginning in 1994, the working group has studied and entertained suggestions on the NAFTA parties' competition policies. With the assistance of private sector and bar association advisors, the group has focused considerable attention on cooperative antitrust enforcement as well as gradual harmonization in areas like merger regulation.

The efforts of the Article 1504 working group may help to enhance the efficacy of antitrust as a remedy to private restraints affecting competition within the free trade area. The group is consciously seeking, albeit with modest results so far, to address some of the inherent limits on antitrust remedies discussed above. According to its "Interim Report" to the NAFTA Commission, the group at its next meeting

> *will review an inventory of past cross-border competition cases and will discuss a paper to be drafted on cross-border anticompetitive activity. The [working group] will also review antitrust cooperation between the three parties, and exchange views on the possibility of formal antitrust cooperation agreements, either bilateral or trilateral.*

For the remainder of 1997, the fourth year of its five-year mandate, the working group plans to continue its "examination of issues related to substantive competition law standards and trade

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13/ See "U.S. Persuades APEC To Support Sectoral Reforms, Trade Official Says," BNA *Daily Executive Reporter*, May 13, 1997, p. A-5, A-7.

issues, enforcement issues (public and private), and discussion on issues with private sector associations." Id.

To date, this working group appears to have appropriately focused its efforts on restrictive practices and antitrust responses, rather than on NAFTA-consistent government trade measures that may have an impact on competition.

One interesting competition policy question arising in the NAFTA context concerns "safe harbors" under national antitrust laws for coordinated conduct by exporters. Recognizing that governments have little interest in prosecuting offshore conduct by their own citizens that has no impact domestically, many nations' competition regimes contain a mechanism under which export associations can register with the competition authorities and then conduct business abroad pursuant to their registration without fear of prosecution by their home governments. The U.S. safe harbors, the Webb-Pomerene Act and the Export Trading Company Act, are particularly important given the aggressive U.S. rules on horizontal conduct and the availability under U.S. law of treble damages. During the NAFTA negotiations, Mexico asked that these U.S. provisions be repealed, at least where intra-NAFTA exports were concerned. The United States, however, rejected any changes to U.S. antitrust laws, including the safe harbor provisions. As explained in the NAFTA Statement of Administrative Action at p. 174:

> *No changes in U.S. antitrust laws, including the Export Trading Company Act of 1982 or the Webb-Pomerene Act, will be required to implement U.S. obligations under the NAFTA. These laws have contributed to the export competitiveness of U.S. industries and they remain appropriate in the context of a free trade area. Nothing in the Agreement requires any NAFTA government to take measures that would adversely affect such associations.*

E. Free Trade Area of the Americas (FTAA)

The FTAA proposed at the Summit of the Americas will, if successfully negotiated and implemented, create the world's largest integrated market. The FTAA as proposed would effectively merge the six regional trade agreements currently in existence in the Western Hemisphere: NAFTA, CARICOM, MERCOSUR, the Central American Common Market, the Group of Three and the Andean Pact.

The competition policy working group established as part of the FTAA negotiations has so far limited itself to preparing an inventory of competition statutes and regulations in the hemisphere. It is unclear to what extent participants in the FTAA discussions will seek to include actual rules on competition policy. Particularly in view of the increased attention the issue is now receiving in the WTO context, it is quite possible that FTAA negotiators will follow the NAFTA model and adopt, at most, hortatory rather than binding provisions on competition policy.

F. Trans-Atlantic Business Dialogue (TABD) and U.S.-EU Cooperation

The TABD was launched in Seville, Spain, on November 10, 1995, by U.S. and European business leaders with the support of their political authorities. The TABD is aimed at developing a business-driven agenda designed to reduce a wide range of impediments to

transatlantic trade and investment, including international business practices and trade liberalization.

A May 1996 TABD progress report contained recommendations for U.S. and EU authorities on both bilateral and multilateral competition policy issues. On the bilateral front, the TABD expressed support for the 1991 U.S.-EU antitrust cooperation arrangement (discussed below) and, in particular, for appropriate uses of the "positive comity" feature of that arrangement under which one government can ask the other to investigate alleged anti-competitive conduct occurring within its jurisdiction. The TABD also endorsed information sharing (with appropriate safeguards) by U.S. and EU antitrust enforcers and efforts toward convergence of procedural requirements, beginning with merger review. On the multilateral front, the TABD recommended establishment of a WTO working group on trade and competition policy, inclusion of competition policy elements in the WTO's Trade Policy Review Mechanism, and use (where appropriate) of WTO dispute settlement to address nullification or impairment caused by toleration of anticompetitive practices.

The U.S. and EU authorities have already sought to move forward on the bilateral front. In early 1997, they announced a proposed *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*. This *Agreement* is designed to complement and elaborate on a similar instrument negotiated in 1991, experience under which is generally understood to have been successful.[14/]

The new draft *Agreement* sets out a rubric for both cooperation and non-interference by the respective competition authorities. The key definitions apply to the terms "Affected Party" and "Territorial Party." An "Affected Party" is defined as "a Party that is adversely affected by anticompetitive activities occurring in whole or in substantial part in the territory of the other Party." A "Territorial Party" is defined as "a Party in the territory of which such anticompetitive activities appear to be occurring." The *Agreement* contains two main operative provisions:

(1) Positive Comity: An Affected Party may request a Territorial Party "to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Territorial Party's competition laws."

(2) Deferral or Suspension of Enforcement Activity: An Affected Party "will normally defer or suspend" its own enforcement activities -- and if it chooses not to suspend, must explain why -- where:

14/ The potential for cooperation between the enforcement authorities existed before the 1991 agreement was negotiated. This includes the potential for "positive comity" -- the ability of one jurisdiction's authorities to request an investigation by the other's -- which was nevertheless heralded as a major innovation at the time of the 1991 agreement. In this respect, the 1991 agreement is perhaps more accurately described as having codified the policies and intentions of the U.S. and EU authorities, rather than added new tools to their respective enforcement arsenals. While the degree of cooperation (at least reported instances thereof) appears to have increased somewhat since 1991, it is not clear whether the authorities undertook any cooperative activities that would have been unavailable to them in the absence of the agreement.

- the anticompetitive practices in question do not directly or principally affect consumers in the Affected Party's market;

- the adverse effects on the Affected Party "can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied" by the Territorial Party; and

- the Territorial Party agrees to: devote adequate resources to the investigation; use best efforts to obtain information; keep the Affected Party informed of the status of the investigation and the information collected; use best efforts to complete an investigation within six months of the Affected Party's decision to suspend enforcement activities; and take into account the Affected Party's views when taking a decision regarding a remedy or settlement of the case.

While cooperation between competition authorities is certainly to be desired, this draft *Agreement* raises at least two key concerns for U.S. industries negatively affected by restrictive practices on the part of their EU-based rivals.

First, the *Agreement*'s main innovation appears to be "negative" rather than "positive" comity. It could be used as a pretext for U.S. antitrust authorities to forego or suspend enforcement activities in cases where anticompetitive practices in Europe close EU markets and thus primarily harm U.S. exporters rather than U.S. consumers. This is the category of cases in which the U.S. antitrust authorities, with the repeal of "footnote 159" of their *International Antitrust Guidelines*, have otherwise been pledging a more active approach.[15/]

It should be noted that the *Agreement* has been criticized in Europe for exactly the opposite reason -- that it does not go far enough in eliminating the possibility of extraterritorial application of antitrust laws on behalf of exporters.[16/] The depth of feeling on this point in Europe and the resulting pressure on U.S. authorities to "stand down" underscore concerns that the *Agreement* may effectively lead to reinstatement of the old "footnote 159" regime -- at least for cases involving anticompetitive practices in Europe.

Second, even the positive comity provisions are of limited utility as they are confined to conduct that violates, or appears to violate, local competition law. While EU law generally

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15/ Footnote 159 refers to a footnote added by Reagan Administration officials to the Justice Department's then-current antitrust enforcement guidelines. The footnote stated that Justice would decline, as a matter of policy, to bring extraterritorial antitrust enforcement actions where the only injury caused by the offending conduct was suffered by U.S. exporters and not U.S. consumers. Bush Administration antitrust enforcers in 1991 repudiated footnote 159, a move applauded and reaffirmed by the Clinton Administration.

16/ See, e.g., *Position Paper: ICC Comments on EU-US Positive Comity Agreement*, March 12, 1997:

> *Another factor which dilutes the effect of the agreement is the weakness of provisions governing the deferral or suspension of the requesting authorities' own enforcement activities. . . . There is . . . no real pressure for a party to use the positive comity procedure instead of, rather than in addition to, exercising its jurisdiction extraterritorially. The ICC recommends that language be modified or added to avoid these dilutive effects.*

reprehends the same kinds of anticompetitive conduct as U.S. law, there are important differences -- as EU commentators are quick to point out – of substance and enforcement.

More substantial questions about the prospects for U.S.-EU antitrust cooperation have been raised by the recent actions of EU officials regarding the proposed merger of two U.S.-based civil aircraft producers, Boeing and McDonnell Douglas. EU authorities reviewed the merger, as was their right, to examine its possible effects within the EU. There may in fact have been legitimate grounds for concern given the industry's high degree of concentration -- although Boeing's absorption of McDonnell Douglas would have only a limited marketplace impact if, as was widely reported, the latter's production would have been taken out of the market absent a purchase. In any event, U.S. authorities reviewed the merger as well, under standard principles of merger review relating to the potential to create undue concentration or market power. EU authorities in public statements, however, introduced into their review several trade policy complaints with no obvious relationship to traditional merger analysis. In particular, EU authorities sought to use the legal proceedings as a lever to reopen a U.S.-EU trade agreement, with which many in Europe are dissatisfied, regarding aircraft subsidies (and in particular alleged U.S. Government indirect subsidies to Boeing).

Subsidies per se, whether historical or prospective, are not a factor in U.S. merger review. Similarly, in reviewing proposed mergers of EU-based companies, EU authorities in the past do not appear to have developed a theory under which subsidies to the acquiring firm count against a merger or make it more likely that a competitively unacceptable situation will result. Rather, the doctrine floated by the EU in this case -- that alleged subsidies to Boeing somehow made its merger with McDonnell Douglas more alarming -- appeared to be newly-minted and could be viewed as an inappropriate attempt to pursue trade policy concessions at the expense of international comity on the antitrust front. Ultimately, after a number of concessions by Boeing, EU authorities approved the merger.

G. Other Multilateral Fora

Beyond those discussed above, there is no multilateral forum in which significant progress on this issue has been achieved or can reasonably be expected in the near future. In 1993-94, an international group of distinguished antitrust scholars gathered under the auspices of the Max Planck institute in Germany to draft a multilateral competition code. The exercise did not result in a consensus draft. The United Nations Committee on Trade and Development (UNCTAD) has issued and periodically updated a set of "principles" in this area, but with no significant impact on the incidence of anticompetitive conduct or the availability of remedies to parties injured by such conduct.

V. POSITIONS OF VARIOUS PRIVATE SECTOR ORGANIZATIONS

A. Business RoundTable (BRT)

The BRT, which brings together CEOs of major U.S. corporations and develops positions on a wide variety of public policy issues affecting the U.S. economy, has been adamant in its

view that competition policy is not yet ripe for the WTO. BRT has urged the U.S. Government not to support introduction of competition policy initiatives in the WTO.

To be sure, BRT has recognized that private restraints present an important international trade problem. "Of particular concern is the extent to which foreign anticompetitive practices may undermine market access opportunities created by bilateral and multilateral trade and investment agreements."[17/] Nevertheless, BRT's recommendations typify the highly cautious approach of the U.S. business community. BRT has identified the following issues, among others, to be analyzed internally before the United States participates in international negotiations on this topic: (1) specific market access problems; (2) source of these problems (inadequate competition laws, regulations, enforcement or lack of harmonization); (3) elements of a future international agreement; (4) appropriate forum or fora for negotiation of an international agreement; and (5) potential effect of an international agreement on U.S. laws and practices.

B. U.S. Chamber of Commerce (USCC)

The USCC is the oldest and largest organization of U.S. businesses. USCC members have become increasingly aware of the effect that foreign anticompetitive practices, and inadequate competition policy responses, have on U.S. businesses in an increasingly global economy. Like the BRT, the USCC does not consider trade-and-competition policy ripe for negotiations at the WTO level, although USCC does not oppose a limited WTO work program to advance international understanding on the issue.

Goals identified by USCC include: heightening awareness of the link between trade and competition policy; promoting appropriate competition policies and laws; eliminating anticompetitive foreign business practices; ensuring that deregulation initiatives include an adequate competition policy component; and, eventually, harmonizing laws through bilateral commercial treaties and multilateral mechanisms in order to reduce uncertainty in the business community as to what rules apply.

C. U.S. Council for International Business (USCIB)

The USCIB represents the interests of U.S. business to the U.S. Government and to a variety of foreign and intergovernmental bodies. Among other things, the USCIB serves as the U.S. affiliate of the International Chamber of Commerce (ICC), the OECD's Business and Industry Advisory Committee, and the International Organization of Employers. Like other U.S. business organizations, the USCIB sees the trade and competition issue as unripe for rulemaking within the WTO:

17/ *Letter from Donald V. Fites to The Honorable Charlene Barshefsky*, July 22, 1996, p. 1.

We . . . were pleased that Ministers rejected proposals for an ambitious work program in the WTO on trade and competition policy and instead opted merely to establish a working group to study the issues. We know that you shared our concerns about bringing competition policy into the WTO. We believe that the Singapore Declaration correctly limits the scope of WTO work on the relationship between trade and competition policies and guards against premature negotiations on these questions in that body.[18/]

The USCIB is, however, a proponent of cooperative antitrust enforcement, so long as the mechanisms devised for exchanging information appropriately protect business confidential information. Unlike some other groups, USCIB believes that increased cooperation among enforcers need not await substantive convergence of competition laws and, in fact, might actually encourage such convergence.

D. American Chamber of Commerce in Japan (ACCJ)

The ACCJ represents over 1,000 U.S. firms doing business in Japan and advises on U.S. trade negotiations with Japan. In keeping with its established role of promoting U.S.-Japan commerce, the ACCJ seeks to increase market access for U.S. firms doing business in Japan, which often is impaired by anticompetitive practices.

The ACCJ's most recent report does not focus on the trade-and-competition issue *per se*, but rather on the many sectoral disputes in which anticompetitive practices have so often turned out to be a large part of the problem. The report advocates an aggressive government-to-government approach to these disputes, subject to several caveats based on historical experience. *See* Section III, above.

E. Advisory Committee for Trade Policy/Negotiations (ACTPN)

The ACTPN is a private sector advisory group established by statute to counsel the President on negotiating objectives and bargaining positions of the United States in international trade negotiations. ACTPN prepares advisory reports on trade agreements presented to Congress under fast-track procedures, and occasionally weighs in on new or evolving trade policy issues through public letters or position papers. On September 6, 1996, ACTPN published a statement on trade and competition policy.

18/ *Letter from Abraham Katz to The Honorable Charlene Barshefsky*, January 8, 1997, p. 2.

As to the appropriate forum for international consideration of these issues, ACTPN concluded that "the time is not yet ripe for the WTO to engage in any competition policy initiative," and that the issue should instead be pursued within the OECD. ACTPN identified, among the issues to be studied, the following: which specific market access problems may be reachable through multilateral agreements; the potential effect of a new competition agreement on U.S. law; the relationship between international rules and local prosecutorial discretion; the degree of foreign enforcement of anti-competition laws; and the relationship between government policy measures and anticompetitive private actions. ACTPN also suggested that the United States continue to seek progress bilaterally through cooperation between enforcement authorities. ACTPN judged that "U.S. interests would not be well served by pluralizing or multilateralizing" existing bilateral antitrust agreements, and that additional bilateral agreements, tailored to the national regimes involved, should be aggressively pursued.

Finally, ACTPN recommended that "[t]he U.S. Government should be very wary of any attempt to link competition policy with antidumping regimes," because other countries could improperly seek to use competition policy talks as an excuse to reopen negotiations on antidumping rules. According to ACTPN, national antidumping laws continue to be necessary and will remain so as long as dumping itself continues.

F. Labor Advisory Committee for Trade Policy/Negotiations (LAC)

The LAC is one of many advisory committees that exist under the umbrella of the ACTPN. The LAC addresses trade policy issues from the perspective of its members -- principally drawn from the labor movement -- and therefore tends to focus on how labor's interests may be affected by developments on the trade front. The LAC noted in its 1994 advisory report on the Uruguay Round that the new WTO dispute settlement rules could constrain the use of section 301 and, thereby, undercut the U.S. Government's leverage to promote market-opening abroad. The LAC specifically related this concern to the U.S. Government's efforts against market-closing anticompetitive practices:

> *Even for practices not addressed [by the Uruguay Round agreements], like worker rights, competition policy, . . . and some forms of environmental protection, this expanded coverage [of the Dispute Settlement Understanding] represents a severe limitation on remedies that could be employed by the U.S. The LAC believes that it is particularly important in this context to develop new remedies, and an improved Super 301, to insure the interests of the U.S. are protected.*[19/]

19/ *Statement of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) on the Uruguay Round of Multilateral Trade Negotiations*, January 1994, p. 5.

G. Americans for Global Competition

Americans for Global Competition, a cross-sectoral coalition of U.S. companies and industry associations, was formed in 1995 as an *ad hoc* working group on Japan trade issues. Among the group's announced goals were supporting firm U.S. Government action against market-restricting anticompetitive practices and increasing market access for U.S. companies in Japan. In its mission statement, Americans for Global Competition urged an aggressive response in the then-pending Japan/autos parts case, calling for "substantive action" against countries that "tolerate and . . . encourage anti-competitive practices and market structures that limit opportunity for American producers and their own consumers alike."[20/]

H. Consumers International

Consumers International represents consumer groups from over 90 countries on a variety of issues. Consumers International's involvement in trade and competition policy stems from its goal of establishing policies at the international level that reflect the concerns of the consumers it represents. According to Consumers International, there is an immediate need for the WTO to begin work on competition rules:

> *Without stricter legislation and enforcement of competition regulations, consumers and national economies suffer. With cross-border mergers and international cartels, competition on a global level is in jeopardy in many industries. There is a need for an international competition policy that ensures both healthy competition between many players and benefits for consumers and domestic economies.*[21/]

20/ *Americans for Global Competition "Mission Statement,"* June 23, 1995, p. 17.

21/ "Consumer Groups Urge WTO to Disclose More Information," *BNA Daily Executive Reporter*, October 23, 1996, p. A-15.

I. American Bar Association (ABA)

The ABA, the world's largest voluntary professional association, has a Section of Antitrust Law and a Section of International Law and Practice, both of which have considered trade-and-competition issues. In early 1995, the ABA House of Delegates adopted a resolution on the role of antitrust as a remedy for anticompetitive practices that close foreign markets to U.S. exporters. The resolution was based on the work of a special task force drawn from the "International" and "Antitrust" sections. The resolution recognized the "important but non-exclusive" role of antitrust in this context and urged the U.S. Government, among other things, to "seek to eliminate private restraints that have the effect of excluding United States exports from foreign markets through the application of United States or foreign antitrust laws, as appropriate."[22/]

Later in 1995, a new Task Force on Trade and Competition Policy was formed within the ABA comprising an equal number of attorneys from the "International" and "Antitrust" sections. Task Force members prepared four papers addressing:

- antitrust/market access issues
- antitrust/antidumping issues
- convergence of antitrust regulation in different jurisdictions
- other issues related to the way that antitrust issues arise in a trade context or trade issues arise in an antitrust context

Initial drafts of the papers, completed in early 1997, are now being revised in the hope that consensus reports and recommendations can be presented for consideration by the ABA House of Delegates. On some of the issues, development of such a consensus appears unlikely.

J. Heritage Foundation

The Heritage Foundation is a research and educational institute that participates in policy debates from a free enterprise/limited government perspective. While often sympathetic to business' views on economic policy issues, Heritage apparently does not share the U.S. business community's reticence regarding competition policy negotiations in the WTO. In recent testimony on the Singapore WTO Ministerial, Heritage recommended prompt negotiation of a multilateral agreement on competition policy.[23/] (As noted above, pursuant to the Singapore Ministerial Declaration, rule-oriented negotiations on competition policy could only occur in the WTO following a separate Ministerial decision authorizing such negotiations.)

22/ "ABA Section of International Law and Practice Report to the House of Delegates: Using Antitrust Laws to Enhance access of U.S. Firms to Foreign markets," adopted August 1994, published in, *The International Lawyer*, Winter 1995.

23/ See *U.S. Trade Policy Objectives and Initiatives During the 105th Congress*: Testimony of John P. Sweeney, Policy Analyst, before a Hearing of the Subcommittee on Trade of the House Committee on Ways and Means, March 18, 1997, p. 7-8.

K. Union of Industrial/Employers' Confederations of Europe (UNICE)

UNICE, comprising 32 industry and employers' federations from 22 European countries, represents the views of European businesses to the institutions of the EU. UNICE has opposed using antitrust extraterritorially or cooperatively to address private restraints affecting international trade:

> *[UNICE] does not support the use of competition law as a trade-policy instrument. If trade-policy measures aimed at opening up markets have failed to work, the remedy is to enforce those measures through the WTO and not to apply competition law extra-territorially to prise open foreign markets, as the US seeks to do.*[24/]

UNICE also objects to national authorities' sharing of confidential information, especially without the consent of the party to whom the information relates, because of differences in EU and U.S. enforcement modes (cooperative vs. litigious), privilege rules, etc.

Yet, UNICE is also quite cool to the idea of addressing the problem multilaterally as a trade matter. Like some of its U.S. counterparts, UNICE has insisted that there be

> *greater consensus on what competition rules are trying to achieve and how they should achieve it, before the drafting of an international competition code superimposed on national laws is engaged. . . . UNICE does not believe that sufficient consensus has been reached at this stage for compulsory, directly effective competition rules to be drawn up.*[25/]

L. International Chamber of Commerce (ICC)

The ICC is a Paris-based private sector organization whose constituent members are national business groups. The ICC serves as a forum where different national business groups can work out common views on trade and other issues, and as an organ for jointly propounding those views to governments and intergovernmental organizations.

The ICC has recommended that governments address the trade-and-competition issue primarily within the OECD, with the option of later seeking WTO ratification of any OECD recommendations. WTO efforts should, in this view, be limited to a study program and should specifically exclude any effort to develop international rules:

> *There is clearly a need for greater understanding of the linkages between these two policy areas, particularly with respect to market access, and convergence in competition laws, before proceeding to the negotiation of multilateral rules within the WTO framework. . . . [A]t the present time, the WTO Ministerial should limit its work in this area to an examination of how and to what extent competition*

24/ UNICE, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, May 24, 1996, p. 1.

25/ Id. at 1-3.

policy issues should be included on the WTO's future work agenda. . . . [W]e support increased global convergence of competition laws and policies and other steps towards the creation of a level international playing field for business. We also encourage continued discussions on the issue of market access and equal treatment of domestic and foreign businesses.[26/]

There has been some debate within the ICC over one of the possible alternatives to a WTO agreement: cooperative antitrust enforcement. In particular, ICC members have split over whether substantive convergence of competition laws is a precondition for greater cooperation by enforcers. European participants in the ICC discussions have cited the low current level of convergence in opposing greater cooperation through exchange of confidential information. Meanwhile, U.S. participants have argued that greater cooperation is appropriate even in the absence of -- and may actually spur -- substantive convergence. (All agree that protection of legitimately "business confidential" information is important.)

The ICC recently established a Joint Working Party on Competition and International Trade. The goal is to produce several papers -- five are currently underway -- which will reflect the views of "international business" on the various aspects of the trade-and-competition debate. The papers in progress are tentatively entitled:

- "Forum for Addressing Conflicts Between Trade and Competition";
- "Competition and Trade Policy Conflicts";
- "Convergence of Competition Policies";
- "Competition Policy and Market Access"; and
- "Antidumping and Competition."

VI. VIEWS AND ROLES OF U.S. GOVERNMENT AGENCIES

A. Federal Trade Commission (FTC)

In 1916, soon after its formation, the FTC published an exhaustive two-volume study of anticompetitive foreign practices affecting U.S. trade, based on a wealth of information gathered from U.S. embassies and consulates abroad and interviews with many U.S. and foreign business people.[27/] This survey was encyclopedic in its depth and scope, and painted a detailed and realistic picture of the way world markets operated. Today, this kind of comprehensive fact-gathering is not done by any of the U.S. agencies concerned with anticompetitive foreign practices. Empirical study of foreign business behavior has been largely supplanted by economic theorizing and mathematical modeling. As a result, the U.S. competition agencies and the USTR must rely primarily on U.S. businesses and other interested parties to supply them with information about anticompetitive practices abroad. There is little or no organic government intelligence-gathering capability in this area and thus, no residual information base from which to mount a proactive policy.

26/ *ICC Policy Statement: Trade and Competition Policy*, October 22, 1996.

27/ Federal Trade Commission, *Report on Cooperation in American Export Trade* (Washington: Government Printing Office, June 30, 1916).

To its credit, the FTC held a comprehensive set of hearings in 1996 aimed at identifying needed revisions to U.S. competition policies in light of globalization and technological change. The testimony offered in these hearings shed light on a number of the problems faced by U.S. industry in the current international competition policy environment. (COT's testimony emphasized, among other things, the information deficit described above.) Concrete results from these hearings are not yet apparent.

As an independent commission, the FTC does not have a unitary view on the international dimension of competition policy. Of the current Commissioners, two that have commented significantly on international competition issues are Chairman Robert Pitofsky and Commissioner Roscoe Starek. Both have focused on cooperation and "soft harmonization" as the most viable way forward. Chairman Pitofsky has emphasized, for example, that "no nation has or is likely to have the power to secure the advantages of competitive markets beyond its own borders."[28/] Commissioner Starek has aptly summarized this "proceduralist" view:

> *[T]he way to build a consensus on antitrust policy and its enforcement is through expanded bilateral and multilateral cooperation in the enforcement of existing laws. . . . Through cooperation, mutual trust and understanding can be built, and thus someday we may have sufficient procedural and substantive harmonization to begin considering whether a consensus on an international [substantive antitrust] agreement can be reached.*[29/]

Commissioner Starek also had the following to say about related complaints, largely emanating from the antitrust bar, about antidumping:

> *Many have suggested supplanting the system of trade remedies with a more pro-consumer, antitrust-based system -- for instance, replacing antidumping proceedings with antitrust actions under more stringent predatory pricing standards. These fairly sweeping proposals reach far beyond the current consensus on competition and its enforcement. . . . [A] more practical -- and more reachable -- goal may be fostering convergence in competition policy through bilateral and multilateral cooperation in the enforcement of national antitrust laws.*[30/]

The Commission has also released a study, setting out the views of certain officials in the FTC Bureau of Economics, claiming that injury to U.S. industries associated with unfairly traded imports has been significantly overstated.[31/] This study, which has been cited by opponents of a

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28/ Remarks at Fordham Corporate Law Institute's 22nd Annual Conference on International Antitrust Law and Policy (October 26, 1995), reported in BNA *Antitrust & Trade Regulation Report*, November 2, 1995, p. 524.

29/ Remarks before "Antitrust 1996" conference (September 29, 1995), reported in BNA *Antitrust & Trade Regulation Report*, October 12, 1995, p. 429.

30/ Id.

31/ FTC Bureau of Economics, *Effects of Unfair Imports on Domestic Industries: U.S. Antidumping and Countervailing Duty Cases, 1980 to 1988*, 1994.

strict antidumping and countervailing duty regime, did not reflect the official view of the Commission or any individual Commissioners.

The FTC joined the Justice Department in initially opposing a WTO work program on competition policy, and it supports Justice's view that the new working group's mandate is narrowly limited and purely educational.

B. Department of Justice (DOJ)

The DOJ strongly criticized the initial European proposal for a WTO work program on competition policy, highlighting a number of potential risks such as "downward" harmonization (the lowest-common-denominator problem) and interference with prosecutorial discretion and national sovereignty. This position is perhaps best encapsulated in a 1996 address by Joel I. Klein, Acting Assistant Attorney General (AAG), presented to the Royal Institute of International Affairs in London.[32/]

Like the FTC, but to an even greater degree, the DOJ has demonstrated a strong attachment to procedural approaches such as enforcement cooperation treaties, exchange of personnel, and soft harmonization. Acting upon this view, in the 1990s the DOJ has stepped up its pursuit of cooperative arrangements with fellow enforcement authorities around the world. The U.S.-EU arrangement in 1991 was a first step. In 1994, the DOJ won passage of the International Antitrust Enforcement Assistance Act (IAEAA), which authorizes more far-reaching mutual assistance arrangements and information-sharing. In 1997, the DOJ has announced a new "positive comity" agreement with the EU and a cooperative antitrust enforcement treaty with Australia (the first to be negotiated under authority conferred by the IAEAA).

While strongly devoted to the proceduralist approach, the DOJ has conceded that it does not provide an adequate answer to the problems faced by U.S. exporters excluded from foreign markets by anticompetitive practices:

> *There are problems in this approach that should be frankly acknowledged. Many competition authorities currently lack the independence, if not the will, to do a proper job. And until that situation changes, positive comity referrals are obviously not a satisfactory answer to the problem of market access that is blocked by private anticompetitive restraints.*[33/]

AAG Klein's caveat is an important one. Clearly, local authorities are in the best position to stamp out -- if properly motivated to do so -- trade-distorting anticompetitive practices. Yet, while local enforcement undeniably has important advantages, and while new bilateral information-sharing agreements (if used effectively) could facilitate much-needed actions against foreign cartels, the soundness of the cooperative model is open to question. Unfortunately, some

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32/ Klein, *A Note of Caution With Respect to a WTO Agenda on Competition Policy*, November 18, 1996. This position is by no means a new one for the DOJ. See, e.g., "DOJ Warns of Obstacles to World Antitrust Pact, Urges Focus on Procedures," *Inside U.S. Trade*, May 29, 1992, p. 13.

33/ Id.

foreign governments are as likely to be implicated in, as they are to be interested in stamping out, anticompetitive practices that protect local firms at the expense of U.S. exporters. Lacking strong and institutionally independent competition authorities, these governments may not hold up their end of the "cooperative" approach. The conclusion has become inescapable that procedural and cooperative approaches are unlikely to yield success without some other source of leverage.

When the efficacy of the cooperative or "soft harmonization" approach has been debated in the past, one of the main areas of progress pointed to by its defenders (primarily antitrust enforcers) has been merger review. If the scholarly literature is any guide, there has in fact been some useful progress with respect to timeliness and other procedural elements of merger review. Nevertheless, recent events (discussed above) with respect to the Boeing/McDonnell Douglas merger seem to let much of the air out of this balloon. With EU authorities apparently using merger review as a tool to pursue political and trade policy goals, and rewriting substantive competition policy rules to that end, procedural harmonization would seem to be at best an irrelevancy from the perspective of the EU's trading partners. These recent developments weaken the case for "giving soft harmonization a chance to succeed" in the face of demands for a more aggressive trade policy approach.

In the case of Japan, the DOJ has played a role in highlighting shortcomings in the implementing regulations for, and the enforcement of, Japan's Anti-Monopoly Law.[34/] In particular, the DOJ is the U.S. agency responsible for the competition policy elements of Japan's "SII" commitments, its "Framework" commitments, and its various "deregulation" proposals of the last several years. Japan's unsatisfactory record in this area has persisted into 1997.[35/] The DOJ also plays a role in interagency deliberations when the market access problems created by Japan's toleration of anticompetitive practices are challenged in particular cases under the relevant provisions of section 301.

C. United States Trade Representative (USTR)

The USTR, like the U.S. antitrust agencies, reacted coolly to the initial European proposal for a WTO work program on competition policy.

> *[W]e believe that government actions which enable private companies to do things which undermine the benefits of negotiated trade concessions are currently fully actionable in the WTO. However, the broader issue of competition is not ripe for any kind of negotiation in the WTO to establish a comprehensive new framework of rules. This is an extremely complicated and multifaceted issue, which encompasses a broad range of questions relating to both private company and governmental actions. . . . [A]n extraordinary amount of work and study remains to be done in this area . . . to determine whether any sort of negotiating program is appropriate. . . . At Singapore, we may want to consider joining a*

34/ *Comments of the Government of the United States on the Japan Fair Trade Commission's Draft Anti-Monopoly Act Guidelines Concerning the Activities of Trade Associations*, June 9, 1995.

35/ "Clinton Denies U.S. Seeking Weaker Dollar; U.S., Japan to Cooperate on Deregulation," BNA *Daily Executive Reporter*, April 28, 1997, p. A-20.

consensus to begin a limited, educational program within the WTO. However, any such WTO work program would have to be modest and cautious, and done in careful coordination with other agencies, especially the Departments of Commerce and Justice and the Federal Trade Commission. In no such work would we alter our antitrust or our antidumping laws.[36/]

When a WTO working group was formally established, as noted above, USTR appropriately stressed the group's limited terms of reference and the lack of any mandate to consider rule changes, in particular antidumping reforms.[37/]

Notwithstanding its caution regarding WTO work in this area, in its policy statements USTR has consistently recognized the burden on U.S. commerce caused by foreign anticompetitive practices, and the importance of vigorous use of the section 301 provision on foreign government "toleration" of anticompetitive practices. The Uruguay Round Statement of Administrative Action, for example, states:

The Administration will enforce vigorously the "toleration of . . . anticompetitive activities" provision in section 301 when appropriate to address foreign anticompetitive behavior. The practices covered by the provision include, but are not limited to, toleration of cartel-type behavior or toleration of closed purchasing behavior (including collusive coercion of distributors or customers) that precludes or limits U.S. access in a concerted and systematic way.

The Trade Representative, in consultation with the Attorney General, will look to a variety of information sources in evaluating a foreign government's toleration of anticompetitive practices. Issues to be addressed include the existence of the anticompetitive practices and whether there was an unreasonable failure to take timely action against them. In making an assessment, the Trade Representative will consider whether the pertinent foreign government, and especially its competition authorities, have been made aware of the alleged practices and, if so, how they were informed, the relevant evidence that has been provided to, or is known to be available to, the foreign authorities, and the nature of response those authorities have made.[38/]

36/ *Statement of Ambassador Charlene Barshefsky, Acting U.S. Trade Representative, before the Subcommittee on Trade of the Committee on Ways and Means*, September 11, 1996, p. 26-27. See also "Hillman Questions Competition Policy as Agenda Item for Singapore," *Inside U.S. Trade*, September 13, 1996; "U.S. Criticizes EU Proposal for WTO Competition Policy Working Party," *Inside U.S. Trade*, July 12, 1996; "USTR Official Says Competition Initiative Needs Industry Consensus," *Inside U.S. Trade*, April 28, 1995.

37/ USTR Press Release, above at note 6.

38/ *Uruguay Round Trade Agreements, Texts of Agreements, Statement of Administration Action*, 103d Congress 2d Session, H. Doc. 103-316, September 27, 1994, p. 367.

> *this statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future*

USTR has also underscored the importance of beginning to develop an effective information base with which to address this problem.

> *In light of the importance the Administration and the Congress attach to ensuring that foreign governments do not tolerate anticompetitive practices, section 311 of the implementing bill amends section 181 of the Trade Act of 1974 to require the Trade Representative to include in the annual National Trade Estimates Report on Foreign Trade Barriers (NTE report) a separate section on foreign anticompetitive practices the toleration of which by foreign governments is adversely affecting U.S. goods or services exports.*[39/]

Carrying out this mandate, in its NTE report for 1997 USTR identified anticompetitive practices as a barrier in 9 countries: China, Egypt, India, Japan, Korea, New Zealand, Poland, Switzerland, and Turkey (Appendix D).

D. Council of Economic Advisors (CEA)

The CEA has noted that private practices receiving added attention internationally, now that formal government barriers have been significantly reduced, include "vertical restraints, such as control over distribution channels, exclusive sales arrangements, or rebates on sales, which inhibit new firms from entering the market." The CEA opined that substantive harmonization of antitrust rules is unlikely in the foreseeable future, except in closely integrated regional country groupings; that cooperation by enforcement authorities is nevertheless likely to lead to some limited convergence; and that the key to faster progress is to develop principles that cut across sectors, addressing, for example, "the definition of national treatment in markets where entry is regulated by licenses, or where firms cannot join private industry associations that have a regulatory role and provide essential services for member companies."

The CEA summarized the stakes involved as follows:

> *Global cartels restrict output and increase prices of both consumer goods and producer inputs. Anticompetitive exclusionary or predatory practices can insulate firms from competition and exclude more efficient or innovative firms from the market. Such practices reduce economic welfare and retard economic growth. Noncompetitive conditions in a domestic market can also serve as a barrier to trade. An example is the $4.5 billion Japanese market for flat glass.*[40/]

> *Administrations will observe and apply the interpretations and commitments set out in this Statement.*

Id. at 1.

39/ Id. at 359.

40/ *1997 Economic Report of the President*, p. 271.

The CEA has also suggested that governments seek to eliminate "safe harbors" under national legislation for export cartels, and that the United States consider expanding the use of competition policy to deal with unfair transborder pricing issues.

VII. COT RECOMMENDATIONS: THE WAY FORWARD

Based on several years of close attention to the issue, COT has formulated the following four recommendations for consideration by U.S. policy makers.

A. Initiate a Congressionally-Mandated Study

The new WTO working group represents the multilateral trading system's most ambitious effort to date to address private anticompetitive practices that impede access to major national markets and cause harmful trade diversion. The WTO working group has begun its work without a clear set of affirmative proposals from the United States, which therefore finds itself in a reactive and somewhat defensive position. Although this situation results in part from the understandable caution of the U.S. business community, as described above, the situation also exists because an empirical and analytical basis for coherent action has not yet been assembled.

Congress should, accordingly, provide for a formal U.S. Government investigation, to be carried out by an appropriate agency on a rapid timetable. This study should be divided into two distinct phases, the first empirical and the second analytical.

- In Phase 1, the agency should identify anomalies in trade flows and prices, *i.e.*, country/product combinations where trade does not occur, or where prices differ sharply, in a manner not easily accounted for by formal barriers imposed at the border. The investigation should focus on manufactured goods, with special attention to sectors identified in the NTE and sectors where there has been scrutiny (even if not formal enforcement action) under national antitrust laws in the past.

  Example -- no imports: Import penetration into Country A (an OECD member) for a product is only half the average import penetration for that product among other OECD countries with comparable local supply factors, per capita GDP, and other demand factors.

  Example -- no exports: Country B ships a product to the United States but not to Canada even though transportation costs and tariffs are roughly the same and demand is comparable.

  Example -- persistent price differential: Prevailing prices for a product in Country C are, and have consistently been for many years, 40% higher than those in the United States.

  Example -- imports only from affiliates: Imports of a product into Country D are low and stable, and sourced in a pattern that is anomalous when compared with broader trade in that intra-firm shipments account for the only growth.

- In Phase 2, an analytical overlay should be supplied. Beginning with the anomalies identified in Phase 1, the investigating agency should analyze private trade restraints as a barrier to particular markets. Using periodical searches, interviews with companies, and input from U.S. officials abroad, the agency should develop analyses to explain the results of Phase 1.

Such a study would lay the groundwork for U.S. participation in the current WTO educational exercise and would serve the U.S. Government well if a decision were later made to proceed to actual negotiations within the WTO or elsewhere. COT would welcome the opportunity to contribute to both phases of this investigation.

B. Enact Improvements to U.S. Law

The Commission on United States-Pacific Trade and Investment, in its recent report, recommended several measures to address market access problems resulting from foreign anticompetitive practices. One of these recommendations is that the U.S. Government, "where appropriate under law, issue cease and desist orders against those anti-competitive foreign practices that restrict U.S. commerce."

To implement this recommendation, Congress should consider amending section 301 (or creating a new provision) to give the USTR authority to take appropriate action to eliminate foreign "restrictive business practices" that burden and restrict U.S. commerce. (See Appendix A.) Restrictive business practices would be defined as coextensive with the practices identified by the U.S. courts as per se illegal under U.S. antitrust law -- practices so inherently anticompetitive that they are never justified under any circumstances. Included would be horizontal and vertical price fixing, joint restraint of output to raise prices, bid-rigging, division and allocation of markets among competitors, and some types of concerted refusals to deal, where the parties enjoy market power. U.S. courts have held that such practices are illegal regardless of the intent of the parties or of possible collateral efficiencies or other pro-competitive effects.

USTR could be given authority to issue cease and desist orders directing foreign enterprises to halt such practices or eliminate the burden that they place on U.S. commerce, and, in cases of violations of cease and desist orders, to seek civil penalties and injunctive relief in federal district court. The orders would be issued after a full evidentiary proceeding comparable to those conducted by U.S. agencies under Section 337 and the Federal Trade Commission Act, with all of the protections of the Administrative Procedure Act. Penalties would not be levied for engaging in a restrictive business practice as such, only for breach of a cease and desist order. Such penalties and other relief would be identical to those that would be assessed against domestic firms found to have violated a cease and desist order issued pursuant to the Federal Trade Commission Act. The issuance of cease and desist orders would be reviewable by U.S. Courts of Appeals in a manner identical to review of cease and desist orders of the FTC.

A slight modification to this proposal would be for the FTC, rather than USTR, to handle the issuance and court enforcement of cease and desist orders. Under this approach, the USTR would not be involved in making regulatory decisions that are "on the record" and subject to judicial review. Rather, USTR would make the initial finding as to whether restrictive business practices are occurring that burden and restrict U.S. commerce. If the finding were affirmative,

and if no remediation occurred within three months, USTR would turn its findings over to the FTC, which would have the authority to issue and enforce a cease and desist order. In light of USTR's finding, a strong presumption would exist in favor of issuing an order.

C. Institute a "Strict Liability" Regime

At the core of the "trade-and-competition" conundrum is the failure of bargained-for market access to materialize as planned and promised. Governments come together in trade negotiations; they exchange and implement concessions; and then it remains impossible to sell across the border. The cause need not be classic "restraints of trade"; it could be any kind of private behavior, including criminal activity, that has the effect of keeping imports at bay. The point is that the expected sales -- or rather the expected *ability* to sell -- does not materialize.

U.S. law should authorize the President to follow a "strict liability" approach in these circumstances which encourages foreign governments to act as guarantors of their own market access commitments. As applied to private trade restraints, such an approach would bypass any questions about the existence of an antitrust law and the adequacy of enforcement; it would simply note that the U.S. Government had bargained for access, that access was missing, and that rebalancing the situation to where it had been before the exchange of concessions required some withdrawal of concessions on the U.S. side.

The WTO corollary of this approach would be a "strict liability" regime wherein a government's failure to correct any situation limiting bargained-for market access would be considered actionable under GATT Art. XXIII. U.S. representatives in the current WTO educational exercise could seek to develop international support for such a rule -- support that might prove useful in rule-oriented negotiations should such negotiations eventually occur**.** Such a rule might be useful not only in the antitrust context but also in addressing other kinds of measures, such as corrupt practices, which impair the value of trade concessions.

D. Avoid Domestic Changes and International Negotiations That Could Weaken the Antidumping Remedy

One result of anticompetitive practices is dumping in the world's open markets, notably including the U.S. market. While attractive in the short term to consumers of the dumped items, dumping erodes the importing economy's productive base over the medium and long term. The antidumping duty remedy is one of the few policy tools that have been at least partially effective in responding to the injury caused by foreign anticompetitive practices. As discussed above, however, it is the underlying *private* conduct – not the governmental response of imposing antidumping duties as contemplated by GATT Art. VI – which presents a “competition policy” problem. For this reason, antidumping rules are not appropriately at issue in international competition policy discussions, whether in the WTO or elsewhere.

While debate over the use of antidumping duties persists, the U.S. Government should continue to avoid domestic measures and international discussions that could undermine the antidumping remedy. The premise relied upon by antidumping “reformers” makes no sense economically. Once market barriers of all kinds have been eliminated, cross-border price discrimination can be expected to decline substantially because of the possibility of arbitrage -- i.e., of selling dumped goods back into the dumper's home market. Use of antidumping, then,

will diminish as closed markets and attendant price distortions diminish, and in fact put pressure on those who export from home market sanctuaries to lower their home market prices. However, anticompetitive practices are but one cause – perhaps not even the most important -- of injurious dumping. Stamping out anticompetitive practices will reduce, but certainly not eliminate, the underlying rationale for maintaining strong antidumping regimes.

COT endorses the suggestion of the Commission on United States-Pacific Trade and Investment, which recommended that where "sustained price differentials between U.S. and foreign markets suggest anti-competitive practices abroad, the United States government should self-initiate dumping cases."

Appendix A:
Amendments to Sections 301-310 of the Trade Act of 1974

1. Section 301(b) is amended as follows:

(b) Discretionary Action.--If the Trade Representative determines under section 304(a)(1) that--

(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, ~~and~~ or that restrictive business practices by foreign enterprises are unjustifiable, unreasonable, or discriminatory and burden or restrict United States commerce, and

(2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice, or restrictive business practice, as the case may be.

Section 301(c) is amended as follows:

(6)(A) For the purpose of eliminating restrictive business practices under subsection (b), the Trade Representative is authorized to--

(i) take any of the actions authorized in this subsection, and

(ii) issue and cause to be served upon any person engaging in restrictive business practices under subsection (b) an order directing such person to cease and desist from engaging in such practices, or to eliminate the burden or restriction on U.S. commerce arising out of such practices.

(B) The Trade Representative shall investigate alleged restrictive business practices under subsection (b) on complaint under oath or upon its initiative. Upon commencing any such investigation, the Trade Representative shall publish notice thereof in the Federal Register and afford interested parties an opportunity to respond. The Trade Representative shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than 18 months after the date of publication of notice of such investigation. For purposes of the 18-month period prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(C) The Trade Representative shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation

of this section, except that the Trade Representative may, by issuing a consent order or on the basis of a settlement agreement, terminate any such investigation, in whole or in part, without making such a determination. Each determination with respect to restrictive business practices under subsection (b) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of Title 5. An evidentiary hearing shall be held upon request of any interested party. All legal and equitable defenses may be presented in all cases.

(D) During the course of each investigation under this section, the Trade Representative shall consult with, and seek advice and information from such departments and agencies as it considers appropriate.

(E) Any person, partnership, corporation, or association who violates an order issued by the Trade Representative under paragraph (A) after it has become final shall forfeit and pay to the United States a civil penalty for each day on which such violation occurs not to exceed $10,000. Each separate violation of such order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Trade Representative, each day of continuance of such failure or neglect shall be deemed a separate offense. Such penalty shall accrue to the United States and may be recovered for the United States in a civil action brought by the Trade Representative in a District Court of the United States. In such actions, the United States District Courts may issue mandatory injunctions incorporating the relief sought by the Trade Representative as they deem appropriate in enforcing such final orders of the Trade Representative. In determining the amount of such a civil penalty the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue business, and such other matters as justice may require.

(F) Any person, partnership, corporation, or association required by an order of the Trade Representative to cease and desist from using any method of competition or act or practice may obtain a review of such order in the United States Court of Appeals for the District of Columbia Circuit by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Trade Representative be set aside. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Trade Representative until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Trade Representative, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Trade Representative as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the Trade Representative is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order

of the Trade Representative. If either party shall apply to the court for leave to adduce additional evidence in the proceeding before the Trade Representative, the court may order such additional evidence to be taken before the Trade Representative and to be adduced upon the hearing in such a manner and upon such terms and conditions as to the court may seem proper. The Trade Representative may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken, and it shall file such modified new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence.

2. Section 301(d)(3) is amended as follows:

(f) the term "restrictive business practices" refers to those practices which are illegal per se under the antitrust laws of the United States.

(g) the term "foreign enterprise" includes entities which are wholly or partially owned or controlled by a foreign government, but which function as commercial enterprises.

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COT BIBLIOGRAPHY

[Law Review Articles, Conference Papers,
Book Excerpts, and Testimony]

Adams, Nathan A. IV

- "Monkey See, Monkey Do: Imitating Japan's Industrial Policy in the United States," 31 Texas International Law Journal 527 (1996)

Anderson, Robert D.

- "Competition Policy Aspects of the U.S.-Japan Structural Impediments Initiative: Implications for Canada," 12 Canadian Competition Policy Record 39 (June 1991)

Atwood, James R.

- "Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels", 50 Law and Contemporary Problems 153 (Summer 1987)

- "Information from Abroad: Who Bears the Burden in an Antitrust Investigation?," 65 Antitrust Law Journal 227 (1996)

- "The Role of National Antitrust Laws in the Promotion of International Competition," 10 Northwestern Journal of Int'l Law & Business 89 (1989)

Bingaman, Anne K.

- The Role of Antitrust in International Trade, (Address before the Japan Society in New York City, Mar. 3, 1994)

- Statement before the Senate Committee on the Judiciary Concerning the International Antitrust Enforcement Assistance Act of 1994, S. 2297 (Aug. 4, 1994)

Bliss, Julia Christine

- "The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response," 20 Law & Policy in International Business 501 (1989)

Boner, Roger Alan
Krueger, Reinald

- "The Basics of Antitrust Policy, A Review of Ten Nations and the European Communities," World Bank Technical Paper No. 160 (1991)

Briggs, John DeQ

- "The Impact of Foreign Competition on U.S. Antitrust Enforcement," 65 Antitrust Law Journal 253 (1996)

Byowitz, Michael H.
Davies, John
Estruelas, Gabriela
Libow, Daryl A.
Crampton, Paul

- "International Antitrust," 31:2 The International Lawyer (Summer 1997)

Burghelea, Gabriela

- "The Extraterritorial Application of Antitrust Law and the National Environmental Policy Act: A Comparative Study," 8 Georgetown International Envtl. Law Review 351 (1996)

Campbell, Neil
Trebilcock, Michael J.

- "A Comparative Analysis of Merger Law: Canada, the United States and the European Community," World Competition

Campbell, Neil
Rowley, J. W.

- Industrial Policy, Efficiencies in the Public Interest: The Prospects for Harmonization of International Merger (paper presented to Centre for Trade Policy and Law, Ottawa, 8th Annual Conference, May 19, 1993).

Canada, Government of
Canadian Consumer and Corporate Affairs, Canada Bureau of Competition Policy

- Interactions Between Competition and Trade Policies: Challenges and Opportunities (discussion paper, undated)

Cann, Wesley A. Jr.

- "Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Antidumping/Antitrust Dichotomy through WTO-Consistent Global Welfare Theory," 17 U. Pa. J. Int'l Econ. L. 69 (1996)

Chandrasekhar, Sandhya

- "Cartels in a Can: The Financial Collapse of the International Tin Council," 10 Northwestern Journal of Int'l Law & Business 309 (Fall 1989)

Christie, Keith H.

- "Damned If We Don't: Some Reflections on Antidumping and Competition Policy," DFAIT Policy Staff Paper No. 94/15 (July 1994)

Chung, John

- "The International Antitrust Enforcement Assistance Act of 1994 and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act," 69 Temple Law Review 371 (1996)

Cane, Marilyn B.
Barclay, David A.

- "Competitive Inequality: American Banking in the International Arena," 13 Boston College International & Comparative Law Review 273 (1990)

Cartland, Michael

- "Antidumping and Competition Policy," 28 Law & Policy in International Business (1996)

Collins, Paul
Brown, D. Jeffrey

- "National Antitrust Laws in a Continental Economy: A Comparison of Canadian and American Antitrust Laws," 65 Antitrust Law Journal 495 (1997)

Daul, David A.

- "A Picture Worth Far More Than a Thousand Words: A Unique Cause of Action at the World Trade Organization to Enforce American Trade Rights Against Japan," 17 Journal of Public Law and Policy 121 (1995)

Davidow, Joel

- Anticompetitive and Monopolistic Practices Likely to Impair the Liberalization of International Trade (paper presented to OECD Trade Committee, May 16, 1995)

- "Introduction to Rahl Symposium," 10 Northwestern Journal of Int'l Law & Business 11 (Spring 1989)

- "Keiretsu and U.S. Antitrust," 24 Law and Policy in International Business 1035 (1993)

- The Whys and Wherefores of GATT Competition Rules: Does An International Antitrust Code Belong in the OECD or GATT? (paper presented to the Antitrust and Public International Law Committee of the District of Columbia Bar's International Law Section, February 4, 1994).

Davis, Russell J.
- "Extraterritorial Application of Federal Antitrust Laws to Acts Occurring in Foreign Commerce," 40 ALR Fed. 343 (1978)

Ellison, Anthony P.
- "The Formation and Dissolution of the Canadian Rail Cartel," 15 Transportation Law Journal 175 (1987)

Epstein, Barbara
- "The Illusory Conflict Between Antidumping and Antitrust," 18 The Antitrust Bulletin (1973)

Feketekuty, Geza
- Conceptual Framework for the Analysis of the Interaction between Trade Policy and Competition Policy (discussion paper, undated)

- "Introductory Remarks" in New Dimensions of Market Access in a Globalising World Economy (OECD, undated)

- "New Trade Related Issues: Competition Liberalization" in New Directions in Regional Trade Liberalization and Investment Cooperation: A Tripartite Approach (G. Yen, ed., Pacific Economic Cooperation Council, June 1993)

- The New Trade Agenda (Group of Thirty, Occasional Papers #40, 1992)

- Reflections on the Interaction Between Trade Policy and Competition Policy: A Contribution to the Development of a Conceptual Framework (draft 2/12/93) (unpublished)

- Thoughts on the Link Between Trade Policy and Competition Policies (Mar. 30, 1992)

Feltham, Ivan R.
- Resolution of Conflicts Between Trade, Investment and Competition Policy (paper presented to the Centre for Trade and Policy Law, Ottawa, 8th Annual Conference, May 19, 1993)

Fernandez, Jaime E.
- "Antitrust Regulation in Latin America," 30 The International Lawyer 521 (Fall 1996)

Fikentscher, Wolfgang
- "An International Antitrust Code," 27 International Antitrust 755 (1996).

Finger, J. Michael
Fung, K.C.
- "Can Competition Policy Control 301?," Policy Research Working Paper, (World Bank Trade Policy Division, Feb. 1994) (1993)

First, Harry
- "Antitrust Enforcement in Japan," 64 Antitrust Law Journal 137 (1995)

Fox, Eleanor M.
- "Mergers 'R Us: Has Antitrust Gone the Way of the 5 & 10?," The Washington Post C1 (Mar. 30, 1997).

- "Toward World Antitrust and Market Access," 91 Am. J. Int'l L. 1 (1997).

- Implementing Cosmopolitanism: World Antitrust and Market Access, ABA Antitrust Policy Institute (Nov. 7-8, 1996).

- "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade," 4 Pacific Rim Law & Policy Journal 1 (1995).

- Developing Criteria for Assessing Degree of Actual Enforcement of Nations' Competition Laws, With a Particular View to Market Access/Trade Problems, presented to OECD Trade Committee (Dec. 28, 1995)

- Competition Law and the Next Agenda for the GATT/WTO, presented to OECD Round Table on the New Dimensions of Market Access in a Globalising World Economy (June 30, 1994)

- "Antitrust, Trade and the Twenty-first Century: Rounding the Circle," 48 The Record 535 (June 1993)

- "The Sherman Antitrust Act and the World: Let Freedom Ring," 59 Antitrust Law Journal 109 (1990)

- "Harnessing the Multinational Corporation to Enhance Third World Development: The Rise and Fall and Future of Antitrust as Regulator," 10 Cardozo Law Review 1981 (June 1989)

Fox, Eleanor M.
Ordover, Janusz A.

- "The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action," 19 World Competition 5 (1995).

Freiberg, Kenneth P.

- Restrictive Business Practices and the GATT (discussion paper, May 5, 1986) (revised) (unpublished)

Garza, Deborah

- "Using the Sherman Act to Remedy the Exclusion of U.S. Firms from Foreign Markets," Antitrust 28 (Fall 1994)

Garten, Jeffrey E.

- "Is America Abandoning Multilateral Trade?," Foreign Affairs 50 (Nov/Dec 1995)

Gavil, Andrew I.

- "Competition and Cooperation on Sherman Island: An Antirust Ethnography," 44 DePaul Law Review 1225 (1995)

Gerber, David J.
Azarnia, Richard

- "*Dirigisme* and the Challenge of Competition Law in France," 3 Cardozo J. of Int'l. & Comp. Law 9 (1995)

Gerber, David J.

- "Foreword: Antitrust and the Challenge of Internationalization," 64 Chicago - Kent Law Review 689 (1988)

- "International Competitive Harm and Domestic Antitrust Laws: Forms of Analysis," 10 Northwestern Journal of Int'l Law & Business 41 (Spring 1989)

Gerson, Ralph J.

- World Trade and the New GATT (remarks before the International Law Section, State Bar of Michigan, Mar. 1, 1995)

Gevurtz, Franklin A.

- "Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade," 27 Va. J. Int'l L. 211 (1987)

Gifford, Daniel J.

- "Antitrust and Trade Issues: Similarities, Differences, and Relationships," 44 DePaul Law Review 1049 (1995)

- "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry," 6 Minn. J. Global Trade 1 (1997)

Gilson, Ronald J.
Roe, Mark J.

- "Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization," John M. Olin Program in Law and Economics, Stanford law School, Working Paper No. 97 (Aug. 1992)

Goldfarb, Lewis H.

- "Trade and Competition Policies in the Global Market Place" in New Dimensions of Market Access in a Globalising World Economy (OECD 1995)

Goldman, Calvin S.

- The Antidumping/Antitrust Debate (outline of remarks to D.C. Bar Program on Antidumping and Antitrust, Feb. 8, 1996)

- "Bilateral Aspects of Canadian Competition Policy," 57 Antitrust Law Journal 401 (1988)

- Regulation of Mergers, Acquisitions and Investment in a Global Market (paper presented to the Centre for Trade Policy and Law, Ottawa, 8th Annual Conference, May 18-19, 1993)

Gowdy, Jonathan S.

- "Exposing Kodak: A Critique of the Toleration of Anticompetitive Practice Provision of Section 301 of the Trade Act of 1974," 47 Florida Law Review 459 (1995)

Graham, Edward M.
Lawrence, Robert Z.
- "Measuring the International Contestability of Markets: A Conceptual Approach," Journal of World Trade

Griffin, Joseph P.
- "EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business," 24 Law & Policy in Int'l Business 1051 (1993)

- "The Impact of Reconsideration of U.S. Antitrust Policy Intended to Protect U.S. Exporters," 15 World Competition 5 (Vol. 15, No. 4, June 1992)

Grover, Warren
- "Canadian Antitrust Aspects of Competing in Foreign Markets," 14 Canada-United States Law Journal 93 (1988)

Gupta, Varun
- "After Hartford Fire: Antitrust and Comity," 84 Georgetown Law Journal 2287 (1996)

Haley, John O.
Iyori, Hiroshi
- Antitrust: A New International Trade Remedy? (excerpts) (Pacific Rim Law & Policy Assn. 1995)

Hamabe, Yoichiro
- "Changing Antimonopoly Policy in the Japanese Legal System: An International Perspective," 28 The International Lawyer 903 (Winter 1994)

Hawk, Barry E.
Laudato, Laraine L.
- "Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison," 20 Fordham International Law Journal 18 (1996)

Hawk, Barry E.
- "The International Application of the Sherman Act in its Second Century," 59 Antitrust Law Journal 161 (1990)

- "The Proposed Revisions to the Justice Department's Antitrust Guidelines for International Operations and Recent Development in EEC Competition Law," 57 Antitrust Law Journal 299 (1988)

Hilke, John C.
Nelson, Philip B.
- U.S. International Competitiveness - Evolution or Revolution? Ch. 1 (Praeger 1988)

Himelfarb, Allison J.
- "The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of 'Extraterritoriality'," 17 U. Pa. J. Int'l Econ. L. 909 (1996)

Hoekman, Bernard
Mavroidis, Petros C.
- Competition, Competition Policy and the GATT (Basil Blackwell Ltd. 1994)

Hoekman, Bernard
- "Trade and Competition Policy in the WTO System," The Emerging WTO System and Perspectives from East Asia 95 (1997)

Horlick, Gary N.
Meyer, Michael A.
- "The International Convergence of Competition Policy," 29 The International Lawyer 65 (Spring 1995)

Howell, Thomas R.
- "Dumping - Still a Problem in International Trade" (1996) (unpublished draft)
- "Foreign Cartels and American Competitiveness," International Trade Policy (ABA 1985)
- "Hearings on Global and Innovation Based Competition" (testimony before the Federal Trade Commission, Oct. 19, 1995)
- "The Trade Remedies" (Sept. 26, 1996) (unpublished draft)

Jackson, John H.
- Statement on Competition and Trade Policy Before the U.S. Senate Committee on Judiciary, 18 June 1992 in 26 J. World Trade 111 (1992)

Janow, Merit E.
- Public and Private Restraints that Limit Access to Markets (OECD, TD/RD(95)13, Apr. 26, 1995)

Jenny, Frederic
- "Domestic Competition, International Trade and Economic Development," International Business Lawyer (Symposium on Trade, Development and Competition Policy, Nov. 1995)

- "French Competition Policy in Perspective," Fordham Corporate Law Institute

- Competition Policy in a Global Economy (March 17-18, 1997, New Delhi)

Jorde, Thomas M.
- "Remarks on Acceptable Cooperation Among Competitors in the Face of Growing International Competition," 58 Antitrust Law Journal 519 (1989)

Kazanjian, John A.
- "Competition Law and Trade Policy: Honk if You Love Competition Policy," Canadian Competition Record 71 (Sept. 1993)

Klein, Joel
Bansal, Preeta
- "International Antitrust Enforcement in the Computer Industry," 41 Villanova Law Review 173 (1996)

Kramer, Larry
- "Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble," 89 The American Law Journal of International Law 750 (1995)

Lake, Charles D. II
- Japan's 'Monzenbarai' Trade Policy: Is Miti Trying to Kill Section 301? (paper presented to Japan Information Access Project, Mar. 27, 1996)

Laudati, Laraine
Friedbacher, Todd J.
- "Trading Secrets -- The International Antitrust Enforcement Assistance Act," 16 Northwestern Journal of Int'l Law & Business 478 (1996)

Lawrence, Robert Z.
- Toward Globally Contestable Markets (OECD, TD/RD (95)4, Feb. 10, 1995)

Lee, Lawrence L.C.
- "Taiwan's Antitrust Statutes: Proposals for a Regulatory Regime and Comparison of U.S. and Taiwanese Antitrust Law," 6:3 Ind. Int'l. & Comp. Law Review (1996)

Lipstein, Robert A.
Rosenthal, Douglas E.
- Competition and Trade Policy in a Global Economy (remarks before the Senate Committee on the Judiciary, June 18, 1992)

Matsushita, Mitsuo
- "Competition Law and Policy in the Context of the WTO System," 44 DePaul Law Review 1097 (1995)

Maule, Christopher J.
Ross, Thomas W.
- "Canada's New Competition Policy," 23 George Washington J. Int'l L. & Econ 59 (1989)

McFetridge, Donald G.
- Competition Policy and Market Access (paper presented to the Centre for Trade Policy and Law, Ottawa, 8th Annual Conference, May 18-19, 1993)

Mann, Michael D.
- Testimony Concerning the International Antitrust Enforcement Assistance Act, Before the Senate Judiciary Subcommittee on Monopolies, Competition and Business Rights (Aug. 4, 1994)

Meessen, Karl M.
- "Competition of Competition Laws," 10 Northwestern Journal of Int'l Law & Business 17 (Spring 1989)

Messerlin, Patrick A.

- "Antidumping Regulations or Pro-Cartel Laws? The EC Chemical Cases," 13 The World Economy 465 (Dec. 1990)

- Competition Policy and Antidumping Reform (paper presented to the Institute for International Economics, Washington, June 24-25, 1996)

- "Should Antidumping Rules be Replaced by National or International Competition Rules?," World Competition

Metzenbaum, Howard M.

- Hearing on S.2297: International Trustbusting - Exchanging Information with Foreign Antitrust Authorities, Before the Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights (opening statement August 4, 1994)

Miranda, Jorge

- "Should Anti-Dumping Laws Be Dumped?" 28 Law & Policy in International Business (1996)

Mirow, Kurt Rudolph
Maurer, Harry

- Webs of Power: International Cartels and the World Economy (Houghton Mifflin Co. 1982)

Morgan, Clarisse

- "Competition Policy and Anti-Dumping: Is it Time for a Reality Check?," Journal of World Trade
- Competition Policy and Anti-Dumping: Overview of Basic Issues (paper presented to the Centre for Applied Studies in International Negotiations, July 11-12, 1996)

Moschel, Wernhard

- "International Restraints of Competition: A Regulatory Outline," 10 Northwestern Journal of Int'l Law & Business 76 (1989)

Mochizuki, Kiichi

- "Antitrust and Trade Laws: Toward a New International Economic Policy," 4 Venture Japan 30

Nakazawa, Toshiaki
Weiss, Leonard W.
- "The Legal Cartels of Japan," The Antitrust Bulletin 641 (Fall 1989)

Nicolaides, Phedon
- "For a World Competition Authority: The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy," Journal of World Trade

- "Reform of Anti-Dumping Regulations: The Case of the EC," 27 Journal of World Trade 31 (1993)

OECD Trade Committee, Competition Committee
- Competition and Trade Policies: Their Interaction (OECD Committee of Experts on Restrictive Business Practices 1984)

- Joint Report by the Committee on Competition Law and Policy and the Trade Committee, OECD/GD(94)63 (June 1994)

- After the Uruguay Round: The Way Ahead (report to the OECD Council at the Ministerial Level) OECD/GD(95)64 (1995)

- Meeting of the OECD Council at Ministerial Level SG/PRESS (95)41 (Press Release, May 1995)

Ostry, Sylvia
- "Globalization, Domestic Policies and the Need for Harmonization"(paper funded by Japan Foundation Center for Global Partnership)

Palmeter, David
- "Antitrust Rules and the GATT," The Journal of Commerce 6A (Mar. 18, 1994)

Paul, Joel R.
- "Comity in International Law," 32 Harvard International Law Journal 1 (Winter 1991)

- "Free Trade, Regulatory Competition and the Autonomous Market Fallacy," 1 Columbia Journal of European Law 29 (1994/95)

Petersmann, Ernst-Ulrich

- "International Competition Rules for the GATT-MTO World Trade and Legal System," 27 Journal of World Trade 35 (1993)

Price, R. Edward

- "Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad," 28 George Washington J. International L. & Econ. 315 (1995)

Rampilla, Narayana Rao

- "A Developing Judicial Perspective to India's Monopolies and Restrictive Trade Practices Act of 1969," The Antitrust Bulletin 655 (Fall 1989)

Rill, James F.

- "Comment," 24 Law & Policy in International Business 1077 (1993)

- Policy: A Force for Open Markets (paper presented at ABA Annual Meeting to the Committee Concerning U.S. Antitrust and Overseas Boycotts As It Pertains to Cracking the Japanese Market, Aug. 11, 1992)

- Hearings on Global and Innovation-Based Competition Before the U.S. Federal Trade Commission, (Oct. 12, 1995) (statement)

- "A Framework for Cooperation: The Status of International Antitrust Enforcement," 18 Whittier Law Review (1997)

Rogers, Richard

- Testimony of the National Association of Manufacturers on the International Antitrust Enforcement Assistance Act of 1994, Before Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights (Aug. 4, 1994)

Rosenthal, Douglas E.

- "Competition Policy," Europe 1992: An American Perspective 293 (1990)

- Harmonizing Antitrust: The Less Effective Way to Promote International Competition (paper presented to Conference on Global Competition and Transnational Merger Regulation: New Developments, New York, June 22-23, 1995)

- "We Need More 'Old-Time Religion': A Response to Jim Rahl," 10 Northwestern Journal of Int'l Law & Business 84 (1989)

Rosenthal, Paul
Silliman, Craig L.

- The Limits of Competition Law in the Current WTO Context (paper presented to the Centre for Applied Studies in International Negotiations, July 11-12, 1996)

Ruggiero, Renato

- Trade Policy, Market Access and Antitrust (paper presented at the Conference on Antitrust: Rules, Institutions and International Relations, Rome, Nov. 20, 1995)

Sandstrom, Mark

- Hearings on the WTO Singapore Ministerial Meeting Before the House Ways & Means Subcommittee on Trade (Feb. 26, 1997) (testimony)

Scherer, F. M.

- "Retail Distribution Channel Barriers to International Trade" (Harvard University Oct. 1995)

Schoenbaum, Thomas J.

- "The Concept of Market Contestability and the New Agenda of the Multilateral Trading System," ASIL Insight #11 (1996)

- "The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust," 19 N.C. J. Int'l L. & Com. Reg. 393 (1994)

Schott, Jeffrey J.

- "WTO 2000: Setting the Course for World Trade" (paper presented to the Institute for International Economics, Sept. 1996)

Schweitzer, Frank J.

- "Flash of the Titans: A Picture of Section 301 in the Dispute Between Kodak and Fuji and a View Toward Dismantling Anticompetitive Practices in the Japanese Distribution System," 11 American University J. of International Law and Policy 847 (1996)

Seita, Alex Y.

- "U.S.-Japan Antitrust Cooperation," 24 Law & Policy in International Business 1081 (1993)

Shank, Robert D.

- "The Justice Department's Recent Antitrust Enforcement Policy: Toward a 'Positive Comity' Solution to International Competition Problems?," 29 Vanderbilt Journal of Transnational Law 155 (1996)

Starek, Roscoe B.

- International Aspects of Antitrust Enforcement (remarks before seminar on Antitrust for the 90's: The Second Century of Change, Minneapolis, July 15, 1994)

Stewart, Terrence P.

- Hearing on WTO Singapore Ministerial Meeting (TR-1) Before the House Ways & Means Subcommittee on Trade (Feb. 26, 1997)

- Why Antidumping Laws Need Not Be Cloned After Competition Laws Nor Replaced By Such Laws (paper presented to the Centre for Applied Studies in International Negotiations, July 11-12, 1996)

Stockmann, Kurt

- "The Janus-Face of Competition Policies," 10 Northwestern Journal of Int'l Law & Business 31 (1989)

Thatcher, K. Blake

- "Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government," 81 Northwestern University Law Review 492 (1987)

Trebilcock, Michael J.

- "Competition Policy and Trade Policy: Mediating the Interface," 30 Journal of World Trade 71 (1996)

Turner, Donald F.

- "The Durability, Relevance, and Future of American Antitrust Policy," 75 California Law Review 797 (May 1987)

Varney, Christine A.

- Cooperation Between Enforcement Agencies: Building Upon the Past (remarks before the APEC Committee on Trade and Investment, Auckland, NZ, July 25, 1995)

Vautier, Kerrin M.
- "Trans-Tasman Trade and Competition Law," CER and Business Competition: Australia and New Zealand in a Global Economy 73 (1990)

Vermulst, Edwin A.
- "A European Practitioner's View of the GATT System: Should Competition Law Violations Distorting International Trade Be Subject to GATT Panels?," 27 Journal of World Trade 55 (April 1993)

Victor, A. Paul
Salonen, Eric P.
- "The Application of U.S. Unfair Trade Laws to Energy Flows: Prospects and Risks," 11 U.Pa. J. Int'l Bus. L. 302 (1989)

Waller, Spencer Weber
- "Antitrust and American Business Abroad Today," 44 DePaul Law Review 1251 (1995)

- "The Ambivalence of U.S. Antitrust Policy Towards Single-Country Export Cartels," 10 Northwestern Journal of Int'l Law & Business 98 (1989)

Walzer, Stephen D.
- The Convergence of International Competition Regimes (paper presented at the ICC Conference of MCE International Company Lawyers, Brussels, Doc. No. 225-103/37, Feb. 26-28, 1997)

Watson, Peter S.
- Practical Implications of the Post-GATT Order: Considerations for the Future Multilateral Agenda (presented to Singapore Congress on World Trade, April 24-26, 1996)

Waxman, Michael Peter
- "Enforcing American Private Antitrust Decisions in Japan: Is Comity Real?," 44 DePaul Law Review 1119 (1995)

Weiner, Michael L.
- "Comity, Cooperation, and Keiretsu: Comments on Papers by Davidow and Griffen," 24 Law & Policy in International Business 1067 (1993)

- "Remedies in International Transactions: A Case for Flexibility," 65 Antitrust Law Journal 261 (1996)

- "The Increasing Internationalization of Antitrust," Antitrust 31 (Fall 1993)

Weinstein, Mark M.

- Statement Regarding the International Antitrust Enforcement Assistance Act Before the Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights (Aug. 4, 1994)

Winterscheid, Joseph F.

- "Foreign Competition and U.S. Merger Analysis," 65 Antitrust Law Journal 241 (1996)

Witten, Samuel M.

- "Book Reviews," 24 Law & Policy in International Business 647 (Winter 1993) (reviewing S. Waller, International Trade and U.S. Antitrust Law (Callaghan 1992))

Wolff, Alan Wm.

- "The Problems of Market Access in the Global Economy: Trade and Competition Policy" in New Dimensions of Market Access in a Globalising World Economy 195 (OECD 1994)

Wood, Diane P.

- "The Impossible Dream: Real International Antitrust," 1992 University of Chicago Legal Forum 277

- "The Internationalization of Antitrust Law: Options for the Future," 44 DePaul Law Review 1289 (1995)

- "'Unfair' Trade Injury: A Competition-Based Approach," 41 Stanford Law Review 1153 (May 1989)

- "Regulation in the Single Global Market: From Anarchy to World Federalism?" 23 Ohio Northern University Law Review (1996)

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Working Group on the Interaction
between Trade and Competition Policy

COMMUNICATION FROM THE UNITED STATES

The following submission has been received from the Permanent Mission of the United States with the request that it be circulated to Members.

At Singapore, Ministers agreed to establish a working group on trade and competition policy:

Investment and Competition

"20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

> establish a working group to examine the relationship between trade and investment; and
>
> establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations."

This paper represents the initial contribution of the United States to the work of this Group, and provides additional views as to the most fruitful scope for the Group's work beyond those initially expressed by the United States at Singapore.

The United States agrees with the point made in the submission of the European Community and its Member States about rules relating to government subsidies and other trade remedies. These rules are already addressed under the WTO and there are existing committees under whose purview the implementation and functioning of those rules lies. This Working Group should focus on the role of competition policy in enhancing trade liberalization.

Therefore, the United States fully supports this effort to study competition law and policy issues as they bear on the work and objectives of the WTO. The development and enforcement of effective competition laws and policies help ensure that the gains of trade liberalization are fully realized, and that competition-inhibiting private conduct, the regulation of markets, and market structures do not take the place of other more obvious governmental policies in restricting entry (domestic or foreign) into markets. It is this linkage to trade which makes the study of competition in the WTO appropriate at this time.

Competition laws have been an increasingly important driver of growth, efficiency and innovation in the United States and other market economies over the past century. Recognition of the central role of competition laws in advancing these objectives has spread dramatically in recent decades to all regions of the world. Today approximately 70 countries have competition laws - many of them enacted during the past five or six years - and the number of countries enacting new laws continues to grow. As countries embrace competition principles, they have also sought to deregulate markets where competition can flourish or be fostered (e.g., the recently concluded negotiations on basic telecommunications services) and, when it remains necessary, to regulate markets to the extent possible consistent with competition principles. Increased competition and deregulation of markets have led to accelerating interaction among countries that have and enforce competition laws, in large part because the increasing globalization of economic activity calls for more cooperative and coordinated approaches among competition authorities. The United States, along with others, has strongly supported all of these movements.

At the same time, there remain many WTO Members that do not currently have competition laws. Among those that do, significant differences are found in the terms of these laws, and in the way in which they are implemented and enforced. These circumstances not only can lead to anti-competitive conditions within domestic markets, but also can create or sustain barriers to market access for external actors.

The Ministers at Singapore recognized that these issues require further examination in the WTO, and that considerable additional study must occur before consideration is given to whether there are issues that are appropriate and ripe for negotiation. We suggest in this paper a work programme aimed at advancing this process and laying the groundwork for future discussion of conclusions or next steps.

Suggested steps outline for the work programme

While some Members have implemented and enforced competition laws for decades, many Members have only recently enacted competition laws, and still others do not have competition laws. Given these circumstances and the nature of the competition policy topic itself, any reasoned approach to the Working Group's analysis must be properly structured and sequenced. It is essential that the work concentrate initially on an analysis of fundamental concepts of competition policy and how they are implemented and enforced. After that foundation is laid, the discussion could then proceed to an examination of the implications of these concepts for the multilateral trading system, with a view toward

reaching a common analytical understanding of the role and relevance of the subject of competition policy to the WTO framework.

1. Competition in the WTO framework. This examination might begin with a review of work relating to competition law and policy that has been done up to now in the GATT 1947 and the WTO:

(a) prior consideration given in the GATT context to developing rules on competition policy: the Havana Charter, the 1960 Recommendation;

(b) competition provisions in existing WTO instruments: TRIPS, TRIMS, the GATS and the recent Reference Paper on regulatory principles incorporated into country schedules as a result of the successful conclusion of the negotiations on basic telecommunications services;

(c) consideration of the prior GATT 1947 and existing WTO dispute resolution mechanisms from a competition perspective.

2. Competition law at the national level. The above review could then be amplified and complemented on the basis of presentations and contributions offered by Members relating to their own perspectives and experiences concerning the way in which competition law has developed at the national level, including:

(a) a brief history of the development of competition law;

(b) a review of existing competition provisions in WTO Members' laws;

(c) the core elements of competition law: cartels and other agreements among competitors, distribution restraints an other vertical arrangements, monopolization or dominance concepts, and mergers;

(d) the economic underpinnings of competition law;

(e) the benefits of national competition laws to trade liberalization;

(f) institutions of competition law: how competition law is implemented and enforced both administratively and judicially.

3. International dimensions of competition law and policy. Finally, the Working Group could review the international dimensions of competition law and policy. Matters for examination would include:

(a) existing instruments for international cooperation, and their objectives: notice, consultation, cooperation and coordination, information exchange, comity and positive comity;

(b) areas where increased cooperation and coordination could bring benefits: international cartels, multijurisdictional mergers and cross-border practices;

(c) areas where market deregulation may be important for futher trade liberalization in the WTO.

With this background, the Working Group will be in a position to carry out its mandate "to identify any areas that may merit further consideration in the WTO framework." This work could lay the foundation for a later discussion of the role of competition law and policy and deregulation in dealing with public and private anti-competitive conduct that impedes trade liberalization. We do not now envisage what conclusions the Working Group might reach. These decisions will be informed by the discussion that occurs in the course of examining the matters described above.

Working Group procedures

The nature of the Working Group's mandate, and the discussions envisaged by this proposed work programme, suggest the following procedural considerations:

(a) After an initial organizational meeting, Working Group sessions should combine presentations by national governmental experts, invited experts, and representatives of other international organizations, as appropriate, with discussion among Working Group Members.

(b) In view of the often technical nature of competition policy issues, maximum participation of officials from capitals with relevant policy responsibility should be encouraged. Meetings should be scheduled in a way that facilitates this.

(c) To the extent appropriate, the Working Group should take account of relevant work being undertaken in UNCTAD, the OECD and other international fora.

Conclusion

Although the United States has stated on other occasions, and continues to believe, that there is not the degree of consensus today that would support negotiation in the WTO of constructive competition policy disciplines, the proposed work programme is intended to foster among Member countries a common understanding of the relationship of competition matters to the WTO framework and to be neutral regarding any conclusions that may be reached. Whether or not Ministers subsequently decide to work toward a negotiation, the educational and exploratory process they have mandated should have independent value for all Member countries in the formulation of their own policies in relation to competition and trade.

FOLLOW-UP TO THE SINGAPORE MINISTERIAL DECLARATION:

WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY

Submission by the European Community and its Member States

Background

At the Singapore Ministerial Conference it was decided to "establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework."

The purpose of this paper is to provide a first contribution to the work of the WTO in this field. It also aims to make some proposals for the work programme of the group.

Introduction

Over the last fifty years the GATT/WTO has led to an effective reduction of governmental barriers to trade. Tariff and non-tariff barriers as well as regulatory obstacles have been either reduced or eliminated. In contrast, while the benefits of rules for business behaviour are generally recognised, none have been developed at the international level.

The world economy has also evolved and firms have adopted global strategies or international production methods. As a result countries have become interdependent and the markets of many goods and services have become regional or even global.

It is noteworthy that more and more countries have come to adopt national competition policies. There are over 50 domestic competition laws[41] today compared to about a dozen fifteen years ago. A primary concern of countries, at all levels of development, has thus been to prevent that the fruits of liberalisation and deregulation undertaken by governments should be nullified by the establishment of barriers set up by business having a same effect.

At the same time, however, national competition laws are in certain cases not fully equipped to address anti-competitive practices with an international dimension. Many practices span the territorial scope of several jurisdictions or may originate outside the jurisdictional reach of a domestic competition authority. Moreover, when firms divide global or regional markets or otherwise engage in transborder anti-competitive practices (for instance when companies abuse their international market power by dealing with suppliers or customers on an unfair basis), this will no longer be of exclusive concern to the consumers and producers of one given country.

[41] Competition laws in this submission are understood to mean what is usually referred to as antitrust law. While there are a few competition laws (such as in the EC) that also include rules relating to government subsidies, these are already covered by rules under the WTO and there are specific WTO for a in which their functioning is examined and reviewed. The same applies to rules relating to other instruments of trade defense.

Developing countries may have a special interest in the competition debate: with only limited resources for competition law enforcement at their disposal, and with legislation in its early stages, the promotion of equal conditions of competition between firms may have a particular appeal. It was at the instigation of developing countries that UNCTAD adopted, in 1980, a comprehensive Code on restrictive business practices. Work in WTO today could in many ways take this initiative further, both in examining how to build upon this, for example by the conferral of binding elements to agreed principles, and by the consideration of a new issues such as international cooperation.

Developing countries may face special difficulties with respect to the introduction of national or other rules; hence special consideration should be given to their particular problems and concerns.

Trade and competition policy perspectives

Competition policy is a basic feature of the market economies and legal systems of many WTO Members. It aims to maximize the national welfare of countries whatever their size and level of development. While supporting the competitiveness of industries, it also protects the right of individual firms to compete and of consumers to buy at the lowest price. These benefits accrue to society as a whole. Moreover, effectively applied competition laws can help keep national economies open, as well as contribute to a further integration of markets.

The adoption of competition rules at the national level can also constitute a means to tackle anti-competitive practices that are implemented exclusively on a domestic market but are carried out by firms operating from third countries.

The absence of common basic competition disciplines at the international level may in certain cases lead to a de facto nullification of trade commitments undertaken by WTO Members. While some multilaterally agreed principles have already been negotiated in the WTO framework (inter alia in the field of basic telecommunications), common principles may increase the coherence of the trading system as a whole.

As a result of the continued liberalisation in WTO, the incentive for firms to divide markets in an artificial way, or to otherwise engage in international anti-competitive practices, may have risen together with the increasing returns of such behaviour. Certainly as a result of the globalisation of business behaviour the number of cases that are handled by competition authorities, and that have an international dimension, has seen a spectacular rise.

Globalisation has other effects too: firms will increasingly be subject to the specific requirements of the competition laws that apply in the different markets in which they are active. A gradual convergence of procedures and certain remedies in specified cases may reduce their costs as well as increase the legal security of their operations. For competition authorities it would reduce possible duplication of work and avoid potential conflicting decisions.

Globalisation in *fine* also calls for greater cooperation between competition authorities. A good deal of progress has been made in this field in recent years, notably through bilateral agreements. A further evolution of these agreements, both in scope and depth, is likely.

From a trade perspective an effective application of competition laws by national authorities will, in providing for more integrated and accessible markets, reduce the scope for unfair trade and the consequent need for recourse to instruments of trade defence.

Competition laws that are effectively enforced will support autonomous liberalisation measures taken by Members in the trade and investment fields. They provide for the appropriate regulatory framework to protect against anti-competitive practices on the domestic market by all producers, including by locally established (foreign) companies. More generally strong and neutral competition policies can usefully accompany and balance possible adverse effects of the investment liberalisation.

Why the adoption of an international framework of competition rules should be considered

The European Community and its Member States welcome the establishment of the Working Group:

- there is a role for the WTO to encourage all its Members, irrespective of their level of development, to enact and effectively apply a domestic competition law;
- the WTO could usefully examine to what extent and which core principles are common to competition laws of different countries
- the WTO could usefully examine how the effectiveness and coherence of the national competition policies of different Members can be enhanced. In parallel further cooperation between national competition authorities may be fostered, insofar as instruments of cooperation can overcome the obstacles to enforcement caused by the internationalisation of business behaviour;
- work in WTO could contribute to the avoidance of conflicts of law and jurisdiction between countries and to the promotion of a gradual convergence of competition laws. This would increase the legal security of firms operating in different jurisdictions, as well as reduce their costs of compliance with competition laws

- the WTO could explore whether it is feasible to foresee the adoption, by consensus, of certain common binding principles of competition law and procedure in the future. Such an examination could consider whether the approach of the WTO to competition policy might be global to all sectors (goods, services, public undertakings) or rather sectoral.

OECD and UNCTAD are in a good position to contribute to this work. The OECD has accomplished significant work to date, bringing together as it does countries with developed competition policies. Its continuing contribution will remain valuable. UNCTAD's role has amongst others been to debate issues of particular relevance to developing countries; this role should continue. However, it will be important to foster any future work of these organisations not in isolation but coherent with, and supportive of, the WTO process.

Possible areas of work for the WTO Working Group

The European Community supports a gradual and progressive work programme for the Working Group. Work could be pursued along consecutive tracks in order to facilitate progress (see below), and efforts may be geared towards issues that have multilateral aspects. One general issue that could be taken into consideration is to see how to increase the confidence of the trade community in the competition law process. In this regard it may be useful, in a first stage, to proceed with an identification of the main anti-competitive practices that are considered to have a negative impact on international trade or investment.

In defining its work programme, the working party could:

1) identify which are the main anti-competitive practices that restrict international trade or development and take stock of the development of competition regimes in WTO Member countries.

This work could facilitate an assessment of how an effective, coherent and non-discriminatory application of competition policies might be enhanced. The Group could identify which are the main anti-competitive practices that restrict international trade or development, or threaten to do so, in the increasingly open world economy.

By way of example, the Group could examine the particular problems and concerns facing developing countries with respect to competition rules, including such issues such as the effects of international cartels on their markets.

The Group could further examine which WTO Member countries have adopted domestic competition laws for controlling restrictive agreements, monopolies and mergers. In parallel, existing international agreements and arrangements relating to competition might be catalogued.

2) examine the feasibility of a commitment by all WTO Members to adopt domestic competition laws and enforcement systems, taking account of the structures and levels of development of national markets.

This work could include the following questions:

Which are the basic features of competition laws that can be said to be of general application?

Material law: Which types of business behaviour are generally covered by competition laws and how are they categorised? Which practices are considered anti-competitive in most jurisdictions? How are practices evaluated by competition authorities? To which extent do competition laws apply to all sectors of the economy (goods, services, public undertakings)? What exceptions exist in the laws of Members? What is the rationale for such exceptions and how are they taken care of in practice? Might there be room for their reduction/elimination?

Procedural law: Which procedures apply in different countries? Which are the areas where, as a result of diverging procedures in different jurisdictions, the application of competition law can give rise to difficulties or increased costs of compliance?

Access to national courts: In most jurisdictions competition laws are part of the national law of countries and create rights and obligations between individuals *inter se*. How is access to courts or independent review bodies for competition cases generally regulated in different jurisdictions? Do any thresholds or other barriers exist in certain countries?

Effective and non-discriminatory enforcement: Enforcement by a competition authority with its own powers of investigation is an integral part of competition law structures next to private action. Which legal powers are attributed to competition authorities in most jurisdictions, how do they operate and how are resources usually allocated? How are rights for firms to seek action by a competition authority regulated? Are sanctions of Members generally commensurate with the economic harm of the conduct and severe enough to have a deterrent effect?

Transparency: How is the transparency of competition law enforcement ensured in different jurisdictions? Is there room for further improvement?

3) examine whether and how cooperation between authorities can be supported within the WTO.

The need for international cooperation has increased as a result of the globalisation of business behaviour. The Working Group might make a catalogue of current practices and the lessons to be drawn from this experience: What is the nature of present international provisions (with respect to the sharing of information in the requested party's possession, the gathering of information on behalf of the requesting party, the safeguarding of information)? Then it could be examined what instruments of cooperation are likely to enhance effective competition policy enforcement.

4) examine whether WTO Members could identify a core of common principles that might be adopted at international level.

Work could identify relevant issues in the field of procedures (such as with respect to mergers, access to domestic courts, cases subject to international cooperation) and in the field of substantive laws or principles (cartels, including bid-rigging and export cartels, boycotts, alliances, mergers, abuse of dominance, vertical practices).

5) examine in a second stage to what extent dispute settlement might be applied in WTO in order to ensure compliance with any multilateral provisions on competition policy.

ANTICOMPETITIVE PRACTICES
Excerpts from the 1997 *National Trade Estimate*

CHINA

Anticompetitive practices in China come in the form of industrial conglomerates created to improve the profitability of state-owned enterprises. In some cases, the government has provided subsidies and other public benefits to such conglomerates, as well as authorizing some to fix prices, allocate contracts and, in other ways, restrict competition among domestic suppliers. Such monopolistic or monopsonistic practices may restrict market access for imported products, raise production costs, and restrict market opportunities for foreign-invested enterprises in China.

EGYPT

Egypt does not have laws prohibiting monopolies, cartels, or conflicts of interest. Given the relatively small size of the economy, most sectors are dominated by only a few players, whether private or public. Thus anticompetitive practices are a structural feature of the economy. Egypt hopes to pass an antitrust law during 1997.

INDIA

As in any country, private and public firms will engage in a variety of anticompetitive practices to the extent they perceive their practices are in their interest and to the extent they can get away with them. One can find examples of both state-owned and private Indian firms engaging in most types of anticompetitive practices with little or no fear of reaction from government overseers or action from a clogged court system. India suffers from a slow bureaucracy and regulatory bodies that reportedly apply monopoly and fair trade regulations selectively. These practices are not viewed as major hindrances to the sale of U.S. products and services at this time. U.S. firms are more concerned with addressing such basic issues as market access, corruption, arbitrary or capricious behavior on the part of their partners of government agencies, and procurement discrimination from both public and private institutions.

JAPAN

Exclusionary Business Practices

American firms trying to enter or participate in the Japanese market face exclusionary Japanese business practices and close government-to-industry relations that give domestic insiders an unfair advantage in the market. These include the following:

- Anticompetitive private practices -- such as bid-rigging, price-fixing, and refusals to deal – which may violate the Antimonopoly Act and other Japanese laws, but often go unpunished;

- Corporate alliances and exclusive buyer-supplier networks often involving companies belonging to the same business grouping (or "keiretsu") that work to protect "market stability" (i.e., stable market shares and profit margins);

- Problematic corporate practices that inhibit foreign direct investment and foreign acquisitions of Japanese firms (e.g., nontransparent accounting and financial disclosure, cross-holding of shares among "keiretsu" member firms, low percentage of publicly traded common stock relative to total capital in many companies, and restrictions on foreigners serving on corporate boards);

- Industry associations and other business organizations that develop and enforce industry-specific rules that limit or regulate, inter alia, fees, commissions, rebates, advertising, and labeling for the purpose of maintaining “orderly competition” among their members, and often also applying to non-members.

Exclusionary Japanese business practices exact a heavy toll on the Japanese economy. By constraining market mechanisms, such practices reduce the choices available to businesses and consumers, and raise the cost of goods and services, as reflected in Japan's large internal-external price gap. Many products and services cost substantially more, often two to three times more, in Tokyo than in other international cities. In addition, by discouraging competitors that seek to break into the market with innovative products and services, these practices impede the development of new domestic industries and technologies (e.g., in software, multimedia, and telecommunications). Moreover, exclusionary business practices discourage potential foreign investors, whose market presence and technological innovation would stimulate the economy, as well as provide critical channels for exports and sales by foreign firms.

Cartels can pose serious barriers for foreign exporters and foreign companies that seek to invest in Japan. The Japan Fair Trade Commission (JFTC) is responsible for deterring and punishing illegal cartel behavior, but is an uneven enforcer with limited resources and strength to use its prosecutorial powers. (See also the sections below on the JFTC’s enforcement record; consumer photographic film and paper; and sea transport and freight.

Japanese regulators view their role not simply as neutral arbiters of a legal rule-based system, but as active players in the control and guidance of their respective industries. Two aspects of this particularly disadvantage new domestic and foreign entrants to the market: the high degree of discretionary authority regulators maintain at both the national and local levels, and the regulator's tendency to rely on incumbent industry players to develop and self-enforce consensus on policy and regulatory changes.

Government-Industry Relationship

The close government-industry relationship in Japan often works to the disadvantage of foreign firms trying to participate in the Japanese market because the relationship favors domestic companies. Several aspects of the relationship are of particular concern.

Privatization of Regulations: The Government of Japan delegates, both formally and informally, governmental or public policy functions, such as industry standard development, product certifications, and entry authorizations, to industry associations and other business-related organizations that are generally not under any obligation to conduct their operations in an open, transparent, and non-discriminatory manner or to include foreign firms in their operations.

Informal Management of Industry: Business in Japan is more heavily regulated than in the United States, with much of the regulation taking place through cooperative consultations between the government ministry or agency and the affected industry, industry association, or other business-related organization; the issuance of "administrative guidance" to Japanese companies; or the placement of retired bureaucrats in companies and trade associations in a practice called "amakudari" (literally, "descent from heaven").

Lack of Transparency in Administrative Practices

Foreign firms are disadvantaged by the lack of transparency in Japanese administrative practices, in particular with regard to the following.

Lack of Rulemaking Process: Japanese ministries and agencies prepare regulations in a "black box" with participation generally limited to bureaucrats, former bureaucrats and special interests. Others with an interest in the regulation are denied the opportunity to take part in the process.

Use of Administrative Guidance: The lack of transparency in the Government of Japan's extensive use of informal directives or "administrative guidance" remains a serious concern despite requirements in the 1994 Administration Procedure Law (APL) that oral administrative guidance must be put in writing upon request and administrative guidance issued to multiple persons must be issued in written form.

Use of Advisory Councils: The Government of Japan often relies upon advisory councils ("shingikai"), established by ministries and agencies, to formulate policies and recommendations which give an appearance of objectivity and independence from the bureaucracy, when in fact the members include former bureaucrats, and the councils are essentially expected to endorse policies developed or advocated by the ministry.

Absence of an Information Disclosure Law: To date, Japan has not enacted an information disclosure law, analogous to the U.S. Freedom of Information Law, that would provide foreign firms, as well as the Japanese public, with access to records and other information in the control of governmental entities. (However, based upon a recommendation by the Administrative Reform Council, the Government of Japan is expected to submit information disclosure legislation to the Diet by March 1998.)

Japan Fair Trade Commission's Enforcement Record

A key reason for the prevalence of anticompetitive business practices is the JFTC's historically weak antitrust enforcement record. The JFTC routinely faces domestic criticism for its lack of bureaucratic clout and reluctance to exercise its enforcement powers aggressively. While there

have been some improvements in recent years due to sustained U.S. efforts under the 1989-91 Structural Impediments Initiative, the U.S.-Japan Framework, and annual bilateral antitrust consultations, which have helped the JFTC muster domestic support for its gradual strengthening, the JFTC's enforcement efforts fall far short of those needed to ensure that Japanese markets are open to fair competition from U.S. and other foreign companies.

The JFTC's ability to enforce Japan's fair competition laws is hindered by its historically weak stature among Japanese ministries, shortage of personnel, and perceived lack of autonomy. The JFTC was "upgraded" last year to allow the formation of an administrative general affairs bureau, an economic bureau, investigations bureau, and a new special investigation division to handle major cases. Previously, the JFTC only had departments, which relegated JFTC officials to a lower status relative to ministry officials. However, the JFTC failed to gain approval for the creation of a competition policy bureau and did not achieve the substantial gains it needs in antitrust enforcement personnel. The JFTC currently has a total of about 540 staff personnel, of which about 236 work in the investigation bureau. There are 46 investigators in the special investigation department -- a number too small to handle more than one or two major cases at a time. The United States has actively supported the JFTC and encouraged the commission to continue pressuring Government of Japan leaders for more investigative resources. However, the JFTC has few real allies on budgetary matters, and, in the current tight fiscal environment, JFTC personnel expansion will likely proceed incrementally.

Over the past five years, the JFTC has improved its enforcement performance, but not enough to shed its public image as an ineffective watchdog. For example, after maintaining surcharge orders for cartel practices at very low levels during the 1980s, since 1990, the JFTC has steadily increased its penalties, imposing 6.4 billion yen in surcharges against 741 companies in JFY 1995. However, the JFTC still rarely criminally prosecutes antimonopoly violators -- on average, tackling one case every two years -- and actual imprisonment for antimonopoly violations is unheard of. The JFTC's infrequent use of the AML's criminal provisions undermines deterrence of illegal business practices.

Although the JFTC is nominally an "independent" commission with "independent" enforcement authority, its leaders are often drawn from other ministries, raising doubts about the commission's autonomy. Indeed, the JFTC's chairman and commissioners always include some former senior officials from trade-related ministries -- notably, from the Ministries of Finance, International Trade and Industry, and Foreign Affairs. Historically, the vast majority of JFTC chairmen have been former top career officials of the powerful Finance Ministry. Japanese economic observers agree that as long as these "ex" ministry officials are involved in JFTC decisionmaking, the commission cannot be considered truly "independent." The JFTC's current chairman is a former public prosecutor and ex-official (Ministry of Justice) who has raised some public expectations of a more activist JFTC enforcement role. The United States has yet to see whether a 1996 amendment raising the mandatory retirement age of the JFTC chairman from 65 to 70 will facilitate the candidacy of non-bureaucrats for the top JFTC job, and thus questions about the JFTC's independence remain.

The JFTC itself administers a number of laws and regulations that have an anticompetitive effect or include inappropriate exemptions.

Law Against Unjustified Premiums and Misleading Representations: The JFTC imposes unrealistic limits on the use of premium offers (prizes), and thereby discourages even legitimate cash lotteries and product giveaways used in sales promotions. Foreign newcomers, who depend on innovative sales techniques to market their company names and products, are severely impaired by the JFTC's restrictions on premiums. In addition, the law aims to deter misleading or fraudulent advertising and labeling -- in itself, a worthy policy. However, the JFTC's practice of allowing "fair trade associations" (essentially, private trade associations) to set their own promotion, advertising and labeling standards through self-imposed "fair competition codes" creates difficulties, especially for newcomers who are unfamiliar with local guidelines. Trade associations can and often do use the cover of these codes to set additional standards that are stricter than the JFTC's regulations under the Premiums Law. Indeed, at least 27 such premium codes have been authorized. Recently the JFTC has incrementally liberalized its rules on premiums and other sales promotions, among other steps, by raising the maximum value of "open" cash lotteries (not requiring a purchase) to ten million yen; repealing restrictions on premiums offered by department stores; and eliminating the 50,000 yen ceiling on consumer premiums (while retaining price caps as a percentage of the transaction value). However, these changes fall short of the dramatic liberalization measures requested by the U.S. Government in Framework discussions and in the November 1996 deregulation submission to the Government of Japan.

Resale Price Maintenance (RPM): The Antimonopoly Act exempts resale price maintenance (RPM) in the distribution of selected products, such as cosmetics, pharmaceuticals, and copyrighted products (books, magazines, newspapers, and CDs). There is no reason that retail price maintenance should be treated any differently under the Antimonopoly Act than any other practice. The JFTC has recently announced that it will terminate the RPM exemption for cosmetics and pharmaceuticals and is considering limiting or eliminating the RPM exemption for copyrighted products.

International Contract Notification: Under the Antimonopoly Act, the JFTC is authorized to screen certain notifiable international contracts -- such as joint ventures involving foreigners -- and to prohibit specific contracts that, in the JFTC's judgment, might cause unreasonable restraints on trade or involve the use of unfair trade practices. Any Japanese entrepreneur who enters into an international contract that is notifiable under JFTC rules must file with the commission within 30 days of concluding such an agreement. Recognizing that this practice needlessly burdens business operators, the JFTC has pledged to submit draft legislation by the end of March 1997 calling for, in principle, the elimination of the current notification system.

Abolition of Cartels: The JFTC's planned elimination of 33 antitrust-exempted cartels by the end of JFY 1998 is a positive step, but most of the under-used cartels targeted for abolition -- such as the price cartel for cultured pearls and silk cocoons -- will not significantly affect U.S. trade interests. Some mainly Japanese firms will benefit from the abolition of cartels in coastal shipping and import/export enterprises. However, these measures do not address more important U.S. concerns, such as Japan's monopolistic port practices by the Japan Harbor Transport Association. The JFTC should implement additional deregulation measures to remedy these serious problems.

KOREA

The Korea Free Trade Commission (KFTC) is responsible for enforcing and improving competition in the Korean Economy. In February 1996, the Chairman of the KFTC was raised to ministerial rank, and thestaff was increased. In December 1996, the assembly passed a revision to the Fair Trade Act effective April 1, 1997. This revision will expand the application of the Fair Trade Act to the financial and insurance sectors, and give the KFTC more authority to demand the revision of anticompetitive elements in both draft and existing laws and regulations. Nevertheless, a major enforcement effort will be required to deter and eliminate chronic anticompetitive practices in the Korean market. Major efforts are also required to ensure that the KFTC applies the same standards and level of oversight to all firms and does not penalize foreign companies importing goods into Korea for practices ignored or tolerated in Korean firms, a problem that was also noted in the cosmetics sector in 1996.

Industry associations are delegated substantial regulatory authority in Korea through both formal and informal means. In a number of instances, industry associations have abused their powers by discriminating against non-members and potential competitors, including American firms. In 1994, the KFTC investigated 68 industry associations and ordered 48 of them to revise 73 anticompetitive by-laws or articles. In 1995, the KFTC investigated 218 industry associations, and ordered them to revise 369 anticompetitive or unfair measures or practices. In 1996, the KFTC decided also to regulate not only collusion between rival firms, but also trade associations that induce their members to engage in anticompetitive practices. However, other associations that are likely engaged in similar kinds of competitive practices have not yet been reviewed. Of particular concern to the United States is the anticompetitive behavior of the Korean insurance and cosmetic industry associations.

The government-affiliated KOBACO has a monopoly over the allocation of television and radio advertising time. Although changes have improved the situation for U.S. firms and products, KOBACO rules continue to prevent market forces from operating normally in this area.

NEW ZEALAND

In New Zealand, the Pharmaceutical Management Agency (PHARMAC) is a limited liability company owned jointly by the four Regional Health Authorities (RHAs). The RHAs are responsible for purchasing health services and supplies for the population within their geographical areas of responsibility. PHARMAC administers the national pharmaceutical schedule on behalf of the RHAs.

PHARMAC controls a pharmaceutical schedule on which all Government of New Zealand-subsidized pharmaceuticals are listed. Private medical insurance companies will not cover unsubsidized medicines. Thus, PHARMAC effectively controls which prescription

medicines will be sold in New Zealand and, to a large extent, the price at which they will be sold. Both foreign and domestic companies have filed five separate legal actions questioning the legality of PHARMAC's practices under New Zealand's Commerce Act. U.S. industry argues that PHARMAC prevents patent holders from obtaining a "fair" return on their costs because PHARMAC will not provide realistic subsidies for new and improved products in existing categories.

U.S. industry estimates that U.S. companies serve 30 percent of New Zealand's $500 million market. Industry advises that it is not possible at the current time to provide a reliable estimate of the increase in sales that would accrue to the research-based companies in New Zealand were the government to change its policies regarding reimbursement of medicines.

POLAND

On October 1, 1996, an Office for Competition and Consumer Protection was established out of the former Antimonopoly Office and State Trade Inspection Office (PIH). This office is empowered to fine state-owned monopolies that unduly prevent competition. A 1995 amendment to the Antimonopoly Office Act removed ambiguities regarding its authority, thereby strengthening its ability to act.

U.S. and other foreign telecommunications companies have complained of strong-arm tactics on the part of the state telecommunications monopoly, TPSA, in regard to telephone interconnection agreements. As a result of this and other anti-competitive actions by TPSA, the Antimonopoly Office has levied fines against TPSA, disallowed planned TPSA rate increases, ruled that the new GSM licensees could not be barred from using other telephone networks (e.g., the railway telephone system), and announced its intention to continue close scrutiny of the telecommunications sector.

SWITZERLAND

Traditionally, there has been a very high degree of cartellization in the Swiss economy. A new law that came into force at the beginning of July 1996, still permits cartels, but requires companies in the cartel to justify their actions under restrictive economic requirements. The existence of cartels has disadvantaged U.S. exports to Switzerland. The Swiss food industry, for example, is controlled by cartels of producers, wholesalers, processors, and retailers. These organizations have succeeded in maintaining non-tariff barriers, such as import calendars, which are designed to favor domestic production.

TURKEY

As part of its customs union agreement with the EU, Turkey has pledged to adopt EU standards concerning competition and consumer protection. However, the Turkish Government has not yet appointed the "competition board" mandated in a 1994 law,

effectively preventing the law's implementation. Government monopolies in a number of areas, particularly alcohol, tobacco, and telecommunications services, have been somewhat scaled back in recent years, but remain a barrier to certain U.S. products and services. In 1997, the Turkish telecommunications sector is to be partially privatized and licenses are to be issued for many value-added services. In the tobacco sector, two U.S. tobacco companies have factories in Turkey, although the dominant position of the state monopoly continues to limit their operations.