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Trade and International Competition Policy

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Summary

International competition policy is aimed at prohibiting private activities that restrict or distort competition — particularly as they affect trade. It is both a process of harmonizing national competition policies and a goal of negotiating a multinational agreement on antitrust policy. Although every industrialized nation has national antitrust and competition laws, there is no consensus on the need for, shape of, or reach of an international competition policy. The World Trade Organization is exploring the possibility of including competition policy in its negotiating agenda. Congressional action on competition policy centers mainly on its oversight of trade, economic, and antitrust relations with foreign countries. This report will be updated as events warrant.

Competition policy refers to the administration of antitrust and other laws aimed at ensuring competition in markets. It has gained importance in international economic relations because successive reductions in tariff and non-tariff barriers have shifted the focus from government-controlled import barriers to restrictive practices by private companies. As trade is liberalized, governments no longer can impose impediments to products from abroad. Private companies, however, can erect barriers with similar effect. International competition policy tries to prohibit agreements and practices which restrict and distort competition among trading states. It also is aimed at preventing the misuse by a firm of its dominant position in a market in a way that adversely affects international trade. It is intended to protect consumers from private firms who unilaterally, or collectively, set prices that are higher than otherwise would prevail.

The pressure for governments to act on competition policy emanates mainly from multinational corporations that operate in different world markets and often face anticompetitive practices there that may be considered illegal in the United States. It also emanates from domestic industries competing with imports from companies that may be engaged in unfair trading practices (e.g. dumping) that may be financed by excess profits generated through exercising monopoly power at home or through international cartels.

Congressional action on competition policy centers mainly on its oversight of trade, economic, and antitrust relationships with foreign countries. The first area of oversight

deals with U.S. efforts to open markets for American exports and businesses abroad. The second is in the activities of multilateral organizations, such as the World Trade Organization (WTO) and the Organisation for Economic Cooperation and Development (OECD). The third is in cooperative (comity) activities with other national antitrust authorities. In the 106th Congress, H.R. 1120 (S. Levin, et al.) would require an investigation by the International Trade Commission to collect information on and assess the adverse effects of anticompetitive practices in international steel trade. Hearings dealing with international competition policy also are being scheduled.

Background

Competition policy has heretofore been mostly a domestic issue. It centers on identifying, regulating, and dealing with restrictive economic structures and practices, collusive business behavior, barriers to entry into industry, and other activities that may deter companies or other economic actors from engaging in free and open market competition. The targets of competition policy include restrictive business practices such as public and private monopolies, cartels (including export cartels), vertical or horizontal restraints, certain mergers and acquisitions, predatory pricing, price fixing, price discrimination, and abuse of market power. Some trade restrictions also can inhibit competition. These practices usually cause economic inefficiencies, abnormally high prices, or may retard the advance of technology.

Monopoly power or restrictive business practices are usually a question of degree. Anti-competitive behavior can range from that of a huge corporation that may destroy all competitors through predatory pricing to producer with a unique product. The issue is not the existence of monopoly power, per se, but its effect on the marketplace.

Firms with monopoly or monopolistic power can diminish economic efficiency, but they also can enhance it. While governments recognize that monopolies cause inefficiencies, they often provide monopoly power to companies. They grant patents, copyrights, and licenses to operate. They establish standards that favor existing companies. They allow public utilities to service specific geographical areas, provide protection from import competition, and allow mergers and acquisitions that reduce competition. Governments recognize that some industries require large, oligopolistic companies to take advantage of economies of scale in production. A domestic company, moreover, may make the case that it requires some monopoly power to compete with foreign companies that dominate their home markets.

Some governments look aside as companies monopolize distribution channels and often are ambivalent about enforcing competition policy. Still, most agree that certain types of anti-competitive behavior should not be tolerated. Every industrialized nation has some form of domestic competition policy. There is no consensus, however, on the need for, shape of, or reach of an international competition policy.

International competition policy could proceed on three basic paths. The first is to harmonize national antitrust laws and rely primarily on cooperation among national antitrust authorities to enforce those laws. The second would be to devise a set of binding competition rules that would be enforceable through an international dispute settlement

process. A third approach would be to have countries agree on a framework for rules or core principles (basic concepts upon which there could be broad agreement).¹

Adopting an international competition policy agreement faces three major hurdles. The first is that the theory underlying the policy and a consensus on the appropriate measures necessary to achieve it are still being developed. There are no authoritative ways to measure restrictive business practices nor do definitive policy prescriptions exist.

The second hurdle is political. The appeal of competition policy depends partly on the level of economic development of a country. Developing nations seem more interested in pursuing industrial policies that will foster strong companies than in anti-trust policy aimed at keeping their companies within bounds. Developing nations also have gained greatly by raising their export prices through cartels or other arrangements in order to shift the terms of trade in their favor (particularly in raising the price of petroleum).

The third major hurdle is enforcement and dispute settlement. The initial responsibility for enforcement rests with the authorities in the countries themselves. Nations may or may not be willing to cede supranational authority to an international organization for enforcement. Extraterritorial enforcement of antitrust laws also carries problems, and comity does not always achieve desired results.²

At the international level, competition policy is being addressed by the OECD through its Committee on Competition Law and Policy and its Joint Group on Trade and Competition. These OECD groups have been doing considerable intellectual work on trade and competition policy. The OECD has worked to define best practices or common approaches to the enforcement of competition law. It has been seeking to promote the convergence of competition policy across countries. At the WTO, competition policy is under consideration as a new issue for its negotiating agenda.³ In its Singapore Ministerial in December 1996, the WTO established a working group to study trade and competition policy. This group, however, has focused first on analytical and educational issues rather than on the possibility of negotiations. It is to issue its report in 1999. The United Nations Conference on Trade and Development (UNCTAD) works mainly with countries that are adopting or modernizing their antitrust laws.

As for support for including competition policy in WTO negotiations, in general, the U.S. Justice Department and Federal Trade Commission have been cool to the idea, while the U.S. Trade Representative has given it limited support.⁴ In the private sector, U.S.

¹ Shelton, Joanna R. Competition Policy: What Chance for International Rules? Paper delivered at Wilton Park Conference 545: The Global Trade Agenda, November 25, 1998. Wilton Park, UK. On Internet at [http://www.oecd.org//news_and_events/release/sheltwiltonpark.htm].

² Alford, Roger P. The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches. *Virginia Journal of International Law*, v. 33, Fall 1992. p. 1.

³ See: CRS Report 98-841 E, *The World Trade Organization: Future Negotiations*, by Arlene Wilson.

⁴ See, for example: FTC Chairman Discusses Competition Policy. Trends in International (continued...)

multinational corporations tend to support wider WTO rules for competition policy. The European Union, which has its own supranational competition authority, in principle, has favored placing competition policy on the WTO negotiating agenda. The Competition Bureau in Canada has stated that it is time to contemplate an agreement on competition policy in the next round of the WTO.⁵ Multinational corporations tend to support more work on competition policies by international organizations, but they are concerned about the exchange of confidential information dealing with their market positions.

In the United States, in November 1997, the Department of Justice formed the International Competition Policy Advisory Committee (ICPAC) to address global antitrust problems.⁶ In forming the committee, the Department noted that recently there have been dramatic increases in both international commerce and international anticompetitive activity. The number of transnational corporate mergers has been rising steadily, and the Department has numerous investigations involving international cartels. ICPAC is to provide advice and information to the Department on international antitrust issues, such as transnational cartels, multi-jurisdictional merger reviews, and international anticompetitive business practices.

In 1992, the U.S. Justice Department stated that it would challenge anticompetitive conduct abroad if (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States; (2) the conduct involves anticompetitive activities that violate U.S. antitrust laws, and (3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.⁷ In 1994, Congress passed the International Antitrust Enforcement Assistance Act (15 U.S.C.A. §§ 6201-6212) which emphasizes cooperation and mutual assistance between the Justice Department in the United States and foreign antitrust enforcement entities. These efforts rely heavily on positive comity or cooperation among antitrust authorities.

Competition policy has been at the heart of several recent trade disputes. On March 31, 1998, the WTO released a decision in a U.S.-initiated dispute involving access by Kodak to the photographic film and paper market in Japan. The WTO panel decided against the U.S. which highlighted the lack of an explicit competition policy agreement in the WTO that would have provided a better legal foundation for such cases.⁸ Competition policy also came into play in a 1995 dispute over automobiles and parts with Japan. One

⁴ (...continued)

Antitrust Enforcement. *Antitrust & Trade Regulation Report*, Nov. 12, 1998. Barshefsky, Brittan Take Stab at Fleshing Out New Trade Initiative. *Inside U.S. Trade*, September 25, 1998. P. 3-4.

⁵ Von Finckenstein, Konrad. Testimony before the U.S. International Competition Policy Advisory Committee. November 2, 1998. Hearing transcript, p. 18.

⁶ The committee is co-chaired by former Assistant Attorney General for Antitrust James F. Rill and former chairwoman of the U.S. International Trade Commission Paula Stern.

⁷ Justice Department's April 3 Statement of Enforcement Policy: Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports. *Antitrust and Trade Regulation Report*, April 9, 1992. P. 483.

⁸ See CRS Report 98-442 E, *The Kodak-Fuji Film Case at the WTO and the Openness of Japan's Film Market*, by (name redacted).

aspects of this dispute dealt with access by U.S. automakers to dealerships and by automobile parts makers to repair garages in Japan.⁹

According to the U.S. Trade Representative, U.S. industries face anticompetitive practices in many other countries. For example, Asian industrial groups (*keiretsu* in Japan and *chaebol* in South Korea) are often accused of anticompetitive behavior. China has created industrial conglomerates to improve the profitability of state-owned enterprises, some of which are authorized to fix prices, allocate contracts and restrict competition among domestic suppliers. In South Korea, the government-affiliated Korean Broadcasting Advertising Corporation holds a monopoly over the allocation of television and radio advertising time. In India, both state-owned and private Indian firms can engage in most types of anticompetitive practices with little or no fear of reaction from government overseers or action from a heavily backlogged court system. In 1996, Switzerland strengthened its anti-cartel law, but it still permits cartels under certain circumstances.¹⁰ Also, even though virtually all industrialized and many developing nations have antitrust laws, enforcement varies widely from country to country.

Some of the newly industrializing nations have pressed for abolishing antidumping laws and replacing them with competition policy agreements. Dumping would be treated as an abuse of power. Although Australia and New Zealand have taken this approach in their free-trade agreement, U.S. policymakers have not supported this approach.

Existing Competition Policy Agreements

As with most other international economic policies, the competition policy agreements that do exist began with arrangements for cooperation or as part of the rules for international trading agreements or economic blocs. The General Agreement on Tariffs and Trade, which has been incorporated into the WTO, contains some provisions which address certain competition-related governmental actions dealing with monopolies, exclusive service arrangements, the effects of domestic regulation, and the need for transparency in all these matters. In the WTO Telecommunications Agreement, there is an obligation to allow service providers of other Members access to public telecommunications networks (which often are public monopolies) on “reasonable and non-discriminatory” terms and conditions.¹¹

With respect to particular nations, the European Union has the most well-developed policy. The commitment to economic integration there is strong enough that members have agreed to a common competition policy and ceded some of their sovereign rights to enforce it to The Commission of the European Communities and the European Court of

⁹ See: CRS Report 95-725 E, *The Japan-U.S. Automobile and Parts Trade Dispute*, by (name redacted), William Cooper, and Gwenell L. Bass.

¹⁰ U.S. Trade Representative. *1999 National Trade Estimate Report on Foreign Trade Barriers*. Washington, U.S. Government Printing Office, 1999. 354 p. On Internet at [<http://www.ustr.gov/reports/nte/1999>].

¹¹ Organisation for Economic Cooperation and Development. *Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements*. Report number COM/TD/DAFFE/CLP(98)FINAL. Paris, OECD, January 1999. P. 14.

Justice. In practice, those cases whose effects can be confined largely to the jurisdiction of a single EU member are acted upon solely by that state. The EC Commission takes only those cases that affect other members.¹²

The North American Free Trade Agreement (NAFTA) includes a chapter on competition policy that requires each party to adopt or maintain measures to proscribe anti-competitive business conduct and to cooperate on issues of enforcement. It has, however, no mechanism for dispute settlement.

In the Australia-New Zealand Closer Economic Relations Trade Agreement (CER), the two countries agreed to extend their domestic antitrust laws to cover the combined two economies. They gave the competition authorities in each country new investigatory powers to obtain evidence in the other nation.¹³ Australia and New Zealand also have taken a novel approach to competition policy and trade. In their CER agreement, they replaced antidumping laws between their two countries with provisions from their competition laws. The monopolization or abuse of dominant positions also applies to dumping cases.¹⁴

The Asia Pacific Economic Cooperation (APEC) council is examining competition policy as a complement to its goal of free trade. The aim is to facilitate trade and reduce trade friction — particularly between the United States and Japan.¹⁵

The OECD has long been addressing competition issues for this group of 25 industrial nations. It has formed a Joint Group on Trade and Competition, and its members have agreed to cooperate on anticompetitive practices affecting international trade and to continue to work informally for greater convergence in standards for competition law, more use of common analytical methods, and more international enforcement capacity and information sharing.

A competition policy agreement, therefore, is on the agenda for consideration and possible action by the WTO, OECD, and APEC. In a sense, international competition policy is both a goal and a process. As a process, nations are seeking to harmonize their antitrust laws and enforcement. As a goal, international organizations are studying the relationship between competition policy and trade. The WTO, however, is yet to decide whether to initiate activity leading to formal negotiations on international competition policy.

¹² Graham, Edward M. "Competition Policy and the New Trade Agenda." *New Dimensions of Market Access in a Globalising World Economy*, by the Organisation for Economic Co-operation and Development. Paris, OECD, 1995. pp. 111.

¹³ Thomson, Graeme A. "Trade and Competition Policy Linkages: Some Ideas on a Framework for the Future." *New Dimensions of Market Access in a Globalising World Economy*, by the Organisation for Economic Co-operation and Development. Paris, OECD, 1995. pp. 142.

¹⁴ Fels, Allan. Remarks before the U.S. International Competition Policy Advisory Committee. November 2, 1998. Hearing transcript page 10. On Internet at [<http://www.usdoj.gov/atr/icpac/2232.htm>].

¹⁵ APEC Eminent Persons Group. *Implementing the APEC Vision*. Singapore, APEC Secretariat, 1995. p. 19-21.

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