LAWS GOVERNING COMMERCE AND COMPETITION IN GLOBAL MARKETS

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Abstract

While the major trading nations move toward harmonizing their trade rules, they continue to put off thinking about the new "Achilles heel" of global trade: harmonizing competition laws. Such a failure to address this parallel track is fostering game-playing in the context of global trade. Privately sponsored restrictive agreements—often vertical anti-competition agreements outside the scope of the World Trade Organization ("WTO") sanctions are taking the place of the previous restrictions on free and fair trade as international trade agreements continue to eliminate government-sponsored tariff and non-tariff barriers.

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1. Introduction

International negotiators can no longer ignore this parallel track of international trade dealing with national competition laws of member states after briefly tracing the evolution of the application of U.S. competition law extraterritorially and developments in international competition law generally. I specifically suggest that all WTO members be required to abide by a minimal international code of competition laws that is based on the per se breaches found in U.S. antitrust statutes and forbids activities like price fixing, cartels, and production constraints. I use these as a starting point since the per se norms forbid behaviour for which no nation can presumably argue that it has justifiable economic benefit. If all nations are obligated to follow those regulations, the troublesome issues of comity and judicial abstention for some objectionable activity should be resolved. Beyond that, however, I contend that attempts to impose an international competition regime are foolish because nationalist courts are unprepared to deal with various economic traditions and concepts of competition and because efforts to harmonize widely disparate definitions of competition that result from disparate jurisprudential experiences would be fruitless.

To address private and hybrid government/private conduct that the governments of trading states permit would be for the WTO to cross the Rubicon, as it started to do in 1994 with the Uruguay Round of the General Agreement on Tariffs and Trade. This will bring the contentious problem of private anti-competitive behaviour with transboundary effects under the WTO's purview.

Historical Background

Traditionally, private actions that restrict competition and harm consumers are the focus of competition laws (mainly antitrust laws). Antitrust laws establish both civil and criminal penalties to discourage such behaviour whenever two parties collude to fix prices, cut output, or boycott economic rivals. Antitrust laws are typically thought of as safeguarding the interests of consumers by preserving healthy competition. Competition laws are enforced by judicial departments of government that are not involved in the constantly changing intricacies, standards, and diplomacy of international trade concerns aiming at market access. They are generally based on domestic legal concepts and intended to maximize economic efficiencies.

Contrarily, trade regulations are intended to influence how people behave. As a result, governments build tariff and non-tariff market barriers to protect domestic producers at the expense of international rivals. International organizations that are made up of representatives from national governments' executive and diplomatic branches enforce trade rules. These organizations frequently settle disputes through negotiations rather than in the winner-take-all setting of a courtroom. Contrary to competition laws, trade regulations are not intended to maximize market efficiency and consumer benefits but rather to open markets to exporters from member countries. The two bodies of law, in sum, include fundamentally distinct actors with fundamentally different institutional orientations, cultures, conflict resolution procedures, and legal principles.

Today, it is a fool's errand to think that these two worlds could dwell harmoniously in parallel universes. Private agreements and hybrid government-private agreements are pervasive and are emerging as the new impediments to a truly open and competitive international economy, as will be described in this essay. In addition, such behaviour is not covered by either nationalist competition rules or international trade laws. The challenging policy challenge is deciding whether the scope of trade laws or competition rules should be enlarged to target behaviour that commonly generates barriers to free trade as well as market inefficiencies. The vastly varied economic cultures and notions of "fair competition" that have produced wildly varying jurisprudence across international trading partners further complicate the situation.

The Application of American Competition Laws Extraterritorially

Because of the custom of judicial and administrative abstention, there has been virtually little governmental or corporate use of extraterritorial antitrust legislation throughout the previous century. Comity is the central doctrine of abstention, according to which courts will defer to the legal systems of nations where violative actions take place and will only provide a forum if unsatisfactory results are obtained after host country remedies have been exhausted, and even then, only if the harm to U.S. markets or consumers is immediate and foreseeable. Positive comity describes agreements between two nations to postpone legal action based on substantially the same standards. In addition to comity, additional doctrines of judicial abstention that seek to prevent courts from interfering with other sovereigns' economic decisions and policies include the Act of State doctrine, the Foreign Sovereign Immunity Act of 1976, and the foreign compulsion doctrine. Shortly after the antitrust rules were put into place, the Supreme Court acknowledged the importance

of international comity. In the case of American Banana Co. v. United Fruit Co., the Court declined to enforce the Sherman Act's restrictions on "anti-competitive" agreements against United Fruit, an American business that had successfully lobbied the Costa Rican government to seize territory that American Banana needed to operate its railroads and distribute produce. In this case, the Court decided that comity considerations would bar American courts from judging the official activities of the Costa Rican government.

In a case involving a conspiracy to create an international cartel involving Alcoa, a Canadian company, and several European aluminium suppliers, the Second Circuit determined 34 years later in United States v. Aluminium Company of America ("Alcoa") that the Sherman Act could be applied to such a conspiracy as its impact had a direct and intended effect on American consumers and judicial action in the U.S. and would not conflict in any way with the laws and policies of other countries.

When the Bank of America was able to convince the Honduran government to confiscate Timberlane Lumber's land in an alleged conspiracy to limit the output of lumber into U.S. markets, the courts applied the Second Restatement in Timberlane Lumber Co. v. Bank of America, N.T & S.A.. The Honduran government's direct involvement in sovereign policy, according to the Ninth Circuit, prevented otherwise cognizable conduct of an initiative that had the goal and effect of increasing prices and decreasing the output of lumber in U.S. markets. Most crucially, the Court stated that the extraterritorial applicability should be prohibited since it would directly interfere with government action in accordance with Honduran law. In assessing comity issues in 1987, the ALI embraced the Ninth Circuit's logic.

The Supreme Court determined that a boycott by U.K.-based reinsurers intended to coerce specific changes in U.S.-based primary insurers' commercial insurance policies was actionable in Hartford Fire Insurance Co. v. California because the conduct had, under Timberlane, intended and foreseeable effects within U.S. shores and because forbidding such conduct in domestic courts would not conflict in any way with any laws or regulations of the United Kingdom.

Development of Recent Policy Changes in The U.S.

Congress and the Department of Justice were wrangling with the other maelstrom of the extraterritorial application of U.S. antitrust law at the same time, namely whether the law should apply to conduct that only harms exporters and not U.S. consumers. An illustration of this might be a cartel-like conspiracy of five foreign manufacturers located in a specific foreign country to tie up distribution channels in that host country in order to prevent market access by U.S. competitors.

With the start of the Reagan Administration and a generally lax approach to antitrust enforcement, the then-new administration was successful in convincing Congress to pass the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to restrict the application of the Sherman Act to conduct that occurs and affects markets abroad. The ostensible purpose was to create a "level playing field" whereby U.S. firms and their foreign competitors were equal in terms of resources and opportunities.

With its DOJ Antitrust Enforcement Guidelines for International Operations, the Department of Justice memorialized this principle in 1988. In the infamous footnote 159, the Department stated that it is "concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices." This policy would characterize a generally hands-off approach to anti-competitive conduct abroad by the Reagan and Bush Justice Departments.

At the end of the Bush Administration, the Department of Justice came to believe that the restriction on footnote 159 was more of a hindrance than an aid to American exports. This was at the time of the "Structural Impediments Initiative," when the Bush and then the Clinton Administrations realized that many still-existing barriers, including those in Japan in particular, were private rather than public in nature.

In April 1993, the Clinton Justice Department followed suit and announced that the guidelines would no longer require direct harm to U.S. consumers. In 1992, the Bush Administration formally declared an end to the requirement of direct harm to U.S. consumers as a condition for the application of antitrust laws abroad.

Instead, the Department stated that it may take action when foreign anti-competitive activity affects U.S. exports of goods or services directly and predictably and involves other antitrust law violations. In 1995, the guidelines were formally altered to allow the government to sue foreign companies that engage in specific anti-competitive activities that close foreign markets.

The effectiveness of antitrust laws in removing what seemed to be the most impenetrable form of market access barriers- private agreements by foreign firms that were tolerated or even tacitly encouraged by foreign governments—was still

viewed with great scepticism by U.S. exporters, despite the liberalization of the extraterritorial application of antitrust laws.

The scepticism of at least one U.S. exporter in the utility of extraterritorial application of U.S. antitrust laws led in part to the Japanese film case. In 1995, Kodak successfully persuaded the United States Trade Representative ("USTR") to utilize trade policy tools such as section 301 of the 1974 Trade Act and WTO dispute settlement system -to attack what were largely private, vertical, non-price restraints on market access whereby Fuji was able to tie up distribution channels and prevent entry by Kodak into the Japanese market. The Japanese film case was the most prominent application of 1988 amendments to section 301, a trade remedy. The definition of "unreasonable practices" under section 301 of the 1974 Trade Act was expanded in 1988 to include governmental actions constituting systematic toleration of anti-competitive activities by foreign firms with market access restricting consequences. Thus began the creep of U.S. trade law into the competition arena.

Comity considerations would have required the plaintiff to first exhaust remedies through the Japan Fair Trade Commission ("JFTC"), which enforces antitrust laws in Japan, had this case been brought under the antitrust laws, which may have been more appropriate given the private nature of the market barriers. In addition, the USTR appeared to disregard the legislative history of section 301, which also states that the USTR should first consider remedies available to it.

Kodak and other U.S. exporters responded, in turn, that both U.S. trade law and the multilateral trade rules were inadequate remedies to address anti-competitive practices in foreign markets, absent some showing of express government endorsement of the practices. The WTO panel ultimately determined that the United States failed to demonstrate the necessary linkage between market access and official acts of the Japanese government in accordance with Article XXIII(1)(b) of the 1994 GATT.

International Developments in Competition Law

Over the past ten years, there have been substantial legislative changes regarding the extraterritorial application of U.S. antitrust law, but there have also been other significant international advances aimed at harmonizing competition laws globally. The first attempt to establish an international framework of regulations for both private and public trade practices was the 1948 Havana Charter for the International Trade Organization, whose vision the United States helped nurture. Although it was unable to secure the required international backing, including that of the United States, it served as a springboard for the GATT and the WT0. And in the forty years that followed the Havana Charter, international harmonization efforts focused on addressing public trade barriers rather than private anti-competitive agreements.

However, the Organization for Economic Cooperation and Development ("OECD") has more recently made an effort to address the issue of competition policy by establishing two working groups and issuing two non-binding recommendations that deal with cartels and cooperation between competition enforcement agencies. Nevertheless, the OECD's efficacy in forging any kind of global agreement on competition laws has been constrained by its membership, which is predominately made up of wealthy nations, and by the absence of an institutional mandate.

As previously said, the WTO, which succeeded GATT, has only recently made an effort to address competition by gradually introducing wording referring to government tolerance of anti-competitive private obstacles that form de facto trade barriers. In contrast, in prior GATT instances, the government had to take explicit action before the dispute settlement procedure could begin. The General Agreement on Trade in Services also incorporates clauses that guard against anti-competitive practices and other monopoly abuses. The Agreement on Trade-Related Investment Measures establishes a Council to produce standards for competition; additionally, the Agreement on Trade-Related Intellectual Property also includes rules to avoid the excessively onerous use of intellectual property rights in anti-competitive ways.

The WTO established the Working Group on Interaction Between Trade and Competition Policy ("WGTCP") at the Singapore WTO Ministerial in 1996. In doing so, the WTO acknowledged that private limitations might limit the advantages of lowering trade barriers. Since its first meeting in July 1997, the WGTCP has had multiple meetings and accepted roughly 188 member ideas, but the issue of creating a multilateral framework for competition policy has not been settled.

Europe has long backed a strategy for competition policy because it understands how trade liberalization and competition regulations are related. In actuality, the European initiative was what spurred the WTO's efforts to address competition policy.

The Treaty of Rome, which outlined guidelines for both private and state trade limitations, marked the beginning of Europe's efforts to create a comprehensive competition strategy. The Treaty of

Rome primarily prohibits contracts or coordinated actions that stifle competition or impose "must deal" conditions on businesses holding dominating market positions. This is in sharp contrast to the privileges of dominant companies in the United States on "refusal to deal". In addition, some state-owned monopolies are designated as "essential facilities" under the Treaty of Rome, which obliges them to open up their networks and participate in competitive bidding. Importantly, the Treaty also addresses the public-private barrier problems associated with state-owned monopolies, such as state-run telephone industries, by applying Article 86 to the (formerly) state-owned monopolies, such as the British telephone industry and the French telecommunications industry, which is required to conduct equipment procurement through a competitive process.

While the American antitrust law places a strong emphasis on allocation and production efficiency, the Europeans appear to be more concerned with other issues like justice and distributional impacts. In the meanwhile, it appears that Japan's competition legislation supports industrial policy objectives and permits some cartel arrangements.

Despite having divergent viewpoints, the U.S. and the E.U. Commission signed two "positive comity" agreements in 1991 and 1998 that required signatories to look into allegations of anti-competitive behaviour but did little to standardize the rules or concepts of competition. Additionally, the European Commission has good comity agreements in place with Israel1, Brazil, Japan, Canada, and the United States. These agreements show a growing interest in working together among certain countries' competition enforcement agencies, which already have robust antitrust laws in place.

However, it is not surprising that there are challenges in creating a multilateral approach to competition policy when developed countries have such different opinions on the subject. It has been challenging to develop a policy that harmonizes trade and competition laws due to these divergent viewpoints.

Can Trade Laws and Competition Laws go hand in hand?

Various institutional perspectives

While the WTO is having considerable success removing trade restrictions put in place by governments, reaching an international agreement on competition policy is fundamentally more difficult. Attempts to expand beyond any regional agreement necessitate bridging significant gaps in culture and behaviour. Comparing European Union competition law to that of the United States and other non-European nations reveals how fundamentally different the European Union's policies are. The main goal of U.S. antitrust laws is to maximize market efficiencies by guarding against coordinated efforts to raise prices or decrease output. (For example, as stated below, dominant firms in the U.S. are free under antitrust laws to "compete hard" and to engage in such schemes as "refusals to deal" and other exclusionary practices so long as there are legitimate efficiency rationales.) The Europeans have rejected many of the U.S. competition paradigms in favour of greater protections for smaller and mid-sized firms, requiring, for instance, that market share as low as forty per cent can trigger a "must deal" Contrarily, developing nations have only recently started to develop and implement antitrust laws. Many of them vehemently oppose an international competition policy regime, claiming that their developing industries are unprepared for the imposition of regimes based on American or European economic traditions.

Each nation has its own economic traditions and distinct conceptions of what competition implies. Keiretsus, or interlocking vertical ties, are a crucial component of Japan's economic structure but may be prohibited under European and American competition laws. The same European regulations that are meant to safeguard small enterprises, however, would be derided as ineffective under U.S. competition law traditions.

The use of terminology, which is greatly varying, is a related issue. Market power is defined very differently in the United States than it is in Japan, Europe, or developing nations. In the United States, market power is thought to be the potential for a rival to circumvent the laws of a competitive market and unilaterally raise prices or reduce output. In the commerce and competition arenas, the terminology also varies. The International Competition Policy Advisory Committee's final report stated:

"Considering a vertical restraint from the standpoint of trade versus the standpoint of competition policy can result in quite different findings regarding the effects of a limitation. If the restraint is investigated under American antitrust law, it will take efficiency and consumer welfare into account. On the other hand, from the standpoint of trade policy, the restriction may be seen as negatively affecting trade flows and access to markets if the foreign producer is prevented from entering a market as a result of the restriction, even though the restriction may be argued to have efficiency-enhancing properties for the participants in the local market."

Laws governing trade and competition must be investigated differently by institutions with distinct institutional interests that are fundamentally different from one another. Representatives of governments involved in ongoing bilateral and multilateral ties who may need to communicate with one another after a dispute is resolved are involved in trade laws, which often include negotiated solutions and are intended to expand markets. Competition laws are battled out in courtrooms that are shielded from the give-and-take of diplomacy and typically have a winner-take-all dynamic. Competition laws are nationalist in nature and implemented to enhance marketplace efficiencies.

Proof that Private Agreements have replaced Trade Barriers

Despite mounting evidence of rising private and hybrid public/private barriers, there are many different legal systems, institutional viewpoints, and dispute resolution procedures. In ten of its member nations, there were numerous private agreements restricting market access in the sectors of agriculture, energy, communications, defence, media, and other industries, according to an OECD investigation from 1996 (the "Hawk Report"). The Business and Industry Advisory Committee ("BIAC") of the OECD undertook a thorough investigation of sixty companies across a variety of industries in June 1999 and discovered that 46% of respondents thought that private anti-competitive behaviours impeded their ability to enter the market. Additionally, 44% of respondents said that it is ineffective, unpredictable, and burdensome to employ competition laws to remove barriers.

The ICPAC Report lists several industries where private anti-competitive behaviour restricts entry to the market. According to reports, the Japanese paper and auto sectors have used tight agreements with distributors as a tactic to keep out international competition. Japanese flat glass producers are charged with engaging in a number of anti-competitive tactics to block access to distribution channels. Ongoing claims of hybrid public/private regulations in the telecommunications sector that obstruct market access are present across Europe. There have also been allegations that Airbus was barring foreign suppliers from participating in cooperative research projects and demanding the surrender of intellectual property rights. Allegations of cartel conduct to fix prices and lower output in the European steel industry have also been made. The Mexican corn sector, the Colombian brewing industry, the Ecuadorian cement and steel industries, the Hungarian and Hong Kong telecom industries, and the United Kingdom have all received similar concerns. Motor business, all of which are supposedly tolerated to varying degrees by government acts. In addition, there is little antitrust enforcement in many other developing economies, including Egypt and India, which have incipient competition laws and poor enforcement practices.

Proposal

A new strategy is needed to fight anti-competitive practices in light of the effects of globalization and the growing interdependence of international trade laws and competition policy. Through the privatized construction of new obstacles, tacit government approval of anti-competitive behaviour in the international arena has the power to reverse decades of talks.

It is improbable that a solution that only seeks to gradually advance the values of comity will be successful. Even if comity were much increased, it would not address the obvious fact that different competition rules among nations will result in many conflicts going unresolved and muddling international competitional rates. In fact, the ICPAC report stated that "while it is apparent that government representatives still maintain visible support for positive comity, the emphasis now has shifted to the 'limited role' it can achieve in international cooperation." Likewise, former FTC Chairman Robert Pitofsky said that positive comity "is a small and modest element that you use in unusual cases to try to protect American firms doing business abroad of foreign firms doing business in the United States."

At the same time, it is implausible to think that an international trade regulation could take the place of the laws governing each nation's purely private economic activity. For instance, the "compete hard" regulations are thought to provide market efficiencies in the United States, as stated above, which U.S. authorities would vehemently urge should not be replaced with less economically efficient European laws. Therefore, it is more practical to try to first establish an international consensus for a basic set of laws governing anti-competitive behaviour that can act as the basis for further, gradual reforms that may only be put into place when an international consensus forms.

The best model for creating a global consensus on competition policy is offered by the per se rules of the U.S. antitrust statutes. Agreements between two or more businesses to raise prices (price fixing) or lower output are explicitly prohibited by Section I of the Sherman Act. Any such private agreement is enforceable under criminal and civil laws and typically doesn't necessitate any additional fact-based research into market dominance, opposing market efficiencies, or anti-competitive intent. It is

commonly accepted that such behaviour inevitably disrupts the free market and has no compensating benefits. It would be helpful to start formulating such basic standards that could be applied with nationalist legislation as a requirement of WTO membership because there is little need to defend such behaviour. Such regulations might also provide appropriate legal processes for prompt resolution and proper discovery. Complete harmonization for this type of behaviour would solve comity issues because there would be a shared set of guidelines.

Second, as it began to do during the 1994 GATT negotiations, the WTO should think about stepping over the line into private conduct that is implicitly approved by states in a similar vein to how the U.S. The WTO rules could be incrementally changed to forbid government toleration of private conduct that discriminates against foreign competitors in light of the Supreme Court's affirmative decision that a state's toleration of racially restrictive real estate covenants constituted necessary "state action" to invoke constitutional protections required to invalidate the covenants during the civil rights movement.

Such action might not fall under the purview of such a rule; for example, if the main widget manufacturer in the nation, Epilson signs exclusive contracts with the three widget wholesalers that are at their disposal. However, if a foreign cartel of widget manufacturers in the nation of Epilson were to strike a deal with distributors to boycott all international suppliers, then such private behaviour might be punishable under the new WTO norm. The advantage of such a proposal is that it avoids imposing new competition regulations that displace an individual nation's historic and legitimate policy goals and instead forbids those behaviours only when they are used to discriminate against foreign rivals.

Third, the WTO ought to adopt the "essential facilities" theory, which calls for monopolists in charge of the exclusive facilities- access to which is a requirement for entering a line of business to make those facilities available to rivals. This served as the rationale behind AT&T's dissolution and the following legislative installation of "open access" rules on regional bell operating companies (or "RBOCs"), allowing rivals to theoretically access the infrastructure of local telephone companies. This is also the rationale behind the opening of numerous state-sponsored monopolies in Europe to competition via trade regulations and agreements of the European Commission. "Essential facilities" frequently refer to monopolies that the government has established in industries like energy and telecommunications. This criterion is advantageous because it is consistent with market-access principles of free trade and the widely held belief among competition theorists that bottlenecks caused by blocked "essential facilities" are inefficient.

Private agreements, however, may be considered trade-restrictive, do not favour domestic over foreign competitors and do not reveal any connection to the government. But if the framework I suggest is adopted, this matter might come up for discussion in the future, particularly if the idea that governments should refrain from taking trade-restrictive action in favour of excessively lenient competition laws is accepted as a foundation for creating international agreements. Furthermore, bilateral and international positive comity agreements could be used to address this category of private activity. But before such behaviour can be addressed, a framework along the lines I've suggested needs to be established.

2. Conclusion

There is overwhelming evidence that efforts by the WTO to remove government-sponsored barriers are being replaced by private trade barriers. The numerous varieties of the new private trade barriers cannot be addressed by the WTO or the respective legal systems of member states alone. Most importantly, member nations must make an effort to enact a global standard for fair competition that will act as a cornerstone for future growth. In the first instance, those regulations should forbid standards that are obviously anti-competitive, ineffective, and without any countervailing explanations based on custom or precedent in order to achieve consensus. Additionally, WTO regulations should be strengthened to forbid governments from tolerating private agreements that discriminate against international rivals. By doing this, the regulations simply prohibit the employment of such methods as de facto discriminatory trade barriers rather than superseding current competition principles. Finally, the WTO should broaden the definition of what constitutes "government measures" required by WTO rules to include both necessary facility bottlenecks and hybrid government/private trade-restrictive activities.

3. Reference

1. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994)
2. See ICPAC REPORT, supra note 1, at 211-26 (discussing anecdotal evidence of

anticompetitive or exclusionary practices submitted to international forums such as the Organization for Economic Cooperation and Development ("OECD"), the WTO, and to the Advisory Committee by trade associations, individuals, and business executives).

3. See id. at 209 (noting the potential overlap of trade and antitrust policy tools in attempting to address anticompetitive practices).
4. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2909-10 (1993)
5. Anne-Marie Slaughter, The Accountability of Government Networks, 8 IND. J. GLOBAL LEGAL STUD. 347, 365 (2001) (providing a definition of positive comity in the context of U.S.-EU antitrust relations); see Matthew Cooper, The Role of Positive Comity Review, 10 PAC. RIM L. & POL'Y J. 383, 399-404 (2001) (discussing the general implications of positive comity in antitrust enforcement).
6. The Foreign Sovereign Immunity Act creates judicial immunities, with certain exceptions, for foreign government actions that otherwise could be cognizable under the antitrust laws. See Foreign Sovereignty Immunity Act of 1976, 28 U.S.C. §§ 1602-11(1994) (setting forth the codification of the Act); see also Edith Yvette Wu, Evolutionary Trends in the United States Application of the Extraterritorial Jurisdiction, 10 TRANSNATIONAL LAW. 1, 6-16 (1997) (discussing generally the doctrine of sovereign immunity and the Foreign Sovereign Immunity Act of 1976 and the act of state doctrine).
7. 213 U.S. 347 (1909).
8. See Sherman Act, 15 U.S.C. § 1 (1994)
9. See American Banana, 213 U.S. at 356-57
10. 148 F.2d 416 (2d Cir. 1945).
11. 549 F.2d 597 (9th Cir. 1976).
12. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (identifying factors which generally tract those in Tinzberlane Lunzber).
13. 509 U.S. 764 (1993).
14. See generally James S. McNeill. Comment, Extraterritorial Antitrust Jurisdiction: Continuing the confusion in Policy. Law, and Jurisdiction, 28 CAL. W. INT'L L.J. 425, 448-52 (1998)
15. See Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97- 290, § 402, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 6a (1994)) [hereinafter the FTAIA]
16. See McNeill, supra note 20, at 445-47 (discussing Congress' enactment of the Foreign Trade Antitrust Improvement Act of 1982).
17. See U.S. DEPT. OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1988), reprinted in Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Spec. Supp. Nov. 17, 1988) (outlining applicable law, enforcement, policy, and jurisdictional considerations in the international antitrust context).
18. Id. at note 159 (qualifying overseas jurisdiction of FTA1A as applied to U.S. exporters).
19. See McNeill, supra note 20, at 449 (noting footnote 159 limited extraterritorial application of antitrust laws to situations where U.S. consumer prices effected).
20. See Press Release, U.S. Dep't of Justice, Foreign Business Conduct that Harms American Exports (April 2, 1993), reprinted in 7 Trade Reg. Rep. (CCH) para. 50,084 (continuing policy shift from solely consumer protection to more emphasis on domestic exporter protection in the extraterritorial application of antitrust law).
21. [1] This case began when Eastman Kodak filed a petition with USTR on May 19, 1995, pursuant to Section 301 of the Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1974) (codified at 19 U.S.C. §§ 2411-2421 (1994)). See Initiation of Investigation, 60 Fed. Reg. 35,447 (July 7, 1995). An investigation was initiated on July 7, 1995. See id. USTR subsequently determined that the government of Japan "established and tolerated a market structure that impede[d] U.S. exports of consumer photographic materials to Japan..." and announced it would pursue the matter within the WTO Dispute Settlement system. See Notice of Determination, 61 Fed. Reg. 30,929 (June 18, 1996).
22. See The Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1974) (codified as amended at 19 U.S.C. §§ 2411-2421 (1994)) (providing authority for the United States to enforce U.S. rights and to respond to actions by foreign countries inconsistent with or otherwise denying the United States benefits under trade agreements).
23. See WTO Agreements, supra note 1, the GATT 1994, art. XXIII (providing for procedures to remedy governmental measures that "nullify or impair" the benefits of the WTO Agreements).
24. See generally William Barringer. Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute, 6 GEO. MASON L. REV. 459 (1997) (arguing against use of section 301 to address alleged market access problems related to private business practices in foreign markets).
25. See Spencer Weber Waller. Can U.S. Antitrust Laws Open International Markets? 20 Nw. J. INT'L L & Bus. 207,

226-28 (2000) (noting aside from the Japanese film case, only two other antitrust type petitions have been filed with the USTR pursuant to the 1988 section 301 amendments).

26. Section 301 as amended provides that a government may be found to be acting unreasonably if it: (1) tolerates systematic anticompetitive activities by state-owned enterprises and/or private firms; (2) denies market access for U.S. firms; and (3) restricts the sales of U.S. goods or services to a foreign market. See 19 U.S.C. § 2411(d)(3)(B)(i)(I—V) (1994).
27. See Barringer, supra note 36, at 463-64 (pointing out that Kodak failed to exhaust domestic remedies and did not approach the .117TC before filing its petition with USTR).
28. See Havana Charter for an International Trade Organization, United Nations Conference on Trade & Development, Final Act and Related Documents, art. 46.1, U.N. Doc. E/Conf. 2/78 (1948) [hereinafter Havana Charter] (stating general principles calling on members to prevent private or public commercial enterprises from engaging in business practices affecting international trade, which restrain competition, limit access to markets, or foster monopolistic control).
29. See Weiss, supra note 45, at 260 (explaining that GATT/WTO competition policy efforts have focused on government market access barriers as opposed to privately sponsored restraints).
30. See P.J. LLOYD & KERRIN M. VAUTIER, PROMOTING COMPETITION IN GLOBAL MARKETS: A MULTI-NATIONAL APPROACH 131 (1999) (describing the OECD as the most active of all international organizations in the field of competition policy).
31. See ICPAC REPORT, supra note 1, at 258 (describing OECD competition policy initiatives).
32. See id. at 260-62 (outlining competition policy features of WTO Agreements); see also C. O'Neal Taylor, The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System, 30 VAND. J. TRANSNAT'L L. 209, 216 (1997) (setting forth illustrations of anticompetitive practices in the area of intellectual property protection).
33. See Japan-Trade in Semiconductors, May 4, 1988, GATT BISD (35th Supp.) 116, at 155 (1989) (holding that it is necessary to find measures "dependent on government action or intervention" in order to be actionable).
34. See General Agreement on Trade and Services. Apr. 15, 1994, WTO Agreements, Annex 1B, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 46, arts. VIII, IX (1994), (addressing monopolies and exclusive service suppliers and business practices that may restrain competition and thereby restrict trade).
35. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreements, Annex1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81, art. 40 (1994) (addressing anticompetitive practices in the context of licensing).
36. See Doha Briefing Notes on Competition Policy, supra note 55 (noting that among WTO member countries "views differ as to the need for action at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system.").
37. See Fox, supra note 27, at 8 (noting Sir Leon Brittan's 1992 speech at Davos suggesting a multilateral approach to competition policy and trade liberalization).
38. See Treaty Establishing the European Economic Community, opened for signature Nov. 23, 1957, arts. 85-94, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter Treaty of Rome] (outlining competition law for the European Community); see also Fox, supra note 27, at 6-7 (commenting on Treaty of Rome competition policy—related provisions, which address private and public activities).
39. See Fox, supra note 27, at 12 (noting that in the United States even a dominant firm has the right to unilaterally set terms and will not be subject to antitrust action unless there is a concerted effort to lower output and prices rise); Id. (comparing United States and European antitrust models).
40. See Case 41/83, Italy v. Commission, 1985 E.C.R. 873 (finding that the competition rules of the Treaty do apply to conduct "made possible by central government[s]").
41. See Case 202/88, France v. Commission, 1991 E.C.R. 1223 (upholding directive requiring member states to abolish exclusive rights to supply telephone terminal equipment).
42. See Fox. supra note 27, at 12 (noting that differences in antitrust policy may be due to American perspective that a higher level of

government involvement harms competition and efficiency).

43. See Doha Briefing Notes on Competition Policy, supra note 55 (noting that among WTO member countries "views differn as to the need for action at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system.")
44. See WTO General Council, Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTAVGTCP/4, para. 31 (Nov. 30, 2000) [hereinafter WGTCP 2000 Report] (expressing concern that local firms in developing countries may be displaced by foreign firms as result of emphasis on competition); id. para. 30 (noting the importance of developing countries' ability to retain use of a broad range of development-related policies and not be hindered by imposition of international competition regime).
45. See WGTCP 2000 Report, supra note 77. para. 26 (pointing out that national competition policies are very diverse as a result of differences in members' history and stage of development. socio-economic circumstances, legal contexts, and cultural norms).
46. See ICPAC REPORT, supra note I, at 210.
47. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, ANTITRUST AND MARKET ACCESS: THE SCOPE AND COVERAGE OF COMPETITION LAWS AND IMPLICATIONS FOR TRADE, 23, 29, 30 (OECD ed., 1996)
48. See ICPAC REPORT supra note 1. at 212-13
49. See ICPAC REPORT, supra note 1, at 218-19
50. ICPAC REPORT, supra note 1, at 235.
51. See Sherman Act, supra note 8, at § 1 (stating that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal").
52. See Sherman Act, supra note 8, § I (criminalizing conduct that significantly interferes with trade and is the product of an agreement between two or more independent actors).
53. See Shelley v. Kraemer, 334 U.S. I, 20 (1948) (holding that the State of Missouri applied laws in a discriminatory fashion and denied equal protection rights to minority property owners).
54. The "essential facilities" doctrine arose in Supreme Court decisions involving concerted refusals to deal that were attacked primarily under Section 1 of the Sherman Act. See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 703-06 (4th ed., Michie 1999)