"Competition Law and Policy in the International Trading System:

A Survey of Key Issues."

Robert Brent Davis

March 2000

A thesis submitted for the degree of

Master of Philosophy of the

Australian National University.
Declaration

This thesis is my own work and has not been submitted elsewhere for another degree. All sources used have been acknowledged.

Further, the views expressed in this study are personal, and should not be attributed to any other organisation with which the author is otherwise associated.

Brent Davis

27/3/00
Expression of Appreciation

The author owes a great deal of gratitude to two groups of people, without whom this thesis would not have been possible.

Firstly, my academic supervisors, Mr Chris Ward and Professor Stephen Bottomley, both of the Faculty of Law at the Australian National University, for their guidance, suggestions and constructive criticisms of my work as my thinking and writing evolved.

Secondly, and by no means least, my spouse Cheryl and daughter Alexandra for their patience and tolerance during the many long, solitary hours I spent reading and writing.

Any work of this nature is ultimately a team effort, but any shortcomings remain my responsibility alone.
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Case for International Competition Law and Policies</td>
<td>84</td>
</tr>
<tr>
<td>- Core Objectives for an International Competition System</td>
<td>89</td>
</tr>
<tr>
<td>- Harmonisation Models</td>
<td>93</td>
</tr>
<tr>
<td>- Approaches to Harmonisation</td>
<td>95</td>
</tr>
<tr>
<td>- Hurdles for Harmonisation</td>
<td>100</td>
</tr>
<tr>
<td>- A Case Study: the EU/US Agreement</td>
<td>104</td>
</tr>
<tr>
<td>Broader Models</td>
<td>110</td>
</tr>
<tr>
<td>- Plurilateral Models</td>
<td>110</td>
</tr>
<tr>
<td>- Multilateral Models</td>
<td>112</td>
</tr>
<tr>
<td>- Extending the European Union Model</td>
<td>121</td>
</tr>
<tr>
<td>- The United States Perspective</td>
<td>123</td>
</tr>
<tr>
<td>- The General Agreement on Tariffs and Trade (GATT)</td>
<td>125</td>
</tr>
<tr>
<td>1. Violation Actions</td>
<td>126</td>
</tr>
<tr>
<td>2. Non-Violation Actions</td>
<td>128</td>
</tr>
<tr>
<td>- The World Trade Organisation (WTO)</td>
<td>132</td>
</tr>
<tr>
<td>1. Enhancing the WTO's Reach</td>
<td>139</td>
</tr>
<tr>
<td>2. Working Group on Trade and Competition Policy</td>
<td>142</td>
</tr>
<tr>
<td>3. Developing/Transitional Country Interests</td>
<td>148</td>
</tr>
<tr>
<td>4. The Case Against a Role for the WTO</td>
<td>155</td>
</tr>
<tr>
<td>- Competition Policy in the Millennium Round</td>
<td>161</td>
</tr>
<tr>
<td>- Reform Models</td>
<td>168</td>
</tr>
<tr>
<td>1. An Intermediate Solution</td>
<td>168</td>
</tr>
<tr>
<td>2. Minimalist Multilateralism</td>
<td>171</td>
</tr>
<tr>
<td>3. Regionalism</td>
<td>175</td>
</tr>
<tr>
<td>4. Individualism</td>
<td>177</td>
</tr>
<tr>
<td>5. No Model At All</td>
<td>178</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Dumping</td>
<td>185</td>
</tr>
<tr>
<td>Enforcement</td>
<td>199</td>
</tr>
<tr>
<td>Exceptions and Exemptions</td>
<td>207</td>
</tr>
<tr>
<td>competition and regulation policies</td>
<td>214</td>
</tr>
<tr>
<td>Extra-territoriality</td>
<td>221</td>
</tr>
<tr>
<td>Government Conduct</td>
<td>233</td>
</tr>
<tr>
<td>Horizontal Arrangements</td>
<td>239</td>
</tr>
<tr>
<td>export cartels</td>
<td>242</td>
</tr>
<tr>
<td>import cartels</td>
<td>247</td>
</tr>
<tr>
<td>Intellectual Property/Research and Development</td>
<td>249</td>
</tr>
<tr>
<td>Market Access and Market Contestability</td>
<td>258</td>
</tr>
<tr>
<td>contestability of markets</td>
<td>263</td>
</tr>
<tr>
<td>Mergers</td>
<td>266</td>
</tr>
<tr>
<td>Monopolisation and Abuse of Dominant Position</td>
<td>285</td>
</tr>
<tr>
<td>Predation and Pricing Practices</td>
<td>294</td>
</tr>
<tr>
<td>Private Conduct</td>
<td>299</td>
</tr>
<tr>
<td>private actions</td>
<td>302</td>
</tr>
<tr>
<td>State Trading Arrangements</td>
<td>305</td>
</tr>
<tr>
<td>Subsidies and Countervailing Duties</td>
<td>307</td>
</tr>
<tr>
<td>Vertical Restraints</td>
<td>310</td>
</tr>
</tbody>
</table>
A 'Best Practice' Model ................................................................. 320

Framework Issues ................................................................. 324
- Multilateral platform ......................................................... 324
- Developing and Transitional Countries .............................. 327
- Non-Discrimination .......................................................... 330
- Objectives ............................................................................ 331
- Other Agreements .............................................................. 334
- Trade Barriers .................................................................... 335
- Transparency ....................................................................... 337
- WTO Council On Competition Law and Policy .................... 339

Substantive Issues ................................................................. 340
- Competition Policy ............................................................. 341
- Competition and Industry Policy ......................................... 343
- Competition and Regulation Policies ................................. 344
- Dispute Settlement .............................................................. 346
- Dumping ............................................................................. 348
- Enforcement ....................................................................... 349
- Exceptions and Exemptions ............................................... 352
- Extra-Territorial Application of Laws and Policies ............... 354
- Government Conduct ......................................................... 356
- Horizontal Arrangements ................................................... 357
- Intellectual Property/ Research and Development ................ 360
- Market Access and Market Contestability ......................... 362
- Mergers .............................................................................. 364
- Monopolisation and Abuse of Dominant Position ................ 366
- Predation and Pricing Practices .......................... 368
- Private Conduct and Actions ............................... 370
- State Trading Enterprises ................................. 372
- Subsidies and Countervailing Duties ..................... 373
- Vertical Restraints ......................................... 375

Conclusion ...................................................... 378

Appendices ...................................................... 381

Bibliography ..................................................... 415
Introduction and Overview

The international trading system has evolved substantially over the past century, from being overwhelmingly driven by the "law of the jungle" to increasingly influenced by the "rule of law" approach.

While commercial laws that provide for the conduct of international trade, commerce and investment, the bilateral and regional agreements, and the multilateral multilateral trading system are evolving, an increasing importance.

A growing number of countries are enacting in place national competition law and policy regimes, many of the developed countries are looking at bilateral and regional arrangements which contain competition law and policy provisions, albeit of varying degrees of ambition, while the multilateral trading system is being praised from a number of quarters, academic, business and government, to embrace competition law and policy issues.

Contrary to some misconceptions, inside and competition law and policy issues are not a new invention in bilateral, regional or even multilateral fora.

The international community, both governments and businesses, have considered the interactions between the two different systems that hardly ever coexist, with one of the earliest and most notable efforts being the "failed" attempts to merge "restrictive business practices" included in the framework of the 1947 proposed International Trade Organization.

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The international trading system has evolved substantially over the past century, from one overwhelmingly driven by the ‘law of the liberal free market’ to one strongly influenced by the ‘rule of law’.

While commercial and economic forces will continue to drive international trade, commerce and investment, the bilateral and regional agreements, and the rules-based multilateral trading system are taking on increasing importance.

A growing number of countries are putting in place national competition law and policy regimes; many of the developed countries are looking at bilateral and regional arrangements which contain competition law and policy provisions, albeit of varying degrees of ambition; while the multilateral trading system is being pressed from a number of quarters, academic, business and government, to embrace competition law and policy issues.

Contrary to some misconceptions, trade and competition law and policy issues are not a recent invention in bilateral, regional or even multilateral fora.

The international community, both governments and business, have considered the interactions between the two streams for more than half-a-century, with one of the earliest and most notable efforts being the failed attempt to have ‘restrictive business practices’ included in the framework of the then-proposed International Trade Organisation.
While there were subsequent efforts, of varying commitment and intellectual robustness, to develop multilateral rules on trade and competition matters, there has been little in the way of meaningful outcomes in the intervening years.

However, trade and competition issues have attracted increasing attention and interest in recent years reflecting, inter alia, expanding and more liberal global trade and investment, and concerns non-border and non-governmental barriers are increasing as tariff reductions and other conventional impediments are coming down as part of multilateral, regional, bilateral and even unilateral trade liberalisation initiatives.¹

At the same time, the globalisation of trade, commerce and investment is impacting upon the competitive structures of national economies, most notably through increasing concentration of commerce and industry.²


Globalised firms, which are very different to the multinational firms of twenty or thirty years ago, operate in imperfectly competitive markets, often with limited competition and competitors because of economies of scale and scope in production and distribution.³

The World Trade Organisation and its substantive agreements will continue to play an important role in facilitating globalisation by, for example, promoting trade and investment liberalisation and through this enhancing the mobility of commerce and industry, and the factors of production (especially capital and technology).⁴

An important dimension of globalisation has been the break down of the national identity of firms. It can no longer be assumed the economic interests of a nationally-owned enterprises are synonymous with those of the country of origin, with the conduct of such firms (and its impact), rather than their nominal 'nationality', becoming increasingly important.⁵

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Globalisation of commerce and industry has also seen increasing tensions between nations in competition law and policy, with stress points including non- or inadequate enforcement of competition law, different views on the nature and permissibility of extra-territorial application of national laws, and nationalistic actions which are little more than protectionist or 'beggar-thy-neighbour'.

The accelerating pace of technological change is also impacting upon economies, and competition, inducing convergence of previously separate markets.

This tendency has been most pronounced in services sectors, such as telecommunications and finance, creating problems for competition law and policy agencies in market definition, especially for 'relevant product market'. The expansion of electronic commerce is expected to exacerbate these challenges.

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7 A Schaub, above n 2 at 228.
However, while we may be living in a globalised economy where national borders are becoming less relevant,\(^8\) we are far from living in a global state\(^9\) with supranational laws and enforcement agencies.

The increasing interest in competition law and policy is evident in the growing number of nations with substantive national competition law and policy regimes. It has been estimated as many as 65 nations accounting for around 80 per cent of global output in 1996 had competition statutes in place,\(^10\) well ahead of the less than one dozen a decade earlier.\(^11\)

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Since 1990 alone, more than 35 countries have either adopted new or substantially revised existing competition laws including both developing and transitional (from planned-to-market) economies, with a further 20 or more in the process of drafting such laws. Looked at another way, more than 60 per cent of the national competition laws currently in place have come into effect over the past decade.

This contrasts with the creation of the first competition statutes a little over a century ago, by Canada in 1889 and the United States (US) in the following year, ironically around the same time their national governments were adopting high tariff policies.

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13 A D Melamed, above n 9; R Pitofsky "Competition Policy in a Global Economy - Today and Tomorrow" Address to the European Institute's Eighth Annual Transatlantic Seminar on Trade and Investment (Washington D.C., 1998) <http://www.ftc.gov/speeches/pitofsky/global.htm> estimates 82 countries have some kind of competition law, with 52 (or 63 per cent) of these coming into effect in the last decade, with a further 24 in the process of drafting or enactment.


15 P Nicolaides, “Towards Multilateral Rules on Competition: The Problems in Mutual Recognition of National Rules” (1994) 17(3) World Competition 5 at 7, argues this is “motivated by suspicion, bordering on hostility, of big business.”

The passage of time has been accompanied by a change in focus in national competition law and policies, from preventing increased industry concentrations and market power (and so economic/political influence) toward pro-actively strengthening market forces, whether in developed, developing or transitional economies.\(^{17}\)

This is not to say competition law and policy have been totally absent from the international stage, just that the nature and degree of focus has oscillated for much of the post-war period, from the focus on cartels in the 1940s, to the growth (and demonisation) of multinational firms in the 1960s and 1970s, to the ascendancy of freer markets in the 1980s and the demise of communism (at least in its economic forms) in the 1990s.\(^{18}\)

Nevertheless, competition policy generally remains outside the international legal system, and for all practical purposes is a patchwork of very different domestic laws and bilateral co-operation agreements of varying degrees of substance and commitment.\(^{19}\)

The synergies, and tensions, between competition and trade law and policy are also being recognised, and will be a key theme of this study.

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\(^{17}\) RS Khemani, above n 12 at 143.

\(^{18}\) EM Fox, above n 8 at 172.

\(^{19}\) P S Crampton and M Barutciski, "Trade Distorting Private Restraints: A Practical Agenda for Future Action" (unpublished paper given at the Pacific Economic Co-operation Council Conference on Trade and Competition Policy, Montreal, 1997) at 1.
An important driver of the convergence of competition laws and trade policies has been the integration of the international trading system, which has seen growing levels of inter-industry and intra-firm trade within international trade flows, and surges in foreign direct investment and technology flows.

This ever-closer integration of markets sees: a growing number of producers selling their products in other markets; more consumers buying products made by producers in other markets, generally in competition with those in the home market; and, a greater number of final products manufactured in a sequence of stages distributed across several countries.

Commerce and industry which is driving this globalisation, where the relevant market is international not domestic, has a diminishing tolerance of government-based barriers which interfere with these flows.20

The iconic status of competition laws has been heralded by the US Supreme Court21 when it said: “The Antitrust laws ... are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to our fundamental freedom.”

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Yet, as another influential commentator observed, ultimately there is no ‘one correct’ competition policy as “economic policy does not provide a single, uniform depiction of the working of the imperfectly competitive industries, and, in particular, does not give a simple, unambiguous prescription for the design of competition policy”.

“Furthermore, even where they agree on the appropriate models to apply in analysing industries, experts often disagree as to application of the models to particular sets of facts.”

It is on these foundations this study looks through a ‘law and policy’ perspective at the linkages between competition and trade law and policy, and their place in the international trading system.

The study has been influenced strongly in its style by some of the leading legal scholars in the field of international competition and trade law and policy, Professors Eleanor Fox (School of Law, University of New York), Mitsuo Matsushita (School of Law, Seikei University, and Member of the WTO’s Appellate Body), and Petros Mavroidis (School of Law, University of Neuchatel).

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The study will address, and seek to provide some answers to three key questions:

firstly, if the World Trade Organisation engages in substantive negotiations on a multilateral instrument on competition law and policy, what are the key issues, mechanisms and processes that will have to be taken into account;

secondly, what are the key issues in the internationalisation of competition law and policy, and their interface with liberal trade policy; and,

finally, if the WTO does engage in such negotiations, what would a 'best practice' negotiating text look like?

The first section will examine the nature of the interface between competition and trade law and policy; the second section will look at key issues in competition law and policy; the third section will focus on options for internationalising competition law and policy, within the global trading system; the fourth section will set out a proposed 'better practice' approach and model for internationalising competition in a trade context; with the final section providing a summary and drawing together the main conclusions of the study.
Trade policy settings in this study will be taken to mean liberal trade arrangements, unless specified otherwise.
In an ideal world, the international competition and trade law and policy system would exhibit a high degree of coherence or complementarity, with little, if any, conflict or tension. However, as in many other areas of human activity, the ideal and reality do not often coincide.

From a wider policy perspective, contradictions or inconsistencies between competition and trade laws and policies can lead to inefficiencies in each instrument, place their credibility into question, and create uncertainty and insecurity for commercial and economic actors.

Conversely, exploiting potential complementarities can help overcome deficiencies in individual policies, facilitate the enforcement of policies and through these raise institutional credibility.24

The fundamental momentum behind efforts to promote greater coherence between competition and trade law and policy comes from their common policy objectives - the fostering of competitive/market-oriented environments, the attainment of economic efficiency, and the improvement in aggregate economic welfare.25

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24 A Jacquemin, above n 2 at 100; H Spier, "The Perspective of the Australian Competition and Consumer Commission on Cross Border Issues on Competition Policy" (unpublished paper given at the Pacific Economic Co-operation Council Conference on Trade and Competition Policy, Montreal, 1997) at 2.

Second, competition and trade policy share a common foundation in economic theory - the theories of free trade and of the perfectly competitive market.\textsuperscript{26} As such, competition policies and trade liberalisation are considered\textsuperscript{27} to be generally complementary and mutually reinforcing.

The complementarity of competition and trade policy is particularly evident in trade liberalisation, both in the reduction or elimination of tariff and non-tariff barriers, and in improving the transparency of non-tariff barriers. Such outcomes help to reduce impediments to market entry and increase the contestability of markets, which are also key objectives for competition policy.

Effective domestic competition laws and policies\textsuperscript{28} complement trade liberalisation agreements by ensuring the resulting benefits are realised by consumers, and not negated by private or public restraints to trade, as well as smoothing the structural adjustments which flow from trade liberalisation accords. In short, effective competition laws help to maximise the benefits of trade liberalisation.

\textsuperscript{26} K M Vautier and P J Lloyd, above n 25 at 10; E Hope, above n 25 at 2.

\textsuperscript{27} F M Scherer, above n 16 at 2; P Nicolaides, "Towards Multilateral Rules on Competition" 17 (3) World Competition 5 at 7; M E Janow, above n 20 at 103; Organisation for Economic Co-operation and Development, "Complementarities Between Trade and Competition Policies" (1999) OECD Doc No COM/TD/DAFFE/CLP(98)98/FINAL 1 at 4.

\textsuperscript{28} Meaning both in substance and enforcement.
Third, competition and trade policy share similar economic efficiency objectives, whether (to use the lingua franca of economics) allocative, productive or dynamic.  

Effective competition and liberal trade policies are both oriented towards maximising efficiency across the short, medium and longer term, although competition authorities may give greater weight to domestic efficiency considerations while their trade counterparts are likely to take a global efficiency perspective.

While there are a number of complementarities between competition law and trade law and policy, there are also clear differences.

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29 In economics, allocative efficiency is concerned with ensuring economic resources are distributed to those who value them most; productive efficiency, with ensuring output is achieved at the lowest cost; and, dynamic efficiency with the process of discovering new technologies: Organisation for Economic Co-operation and Development, "Consistencies and Inconsistencies Between Trade and Competition Policies" (1999) OECD Doc No. COM/TD/DAFFE/CLP(98)25 FINAL 1 at 6.

First, the two policy streams see the intersection of their domains quite differently: while competition officials see the objective as encouraging market competition and through this consumer welfare, their trade counterparts regard their objective as market access.31

In this regard, although both policy streams are concerned with distortions to market conditions, competition policy tends to focus on predatory practices of dominant firms which could lead to exclusion or foreclosure of markets and so harm competition, and while trade policy tends to focus upon practices of governments which impede access to markets.

Second, the temporal perspectives of the two streams also tend to differ, with competition policy generally applied on a case-by-case and ex post basis (the exception being merger review), while trade policy tends to be applied on a sectoral- or economy-wide basis and ex ante (the exception being trade remedies).32

31 P Nicolaides, above n 27 at 31; P J Lloyd, “A Link Between International Trade and International Competition Policy” (1996) 1 at 8; B M Hoekman and P C Mavroidis, “Dumping, Antidumping and Antitrust” (1996) 30(1) Journal of World Trade 27 at 29; D I Baker and W T Miller, above n 6 at 83, observe, with a touch of irony: "... foreign market access pursued under antitrust law can raise novel issues when there is no apparent injury to domestic consumer welfare (which) suffers from too little competition, whereas trade law pursue(s) market access strictly as principles of fairness that have no necessary relationship with consumer welfare anywhere." (emphasis in original).

32 P Nicolaides, above n 27 at 31.
For these reasons, competition policy tends to emphasise actual competition in particular markets, while trade policy is oriented towards encouraging potential competition by safeguarding opportunities, with competition policy adopting a narrower, and trade policy a broader, definition of 'markets'.

Third, competition and trade policy agencies tend to focus on different mechanisms and outcomes. While competition agencies use the rule of law to prevent (usually private) actors within their jurisdictions from engaging in anti-competitive conduct prejudicial to economic efficiency, trade policy agencies pursue collective, co-operative solutions through international negotiations to reduce government-imposed distortions to cross-border trade.

Fourth, and in a similar vein, competition policy agencies have the capacity to use potentially quite powerful tools, most notably per se prohibitions, against market behaviour or practices which they regard as anti-competitive. Trade officials generally have much weaker policy instruments, which often rely on international consensus for their application (although this is changing with the maturing of the WTO's dispute settlement mechanism).

33 Organisation for Economic Co-operation and Development, above n 29 at 7.
34 PC Mavroidis and S J Van Siclen, above n 30 at 16; E Hope, above n 25 at 3.
35 Ibid.
Fifth, there are differences in the performance criteria used to evaluate policy instruments under the two disciplines. While the effectiveness of competition law and policy can be measured by the changes in economic efficiency following an agency intervention, trade policy tends to focus upon changes in the levels and patterns of international trade flows.36

Sixth, competition and trade policy generally serve different constituencies. While competition law and policy seek to defend consumers against market-distorting practices and restraints by facilitating the effective functioning of free markets, trade law and policy are oriented toward advancing the competitive position of domestic industries and firms (that is, producer interests), both at home and abroad.37

A nuance of this perspective is competition analysis tends to focus on the welfare of a class of consumers in a defined (usually the domestic) market, while liberal trade policy tends to look toward global welfare (both consumers and producers in domestic and foreign markets).38

36 Ibid.
38 Organisation for Economic Co-operation and Development, above n 29 at 7.
Seventh, the attitudes of the two disciplines also differ markedly on the question of sovereign compulsion.39

The mandate of competition authorities is generally to monitor and discipline private anti-competitive behaviour, setting aside conduct which is subject to sovereign compulsion (or protection) - although this has started to change as competition authorities extend their reach into areas such as essential facilities, public utilities, and State or regulated monopolies.

By contrast, trade policy and negotiations are about the conduct or policies of governments, with sovereign compulsion not considered a rationale for avoiding or evading an issue, including where the latter provides comfort (or more) to private behaviour.

Eighth, there are also notable differences in the legal contexts in which both policy streams operate. At the most basic, while there are multilateral rules on trade, there are no parallel arrangements in competition law and policy.40

Furthermore, competition policy tends to be more codified, with foreign firms in most countries having easier access to national courts for competition-related matters than trade-related complaints.41

40 The E.U. being a regional arrangement.
41 P Nicolaides, above n 27 at 32.
The burdens of proof also differ, with the defendant in trade (for example, dumping) matters being required to overcome a presumption of guilt, while in competition complaints the burden falls, more conventionally, upon the plaintiff.

The evidence collection approaches adopted by competition officials also tend to differ from those of their trade counterparts,\(^{42}\) and parallel the differences of ‘corporate culture’ evident in sovereign compulsion.

Competition officials generally work within a framework where evidence and facts are gathered in a domestic legal environment with powers of compulsion to collect confidential information.

Where such information is held in another country, competition officials tend to defer to the sovereignty of the other government and are reluctant to pursue extra-territorial investigations without the explicit permission or co-operation of foreign authorities.\(^{43}\)

Trade officials, by contrast, recognise most evidence on trade barriers and related practices has to be gathered from publicly available sources, without the assistance of a State agency to compel disclosure of confidential information.

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There tends to be little institutional constraint on collecting information outside of the home jurisdiction, with such conduct generally not regarded as undermining co-operation on other trade matters.

The standards of evidence also differ. While competition authorities operate within domestic legal frameworks which require high standards of evidence to defend individuals against unreasonable actions by the State, trade officials collect evidence from public sources abroad which is convincing but not necessarily clear-cut and fully conclusive.44

Competition proceedings also tend to have greater degrees of transparency than trade actions. For example, where authorities prosecute firms under competition law the latter generally have the right to access their files. However, in trade cases, where the matters are generally handled by governments, often acting as agents for private parties, the original complainant firm often does not get access to confidential and detailed information.45

Ninth, there are noticeable differences in the bounds and discretion of the authorities under each discipline. While competition laws generally set outer bounds for competition authorities, leaving them some discretion to take case-by-case, 'rule of reason' approaches, their trade counterparts have less latitude, operating within more of a per se prohibition environment.46

44 G Feketekuty, above n 39 at 288.
45 P Nicolaides, above n 27 at 33: leaving aside the problem of the representative governments tempering prosecution/defence of the complaint on the grounds of broader 'national interest'.
46 P C Mavroidis and S J Van Siclen, above n 30 at 17.
Tenth, the availability of remedies differs between the two streams. While competition authorities have a greater range of readily available remedies, especially for private anti-competitive behaviour where the firm(s) concerned have assets in the prosecuting nation,\textsuperscript{47} trade officials lack internationally accepted remedies for conduct not covered by existing trade rules (although the strengthening of the World Trade Organisation's dispute settlement mechanism has given them more effective remedies).

A number of the differences between competition and trade policy are underlined in the treatment by the two policy domains of several issues which have salience to both.

For example: competition policy generally regards export cartels as harmful, while trade policy appears more tolerant; competition policy often regards extra-territorial application of laws as necessary to deal with conduct having cross-border effects, while trade policy regards the incursion into national sovereignty with alarm; and, competition policy regards anti-dumping rules as detrimental to the country imposing the measures, while trade policy is more tolerant of such mechanisms.\textsuperscript{48}

The inevitable consequences of these differences are that competition law and policy can have an anti-trade effect, and trade law and policy can have anti-competitive effects.

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\textsuperscript{47} G Feketekuty, above n 39 at 289.

\textsuperscript{48} M Barutciski, "The Two Solitudes: Trade and Competition Policy" (unpublished paper given to the Canadian Bar Association, Annual Competition Law Conference, Ottawa, 1998) at 11 - 17.
Competition law and policy can have anti-trade biases, causing exports/imports to be higher/lower than otherwise through, for example, lax rules (either of substance or enforcement, or in the breadth and/or depth of exceptions and exemptions) in key areas such as ‘crisis cartels’, horizontal and vertical arrangements, and predatory pricing.

Trade policy can distort competition when it stipulates price and/or quantity floors/ceilings, and where import-relief measures (for example, implementable under dumping or other ‘safeguard’-type rules) have selective effect, usually protecting the most inefficient domestic firms/penalising the more efficient foreign firms.\(^4^9\)

Table 1 attempts to summarise, in abbreviated form, a number of the complementarities and distinctions between competition and trade law and policy:

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\(^4^9\) P Nicolaides, above n 27 at 34 - 35.
<table>
<thead>
<tr>
<th>Issue</th>
<th>Trade Policy&lt;sup&gt;51&lt;/sup&gt;</th>
<th>Competition Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy Orientation - I</td>
<td>Competitive Market</td>
<td>Competitive Market</td>
</tr>
<tr>
<td>Policy Orientation - II</td>
<td>Promoting Efficiency</td>
<td>Promoting Efficiency</td>
</tr>
<tr>
<td>Origins of Distortions</td>
<td>Generally Government</td>
<td>Generally Private</td>
</tr>
<tr>
<td>Policy Focus</td>
<td>Producer Oriented</td>
<td>Consumer Benefit</td>
</tr>
<tr>
<td>Operating Horizon - I</td>
<td>International</td>
<td>Generally Intranational</td>
</tr>
<tr>
<td>Operating Horizon - II</td>
<td>Ex ante/ economy or sectoral wide</td>
<td>Ex post/case-by-case</td>
</tr>
<tr>
<td>Definition of Market</td>
<td>Generally Broader</td>
<td>Generally Narrower</td>
</tr>
<tr>
<td>Constituencies</td>
<td>Governments and Producers</td>
<td>Consumers</td>
</tr>
<tr>
<td>Mechanisms</td>
<td>Negotiated Outcomes</td>
<td>Rule of Law</td>
</tr>
<tr>
<td>Enforcement Tools</td>
<td>Consensual/Peer Review</td>
<td>Per se Prohibition/Rules of Reason</td>
</tr>
<tr>
<td>Sovereign Compulsion</td>
<td>Negotiable</td>
<td>Can be significant barrier</td>
</tr>
<tr>
<td>Performance criteria</td>
<td>Levels and patterns of trade</td>
<td>Economic Efficiency</td>
</tr>
<tr>
<td>Negotiations</td>
<td>Multi- and bi-lateral, and regional</td>
<td>Very few, then bilateral</td>
</tr>
<tr>
<td>Evidence Collection</td>
<td>Public sources, non-compulsory</td>
<td>Public &amp; Private, compulsion avail.</td>
</tr>
</tbody>
</table>

<sup>50</sup> Author: simplified summary drawing on references used in this study.

<sup>51</sup> Liberal trade policy.
<table>
<thead>
<tr>
<th>Issue</th>
<th>Trade Policy</th>
<th>Competition Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standards of Evidence</td>
<td>Generally convincing</td>
<td>Generally fully conclusive</td>
</tr>
<tr>
<td>Dispute Resolution</td>
<td>National/International Law</td>
<td>National Law</td>
</tr>
<tr>
<td>Emphasis of policy intersection</td>
<td>Market Access</td>
<td>Contestability</td>
</tr>
<tr>
<td>Attitude to - export cartels</td>
<td>Tolerant</td>
<td>Harmful</td>
</tr>
<tr>
<td>- extra-territorial laws</td>
<td>Generally Opposed</td>
<td>Generally necessary</td>
</tr>
<tr>
<td>- anti-dumping</td>
<td>Tolerant</td>
<td>Generally disdainful</td>
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</tbody>
</table>
Taken as a whole, there exist a number of similarities and complementarities, as well as differences and divergences, between competition and trade law and policy.

However, this does not necessarily mean the inconsistencies between competition and trade policy are such that one policy domain impedes or conflicts with the operation of the other. Rather the differences can reflect the distinct matters dealt with by each policy domain, while also underlining their complementarity in other instances.\textsuperscript{52}

The inconsistencies between competition and trade law and policy may well be the outcome of the fragmentation of policy making between the two streams.\textsuperscript{53} While greater co-ordination in policy making and implementation would be helpful, it would not constitute a complete solution where there are other fundamental and/or irreconcilable differences between the two policy streams.

A number of reasons have been put forward\textsuperscript{54} to explain the inconsistencies between competition and trade law and policy.

\textsuperscript{52} Organisation for Economic Co-operation and Development, above n 29 at 10 - 11.

\textsuperscript{53} P Nicolaides, above n 27 at 7.

\textsuperscript{54} Ibid at 9 - 10; M Barutciski, above n 48 at 11 - 17.
These include the propensity for governments to use competition and trade (which are ostensibly economic) policies for non-economic (especially social) policy purposes (for example, regional development in rural areas), and the incompatible implementation of the different policies (which can be problematic when the two policy streams are administered by different agencies, which is not uncommon).

Policy-based solutions to resolving the inconsistencies between competition and trade law and policy could include: requiring each policy stream to take into account its effects on the other; improving policy and implementation co-ordination between competition and trade agencies; and, (probably most importantly) not using competition and trade law and policy instruments to pursue objectives for which they are not suited.

If anything, the two policy domains can learn from each other: the competition policy stream, of the adverse effect on international relations of the failure to deal with allegations of anti-competitive conduct in a timely and transparent manner; and, the trade policy stream, of the analytical discipline and rigour which characterises contemporary competition law and policy.\(^55\)

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\(^{55}\) M Barutciski, above n 48 at 6.
At the same time, as one commentator has remarked: "... the economic interests of individual nations have become so closely knitted together, that the traditional distinction between a domestic economic policy instrument and a foreign economic policy instrument (foreign trade or foreign investment measure) has become less meaningful. Any measure that has a significant impact on production decisions by a globalised firm has become a matter of concern for other national governments and the world community as a whole."56

To put it in plain terms, competition and trade policy will need to work together, regardless of their points of convergence or divergence.

**Competition and Anti-Trust**

Discussion of competition law and policy issues frequently makes reference to the concepts and terms of ‘competition policy’ and ‘anti-trust’.57

In some cases, these terms are regarded as synonyms, being used interchangeably at the discretion of the author concerned. In other cases their usage reflects the nationality of the author: those of European (and Australian) origin tend to prefer ‘competition policy’; while those of US origin embrace ‘anti-trust’.

56 G Feketekuty, above n 5 at 4.
57 A term which, according to one American, “has a disagreeably negative ring”: F M Scherer, above n 16 at 1.
In this study, the two terms will be taken to have different meanings: ‘competition policy’ is the broader term, involving the application of competition rules to governments, their agencies and regulatory actions; while ‘anti-trust’ has narrower meaning and application, only to those rules concerning the anti-competitive behaviour of private firms.\textsuperscript{58}

As noted earlier, the central objective of competition policy is making markets work better, by balancing and defining the boundaries between competition and co-operation in the market-place. Competition policy sets the outer limits of (im)permissible competition and (im)permissible co-operation.\textsuperscript{59}

Somewhat surprisingly, there is a view\textsuperscript{60} that competition per se is not necessarily the principal objective of competition policy; rather, it is seen to be efficiency and fairness.

To their mind, the challenge for competition authorities is to deal with conflicts between efficiency and fairness, and to make trade-offs between them (given moving closer to one often involves moving further away from the other).\textsuperscript{61} The ‘rule-of-reason’ approach can facilitate such trade-offs.\textsuperscript{62}

\textsuperscript{58} P Nicolaides, “Competition Policy in the Process of Economic Integration: An Exploration of the Forms and Limits of Co-operation” (1997) 21(1) World Competition 117 at 117 - 118.


\textsuperscript{60} Ibid.

\textsuperscript{61} Which implicitly recognises the ideal of ‘perfect competition’ is unrealistic, in practice: World Trade Organisation, above n 22 at 38. Economics defines ‘perfect competition’ to be a situation where all participants in a market are perfectly informed and have no power to set prices, a situation which is rarely possible.
However, this view has been forcefully challenged on the basis that competition policy is about competition, which means encouraging efficiency, commercial rivalry and preserving opportunities in the marketplace, and thus governance by markets rather than by firms. Basing competition policy on fairness would lead ineluctably to codes of conduct and thus constrained/non-competitive behaviour.

Other key considerations which competition authorities often need to take into account are the balances between static and dynamic efficiency, and the idea that what may well be legitimately efficient for one nation, may not be so for another or the world.

National governments and their competition agencies must also remain vigilant to the potential for competition policy to have protectionist effect - that is, lax competition regimes can be used by protectionist minded governments as substitutes for state-imposed barriers to trade.

More realistically, competition policy, and authorities, seek to ensure 'workable' levels of competition to optimise economic efficiency - that is, the optimum response to different kind of deviation from perfect competition: P Nicolaides, above n 27 at 21.

62 Under United States' law, by assessing the effect of conduct in promoting or suppressing competition: National Society of Professional Engineers vs United States, 435 U.S. 679 (1978); also, Chicago Board of Trade vs United States, 246 U.S. 231 (1918).


This can occur either by substance (where such laws and policies are structured to be permissive of anti-competitive conduct by domestic actors) or by application or enforcement (where competition agencies do not diligently and objectively pursue privately-generated anti-competitive conduct).  

**Competition Law vs Competition Policy**

At the same time, it is appropriate to distinguish between competition law and competition policy.

Competition law has been defined as those instruments used to control the conduct of natural or private legal persons, prohibiting anti-competitive behaviour, such as price fixing, collusion between firms to restrict output, and/or the abuse of dominant position.

Competition policy, however, covers a much wider span of instruments and measures which can be implemented by governments to promote the contestability of markets.

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Such initiatives include the privatisation of state-owned enterprises, deregulation of commercial activity, reduction in firm-specific subsidy programs, and curtailing policies and practices which discriminate against foreign products/ producers.

Competition policy can also contain an advocacy element, where competition agencies encourage other branches of government to modify and/or implement their policies to ensure the minimum interference necessary with market competition.\(^{68}\)

**National Objectives**

A particularly important tension in the internationalisation of trade and competition law and policy is the different objectives of national governments.

While the main objective of the US competition regime (known as anti-trust) is the protection of consumer welfare, followed by enhancing efficiency,\(^{69}\) the central objective for the European Union (EU) is promoting economic integration.\(^{70}\)

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\(^{69}\) Although the Supreme Court has underscored the limits of U.S. antitrust laws, saying such laws are not a vehicle for proscribing competitive practices thought to be offensive to proper standards of business morality: *NYNEX Corp vs Discon Inc*, 119 S. Ct. 493. Appendix 1 for a summary of the main U.S. competition statutes and their main provisions.

\(^{70}\) World Trade Organisation, above n 22 at 44; P Nicolaides, above n 15 at 9 - 31 for lengthy discussion of key features of E.U. and U.S. laws.
Within the efficiency perspective, it could be said the US inclines toward pursuing dynamic efficiency, with the EU blending dynamic and static efficiency.\textsuperscript{71}

Such differences can also be cultural (in the wider sense) or generic in nature. A key example of endemic differences, it has been argued,\textsuperscript{72} are different perceptions of proper process: while the US insists on due legal process, the preferred approach in continental Europe is proper administrative process.

In key jurisdictions, such as the US (where the judiciary plays a relatively influential role in competition law and policy), differences of judicial opinion can be significant.\textsuperscript{73} By contrast, the EU places greater reliance on administrative approaches, which tend towards higher consistency.

\textsuperscript{71} E M Graham and J D Richardson, above n 59 at 8.
\textsuperscript{72} J D Richardson, above n 64 at 343.
\textsuperscript{73} R Pitofsky, above n 13 at unnumbered, noting the 5/4 and 4/3 split decisions by the U.S. Supreme Court in several key, competition related matters; for example: \textit{Fortner Enterprises Inc vs United States Steel Corp}, 394 US 495 (1969), and \textit{Arizona vs Maricopa Medical Society}, 457 US 332 (1982); also, J O Haley, "Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?" (1995) 4(1) \textit{Pacific Rim Law and Policy Journal} 303 at 308 for discussion of the relative roles of the judiciary and the legislature in the U.S. system.
Institutional differences are also important: in the US private enforcement constitutes the overwhelming majority (on one estimate, around 90 per cent)\(^\text{74}\) of all actions, with the capacity for criminal proceedings against corporate executives in price fixing conspiracies, and treble damages; while in the EU the European Commission plays a central role, acting as both prosecutor and judge, with firms generally accessing the European Court of Justice only to challenge a Commission decision which directly affects them.

Distinct interpretations of key competition laws and principles (for example, collusion or concerted action) are another important area of difference: the US has a more forthright approach, with greater emphasis on per se illegality even if the economic effect is otherwise negligible; while the EU expressly permits exemptions where inter-firm co-operative arrangements have net positive economic effects for the Community as a whole.

The impact of alleged anti-competitive conduct upon trade is also treated differently in the two jurisdictions: in the US, only unreasonable restraints on trade are illegal and there is no notification requirement; while in the EU, co-operative arrangements which affect trade need explicit authorisation if they are not to be subject to prosecution.\(^\text{75}\)

\(^{74}\) P Nicolaides, above n 15 at 32.

\(^{75}\) The “Key Issues in Competition Law and Policy” part of this study will examine the issues of similarity and differences between E.U. and U.S. competition law in more detail.
Careful analysis and thinking on the linkages between competition and trade law and policy are not the preserve of multilateral agencies, 'think-tanks' or members of the academic community.

National administrations, in the policy arms of government and in competition authorities, are taking an increasing interest in the potential future shape and thrust of competition law and policy in the global economy and the international trading system.

The EU examined the nature and extent of linkages between trade and competition policy in what has become known as the van Miert Report. 76

The key thrusts of the van Miert Report 77 were first, the agreement of a list of common, minimum principles which should be incorporated into national laws covering initially prohibitions on horizontal (especially export) cartels relating to price pricing, restrictions of supply or market-sharing. Other principles would cover vertical restraints, abuse of dominant position, and harmonisation of merger procedures.

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76 European Commission, "Competition Policy in the New Trade Order: Strengthening International Co-operation and Rules" (1995). While the report was prepared by an external group of experts, the report was also named after Karel van Miert, then Commissioner for Competition.

77 Ibid at 20 - 27.
Second, the Report also proposed the creation of a new international body to help member governments extend the common principles, act as a central registry of anti-competitive practices existent in member countries, and provide a dispute settlement facility (corresponding to the WTO structures) to arbitrate on dispute between competition agencies.

Third, membership of the agreement would include the major trading nations of the world (for example, members of the OECD, countries of central and eastern Europe, and industrialised Asia - Hong Kong, Singapore and Taiwan), with extension at the earliest opportunity to the more advanced countries of Latin America.

The US Government has sought to examine the interaction between competition and trade law and policy through a specially-appointed International Competition Policy Advisory Committee (ICPAC) within the US Department of Justice.

The main terms of reference for the Committee are to examine mechanisms for strengthening consensus amongst competition authorities around the world for prosecuting international cartels, improving co-ordination between competition authorities in their merger review work, and ensuring that as trade agreements reduce governmental impediments to freer trade these are not replaced by private sector barriers to market access.78

The Committee has reportedly79 adopted a broad perspective looking towards policy recommendations which will, inter alia, deter anti-competitive restraints, address problems relating to lax or discriminatory enforcement, increase transparency and promote effective competition in jurisdictions which lack competition laws.

The Committee is also examining different mechanisms and processes for enforcing competition laws: unilateral enforcement of US antitrust laws against foreign market access; increasing the number and reach of bilateral co-operation agreements, in particular expanding positive and negative comity; greater use of unilateral US trade laws (for example, Section 301); and, the usefulness of plurilateral, regional (for example, through APEC, NAFTA and/or the OECD), and multilateral (that is, WTO) platforms.

Other countries have been formulating their views on competition and trade law and policy issues, which have had limited circulation as national papers provided to the WTO’s Working Group on Trade and Competition Policy (WGTCP).

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79 P Stern, above n 63 at unnumbered: Co-Chair of the ICPAC.
. Are There Linkages?

The a priori assumption of linkages between competition and trade law and policy has been challenged by some commentators.

To their mind, the case of linking trade and competition policies is not sufficiently made merely because there are interactions between the two policy streams, or they share the common objective of promoting efficiency in individual and the world economies.

Rather, the better test is whether the two sets of policies can be pursued more effectively separately or jointly.

In this view, a linkage would be essential if management of the multilateral rules-based trading system and/or negotiation of further liberalisation were jeopardised by anti-competitive behaviour, or if competition policies could not be conducted without (re)regulation of the international trading system.

Or, to put it another way, while there may be spillovers in practice between competition and trade law and policy, the more appropriate issue is whether the spillovers create distortions, in terms of reducing global welfare.

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80 K M Vautier and P J Lloyd, above n 25 at 11.
82 World Trade Organisation, above n 22 at 30.
Such interactions are not seen to exist at this time: “In practice, national competition policies seem to have been able to operate independently of national trade policies, and competition laws have been enforced, even though in some markets restrictions on international trade reduce foreign competition.... (C)ompetition policy and international trade policy can be pursued separately without one undermining the other.”

Nevertheless, there is a need for a comprehensive list of problems in international competition and trade law and policy, involving two or more countries, and an indication of the importance attached to them by business and governments.

If anything, a number of substantive policy-based pressures mitigate against any convergence in competition policies. These include the strong differences in opinion on the ‘best practice’ amongst alternative approaches to competition law, and the underlying challenge to domestic political sovereignty inherent in convergence.

Having examined the points of interface and the linkages between trade and competition policy, the study will now look at the potential mechanisms and processes for internationalising competition law and policy within the global trading system.

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83 K M Vautier and P J Lloyd, above n 25 at 125 - 126.
84 Ibid. at 9.
85 E Iacobucci, above n 66 at 27; Organisation for Economic Co-operation and Development, above n 419 at 7.
Internationalising Competition

Law and Policy

Within the

Global Trading System
Trade and Competition Law and Policy

Any meaningful initiatives to more effectively and extensively integrate competition law and policy into the international trading system will require careful consideration of a range of factors.

Not least amongst these factors will be the nature and extent of the linkages between competition and trade law and policy, the differing 'corporate cultures' of the two policy streams, and comparative experiences with the various mechanisms and processes - bilateral, regional and multilateral.

- The Linkages

Competition and trade law and policy are not mutually exclusive. If anything their goals can be mutually reinforcing\(^\text{86}\), with both seeking to enhance consumer welfare (whether as business-user or the more traditional concept of householder or individual end-user) through increased economic efficiency, and fostering of competitive, market-oriented environments.

\(^{86}\) F M Scherer, above n 16 at 2; M E Janow, above n 20 at 103; Organisation for Economic Co-operation and Development, above n 27 at 4; E M Fox, "Competition Law and the Millennium Round" (unpublished paper given to the OECD Conference on Trade and Competition, Paris, 1999) at 2.
The two policies are also becoming increasingly intertwined, with trade policy taking an increasing interest in domestic barriers to commerce, and competition policy taking into account foreign practices which have adverse effects on domestic markets. The latter situation reflects the tendency for anti-competitive behaviour to be more prevalent in protected sectors. 87

Closer attention to the linkages between competition and trade laws and policies is an inevitable outcome of the increasing movement toward globalisation, the growing pressure for decisive action on non-tariff barriers as tariffs and quotas come down88 or are eliminated, increasing demands from global businesses upon governments for special treatment as the latter compete for foreign direct investment,89 and deregulation of economies and privatisation of government enterprises continue.90


88 The WTO estimates the average tariff on industrial products, post-Uruguay Round, was just 3.9 per cent in OECD countries: J Seade, “Competition and Trade Policy: Co-operation or Obligations” (1995) International Business Lawyer 476 at 477; non-tariff barriers which cause particular problems in a competition policy context are seen to include health requirements, product standards, and labelling/ packaging requirements: World Trade Organisation, above n 22 at 50.


90 P J Lloyd, above n 31 at 4.
The globalisation of commerce and industry has resulted in an increasing number (and magnitude) of competition issues which transcend national boundaries, which cannot be dealt with adequately by a single nation. Such practices include international market sharing agreements, export cartels, restrictive business practices (especially in international transport) and abuse of dominance across several national markets.  

It has been observed the “lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away...”

From the trade policy perspective, these snags include anti-dumping measures, retaliatory trade practices against ‘unfair’ trade, and private sector conduct (often abetted by governments) which adversely affect international trade. The United States-Japan auto-parts dispute is regarded as a case-in-point.

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94 E M Graham and J D Richardson, above n 59 at 6.
A broader approach to dealing with such barriers has been conceptualised\(^9\) as "effective market access". It starts from the premise that barriers to entry by foreigners are no longer confined to the border, with effective market barriers arising from both government and institutional impediments.

In simple terms, 'effective market access' is the sum of trade policy, competition policy and the interaction between them.

- Differing Cultures

A central tension in attempts to promote convergence in competition and trade law and policy, whether in substance or enforcement, is the different mind-sets and approaches adopted by competition and trade officials.

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Competition officials recognise firms often prefer to exclude competitors rather than confront them in the marketplace, asking whether the harm being caused to the competitor results in a sustained, substantial lessening of competition. If not, competition officials tend not to intervene.

Trade officials, by comparison, tend to represent a constituency whose main interests are gaining improved access to markets. Where barriers to market access are erected by foreign governments, the primary approach has been to try to have them removed initially through negotiation or, failing that, by threats of retaliatory action (increasingly through the WTO's dispute settlement mechanism).

In short, according to some commentators: "International trade specialists act as if the objective of international competition policies is to achieve free trade or to maximise the benefits of free trade whereas the competition specialists act as if the objective of international trade policies is to achieve fully competitive markets. These are two quite different approaches to the issues involved in the interface of trade and competition policies."

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96 R Pittman, "Why Competition Policy - Especially for Developing Countries" (1999) 4(1) Economic Perspectives at unnumbered, contends "business enterprises will often try to keep competition from working. They love to competition when they are acting as buyers in the marketplace and seeking the best products and prices for themselves, and they will often co-operate with the competition authorities to protect such competition. But, they tend to prefer an easier, more solitary existence when they are selling their own products to buyers." Or as E M Graham and J D Richardson, above n 59 at 11 wryly observe: "No firm prefers competition in its output market ... each firm would rather have less competition as a seller."


98 P J Lloyd, above n 31 at 8.
Differing Approaches

Efforts and proposals to more closely and effectively integrate competition policy into the international trading system do not start from a 'clean sheet of paper'. Rather, they must take into account, and may well be constrained by, a number of existing approaches, arrangements and firmly held policy positions.

Differing National Approaches

National competition laws and policies are not considered to be effective in dealing with international competition issues, not least because for most developed countries (with the exception of the US, evident in its approach to extra-territoriality) their primary purpose, in design and focus, has been on dealing anti-competitive domestic conduct.

National competition policies have a number of inherent shortcomings when dealing with competition issues in the international domain. These weaknesses include that national competition laws and policies are designed in most countries to deal only with practices which occur within the domestic economy, and by implication generally do not address conduct which has an adverse impact upon other nations.

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100 P J Lloyd, above n 31 at 13 - 15.
Other limitations include the procedural challenges which arise in cross-border mergers, the difficulties in obtaining information and evidence from parties located in foreign jurisdictions, and imposing remedies on malefactors in same. Further weaknesses emerge where national competition laws are not effectively enforced when the enterprises or products are foreign, or the scope of such laws is comparatively narrow.

Other deficiencies present themselves where there are formal exemptions for anti-competitive behaviour which impacts on foreign, rather than domestic, markets, or for the actions of State agencies or State-owned enterprises. Different competition agencies and national legislatures may have different views on what amounts to permissible, and impermissible, commercial behaviour.101

Furthermore, even where there may be some nascent consensus on the basic principle(s) of competition law and policy, sovereign nations reserve (and from time-to-time exercise) the right to decide how and when they will deviate from such norms, especially when doing so is in its own (self-defined) 'national interest'.102

101 P Nicolaides, above n 58 at 130; B E Hawk, above n 66 at 9 - 12; R B Starek, above n 1 at 42.
Bilateral approaches to dealing with international competition matters are attracting increasing interest amongst competition law and policy-makers, and authorities. It has been estimated by the European Commission\(^{103}\) between 20 and 25 per cent of the competition cases it handles require effective co-operation with other competition authorities.

The main advantages of bilateral approaches include they are generally easier to negotiate, better balance the interests of the parties, and have higher levels of commitment and enforcement.\(^ {104}\)

A number of bilateral arrangements designed to facilitate greater two-way co-operation in competition policy enforcement were created during the 1970s and 1980s, largely between the US on the one hand and Germany,\(^ {105}\) Canada\(^ {106}\) and Australia\(^ {107}\) on the other (with US-Japan agreement under discussion\(^ {108}\) and EU-Japan agreement\(^ {109}\) considered a priority).


\(^{104}\) M Matsushita, "Competition Policy and Free Trade" (unpublished paper given to the OECD Conference on Trade and Competition, Paris, 1999) at 1 - 2.


\(^{106}\) "Memorandum of Understanding as to Notification, Consultation and Co-operation with Respect to the Application of National Antitrust Laws" Reprinted in 4 Trade Reg Rep (CCH) 13,503

\(^{107}\) "Agreement Between the Government of the United States of America and the Government of Australia Relating to Co-operation on Antitrust Matters" 21 International Legal Materials 702

These instruments reflect, in large part, the priority attached by the US Government to bilateral arrangements, founded on practical working relationships,¹¹⁰ and are regarded by the US Government¹¹¹ as serving their national interests well. Their small number, and between more highly-developed economies, is also indicative of the challenges of just achieving agreement to co-operate between national competition systems.¹¹²

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¹¹ J I Klein, above n 10 at unnumbered.

¹² R Tritell, above n 108 at unnumbered; the Australian Government, at enforcement agency level, appears to favour greater use of bilateral mechanisms to strengthen co-operation in general, and enforcement in particular: H Spier, above n 24 at 14 - 16.

¹² A K Bingaman, "U.S. International Antitrust Enforcement: The Past Three Years and the Future" in B E Hawk (ed), "Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy (1996)" (1997) 9 at 18, observed: "... co-operation is not always easy. There may be important differences in national substantive law, legal procedures or legal cultures.... if such co-operation were easy, we would have been doing it in many cases over many years."
The core characteristics of these bilateral arrangements reflect the main provisions of an OECD Recommendation on bilateral co-operation in competition law and policy matters regarding notification, exchange of information, co-ordination of action, and consultation on actual or potential disputes.

One of the higher profile and more substantial bilateral arrangements is between the EU and the US, originally agreed in 1991.

Key provisions of the EU-US Agreement deal with notification by one party of enforcement activities which affect the important interests of the other party, and for exchanges of information of a general competition policy nature and more particularly relating to specific anti-competitive conduct.

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114 "Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws". 30 International Legal Materials 1487 (1991) Although subsequently annulled by the European Court of Justice on a procedural technicality - French Republic vs Commission of the European Communities (No C-327/91) (9 August 1994) - its terms and conditions were observed in the intervening period by the trans-Atlantic partners until its entry into effect in 1995 following adoption by proper procedure by the EC Council of Ministers, and back-dated that of original Agreement.
An important feature of the EU-US Agreement is the principle of 'positive comity', under which a party that considers anti-competitive conduct which is being carried out in the jurisdiction of the other party is adversely affecting its important interests can notify the other party accordingly, and seek the other party's competition authorities to initiate appropriate enforcement activities.

In other words, the agency best positioned to effect a remedy may take action to address the concerns of the other enforcement agency. (Negative comity, by comparison, involves offering assurances competition authorities will enforce their own rules without intruding upon the jurisdiction of other nations, and is aimed at minimising conflict between deference and restraint.)

115 The "Agreement Between the European Communities and the United States on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws." 37 International Legal Materials 1070 (1998) elaborated on the positive comity provisions of the earlier accord: A D Melamed, above n 108 at unnumbered. However, it does not apply to merger enforcement, because of the statutory deadlines for merger assessments, nor for the exchange of confidential information, unless the consent of the source of the information has been obtained: J P Griffin, above n 43 at 183.

116 Around one-quarter of cases dealt with by E.U. competition authorities reportedly involve close co-operation with their U.S. counterparts: K van Miert, above n 103 at unnumbered.

117 J J Parisi, "Enforcement Co-operation Among Antitrust Authorities" (1999) European Competition Law Review 133 at 136, argues there is a potential for misunderstanding in the subsequent 1998 E.U./U.S. 'positive comity' agreement about what constitutes "important interests which trigger key provisions relating to, inter alia, the notification, information sharing and co-operation processes of the Agreement."
The EU has signalled a desire to consolidate its competition law and policy arrangements with the US, in the form of a 'second generation agreement' which would enable each government to share confidential information with their counterpart.118

To this end, the EU has reportedly119 established a working group to examine means for overcoming from the problems associated with the exchange of confidential information.

Key issues under study include the criteria and guarantees which would need to be obtained before confidential information would be provided, the protections needed to ensure such information was not misused or unduly disclosed, and the areas of violation of competition law where such exchanges would be permitted.


119 Ibid at 223.
Many of the features of the EU-US Agreement have been replicated in the Canada-US Agreement\textsuperscript{120} reached in 1995, and the Australia-US Agreement\textsuperscript{121} signed in 1999, which also contains provisions dealing with the exchange and preservation of confidential information. The EU and Canada entered into a draft bilateral agreement\textsuperscript{122} in mid 1999, much along the lines of the Canada-US Agreement.

These instruments, which have been characterised\textsuperscript{123} as "soft agreements", generally require the parties to do little more than notify each other of pending enforcement actions which may impact on the important interests of the other party and take account of the views of the latter in any decisions to proceed.\textsuperscript{124}

\begin{itemize}
  \item \textsuperscript{120} "Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws". \textit{International Legal Materials} 309 (1996)
  \item \textsuperscript{121} "The Australia - United States Mutual Antitrust Enforcement Assistance Agreement". (Washington D.C., 27 April 1999; Not Yet in Force, at February 2000.)
  \item \textsuperscript{122} "Agreement Between the Government of Canada and the European Communities Regarding the Application of Their Competition Laws" http://strategis.ic.gc.ca/SSG/ct01242e.html, 17 June 1999
  \item \textsuperscript{124} The U.S. 'Federal Trade Commission Act, Section 5, requires a 'public interest' determination by the FTC before it commences an enforcement action. As such, the U.S. may decline to co-operate in a bilateral enforcement request when doing so would be against its own 'public interest': R B Starek, above n 1 at 39; J J Parisi, above n 117 at 135.
\end{itemize}
Bilateral approaches to dealing with competition policy issues have been criticised for their failure to deliver convergence of substantive law,\(^{125}\) and their tendency to operate on a reciprocity of concessions, limited capture of bilateral trade, relatively modest gains, and potential to be inherently trade discriminatory and so inconsistent with the Most Favoured Nation principle which underpins the multilateral trading system.\(^{126}\) The capacity of the more strict competition authority to influence their less strict counterpart has also been questioned.\(^{127}\)

Other criticisms include the general absence of mechanisms to resolve disputes which may remain after consultations have been completed (or exhausted)\(^ {128}\) and the creation of a web of such arrangements could produce a body of disparate, individualised legal solutions ranging from inconsistent to conflicting.\(^ {129}\) With nearly 100 competition authorities around the world, it would be neither realistic nor efficient to rely exclusively on bilateral arrangements.\(^ {130}\)

\(^{125}\) M E Janow, above n 123 at 272; L Waverman, "Competition and/or Trade Policy?" in E Hope and P Maeleng (eds), "Competition and Trade Policies: Coherence or Conflict?" (1998) 31 at 35; E M Fox, above n 6 at 7; A B Zampetti and P Sauve, above n 3 at 14.

\(^{126}\) M J Trebilcock, above n 20 at 292; Canadian Competition Bureau, above n 42 at unnumbered.

\(^{127}\) European Commission, above n 76 at 16.

\(^{128}\) M E Janow, above n 123 at 272.

\(^{129}\) T J Schoenbaum, above n 37 at 187.

\(^{130}\) L Brittan, above n 14 at unnumbered.
Regional Approaches

While considerable attention has been given to bilateral arrangements, regional groupings have the potential to play a constructive, foundation role in the development of international competition law and policy.\textsuperscript{131} Such groupings, by their co-operative nature, can facilitate movement towards common, regional competition policies.\textsuperscript{132}

Members of such arrangements usually have much greater commonality of economic interests, stage of development and often competition policy than may be found in multilateral structures. They also have a greater capacity to be innovative in trialing different approaches to international competition law and policy, which may be informative or transferable to multilateral fora.\textsuperscript{133}

This potential has been underscored by estimates that around one-quarter of the Member States of the WTO, by absolute number, are involved in regional competition frameworks as members of regional arrangements,\textsuperscript{134} with the figure being higher if viewed on a national output or world trade-shares basis.

\begin{footnotesize}
\begin{enumerate}
\item K M Vautier and P J Lloyd, above n 25 at 27.
\item K M Vautier and P J Lloyd, above n 25 at 27.
\item Ibid.
\end{enumerate}
\end{footnotesize}
The European Union, under the Treaty of Rome, has implemented a single competition policy for all Member States for transactions with a Union dimension, as part of its ambition to create an area without internal frontiers which allows the free movement of capital, goods, services and persons, under a supranational competition policy and enforcement agency.\footnote{"The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.": Treaty of Rome, Article 7a; "... the first successful step towards the internationalisation of competition policy."; P S Crampton and M Barutciski, above n 19 at 21.}

An effective approach to competition policy was necessary to overcome a situation where many European countries had no tradition of such policies, and where pervasive industry policies sheltered so-called 'national champions' from competition.

The key competition policy-related provisions of the Treaty of Rome\footnote{The key competition-related elements of these Articles are contained in Appendix 2.} are: Article 3, which tasks the Community with establishing a system for ensuring competition in the common market is not distorted; Article 85, which covers agreements or concerted practices between undertakings which restrict or distort competition in the common market, and affect trade within the EU; and, Article 86, which addresses abuses of dominance by enterprises, with dominance determined on the basis of the relevant product and geographic market.
Other important provisions are: Article 90, dealing with public and other undertakings to which EU Member States grant special or exclusive privileges; Article 91, vesting in the Commission the competence to police dumping matters; and, Article 92, which covers state-aids and subsidies provided by Member States, which are considered incompatible with the common market if they affect trade flows. Regulations on merger control were initially adopted in 1989.

In those areas of competition policy where the European Commission has competence, there is a single enforcement authority (Directorate General IV, or DG IV) and an ultimate adjudicative authority (the European Court of Justice). In substantive law, the EU and its Member States have abrogated antidumping and countervailing duties laws, with such matters now dealt with under predatory pricing and price discrimination rules, administered by DG IV. Member States are also prevented from adopting subsidies which are prejudicial to competition with producer interests elsewhere in the Union.

137 Although generally available subsidies are permitted in principle, as is aid targeted at 'disadvantaged regions': Treaty of Rome, Article 92.3a.
A particularly important characteristic of the EU approach has been the absence of any meaningful effort to harmonise national competition law and policy regimes, which are seen\textsuperscript{140} to differ substantially between Member States. Italy, for example, only adopted a comprehensive competition law in 1990.

Also noteworthy is the comparatively modest direct impact of the EU competition regime on the (economically) smaller Member States, whose markets are regarded as too small to satisfy the 'trade effects test'\textsuperscript{141} for the intervention of EU competition agencies and rules.

The EU has flagged\textsuperscript{142} plans to update its competition law and policy regime, focusing on new guidelines for defining relevant market, the treatment of vertical restraints on competition, the coverage of research and development under horizontal restriction rules, and rules dealing with State aids.

The competition regime operated by the EU is regarded as unique,\textsuperscript{143} and not replicable at the multilateral level because of its supranational nature, evident in the role of EU institutions in enforcement, the potential for EU competition rules to have direct effect in the domestic legal order of Member States, and the supremacy of EU competition law over those of Member States where the two are inconsistent.\textsuperscript{144}

\textsuperscript{140} B M Hoekman, above n 67 at 304 - 305.
\textsuperscript{141} That is, government policies which may act to impede realisation of the single market: B M Hoekman, above n 67 at 303.
\textsuperscript{142} A Schaub, above n 2 at 233; K van Miert, above n 103 at unnumbered.
\textsuperscript{143} World Trade Organisation, above n 22 at 82; H Spier, above n 24 at 10.
\textsuperscript{144} M Trebilcock, above n 16 at 94; J D Richardson, above n 64 at 365.
However, the EU system of competition law and policy suffers from a number of weaknesses including tensions between competition and industry policy, the dominant role played by DG IV, slowness to respond to changes in analytical approaches, and the cumbersome nature and slowness of the administrative and judicial processes.  

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ANZCERTA  

Australia and New Zealand in the original Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) did not attempt deep integration of their competition laws.  

However, subsequent protocols to the ANZCERTA have led to the abolition of anti-dumping actions and the suspension of anti-dumping duties, harmonisation of the misuse of dominant position provisions within their respective competition statutes, and allowing cross-jurisdiction legal actions (including collection of evidence and enforcement of decisions) between the two countries.


147 Vautier and Lloyd, above n 25, for a detailed examination of the competition law and policy aspects of the ANZCERTA.  

As a result, the nationals of one CER partner can be made subject to an inquiry by the competition authority of the other partner, and be required to respond to requests for information, with competition laws in the two jurisdictions being extended to the behaviour of national firms with market power in either of the national markets or the combined ANZ market.\footnote{149}

An Agreement\footnote{150} between the Australian and New Zealand Government implemented in 1994 provides for prior notification of enforcement activities which may affect the important interests of the other party, and facilitates the exchange of general information, the co-ordination of enforcement activities and exchange of information on specific enforcement matters.

While ANZCERTA does not expressly cover capital flows, both countries operate liberal investment regimes. However, the Agreement permits the free movement of labour, and contains far-reaching commitments on the liberalisation of trade in services. Taken as a whole, ANZCERTA extends well-beyond the adoption of common competition regimes.

\footnote{149} B M Hoekman, above n 67 at 312.

The ANZCERTA accord is regarded as an exceptional regional arrangement in that it covers two contiguous countries at a common level of development with similar judicial systems and national values,\(^{151}\) which may not necessarily be replicable elsewhere.\(^{152}\)

**NAFTA**

The North American Free Trade Agreement (NAFTA) between Canada, Mexico and the US has fairly weak commitments concerning integrating competition and trade policies.\(^{153}\) Article 1907(2), for example, commits the Parties to little more than consultation on the potential for more effective rules and disciplines on the use of government subsidies.

NAFTA contains only a short chapter (Chapter 15) on competition policy, monopolies and state enterprises, requiring each Party to adopt and maintain measures proscribing anti-competitive business practices. There are also commitments to co-operation in competition law enforcement (including mutual legal assistance, notification and exchange of information on enforcement within the NAFTA Parties).

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\(^{152}\) P S Watson, J E Flynn and CC Conwell, above n 145 at 296.

\(^{153}\) North American Free Trade Agreement, 32 *International Legal Materials* 605 (1993); M J Trebilcock, above n 20 at 274; A B Zampetti and P Sauve, above n 3 at 21.
In the areas of monopolies and state enterprises, the Parties individually are committed to ensuring State-sanctioned monopolies will function in ways which minimise or eliminate any nullification or impairment of the benefits of the Agreement. However, and importantly, the Agreement explicitly precludes any Party having recourse to dispute settlement.\textsuperscript{154}

The NAFTA partners have created a Working Group on Trade and Competition to examine the relationship between the two policy disciplines, as required under Article 1504.

The Working Group has, to date, produced a series of reports and studies on various aspects of the relationship between competition and trade policy, under three generic headings: the contextual framework; comparisons of competition laws of the NAFTA partners; and, specific issues (such as the application of national treatment, and the implications of competition policy for telecommunications).

The work on the comparison of competition laws has focused on issues such as scope and coverage of national laws, comparative analyses of laws and policies relating to vertical and horizontal restraints, as well as merger review, treatment of abuse of dominant position, export cartels, and rights to pursue private actions.\textsuperscript{155}

\textsuperscript{154} Article 1501 (3) states: "No Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article."

\textsuperscript{155} Department of Foreign Affairs and International Trade (Canada), "Interim Report of the NAFTA 1504 Working Group to the NAFTA Commission" (1997).
The Working Group has reportedly\textsuperscript{156} been cautioned to adopt a cautious approach to suggestions that it should examine harmonisation of existing domestic competition laws, and abjure the idea of a regional competition law, reflecting US concerns over sovereignty and the desire of the Mexicans to gain more experience with their relatively new (1992) domestic competition law.

\textbf{Andean Community and Mercosur}

Competition policy issues also feature in a number of South American regional trade integration agreements, such as the Andean Community\textsuperscript{157} (covering anti-competitive agreements and concerted practices amongst enterprises, and abuse of dominance; and the Mercosur grouping (dealing with practices which have the potential to distort competition and adversely affect trade between Member States).\textsuperscript{158}

The Mercosur partners have initiated a process to harmonise national competition laws, and to create a mechanism to prevent anti-competitive activity from impairing intra-regional trade.

A protocol\textsuperscript{159} on the preservation of competition within the Mercosur grouping prohibits concerted practices which restrict or distort competition, and affect trade between Member States. Prohibited practices include price fixing, market division, tying, and market manipulation.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{156} P S Crampton and M Barutciski, above n 19 at 23 - 24.
\item \textsuperscript{157} Venezuela, Columbia, Peru, Bolivia and Ecuador.
\item \textsuperscript{158} Argentina, Brazil, Paraguay and Uruguay, with Chile as an associate; M A A Warner, above n 87 for an extensive discussion.
\item \textsuperscript{159} "Protocol of the Defense of Competition" released in 1996: Ibid. at 14 for discussion.
\end{itemize}
\end{footnotesize}
It also provides Mercosur's institutions with the power to enforce these rules, although primary responsibility for implementation remains with national competition agencies.  

Mercosur's Member States have also made commitments to review before the end of 2000 the continuing need for anti-dumping arrangements on intra-regional trade.  

- Contrasting Regional Arrangements

While there has been growing interest in, and usage of, regional trading arrangements in dealing with competition law and policy issues, to varying degrees, the approaches pursued have not been uniform, as Table 2 indicates.

As can be seen, the EU and the CER arrangements appear the most extensive in their coverage of competition law and policy issues within their respective jurisdictions, while their NAFTA and Mercosur counterparts are more modest (the former reflecting its more limited ambition, and the latter its nascence, in competition law and policy matters).

160 PS Watson, J E Flynn and CC Conwell, above n 145 at 317 - 318 for discussion.
The essential differences between the main arrangements are: the pervasive role played by supra-national authorities in the EU; the voluntary convergence of national laws and extension of the powers of national competition agencies into the other party’s jurisdiction in the ANZCERTA; and, the absence of a regional competition policy under the NAFTA, with the requirement only for members to have national policies. 161

Table 2: A Comparison of Preferential Trading Area Arrangements\textsuperscript{162}

<table>
<thead>
<tr>
<th>Provision</th>
<th>EC</th>
<th>NAFTA</th>
<th>CER</th>
<th>Mercosur</th>
</tr>
</thead>
<tbody>
<tr>
<td>Free Labour Mobility</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Free Capital Flows</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Free Services Trade</td>
<td>Yes</td>
<td>Signif.</td>
<td>Signif.</td>
<td>No</td>
</tr>
<tr>
<td>Strong Competition Policy Rules(*)</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ex Ante Harmonisation of national antitrust</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>To be Det.</td>
</tr>
<tr>
<td>Areawide antitrust rules conditional on 'trade effects' test</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Formal co-operation agreements between antitrust authorities</td>
<td>n.a.</td>
<td>Yes</td>
<td>Yes</td>
<td>To be Det.</td>
</tr>
<tr>
<td>Supranational enforcement of antitrust</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Binding dispute settlement on antitrust</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>To be Det.</td>
</tr>
<tr>
<td>Elimination of contingent protection</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>To be Det.</td>
</tr>
</tbody>
</table>

(*): Defined as significant disciplines, on industrial policies (for example, subsidies, government procurement)

Notes: Signif. = Significant; To be Det. = To Be Determined

\textsuperscript{162} Derived from B M Hoekman, above n 67 at 316.
Taken as a whole, both the EU and ANZCERTA models are regarded\textsuperscript{163} as stand-out exceptions to the limitations of regional competition initiatives: the EU because of the surrender by Member States of sovereign powers to supranational institutions; and, the ANZCERTA for its focused scope and much lesser sacrifice of national sovereignty.

- Criticisms of Regional Approaches

Regional competition policy arrangements have attracted criticism\textsuperscript{164} for their capacity to cover only a relatively limited share of the trade of member countries, while systemic frictions with external trading partners (that is, those not belonging to the regional arrangement) remain a significant problem.\textsuperscript{165}

The main existing regional arrangements, discussed above, have been specifically criticised\textsuperscript{166} for their limited focus on procedural, rather than substantive, subjects, and when and where they move towards the latter the resulting provisions tend to be too general for useful application.

Whether bilateral or regional, such co-operative-style arrangements have a number of important limitations, some of them ostensibly 'built-in' to their parent agreements.

\textsuperscript{163} R Vernon, above n 151 at 322 - 323.
\textsuperscript{164} M J Trebilcock, above n 20 at 293.
\textsuperscript{165} Although the concept of 'system friction' has itself been criticised as unhelpful as an analytical guide, given national differences are the driving force of international trade: M Trebilcock, above n 16 at 92 - 93.
\textsuperscript{166} R Vernon, above n 151 at 321.
These limitations include their sometimes non-binding nature, with undertakings made on a 'best endeavours' basis, the comity arrangements do not require co-operation where 'important interests', (however, and variously, defined) are affected, their general lack of coverage for the exchange of confidential information which can be decisive in prosecutions, and insufficient clarity in efforts to harmonise procedural requirements, especially with mergers and acquisitions.

As the World Trade Organisation (WTO) has observed: "The disparate nature of the co-operative arrangements is striking. Arrangements exist at the bilateral, regional and multilateral levels, in the context of broader trade arrangements and in isolation from such agreements, in the context of specific sectors or subject areas, and with widely differing country participation."

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167 Advocates of greater use of comity arrangements are said to under-estimate the potential for conflicts of interests amongst nations: K M Vautier and P J Lloyd, above n 25 at 17.

168 The traditional means of obtaining documents or testimony located in a foreign jurisdiction has been letters rogatory, whereby a court in one country requests the assistance of a court in another country. However, this process suffers from a number of weaknesses, including its slowness of pace, unpredictability of result, and absence of any strong, sustained institutional relationships: A K Bingaman, above n 112 at 17.

169 World Trade Organisation, above n 22 at 85.

170 Ibid.
Multilateralism

Multilateral options appear to be attracting increasing attention from academics, practitioners and other interested parties from economics, law, and competition and trade policy. However, as the following discussion will show, opinion varies on a range of issues, both of mechanisms and process, and substance.

In distilled form, the appropriate question has become not whether there are linkages between trade and competition law and policy, and the forms they could take, but rather how the GATT/WTO could operate for half-a-century without meaningful negotiations to integrate trade, investment and competition policy.

. early approaches

Efforts to explore and build linkages between competition and trade policies are not a recent phenomenon of the international rules-based system of trade and commerce.

The draft Havana Charter for the proposed International Trade Organisation in the late 1940s devoted a whole chapter (Chapter V, containing nine Articles) to the then contentious issue of restrictive business practices.

171 J D Richardson, above n 64 at 339.
172 Although "it may well take another fifty years to how they work out in full": Ibid.
173 Also, P J Lloyd and G Sampson, above n 92 at 686 - 690 for a more detailed chronology.
Various multilateral institutions have examined, to varying degrees, aspects of, and some of the interactions between, competition and trade policy.

These organisations include the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD), the United Nations Commission on Transnational Corporations (UNCTC), and the General Agreement on Tariffs and Trade (GATT).

The draft Havana Charter of the ITO sets out the purpose of the Chapter as being: "... to prevent, on the part of private or commercial public enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives (of the Charter)."\(^{174}\)

Practices targeted by the Charter included price fixing, market sharing, production quotas, agreements to prevent the development of technology, and certain uses of patents, trade marks or copyright.\(^ {175}\)

Such practices were considered to have adverse effects on the growth of international trade, and would impede the achievement of other objectives of the Charter. Remedies were to include greater transparency, and consultation and conciliation between the governments concerned.\(^ {176}\)

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\(^{174}\) Article 46.1.

\(^{175}\) Articles 46(1) - (5).

\(^{176}\) Articles 48 - 50.
While the ITO did not come into being, a number of the provisions (excluding those on restrictive business practices) were incorporated into the text of the General Agreement on Tariffs and Trade (GATT).

While the GATT, by and large, did not initially take a significant interest in restrictive business practices, there was a surge of activity in the late 1950s with an examination of the activities of international cartels and trusts which could impede the growth of world trade, undermine development in individual countries and thus interfere with the objectives of the GATT.

Although the studies gave credence to these concerns, there was no consensus on the appropriate multilateral response, and thus no substantive provisions on restrictive business practices were included in the GATT. An agreement reached in 1960 providing for ad hoc notification and consultations for resolving conflicts of interest between members on such matter was never invoked.

The United Nations System has also taken an interest in restrictive business practices.

A Committee on Restrictive Business Practices formed under the United Nations Economic and Social Council (ECOSOC) in the early 1950s proposed an international code involving the formation of a multilateral co-ordinating agency which would receive, investigate and recommend remedial action on complaints concerning restrictive business practices in international trade. This initiative also failed, reflecting insufficient support from UN member countries.

The United Nations Conference on Trade and Development (UNCTAD) has taken an interest in restrictive business practices since the late 1960s, with this work culminating in 1980 in the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” (also known as the ‘UN Principles and Rules’ or ‘the Set’).

The central focus of the UN Principles and Rules was the promotion of transparency and principles for national legislation, and setting down standards of behaviour for private enterprises. They also sought to address the acquisition and/or abuse of dominant position of market power, covering both private and public sector enterprises at national and sub-national level.
However, the UN Principles and Rules were not legally binding, imposing only a moral obligation on governments to introduce/strengthen legislation in the area, and to ensure private and public enterprises in their jurisdictions adhered to the code. UNCTAD senior officials have conceded\textsuperscript{178} the Principles and Rules have had only limited impact, with their existence little known outside the UN system.

Efforts by the United Nations Commission on Transnational Corporations (UNCTC) to develop a code of conduct for such enterprises have not yielded any substantive results, with no agreement on a final instrument.

The Organisation for Economic Co-operation and Development (OECD) has issued since the mid 1960s a series\textsuperscript{179} of recommendations dealing with anti-competitive practices affecting international trade and commerce.

One of the most notable was the 1967 "Recommendation Concerning Co-operation Between Member Countries on Anti-Competitive Practices Affecting International Trade"\textsuperscript{180} (which was revised in 1995\textsuperscript{181}).


\textsuperscript{179} <http://www.oecd.org/daf/clp/recommendations.htm> for a list of these recommendations and their respective texts.

\textsuperscript{180} C(567)53(Final).

\textsuperscript{181} Organisation for Economic Co-operation and Development, "Revised Recommendation Of The Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade" - C(95)130/FINAL.
Key features of the Recommendation were encouragement for members to notify other countries of investigations or proceedings which could affect the important interests of the other country, co-ordinate investigations, respond favourably to requests for assistance by other OECD member countries, and for greater exchanges between members of experiences in the application of competition law and policy.\textsuperscript{182}

The OECD Guidelines on Multinational Enterprises, originally published in 1976,\textsuperscript{183} provide a framework of conduct for enterprises, although as the nomenclature indicates they are oriented toward multilateral enterprises rather than governments.

More recently (March 1998), the OECD adopted a "Recommendation Concerning Effective Action Against Hard Core Cartels",\textsuperscript{184} under which members are encouraged to ensure their domestic laws effectively halt and deter hard core cartels,\textsuperscript{185} and co-operate in enforcing their laws in this area.

\textsuperscript{182} Many of these themes were subsequently reflected in various bilateral arrangements, for example, above \textsuperscript{n 114}.

\textsuperscript{183} \url{www.oecd.org//daf/cmis/CIME/mnetext.htm}, for current text.

\textsuperscript{184} C(98)35/FINAL.

\textsuperscript{185} The Recommendation, at clause I (B)(2), defines hard core cartels as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce." However, it also specifically excludes from coverage "agreements, concerted practices, or arrangements that ... are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies."
However, the Recommendations and the Guidelines are voluntary and not legally binding, with neither of the Recommendations containing precise legal definitions of 'multinational enterprise'.

Work within the OECD since the early 1980s, through its Competition Law and Policy Committee, its Trade Committee and joint efforts of the two, has sought to examine potential longer term approaches to the interface between competition and trade policies.\(^{186}\)

Importantly, the concepts of 'restrictive business practices' and 'anti-competitive practices' have been replaced by approaches oriented toward fostering competitive conduct. The emphasis has very much been on developing 'adequate or sound' competition laws and policies, rather than rigid minimum standards of conduct.

\(^{186}\) The OECD convened a series of 'Best Practice Roundtables' between 1996 and 1999 on issues in competition law and policy dealing with, for example, the relationship between competition and regulation, intellectual property, judicial enforcement, high technology, abuse of dominance, essential facilities, as well as the application of competition policy in sectors such as postal services, government procurement, insurance, banking, utilities, sports, and entertainment films.<http://www.oecd.org/da/daf/clp/roundtables.htm>.
Taken as a whole, only three multilateral agreements have been concluded containing provisions dealing with restrictive business practices of both private and public enterprises, all of which have limitations: the UN Principles and Rules only apply to UN members, while those of the OECD apply only to its (developed country) members; they only apply to practices which affect the domestic economy of individual country's; and, emphasise voluntary approaches, reflecting their non-legally binding nature.

The WTO has remarked\textsuperscript{187} of these arrangements: "The disparate nature of these co-operative arrangements is striking. They exist at the bilateral, regional and multilateral levels, in the context of broader trade arrangements and in isolation from them, of general application or in the context of specific sectors or subject areas, and with widely differing country participation."

\textbf{the Case for International Competition Law and Policies}

While the mechanisms and processes for progressing competition and trade law and policy will be an important consideration, of greater significance to decision- and policy-makers, and those charged with undertaking and completing any substantive negotiations, will be the nature and veracity of the relative arguments for and against international competition law and policy.

\textsuperscript{187} World Trade Organisation, above n 22 at 32.
The case for international competition rules has been based on a number of arguments.\textsuperscript{188}

First, the absence or inadequate enforcement of national competition rules tends to create trade distortions, which can act as a form of de facto protectionism (where the lack of and/or selective enforcement results in preference and/or protection to domestic industries over foreign firms).\textsuperscript{189}

For example, domestic restrictions which foreclose markets (through, for instance, tight distribution arrangements) can diminish the benefits of more liberal market access from trade liberalisation, a point of tension in the Japan-US relationship (evident in the Structural Impediments Initiative of the late 1980s/early 1990s).\textsuperscript{190}

Second, substantive deficiencies or limitations in competition policies can also create trade distortions, especially when such ‘policy gaps’ are used for strategic industry policy purposes.\textsuperscript{191} Exemptions for co-operative research and development activities, export cartels, and some mergers (where they create ‘national champions’) are cases-in-point.


\textsuperscript{189} E Iacobucci, above n 66 at 19; W S Comanor and P Rey, above n 66 at 468.


\textsuperscript{191} Also, P Nicolaides, above n 15 at 5, on ‘strategic competition policy’.
Third, anti-dumping regimes are inherently protectionist, and the international trading system would be better served by their replacement with competition policy regime. Developing countries would be expected to gain from such an approach, being less subject to, and less inclined to introduce, politically-motivated anti-dumping regimes.

Fourth, the expanded use of international competition policy would at very least have a containing effect on government-mandated monopolies and state-trading enterprises, which often escape domestic regimes. State trading enterprises, with their often monopoly rights of export and/or import, are particularly important anti-competitive actors.

Fifth, an international competition policy regime would help to overcome limitations on jurisdiction for national agencies.192

Such problems emerge when the source of the anti-competitive impact in the domestic market is located in a third country, out of jurisdictional reach of the home country’s competition authorities. Prominent examples include export cartels or mergers in foreign countries where the relevant firms do not have a presence in the affected country.

Sixth, differences in the competition policy standards implemented by relevant agencies can result in inconsistencies or conflict in approach. Such differences can result in a cross-border merger, for example, being approved in one jurisdiction, yet rejected in another (as happened with the Boeing/McDonnell Douglas merger) or subject to contradictory requirements in different jurisdictions which are excessively demanding on the business parties.

Other arguments put forward include the apparent recognition that as formal border barriers to trade and commerce come down either through multilateral, regional, bilateral or even unilateral liberalisation initiatives, domestic barriers to liberal trade and commerce are becoming more important, many of which are not subject to binding international rules.

From a trade strategy perspective, the inclusion of competition policy explicitly within the WTO framework would help to reduce problems arising from unilateralism in trade policy, especially the aggressive use by the US of Section 301 of the Trade Act of 1974 to force market access.

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193 However, E.U. and U.S. agencies (in the latter case, the FTC) have taken similar views and complementary actions in other important cases, for example: Montedison S.p.A et al, 60 Fed. Reg. 31469, issued 15 June 1995; and, Imperial Chemical Industries PLC et al, 59 Fed. Reg. 1743, issued 12 January 1994.

194 F M Scherer, above n 16 at 2; M E Janow, above n 20 at 102; World Trade Organisation, above n 22 at 30; Canadian Competition Bureau, above n 42 at unnumbered.

195 However, extensive research by the OECD has reportedly failed to find any large body of convincing evidence for this hypothesis: J R Shelton, above n 68 at 70; also, A W Wolff, above n 81 at unnumbered.

Regardless of these arguments, the case for national, let alone international, competition policies and rules has not been completely accepted around the world community of trading nations.

According to one commentator: 197 "The discipline of competition law has not spread to all corners of the world, and even where countries have such a law on their books, there are wide differences in their enforcement approach and the objectives they choose it to forward."

"There is even disagreement on the need for international competition rules at all, with some countries preferring to deal with private restraints of international trade themselves, or through co-operative efforts with other competition authorities."

Furthermore, considerably greater analysis and consensus building is seen 198 to be necessary to identify the areas where governmental and private sector practices have international trade effects which necessitate expanded trade/competition disciplines.


Core Objectives for an International Competition System

The ultimate model for global competition rules will be determined both by the objectives set down for such a system, and the political commitments required.

Almost self-evidently, just as national competition laws and policies should be designed and implemented to deliver efficiency in domestic markets so, it is argued, global competition laws should also improve efficiency in the world economy, for both producers and consumers.

While trade policy generally pursues freer and more liberal trade, and competition policy promotes greater competition, the interface and joint objectives of trade and competition policy must also be clearly defined.

One useful definition sees the competition and trade interface as the international action required to eliminate practices which diminish competition, involve consumers and producers in more than one country, and impede the efficiency of consumption and production in countries of the world economy.

A major international study identified a broad spectrum of objectives for competition law and policy within national jurisdictions, some of which are transferable into the rules-based multilateral trading system.

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199 P J Lloyd and G Sampson, above n 92 at 685; analogous to the economist's concept of 'global welfare'.
200 P J Lloyd, above n 31 at 9.
201 World Trade Organisation, above n 22 at 39.
These include protecting consumers from the undue exercise of market power, promoting both static and dynamic efficiency, encouraging economic integration and trade within an economic union or area, facilitating economic liberalisation through privatisation, deregulation and reduction in trade barriers, and promoting the development of a market economy.

Other objectives include promoting democratic values such as economic pluralism and dispersion of socio-economic power, ensuring 'fairness and equity' in market transactions, protecting the 'public interest' (variously defined), minimising more intrusive forms of government intervention and regulation, and protecting opportunities for smaller to medium sized enterprises.

Tensions in international competition law and policy arise where there are different policy objectives between, and even within, national frameworks, for example between pursuing efficiency (and between the different types) on the one hand, and fairness and support for smaller firms on the other.

One effort\textsuperscript{202} to set down criteria for a global competition policy agenda is reproduced in Table 3:

\begin{table}[h]
\centering
\caption{Criteria for a Global Competition Policy Agenda}
\end{table}

\begin{itemize}
\item Conclusions and Recommendations in E M Graham and J D Richardson, "Global Competition Policy" (1997) 547 at 554 - 555; edited by author.
\end{itemize}
Table 3: Criteria for a Global Competition Policy Agenda

<table>
<thead>
<tr>
<th>Issues Pertaining to:</th>
<th>Economic Clarity</th>
<th>Convergence to Best Pract. (a)</th>
<th>Feasibility of Further Convergence</th>
<th>Efficiency Further Convergence</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Market Structure</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&gt;Cartelisation</td>
<td>Clear</td>
<td>Low</td>
<td>Moderate</td>
<td>High</td>
</tr>
<tr>
<td>&gt;Retail Price</td>
<td>Murky</td>
<td>Cont.</td>
<td>Moderate</td>
<td>Low</td>
</tr>
<tr>
<td>&gt;Foreclosure</td>
<td>Murky</td>
<td>Cont.</td>
<td>Low</td>
<td>Moderate</td>
</tr>
<tr>
<td>&gt;Strategic Alliances</td>
<td>Murky</td>
<td>Cont.</td>
<td>Indeterminat</td>
<td>Moderate</td>
</tr>
<tr>
<td>&gt;Merger/Acquisition</td>
<td>Clear (-)</td>
<td>Moderate</td>
<td>Mod/High</td>
<td>Moderate</td>
</tr>
<tr>
<td><strong>Firm Conduct:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&gt;Predation</td>
<td>Clear (-)</td>
<td>Cont.</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>&gt;Price Fixing</td>
<td>Clear</td>
<td>High</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td>&gt;Price Discrimination</td>
<td>Clear (-)</td>
<td>Cont.</td>
<td>Low/Mod.</td>
<td>Low</td>
</tr>
<tr>
<td>&gt;Abuse of Market</td>
<td>Murky</td>
<td>Cont.</td>
<td>Low</td>
<td>Indeterminat</td>
</tr>
<tr>
<td><strong>Exemptions:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&gt;Functional (eg R&amp;D)</td>
<td>Murky</td>
<td>Cont.</td>
<td>Moderate</td>
<td>Low/Mod.</td>
</tr>
<tr>
<td>&gt;Sectoral</td>
<td>Murky</td>
<td>Cont.</td>
<td>Low, but</td>
<td>Moderate</td>
</tr>
<tr>
<td>&gt;Efficiency defence</td>
<td>Murky</td>
<td>Cont.</td>
<td>Low</td>
<td>Indeterminat</td>
</tr>
<tr>
<td><strong>Trade Policy</strong></td>
<td></td>
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<td></td>
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<tr>
<td>&gt;anti-dumping</td>
<td>Clear</td>
<td>Low</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>&gt;national treatment for imports</td>
<td>Clear (-)</td>
<td>High</td>
<td>In place</td>
<td>Low</td>
</tr>
<tr>
<td><strong>Other Issues:</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>&gt;Intellectual Prop. Prot.</td>
<td>Murky</td>
<td>Cont.</td>
<td>Mod/High</td>
<td>Moderate</td>
</tr>
<tr>
<td>&gt;Subsidies for R&amp;D</td>
<td>Murky</td>
<td>Cont.</td>
<td>Moderate</td>
<td>Moderate</td>
</tr>
<tr>
<td>&gt;Production subsidies</td>
<td>Clear (-)</td>
<td>Moderate</td>
<td>Moderate</td>
<td>Moderate</td>
</tr>
</tbody>
</table>
| **Notes:** Clear (-) = clear, minus; (a) = state of convergence; (b) raising competition Cont. = controversial (best practice is not clearly defined, or is controversial). Economic clarity means whether there is a strong consensus amongst economists as to what is substantively best practice; feasibility means political feasibility.
Table 3 identifies a number of the challenges confronting those seeking substantive outcomes on any global competition agenda: the economic clarity of many difficult reforms are likely to be uncertain (or, in one lexicon, “murky”); and, convergence to best practice can be expected to be controversial, either because the measure of best practice is not defined or is itself controversial.

Furthermore, the feasibility of further convergence towards best practice is regarded as being generally in the low to moderate range, while the efficiency gains from further convergence are also moderate or below.\(^{203}\)

Important barriers to ‘soft’ convergence include significant commercial, cultural, historical and jurisprudential differences between jurisdictions,\(^{204}\) with the remaining differences being the more substantive and most resistant to convergence.\(^{205}\)

\(^{203}\) Author’s summary of Table 3.

\(^{204}\) J Rill, Comments to the Meeting of the International Competition Policy Advisory Committee (unpublished, Washington D.C., 1999) at unnumbered; Canadian Competition Bureau, above n 42 at unnumbered; F Jenny, “Trade and Competition in the Global Market: Challenges and Issues” (unpublished paper given to the International Competition Policy Advisory Committee, Washington D.C., 1998) at 19 regards these differences as legitimate, and particularly important for developing countries.

\(^{205}\) E M Fox, above n 125 at 7.
The idea of harmonising national competition policies has attracted support\textsuperscript{206} as a pragmatic approach to dealing with problems in international competition policy.\textsuperscript{207}

Harmonisation has been defined\textsuperscript{208} as a process which relieves tensions between and amongst the laws and policies of different nations in a global, liberal competition and trading system by bringing greater compatibility between these laws and policies.

Amongst the principal advantages of harmonisation of enforcement and/or substantive competition law are the potential reductions in public and private transaction costs, increasing efficiency and, through these, greater global welfare.\textsuperscript{209}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{206} E M Fox and J A Ordover, above n 89 at 5 - 6; D I Baker, A N Campbell, M J Reynolds and J W Rowley, "The Harmonisation of International Competition Law Enforcement" in L Waverman, W S Comanor and A Goto (eds), "Competition Policy in the Global Economy Modalities for Co-operation" (1997) 439 at 439 - 461 for an extensive discussion.
\item \textsuperscript{207} For an alternate view, arguing the inefficiencies and strains of harmonisation of competition law and policy: E Iacobucci, above n 66 at 26 - 32.
\item \textsuperscript{208} E M Fox and J A Ordover, above n 89 at 7.
\item \textsuperscript{209} The global welfare effects of any alleged anti-competitive conduct are never clear-cut. For example, while export cartels may produce domestic welfare gains, at the cost to foreign welfare, the reverse could well be the case for mergers and horizontal and vertical restraints with international dimension. However, getting a Court or legislature to take a global welfare perspective may be a bold expectation: P S Crampton and C L Witterick, "Trade Distorting Private Restraints and Market Access: Learning to Walk Before We Run" (1997) 24 Empirica 53 at 56 - 57.
\end{itemize}
\end{footnotesize}
Harmonisation also mitigates pressures on governments for policy concessions to win and hold foreign direct investment and helps diminish 'system frictions' arising from historical and cultural legacies and the interaction of different national competition laws and policies. Further, harmonisation lessens the potential for competition agencies to pursue remedies which may be efficient in their own jurisdiction while disadvantageous, or in conflict with determinations, in another country, as well as reducing the capacity of miscreant actors to play-off national competition agencies (and governments), and treat constructive and cooperative enterprises in a fragmentary and inefficient manner.

However, harmonisation also has its disadvantages, such as the potential to neglect differences in national conditions, preferences and traditions, as well as stifle policy experiments and innovation, and deliver rigidity in law and policy (reflecting the implicit assumption current practice is best achievable practice).

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210 S Ostry, above n 95 at 29

211 E M Fox and J A Ordover, above n 89 at 6; although government interventions in market mechanisms can be the cause of certain of these 'frictions': F Jenny, "Domestic Competition, International Trade and Economic Development" (1995) International Business Lawyer 474 at 475.


Close harmonisation also requires a high degree of similarity between market players and market conditions, which is not often present in the real world.\footnote{P Nicolaides, "The Enforcement of Competition Rules in Regulated Sectors" (1998) 21(3) World Competition 5 at 14.}

The necessary intellectual/policy and political will is also lacking\footnote{M E Janow, above n 20 at 102; E M Graham and J D Richardson, above n 202 at 560.} on the appropriate standards to be adopted, either in substantive law and policy, and/or on enforcement, with leading nations (such as the EU and the US) appearing unwilling to subordinate their (high) national standards to achieve any pluri- or multi-lateral consensus.

One commentator\footnote{B M Hoekman, "Competition Policy in the Global Trading System: A Developing-Country Perspective" (1997) 1 at 11.} remarked of (even) the fairly homogenous OECD: "... differences exist on virtually all aspects of competition law, be it the treatment of mergers, resale price maintenance, parallel imports, the weights that should be given to actual versus potential competition, what constitutes an abuse of a dominant position and so forth. This reflects the differences in objectives, priorities and economic philosophy."

- **Approaches to Harmonisation**

Harmonisation can be achieved through a number of channels, for example by convergence in enforcement procedures, goals and objectives and/or in substantive laws.
Indeed, harmonisation of enforcement may be a necessary precursor to harmonisation on substantive law and policy, reflecting the need for confidence-building between the relevant parties, although it is expected material differences in substantive competition law (whether based in policy goals, legal traditions or political inertia) will remain for some time.

The two of the most notable mechanisms for harmonisation are, first, adoption of common laws and policies (that is, a single law/policy interpreted and applied by the same agencies) and/or, second, common goals with national implementation in a harmonious and synergistic way.

Harmonisation can also mean similar interpretations of the various legal concepts of competition law and policy, and the development of the same jurisprudence and enforcement of those concepts through equivalent procedures and mechanisms.

Advocates of enforcement harmonisation have identified a number of fundamental principles as integral to achieving this objective.

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218 E M Fox and J A Ordover, above n 89 at 8.
220 DI Baker, A N Campbell, M J Reynolds and J W Rowley, above n 206 at 441; A Mattoo and A Subramanian, above n 188 at 109 - 115.
These principles include national treatment, which is the cornerstone of most international trade agreements, would be valuable in tackling discriminatory substantive provisions such as the exemption of export cartels from competition laws, and tempering the use of extra-territorial application of laws and policies by extended recognition of 'negative comity', where national authorities provide assurances they will enforce their own rules without intruding on the jurisdiction of other nations.

Other principles include the expanded use of 'positive comity', and substantially increasing the transparency of competition laws and their enforcement to encourage greater certainty for the private sector and consistency in decision-making by enforcement agencies.

Positive comity is also regarded\textsuperscript{221} as a useful mechanism to constrain the use unilateral/extra-territorial application of domestic competition laws, the latter being inconsistent with the co-operative ethos of harmonisation.

Moving forward with enforcement harmonisation is likely to be most easily achieved at the bilateral level. Monitoring and trust are likely to be more readily achievable and maintained where only two agencies are involved.

\textsuperscript{221} K van Miert, above n 212 at 22; however, F Romano, "The Boeing/MDD Merger, and the EC/U.S. Agreement on the Application of their Antitrust Rules" (1998) \textit{International Business Law Journal} 509 at 516 - 518 for a discussion of the weaknesses of the positive comity approach, especially in the context of the Boeing/McDonnell Douglas merger application.
At its most basic, bilateral harmonisation of enforcement could be facilitated by regular, informal contact between competition authorities without the need for legislative or regulatory instruments.

One step higher would be memoranda of understanding which would ostensibly just formalise existing informal contacts, while a still higher option would be mutual legal assistance treaties (MLAT).222

Such treaties permit enforcement officials engaged in criminal investigations to exchange information and enforcement assistance, although such instruments are uncommon in competition policy agreements because of the requirement for dual criminality.223

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222 International Bar Association, “Exchanges of Confidential Information Between Antitrust Enforcement Agencies” (unpublished paper given to the International Competition Policy Advisory Committee, Washington D.C., 1999), for a discussion of the different approaches to, and the relative strengths and weaknesses of, MLATs.

Amongst the main advantages of the MLAT approach are the capacity to overcome the limitations of domestic laws, especially regarding the gathering of information and evidence, and the exchange of confidential information.\textsuperscript{224} The US Government has indicated its interest in making greater use of bilateral MLATs in competition law and policy matters.\textsuperscript{225}

However, these potential advantages could be more than offset by the emergence of a patchwork of different bilateral arrangements which could create a plethora of anomalies and complexities, and be cumbersome in dealing with conduct which extended beyond a bilateral pairing. At most, bilateral harmonisation would be a platform for more broadly-based (regional or multilateral) initiatives.\textsuperscript{226}

\textsuperscript{224} The U.S. Federal Trade Commission Act, 15 U.S.C, provides strict statutory protection for certain types of confidential information, for example trade secrets and confidential business information (Section 6 (f)), and that acquired through compulsory process or voluntarily in lieu thereof (Section 21); also, J J Parisi, above n 117 at 137 - 142, for a discussion of problems relating to exchange of confidential information, and suggestions for remedial action.

\textsuperscript{225} J I Klein, above n 10 at unnumbered; the U.S. has only one MLAT, with Canada: "Canada- United States Mutual Legal Assistance Treaty in Criminal Matters" (24 International Legal Materials 1092 (1995). However, Canadian engagement in any instrument under the IAEAA has been impaired by the Federal Court of Canada decision in Schreiber vs Canada 137 D.L.R, 4th 582 (Fed Ct 1996); J W Rowley, "International Antitrust Policy: Panel Discussion" in B E Hawk (ed), "Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy (1996)" (1997) 49 at 60 for discussion.

\textsuperscript{226} D I Baker, A N Campbell, M J Reynolds and J W Rowley, above n 206 at 447.
Advocates of harmonisation of international competition laws and policies - the 'substantive convergence' approach - concede achieving this objective will not be easy.\textsuperscript{227}

One significant hurdle to be overcome in achieving meaningful convergence on substantive law is the considerable variance between countries in the objectives of their national competition laws and policies.

These differences include while most jurisdictions have efficiency as an objective, not all distinguish between static and dynamic efficiency, with many countries allowing political and social objectives to be taken into account in competition enforcement assessments, and the consistency in enforcement of competition policy by size of firm (the anti-competitive activities of smaller enterprises being more tolerated than similar actions by larger firms\textsuperscript{228}).

\textsuperscript{227} S Ostry, above n 95 at 34.
\textsuperscript{228} E M Graham and J D Richardson, above n 59 at 22.
Other fundamental hurdles include the substantial differences between nations in the breadth of coverage and the analytical methods used when evaluating the conduct of private sector firms, and whether the same methods should be applied to state-owned enterprises and governments, and for defining key concepts (particular 'anti-competitive', 'abuse' and 'market') and assessing market power.

A central question in any efforts at harmonisation is 'how much, and towards what end point?'

Some commentators argue the international consensus on substantive harmonisation tends to be shallow, proceeding little further than certain cartel practices (such as price fixing) and monopoly practices (such as predatory pricing).

Divergences of opinion, and diminishing commitment to harmonisation, become apparent, in this view, when discussion moves on to issues such as the treatment of vertical agreements, exceptions for co-operative agreements between companies (such as for research and development), criteria to be taken into account in assessing the impact of mergers, and the nature and extent of competition to which state-owned enterprises should be exposed.

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230 E M Fox, above n 93 at 16.

231 P Nicolaides, above n 58 at 135.
Other challenges to harmonisation include the need for, and form of, common institutional structures and procedures, the place of national and/or public interest in limiting the reach of competition policy, and the application of competition policy to government itself.

Harmonisation models have also been criticised\textsuperscript{232} for being inconsistent with the underlying raison \textit{detr}e of trade and commerce between nations (namely, the trade in goods and services exists because of the differences between countries), and as such are regarded as neither desirable nor realistic.

Countries engage in, and gain from, trade because of different comparative advantages, as well as systemic differences which some firms and enterprises are better able to realise and capitalise upon than their competitors.

While some may allege such capacities can result in unfair competition, efforts to eliminate systemic differences\textsuperscript{233} may require such a high degree of substantive harmonisation as to render trade unprofitable.

There are also a number of shortcomings in substantive harmonisation models, reflecting the national legislation platform on which they are based.

\textsuperscript{232} Ibid at 129; M Trebilcock, above n 16 at 92 - 93.

\textsuperscript{233} Especially where efforts toward tight harmonisation seek to force together systems which would not naturally fall together: E M Fox, above n 93 at 17.
These include that national legislation is generally designed to control only practices which have an impact upon the domestic economy and normally does not address practices within its jurisdiction which have an adverse impact on other countries (for example, export cartels which are often accommodated or even implicitly supported).\(^{234}\)

A further weakness of the harmonisation approach is the assumption of mutuality of interests between the two or more countries affected by the anti-competitive act; there are often conflicts of interests between nations.\(^{235}\) The alternate or conflicting interests of nations lay behind tensions between Japan and the US over sectors such as automobiles, auto parts, insurance, telecommunications and medical equipment.\(^{236}\) While Japan has stressed 'fair trade and market access', the United States has pressed for 'free trade and liberal market access'.\(^{237}\)

Broadly-based substantive harmonisation is unlikely to be effective given the breadth and depth of any agreement(s) are likely to decline as the number of national jurisdictions involved in the negotiations rise, with the inherent risk of producing little more than a 'lowest common denominator' outcome.

\(^{234}\) P J Lloyd and G Sampson, above n 92 at 683.

\(^{235}\) F M Scherer, above n 16 at 90; P J Lloyd, above n 31 at 14; World Trade Organisation, above n 22 at 22; G Feketekuty, above n 39 at 286; A W Wolff, above n 81 at unnumbered.

\(^{236}\) P J Lloyd and G Sampson, above n 92 at 684.

\(^{237}\) D J Gifford and M Matsushita, above n 190 at 276 - 277 and 309 - 311.
If any meaningful progress is likely to be achieved in substantive harmonisation beyond a small number of bilateral cases, the initiative may well have to come at the regional level.\textsuperscript{238}

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**A Case Study: the EU/US Agreement**

Efforts at closer co-operation between the EU and the US\textsuperscript{239} are regarded\textsuperscript{240} as a good case study of both the synergies and tensions in substantive law and legal systems, and as such a microcosm of the potential for international convergence in competition law and policy.

In effect, most of the possibilities and problems in enforcement and/or substantive harmonisation are likely to be found in the EU/US relationship.\textsuperscript{241} Some commentators\textsuperscript{242} have gone so far as to suggest the EU and the US systems of competition law will, separately, become role models for developing and transitional economies.

\textsuperscript{238} D I Baker, A N Campbell, M J Reynolds and J W Rowley, above n 206 at 449.

\textsuperscript{239} Above n 114.

\textsuperscript{240} E M Fox and J A Ordover, above n 89 at 12; J Rill and C S Chambers, *Cross-Border Co-operation: The Changing Nature of International Antitrust Enforcement* (unpublished paper given to the Pacific Economic Co-operation Council Conference on Trade and Competition Policy, Montreal, 1997) for a general discussion; and, Appendix 3 for a tabular summary of some of the key points of comparison and contrast.

\textsuperscript{241} F Romano, "First Assessment of the Agreement Between the European Union and the USA Concerning the Application of their Competition Rules" (1997) *International Business Law Journal* 491, for a general discussion of the early performance of the Agreement, in particular the experiences of a number of examples of the effectiveness of implementation.

\textsuperscript{242} P Nicolaides, above n 15 at 7.
The 1995 EU/US Agreement establishes a framework where both parties agree to co-ordinate action against anti-competitive practices which effect them both, although they are not obligated to take any actions.243

Second, either party may request legal action by the other when either believes anti-competitive practices adverse to its interests are being carried out in the territory of the other party, although (again) the notified party is not obligated to take any action.244

Thirdly, the Agreement requires notification of any enforcement activities in one country which effect important interests in the other, with each party to take into account the important interest of the other within the framework of its own laws and its own important interests (a concept which is not defined).


244 T Lampert, above n 118 at 216, reports there were 78 notifications between the E.U. and the U.S. in 1997 under the E.U.-U.S. Agreement and the OECD Recommendation, comprising 42 from the E.U. to the U.S. (30 involving mergers), and 36 from the U.S. to the E.U. (20 involving mergers). This reportedly compares to just 2 from the E.U. to the U.S., and 4 from the U.S. to the E.U. in 1991: J P Griffin, above n 43 at 181.
The original Agreement has been criticised for being obligatory only for its procedural, not its substantive, provisions, having no binding rules on jurisdiction, and failing to preclude extra-territorial action. Further, it does not resolve problems relating to gaps and/or overlap in jurisdictions nor the sharing of confidential business information.

Similarly, the fundamental differences in the EU/US competition law and policy systems are seen to highlight the difficulties inherent in pursuing a more ambitious multilateral agreement. While competition law and policy in both jurisdictions are oriented toward promoting economic efficiency, they differ quite substantially in the mechanisms and processes by which they seek to achieve it.

For example, the EU and the US define different activities as being per se illegal, have distinct thresholds for the size of firms falling within their scope, exempt different industries from the coverage of their competition laws, and allow for different defences to infringements of competition laws (for example, only the EU provides block exemptions).

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246 P Nicolaides, above n 219 at 136.

247 A point recognised in Article IX of the Agreement: R B Starek, above n 1 at 36.

248 A Mattoo and A Subramanian, above n 188 at 99 - 102 for a tabular comparison of the main features of the competition laws and policies of the European Union, Japan and the United States.


250 P Nicolaides, above n 58 at 137.
Further areas of divergence include the different importance attached to various infringements of competition law (for example, the US takes a more relaxed view than the EU of vertical restraints, while the reverse has generally been the case, until recently, with mergers and acquisitions), differences in the 'corporate attitudes and cultures' of their competition authorities, and varying treatment of 'acts of the State' (for example, excluded in the US, captured in the EU).

The institutional arrangements are also quite different. Within the EU, Directorate General IV acts as both an investigatory and prosecutorial agency, and to some extent a judicial body\textsuperscript{251} while the US has two agencies (the Antitrust Division of the Department of Justice, and the Federal Trade Commission) whose roles are limited to investigation and prosecution.

The standing of private parties also differs markedly between the two systems. While private parties with antitrust complaints can take action in the US courts without recourse to enforcement agencies (indeed, such actions are an important aspect of US competition law and policy\textsuperscript{252}), there is no right of private action in the European system.


\textsuperscript{252} Ibid; accounting for around 90 per cent of actions: P Nicolaides, above n 15 at 32.
Despite these differences, competition authorities regard the original Agreement as effective in promoting meaningful co-operation in most areas of mutual interest, with only infrequent situations where EU and US approaches diverge. They also contend differences in industry and trade policy are little more than ‘ambient noise’, and have not impacted directly on bilateral co-operation on competition matters.

The EU and the US extended the original Agreement with a new instrument which strengthened the positive comity commitments, creating a presumption that when anti-competitive conduct takes place in whole or substantial part in the jurisdiction of one of the parties and affects the interests of the other party, the latter will normally defer or suspend its enforcement work in favour of the former.

The active party will, however, keep its passive counterpart informed of developments in the enforcement procedure, within the limits of national laws and rules on confidentiality of information, although EU competition authorities have signalled interest in even closer co-operation in the form of a MLAT.

253 K van Miert, above n 212 at 18; J F Pons, above n 109 at unnumbered.
254 Above n 115; also, T Lampert, above n 118 at 216, who notes mergers are not covered as both the E.U. and U.S. have binding legislation which does not allow deferral or suspension of action as envisaged by the Agreement, and J J Parisi, above n 117 at 135 for a general overview of the 1998 Agreement.
The two parties further extended their co-operative arrangements with the realisation of an Administrative Arrangement for Attendance (AAA), which allows the competition authorities to attend, on a reciprocal basis, the other's hearings of individual cases affecting their important interests.\(^{256}\)

However, further development of the EU/US relationship on competition law and policy matters, toward a mutual recognition model, is likely to be particularly challenging.

Key hurdles would include remaining, important policy differences,\(^{257}\) the need for action on countervailing border measures (such as anti-dumping and anti-subsidy arrangements), elimination of double jeopardy for commercial activity (what is deemed legal in one jurisdiction would have to be accepted as legal in the other), and expeditious and mutually recognised dispute settlement.\(^{258}\)

\(^{256}\) J F Pons, above n 109 at unnumbered.

\(^{257}\) To be examined in more detail in the “Key Issues in Competition Law and Policy” section of this study.

\(^{258}\) P Nicolaides, above n 15 at 36 - 41.
Broader Models

The strong interest in academic, government, legal and trade circles in competition and trade law and policy issues has been reflected in the development and promotion of a spectrum of multilateral models, of varying ambition, breadth and depth, and degrees of association with the multilateral, rules-based trading system, in the form of the WTO. 259

Plurilateral Models

The development and take-up of plurilateral instruments are seen 260 as a fundamental building block for further substantive work on competition law and policy within the multilateral trading system. 261

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259 The OECD is not regarded as a viable alternate platform for effective multilateral negotiations, reflecting its more limited (developed country) membership, and its primary role as a policy analysis, not binding treaty negotiation/rule enforcement, institution: E M Fox, above n 86 at 18; M Matsushita, above n 104 at 7.


261 The OECD is also developing a model plurilateral or multilateral agreement: J R Shelton, above n 68 at 70, but these are not yet in the public domain. Plurilateral arrangements generally engage several members, multilateral models generally engage many members, however, this is no definitive numerical dividing line.
One proposal, for a Plurilateral Agreement on Competition and Trade (PACT), would, inter alia, require the introduction of effective national competition laws and agencies (where they do not already exist), and agreed national standards on substantive competition rules for trans-border cases.

Enforcement of PACT rules would remain primarily the responsibility of national competition agencies, recognising the principles of negative and positive comity. However, failure to enforce the internationally agreed principles would be actionable and punishable under WTO dispute settlement arrangements, as would restrictive business practices which nullified or impaired WTO benefits.

Another plurilateral approach has been proposed, under the title of a "Plurilateral Agreement on Competition Policy" (PACP), which could operate under Article II of the Marrakesh Agreement which created the WTO.

Key characteristics of the proposed PACP would be notification and cooperation in enforcement activities between national agencies (both negative and positive comity), provision for the exchange of confidential information, and application of national treatment and Most Favoured Nation (for goods, services, and capital).

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262 E U Petersmann, above n 260 at 45 - 58.
263 T J Schoenbaum, above n 37 at 187 - 189, building on above n 120.
A WTO Council on Competition Policy would be established to encourage the progressive harmonisation of competition laws and mediate on disputes, with the WTO’s Dispute Settlement Body having jurisdiction over competition disputes which could not be resolved by consultation or mediation.

- **Multilateral Models**

One of the more high-profile, substantive multilateral approaches was the Draft International Anti-Trust Code (DIAC), developed by a group of academic competition policy experts. Their proposal, in effect, amounted to a World Competition Code which would be imposed from the ‘top down’ into the legislation of Contracting Parties.

The DIAC was based on a number of core principles including minimum international standards for cross-border cases (dealing only with horizontal and vertical restraints, and control of mergers and abuse of market power), incorporation of international rules into domestic competition laws, enforcement primarily through domestic competition authorities and courts, and unconditional national treatment of foreigners under domestic competition laws.

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264 Sometimes referred to as ‘the Munich Code’: (1993) 5 *World Trade Materials* 126; it was the view of the majority of participants.
The DIAC also proposed supervision by an independent International Antitrust Authority of the effectiveness of enforcement of domestic competition laws, and integration of the Code into the WTO-based trade and legal system, with inter-governmental dispute settlement proceedings before an International Antitrust Panel operating as part of the WTO's dispute settlement mechanism.

However, there was division amongst the academic specialists, with the published DIAC report reflecting the majority view; a minority proposed a more minimalist model, building on fifteen core principles, six of which were proposed for adoption into national laws (another eight being enforcement/procedural).265

The DIAC approach has been criticised266 for being overly ambitious, with the degree of harmonisation advocated neither economically necessary nor politically feasible.

Other criticisms267 include it relates only to the anti-trust component of wider competition policy, and then only to cross-border, not within border, competition. The proposed International Antitrust Authority would also be unacceptable to many countries for its incursion into national sovereignty.268

265 P S Watson, J E Flynn and CC Conwell, above n 145 at 325, for summary of the minority view.
266 T J Schoenbaum, above n 37 at 187.
267 P J Lloyd and G Sampson, above n 92 at 698.
268 However, E M Fox, above n 8 at 172, questions the existing and future "sanctity of sovereignty" in a globalising world economy.
One variation\textsuperscript{269} of the DIAC model would see the creation of a World Code, with detailed rules on competition law, enforced largely in national courts, although with substantial functions for an international anti-trust authority. Contracting nations would commit to a small number of strong, shared principles of competition law which interface with trade law, and would be adopted into national laws.

Key amongst these principles would be agreement by contracting nations to extend the scope of their competition laws to proscribe anti-competitive conduct within their jurisdiction which caused anti-competitive injury in another contracting nation(s).

Contracting parties would also be required to eliminate the capacity of nations to take 'beggar-thy-neighbour'\textsuperscript{270} government action, make their courts accessible to harmed contracting nations, and ensure the availability of a dispute settlement mechanism, including accepting appeals to an impartial body.

Another configuration\textsuperscript{271} deliberately limits the scope of any multilateral agreement to a small number of what are considered essential principles.

\textsuperscript{269} E M Fox and J A Ordover, above n 89 at 12.

\textsuperscript{270} That is, actions where governments gives scant consideration or plainly disregards the adverse effect on other governments or nations.

\textsuperscript{271} F M Scherer, above n 16 at 91 - 96.
These core principles include the prohibition of cartels in international trade, remedial action on serious abuses of dominant positions in global markets, and the co-ordination of procedural aspects of merger reviews by national competition agencies.

Because many nations would not accept any comprehensive prohibition on all international cartels (pointing to national support for export cartels), each nation would initially be allowed three narrowly defined exceptions to the general rule, which would gradually phase out over time.

An international office with competition policy responsibilities would be created, initially emphasising investigative activities and publicising cross-border restrictive activities, and after a discrete interval (suggested as being six years) would engage in enforcement, generally relying on national competition agencies, except in cases of national intransigence.

A further variation would focus primarily on those anti-competitive practices which impacted directly on international trade.

Key elements of this approach would see WTO Members undertake to: ensure their domestic laws prohibited both export and import cartels; adopt procedural harmonisation for dealing with international mergers; publish non-binding merger enforcement guidelines as a common checklist of issues to be addressed in assessing merger applications; and, similarly in the area of vertical foreclosure, publish non-binding guidelines on vertical restraint enforcement, including a common checklist of issues.

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272 M J Trebilcock, above n 20 at 295.
Other models put forward by different commentators present variations of these approaches, however all stress the importance of a multilateral framework for effectively internationalising competition policy. Table 4 highlights features from a number of proposals.

The different models summarised in Table 4, from amongst the many 'in the policy market place', demonstrate the diversity of ambition, breadth and depth of the various multilateral models.

273 E M Fox, “Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade” (1995) 4(1) Pacific Rim Law and Policy Journal 1 at 30 - 33; M Matsushita, above n 4 at 1111 - 1117; M Trebilcock, above n 16 at 104 - 105; P Brusick, “Competition at the Crossroads” in E Hope and P Maeleng (eds), “Competition and Trade Policies: Coherence or Conflict?” (1998) 152 at 164 - 165; U Immenga “Basic Principles for an International Antitrust Code” in E Hope and P Maeleng (eds), “Competition and Trade Policies: Coherence or Conflict?” (1998) 46 at 50 - 55; E M Fox, above n 125 at 8 - 13; J R Shelton, above n 68 at 62 - 66; P S Watson, J E Flynn and CC Conwell, above n 145 at 336 - 346, (including detailed proposed text) amongst a long list addressing both enforcement processes and substantive principles; E M Graham, above n 145 at 112 - 113, and D I Baker, A N Campbell, M J Reynolds and J W Rowley, above n 206 at 449 - 461, on enforcement and process issues; P S Crampton and M Barutciski, above n 19 at 27, on private restraints to market access; and, P S Crampton and C L Witterick, above n 209 at 55, on a multilateral dispute settlement mechanism for dealing with private conduct which has an international dimension.

Table 4: Summary of Some Key Models

<table>
<thead>
<tr>
<th>Brittan and Van Miert</th>
<th>Scherer</th>
<th>Fox and Ordover</th>
<th>Baker et al</th>
</tr>
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<tbody>
<tr>
<td>Commitment by WTO Members to adopt effective domestic competition rules and enforcement structures.</td>
<td>Modest code of core principles governing only significant international trade or investment transactions.</td>
<td>Guiding standard for World Competition Policy to be world welfare.</td>
<td>Multilateral treaty based on international merger review system.</td>
</tr>
<tr>
<td>Identification of core common competition rules and procedures for adoption at international level.</td>
<td>Substantive coverage of export and import cartels, abuse of dominance position in world markets and merger approvals.</td>
<td>All nations to prohibit cartels, anti-competitive mergers and the foreclosure of market access by firms (including those state-owned) with significant market power.</td>
<td>Two-stage pre-notification with relatively light initial filing. Tight but attainable common time limits at each stage of review process.</td>
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<tr>
<td>Generally recognised anti-competitive practices to be codified at an early stage. More difficult issues to be tackled over time.</td>
<td>Each nation allowed small number of industry exceptions from export cartels, which will be progressively reduced over time.</td>
<td>Prohibitions to include conduct which causes antitrust harm in any contracting nation. All nations to treat harm anywhere within the</td>
<td>Clear rules permitting sharing of confidential information between, but not beyond, enforcement agencies reviewing the transaction. Also, regular</td>
</tr>
<tr>
<td>Brittan and Van Miert</td>
<td>Scherer</td>
<td>Fox and Ordoover</td>
<td>Baker et al</td>
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<tr>
<td>Initial efforts to be devoted to procedural issues including transparency, national treatment and deadlines for merger examinations.</td>
<td>Creation of international competition agency with initial jurisdiction confined to investigating and reporting on alleged cross-border restrictive practices, with enforcement activities to be undertaken only after seven years.</td>
<td>Any process and criteria for authorisation of anti-competitive mergers to be transparent and clear. Such mergers should not be approved if anti-competitive harm to non-nationals exceeds harm to nationals.</td>
<td>High degree of transparency with respect to both general approaches (for example, through enforcement guidelines) and case-specific decisions (for example, through official media statements).</td>
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<td>Establishment of instrument of co-operation between competition authorities. Initially only limited number of countries and providing for exchange of non-confidential information, consultations on cases of</td>
<td>International competition agency to tread warily, respecting national sovereignty and using national agencies to support its investigations and enforcing recommended corrective action.</td>
<td>Tension between anti-dumping laws and global welfare to be examined. Such laws to be modified to align with antitrust allowance of competitive low pricing.</td>
<td>Availability of time-limited clearance and/or authorisation mechanisms in each jurisdiction, at least for international merger transactions.</td>
</tr>
<tr>
<td>Brittan and Van Miert</td>
<td>Scherer</td>
<td>Fox and Ordover</td>
<td>Baker et al</td>
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<td>common interest, co-ordination of procedures.</td>
<td>WTO enforcement mechanisms to be used only in cases of national intransigence.</td>
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<td>Membership and elements of the instrument could be expanded progressively.</td>
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<tr>
<td>Identification of procedural and material elements which could be made subject to WTO dispute settlement mechanism.</td>
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<td>Each nation to report annually on national and state aids and laws which discriminate against foreign goods and services, stating justification.</td>
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</table>
An alternative approach\footnote{Organisation for Economic Co-operation and Development, “Outline of (A) Core Principles, Common Approaches and Common Standards, and (B) Bilateral and Multilateral Approaches” (1999) OECD Doc No. COM/TD/DAFFE/CLP(98)97 FINAL 1 at 3-11.} would see the issues orientation of other models replaced by a more conceptual framework, with any multilateral arrangements building on core principles, common standards and common approaches.

Under this approach, core principles would be fundamental standards of general application, and expressed in general enough terms to provide contracting nations with significant discretion to choose their own laws, or the nature of their policies and procedures.

Common standards would be more detailed and specific commitments by countries, and set down the standards which must be applied by contracting nations and the manner in which they must be applied, while common approaches would list certain criteria or objectives to be considered by governments without necessarily prescribing how they should be applied or their relative weighting.

Without being unduly prescriptive, core principles would likely include national treatment, non-discrimination, transparency in laws, policies and regulations, due process under law, and presence of competition laws, while common standards and common approaches would cover, inter alia, hard core cartels, vertical restraints, mergers, and abuse of dominance (the allocation between the streams being a matter for negotiation).
A variation of this conceptual approach would involve the clustering of policy-issues for multilateral negotiation into four main categories.\textsuperscript{276}

These include laws, policies or regulations which: first, discriminate between firms on the basis of the nationality of its owners; second, unnecessarily impede or distort the operation of market forces or limit the entry/exit of firms; third, are essential for the effective operation of the global market; and fourth, facilitate discriminatory measures that create distortions whose removal would have net costs in the relevant market.

- **Extending the European Union Model**

The approach adopted by the EU has been held out\textsuperscript{277} as a potential model for a wider multilateral mechanism, especially for the lessons it contains for overcoming the limits to international co-operation in competition policy.

Some commentators\textsuperscript{278} have gone so far as to argue: “if there is a perceived need for one rule world-wide, the pressures for harmonisation towards an EU standard are likely to be strong.”

\footnotesize
\textsuperscript{276} G Feketekuty, above n 5 at 5.
\textsuperscript{278} E M Fox and J A Ordover, above n 89 at 13.
However, this has been challenged on the basis the US would be unlikely to adopt EU standards,\textsuperscript{279} and few other countries are likely to cede sovereignty to a supra-national authority as the EU Member States have done, especially the US.\textsuperscript{280}

Reflecting its own experiences in co-operation and enforcement of competition policy within a regional framework, an expert group formed by the EU proposed\textsuperscript{281} a Plurilateral Agreement on Competition and Trade (PACT).

Key elements of the PACT were a global competition code, with an international competition authority responsible for its implementation, which would have legal status as a plurilateral agreement annexed to the WTO. While the PACT would be open to all countries, membership would come initially from the OECD, central and eastern Europe, and developed Asia.

\textsuperscript{279} E M Graham and J D Richardson, above n 202 at 561; J D Richardson, above n 64 at 365 - 366; E M Fox, above n 63 at 377; E M Fox, "Antitrust, Competitiveness and the World Arena: Efficiencies and Failing Firms in Perspective" (1996) 64(3) Antitrust Law Journal 725 at 725, goes further arguing "US law is 95 per cent world class".

\textsuperscript{280} E M Fox, above n 93 at 12; F M Scherer, "International Trade and Competition Policy" in E Hope and P Maeleng (eds), "Competition and Trade Policies: Coherence or Conflict?" (1998) 13 at 17.

\textsuperscript{281} European Commission, above n 76.
The PACT would build upon three sets of core rules: first, procedural notification, co-operation, and positive and negative comity obligations; second, a limited number of substantive, minimum principles for cross-border cases which would be included in the national laws of member countries; and, third, an institutional structure which would, inter alia, provide effective international dispute settlement and enforcement procedures, and register anti-competitive practices within contracting parties.

The common minimum principles of the PACT would potentially include: prohibition of horizontal cartels relating to price fixing; restrictions on supply or sharing of markets, including banning export cartels; harmonisation of merger procedures to enable competition authorities to better consult with each other; subjecting state-trading enterprises with 'exclusive or special privileges' to comparable treatment under competition law as applied to other commercial enterprises; and, making actionable conduct which results in 'nullification and impairment' of market access commitments.

- The United States Perspective

While the EU is one model for dealing with trade and competition policy issues, the commercial and economic significance of the US requires consideration be given to its policies and practices.
On the broader issue of the internationalisation of competition law and policy, the US has shifted its stance in recent years, now believing it is preferable to act unilaterally, and/or pursue bilateral co-operation with like-minded developed countries.\footnote{282 B M Hoekman and P Holmes "Competition Policy, Developing Countries and the WTO" (unpublished paper to Fondazione Eni Enrico Mattei Workshop on Trade and Competition in the WTO and Beyond, Venice, 1999) 1 at 3.}

The underlying message of official statements\footnote{283 J I Klein, above n 10 at unnumbered; A D Melamed, above n 108 at unnumbered.} in this area indicate the US Government is clearly unwilling to subordinate its own competition laws and policies to any international regime.

The US Government has expressed concern the outcome of any multilateral negotiation on competition law and policy would be likely to reflect the balance between often diverse national interests, and compromises against negotiations in areas such as agriculture, services, industrials, or intellectual property (amongst the myriad of disciplines covered by the WTO).

Such an approach would hold out the risk of a lowest-common-denominator outcome: "(E)fforts to achieve a ‘minimum’ set of competition principles or to identify common substantive standards could end up legitimating weak and ineffective rules, which certainly would not serve the goals of trade liberalisation. As we all know, minimum standards often become the maximum."\footnote{284 J I Klein, above n 10 at unnumbered.}
The General Agreement on Tariffs and Trade (GATT)

The General Agreement on Tariffs and Trade (GATT), and subsequently the WTO, does not address competition policy per se; there is no General Agreement on Competition Policy, or the like.

Indeed, it is worth recalling earlier endeavours to address competition law and policy matters within the multilateral, rules-based trading system, in the form of the provisions on restrictive business practices in the so-called Havana Charter, played a key role in the failure in the late 1940's of the incipient International Trade Organisation.

However, a number of the GATT rules have provisions which relate to aspects of international competition policy.285

The GATT, and subsequently the WTO, are ostensibly the rules-of-the-game for international trade, and constitute a forum for negotiation for trade liberalisation. The WTO has agreements dealing with, inter alia, trade in agriculture, manufactures, services, and intellectual property rights. At the end of 1999, the WTO had 134 member economies, with a further 33 in the process of accession.286


Violation Cases

Violation cases arise when a Contracting Party to the WTO alleges some governmental measure or action by another Member State is inconsistent with a WTO rule. One of the most prominent of these rules, Article VI of the GATT, which deals with anti-dumping, is the only provision of that Agreement intended to cover private anti-competitive conduct.

Other rules likely to be subject to violation cases from a competition policy perspective are seen to include: Article III on National Treatment, which obliges Member States to establish certain competitive conditions for imported products in relation to domestic products; Article XI on Quantitative Restrictions dealing with, for example, import quotas which restrict supplies from some sources; and, Article XVII on State Trading Enterprises, covering, for example, State export or import monopolies.

Article III, which addresses national treatment, is regarded as potentially quite important for dealing with competition-related matters. This situation reflects its fundamental orientation toward the maintenance of competitive conditions, independent of any actual trade effects. That is, Article III would apply in matters which affect the competitive relationship between imported and locally made products.


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Article XI bans the use by governments of most quantitative import and export restrictions and prohibitions. While this Article does not capture purely private sector actions or measures, it may have implications for the way such practices are treated.

A GATT Panel has determined any measure instituted or maintained by a Member State which restricts the export of products for sale, irrespective of the legal status of the measure, is captured by Article XI.

Article XVII on State Trading Enterprises imposes obligations on Member States regarding the conduct of enterprises which are State-owned or State-controlled, or which have been granted by the State exclusive or special privileges.

A GATT Panel considered the scope of this Article, determining it did not concern the organisation or management of import monopolies, only their operations and affects on trade, with the presence of a producer-controlled monopoly not a breach of the GATT per se.

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Non-Violation Actions

While the GATT rules do not cover competition policy per se, it is open whether the WTO's dispute settlement procedures - in particular, its non-violation clause - provides a viable avenue for actions dealing with inadequate enforcement by governments of their national competition policies, and with private sector anti-competitive practices. Greater use of such actions is seen as particularly beneficial for developing countries.  

Non-violation cases arise when there are allegations a government measure nullifies or impairs some condition of market access negotiated under the GATT (Article XXIII).  

In this situation, nullification or impairment arises because of: the failure of a Member to carry out its obligations under the GATT (XXIII: 1(a)); the application by a member of any measure, whether or not it conflicts with the provisions of the GATT (XXIII: 1(b)); or, the existence of any other situation (XXIII: 1(c)).  

The argument for recourse to non-violation actions rests on the presumption governments either support or permit private anti-competitive behaviour, even though no WTO provision has been breached, which infringe upon conditions of competition.  

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291 B M Hoekman, above n 216 at 23.  
292 The Kodak-Fuji dispute rested on such allegations: D I Baker and W T Miller, above n 6 at 102 - 106 for a commentary on the matter, from a market access perspective.  
The potential for non-violation actions to be initiated by governments (which are the only ones with standing, as Contracting Parties to the WTO agreements) is likely to be limited.\textsuperscript{294}

Key hurdles which would need to be overcome include: the onus of proof is very much on the complainant to provide detailed justification that the 'non-violating' measure had the effect of nullifying or impairing benefits accruing to it under the WTO; the need to establish the act of omission, namely to enforce the law, constituted an application of a 'measure'; and, the measure could not, at the time the concession or obligation was negotiated, have been reasonably anticipated.

Other limiting factors are likely to include concerns by potential complainants (and defendant governments) the WTO dispute settlement processes could err on the side of implicitly creating new rules, rather than interpreting existing ones, with unpredictable, systemic consequences.

Further, standards for bringing such a complaint are quite high and generally only applicable where government action leads to anti-competitive outcomes in one's own market. Export cartels, where the adverse impact tends to be in another market, would not be captured.\textsuperscript{295}

\textsuperscript{294} World Trade Organisation, above n 22 at 79; however, I De Leon, "Should We Promote Antitrust in International Trade?" (1997) 21 (2) World Competition 35 at 40 - 41, who sees fertile grounds for formal complaints relating to breaches of GATT Articles III (National Treatment), XVII (State Trading Enterprises) and/or XI (Quantitative Restrictions).

\textsuperscript{295} A Mattoo and A Subramanian, above n 188 at 108.
Additionally, WTO Panels have traditionally not passed judgement on the adequacy (including failure) of Member States to enforce their national laws and policies, if they are not germane to specific WTO obligations. For a Panel to expand its reach on a national competition law or policy matter would set a precedent which may well be unacceptable to member governments.296

The Kodak-Fuji matter297 highlighted what some commentators298 regard as operational weaknesses in the WTO Panel system for dealing with competition law and policy matters, notably the limited ability of the Panel to engage in the ‘discovery’ process and the absence of effective remedies.

However, others299 point out what is essentially a competition law and policy matter was presented for adjudication to the WTO when the Organisation did not a specific agreement on competition within its armoury, apparently on the assumption the WTO's trade rules could deal adequately with competition law and policy issues.

296 E M Graham and J D Richardson, above n 202 at 564 - 565.
298 B M Hoekman and P Holmes, above n 282 at 6; A W Wolff, T R Howell and J R Magnus, above n 177 at unnumbered.
299 P C Mavroidis and S J Van Siclen, above n 30 at 5.
Nevertheless, according to one particularly influential commentator\textsuperscript{300} there may be grounds for a non-violation action in competition-related matters, for example, where a competition agency ignores a complaint by a foreign company when there have been similar complaints lodged by domestic firms and these have been subject to enforcement activity.

Even where a non-violation action was successful, there is no obligation under WTO rules for the defendant country to withdraw the measure,\textsuperscript{301} although this may be an option for the parties to the dispute. The WTO Panel or Appellate Body can only recommend the disputing parties agree on a mutually satisfactory outcome.\textsuperscript{302}

A 'middle path' between violation and non-violation actions has been proposed\textsuperscript{303} taking the form of attaching warranties to the outcomes of trade negotiations.

The warranty system would clarify, for example, if private restraints to trade, private collaboration with government bodies or informal administrative guidance frustrated the intent of the Contracting Parties and undermined the value of the trade agreement, each restraint would constitute grounds for compensation for the impaired concession through the WTO's dispute settlement processes.

\textsuperscript{300} M Matsushita, "EC, Japan and US Competition Issues: Panel Discussion" in B E Hawk (ed), "Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy (1997)" (1998) 83 at 103; Matsushita is a Member of WTO Appellate Body.

\textsuperscript{301} Article 26 of the Dispute Settlement Undertaking.

\textsuperscript{302} World Trade Organisation, above n 22 at 79.

\textsuperscript{303} A W Wolff, T R Howell and J R Magnus, above n 177 at unnumbered.
Conduct incompatible with the warranty system would come from the conventional list of behaviour considered to be per se illegal, for example price-fixing, bid-rigging, monopolising essential port or distribution facilities, and actual or threatened refusals to deal.304

- The World Trade Organisation (WTO)

The Uruguay Round of trade negotiations reinforced existing GATT rules in the area of competition policy, as well as creating some new rules.305 They are seen306 as introducing 'hard law' in the area of international competition law and policy, in contrast to the 'soft law'307 which has prevailed in the past.

These WTO instruments include the: General Agreement on the Trade in Services (GATS); Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs); Agreement on Trade Related Investment Measures (TRIMs); Agreement on Technical Barriers to Trade (TBT); Agreement on Subsidies and Countervailing Measures; and, Agreement on Safeguards.

304 A W Wolff, above n 198 at unnumbered.
305 P J Lloyd and G Sampson, above n 92 at 699 - 702, for a more expansive discussion of the WTO's coverage across these instruments.
306 J Seade, above n 88 at 479.
307 For example, the various non-binding agreements et al created under the UN System, such as the UNCTAD 'Principles and Rules', and the OECD's various Guidelines and Recommendations.
The General Agreement on the Trade in Services (GATS) applies to those measures (governmental and some non-governmental) which affect the trade in services, with the general objective of the GATS being the progressive liberalisation of the trade in services.

The GATS contains a number of provisions dealing with aspects of competition policy: Article VII, which is intended to prevent the use of licencing or similar requirements from acting as a barrier to entry for foreign service providers; and, Article VIII, which requires service suppliers not to abuse any monopoly positions, and respect the Most Favoured Nation obligation found in Article II of the GATS.

GATS Article IX provides recognition that certain business practices of service suppliers can restrain competition and through this restrict trade in services. Members undertake, at the request of another Member, to engage in consultations with the view to eliminating such practices.

Other aspects of the GATS with competition policy dimensions deal with access to public telecommunications networks, transparency, subsidies, government procurement, and the distribution and marketing of services, which are important given services are essential inputs into many production activities.

The Agreement on Basic Telecommunications Services concluded by some 57 governments in early 1997 involves commitments to apply regulatory principles which draw upon competition policy.

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308 This number had increased to 69 by mid 1999: J R Shelton, above n 68 at 61.
These include requiring interconnection with major suppliers be done on non-discriminatory terms to ensure, amongst other things, rivals are not denied access on competitive terms, and competition safeguards binding Members to prevent major suppliers from abusing control over information or engaging in anti-competitive cross-subsidies.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) contains three Articles which touch upon competition policy: Article 8, which seeks to prevent abuses of intellectual property rights to "unreasonably restrain trade"; Article 39, which deals with 'effective protection against certain forms of competition'; and, Article 40, which seeks to control practices which constrain competition that may have an adverse effect on trade, and the dissemination and transfer of technology.

Much of the TRIPs agreement is concerned with pricing and reasonable use of intellectual property, which are fairly traditional issues within competition policy.

The Agreement on Trade Related Investment Measures (TRIMs) for the first time brings investment laws and regulations within the rules-based multilateral trading system.
Particularly noteworthy from a competition law and policy standpoint, the TRIMs agreement (Article 9) provides for a review of the Agreement within five years of its entry into force, which will include whether it should be complemented by provisions on investment policy and competition policy. Lesser developed countries reportedly see this review addressing, inter alia, what they regard as anti-competitive practices of multinational enterprises.

While not consolidated in one location, a number of the provisions of other specific agreements under the WTO explicitly address anti-competitive private and public business practices.

These have been identified as including: the Agreement on Technical Barriers to Trade (Articles 3, 4 and 8), which are intended to ensure compliance with technical regulations, standards and conformity assessment procedures by non-governmental bodies are not more trade-restrictive than necessary; and, the Understanding on Interpretation of GATT 1994 Article XVII, which provides for greater surveillance of state-trading enterprises with exclusive or special privileges, and their operations be non-discriminatory, as well as strengthened notification and review procedures.

309 E U Petersmann, above n 277 at 21.
310 Ibid at 19 - 20; M C Malaguti, above n 91 at 123 - 125.
311 Although the Organisation for Economic Co-operation and Development, "Trade and Competition: Frictions After the Uruguay Round" (1996) OECD Doc No. OCDE/GD(96)105 1 at 6 considers there is sufficient vagueness in the Agreement to permit abuse.
Elsewhere, the Agreement on Subsidies and Countervailing Measures (Articles 6 and 18) provides more detailed regulation of 'market displacement', price under-cutting and voluntary undertakings by exporters, and (Article 15) closer examination of trade-restrictive practices and competition between domestic and foreign producers when assessing injury.

The Agreement on Safeguards (Article 11.1(b)) prohibits orderly marketing arrangements, voluntary export restraints and/or similar measures on either the export or import side by the private or public sectors, while the Agreement on Agriculture, while requiring specific and binding reductions in export subsidies as well as commitments on market access and domestic support, still permits the use of subsidies for agricultural exports.

The expansion of sectoral-specific negotiations, such as the Agreement on Basic Telecommunications Services, are seen as useful opportunities to explore and develop selective aspects of competition policy, and through this act as 'proving grounds' for multilateralising competition law and policy.

312 A B Zampetti, "The Uruguay Round Agreement on Safeguards: A Competition-Oriented Perspective" (1995) 19(2) World Competition 147 at 147 - 158 for a general discussion of the treatment of safeguards in the multilateral trading system and their broader relationship to competition policy issues, the strengths and weaknesses of the new Agreement on Safeguards, and the generic use of such rules for protectionist purposes.

313 M E Janow, above n 123 at 282 - 283; J D Richardson, above n 64 at 363.
However, such Agreements have been criticised\(^{314}\) for their capacity to encourage the creation of sector-specific instruments, each with their own competition rules, leading to both diverse rules and interpretations within individual countries, and inefficient market distortions.

Further, there would be an inherent risk sector-specific competition rules could degenerate into de facto regulation, with sector-specific regulators being more prone to capture by vested interests than competition agencies with economy-wide perspectives.

Finally, and not unimportantly, the enhanced WTO Trade Policy Review Mechanism (TPRM) covers the competition policies of Member countries, and is regarded\(^{315}\) as a useful vehicle for examining the interface between competition and trade law policy at the individual country level (and potentially at the regional level, where WTO Member countries belong to regional groupings).

Such reviews can usefully focus on the effects of government policy on competition in particular areas, for example the impact of product standards and certification requirements on the contestability of markets, and the behaviour of state-trading entities and firms granted exclusive rights.\(^{316}\)

\(^{314}\) J R Shelton, above n 68 at 62.

\(^{315}\) E U Petersmann, above n 277 at 23.

\(^{316}\) B M Hoekman, above n 216 at 7.
The WTO has reported\textsuperscript{317} competition issues are often raised during TPRM reviews, in terms of their effects on trade (exports and imports of both goods and services), and the efficient allocation of resources within the domestic economy.

Such discussions also cover basic principles, legal provisions and institutional arrangements governing competition law and policy, with Member States showing particular interest in issues such as export/import cartels, the legal powers of competition authorities, the extra-territorial application of competition laws, intellectual property rights and parallel import laws, and the role and treatment of state trading enterprises.

Taken as a whole, the outcomes of the Uruguay Round, while extending the reach of the multilateral rules-based trading system into the competition domain, are not regarded\textsuperscript{318} as imposing upon WTO Members a direct and general duty (beyond those specifically set down) to ensure there are no anti-competitive practices which adversely impact upon trade within their respective jurisdictions.

However, these commitments require Members not to use or apply domestic competition laws, or structural market barriers, in ways which circumvent their broader WTO obligations to equality of competitive opportunity to any goods/services, regardless of their origins.

\textsuperscript{317} World Trade Organisation, above n 22 at 79.
\textsuperscript{318} M C Malaguti, above n 91 at 137.
Enhancing the WTO's Reach

The Uruguay Round has undoubtedly extended the reach of the rules-based multilateral trading system in the internationalisation of competition policy, with the WTO itself\(^{319}\) arguing it is only a question of 'how and when', rather than 'if' specific competition rules will be included within the multilateral trading system.

A number of advantages have been identified\(^{320}\) in making greater use of the WTO in the internationalisation of competition law and policy, including its near universal membership, its past successes in achieving binding rules which require Members to deliver on their commitments, and the increasing effectiveness of its dispute settlement mechanism.

Other advantages are seen\(^{321}\) to include (depending on the specific content of any WTO competition instrument) encouraging the spread of a culture of competition, especially to developing and transitional economies, reinforcing the domestic authority of national competition agencies, mandating greater transparency as well as non-discrimination in domestic competition laws, policies and enforcement processes, and tackling anti-competitive practices which have adverse effects on international trade and investment.

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\(^{319}\) World Trade Organisation, above n 22 at 32.


Furthermore, concerted multilateral action would greatly assist national
governments to overcome the resistance (even outright opposition) of
politically powerful vested interest groups which are able to block
unilateral liberalisation and reform, both in developed and developing
countries.\textsuperscript{322}

However, there may be a number of difficulties which the WTO will need
to confront if it (that is, the Members, collectively) wish to secure broader
and/deeper reach in the area of competition law and policy.

Amongst the most basic of these challenges is the breadth of membership
could well act to impede, rather than assist, agreement on substantive
competition policy issues (reinforced by the fact a large number of WTO
Members do not have effective competition laws on their statute books),
supplemented by the tendency for those Members with competition laws
to differ widely in both substantive law and enforcement.\textsuperscript{323}

Advocates of a multilateral approach through the WTO respond\textsuperscript{324} the lack
of competition law and policy in many developing and transitional
economies very much justifies a greater role for the WTO, in that any
resulting legislation can be based on commonly agreed principles drawing
upon the experience of developed countries.

\textsuperscript{322} B M Hoekman and P Holmes, above n 282 at 8.

\textsuperscript{323} P B Marsden, above n 197 at 94 - 95; World Trade Organisation, above n 22 at 31.

\textsuperscript{324} European Union, above n 321 at 6.
Second, the WTO has only limited coverage of private restraints (although these are facilitated by government\textsuperscript{325}), being only insofar as the impact on competition results from a government measure. This situation has led some commentators to suggest a complaint of private sector anti-competitive conduct may either have to place it in the framework of government activity, or otherwise seek a diplomatic-political solution.\textsuperscript{326}

Third, the WTO is also subject to tight limitations on the remedies it can deliver.\textsuperscript{327} These do not extend to traditional remedies such as injunctions and orders for divestiture which exist under some national competition laws, and the WTO’s penalties of compensation and suspension are intended to be only temporary.

Fourth, many nations may well be reluctant to make meaningful and binding commitments ceding authority to an international body\textsuperscript{328} for matters which have traditionally been seen as the exclusive preserve of national jurisdictions and systems,\textsuperscript{329} for both evidentiary and adjudicatory reasons.\textsuperscript{330}

\textsuperscript{325} E M Fox and J A Ordover, above n 89 at 15; B Hindley, above n 245 at 334.

\textsuperscript{326} Y K Kim and G N Horlick, "Private Remedies for Private Anti-Competitive Barriers to Trade: The Kodak-Fuji Example" (1997) 24 Empirica 75 at 78.

\textsuperscript{327} P J Lloyd and G Sampson, above n 92 at 703.

\textsuperscript{328} Although this has not prevented one commentator proposing the nomenclature of a "World Economic Court of Justice": E M Fox, above n 86 at 23.

\textsuperscript{329} P J Lloyd and G Sampson, above n 92 at 703; P B Marsden, above n 197 at 104; D I Baker, A N Campbell, M J Reynolds and J W Rowley, above n 206 at 450.

In the evidentiary situation, national competition agencies and governments are unlikely to provide the WTO investigators with the quantity and quality of confidential information necessary for proper analysis and actions.

Fifth, use of the WTO’s dispute settlement processes may give procedural legitimacy to actions harmful to the WTO’s trade liberalisation agenda being (mis)represented as competition policy. WTO panels could become inappropriately involved in reviews of case-specific, highly confidential business information, for which they are not necessarily well-suited.

**Working Group on Trade and Competition Policy**

The WTO is not sitting idly by as the debate on competition and trade law and policy issues takes place in other fora. Rather, it appears to have adopted a more subtle, consultative and educative approach, carefully exploring key issues and sensitively testing the interest and willingness of Member States to engage in substantive discussion on key issues.

The WTO at its Singapore Ministerial meeting in December 1996 instructed\(^1\) the newly-created Working Group on Trade and Competition Policy (WGTCP) to examine the interaction between trade and competition policies, including anti-competitive practices, and to identify any areas which may warrant further consideration within the broader WTO framework.

\(^{1}\)WTO Document WT/MIN (96)/DEC, at para 20.
The WGTCP was effectively given only limited ‘terms of reference’, with no meaningful commitments for any further action arising from their progressive and final reports.\textsuperscript{332} Within this seemingly broad mandate, the Working Group has created its own agenda and work program, although it appears to have given first attention to private anti-competitive practices which restrict international trade.\textsuperscript{333}

Substantive work within the WGTCP appears to have centred upon common rules which WTO Members could include within their own national competition laws, and developing instruments to broaden and deepen international co-operation in law enforcement.

These rules have focused on the interaction between trade and competition policies in three situations.\textsuperscript{334}

The first situation is where anti-competitive practices foreclose access in third country markets, for example import cartels, certain exclusive distribution arrangements or abuses of dominant position. These can be attributable to lack of exceptions to, or failure to effectively enforce, competition laws by governments and their competition agencies.

\textsuperscript{332} K van Miert, above n 212 at 15.


\textsuperscript{334} European Union, above n 321 at 2.
Second, there are anti-competitive practices which impact on several markets, for example international cartels and certain mergers, which could give rise to market access problems and/or where several competition authorities could claim jurisdiction.

And, the third situation is anti-competitive practices whose effects are felt primarily in different jurisdiction(s) where the activities originate, such as export cartels, and certain mergers and abuses of dominant position. Particular problems include difficulties in obtaining evidence and/or applying effective remedies.

The WGTCP has attracted both support and criticism, both for its existence per se, and the nature and progress of its work.

Supporters argue the Working Group has: played a useful educational role for developing countries without direct experience of competition law and policy; clarified the different needs and priorities of developed and developing countries in international competition law and policy; and, facilitated some agreement on priority anti-competitive practices which need to be addressed in multilateral fora (such as ‘hard core’ cartels).

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336 Also, C R Frischtak, B Hadjimichael and U Zachau, “Competition Policies for Industrialising Countries” (1993) 1 for a general discussion of the competition policy priorities of developing countries, emphasising the importance of addressing policy-generated barriers to economic development across the regulatory, industry and trade policy regimes, and market-entry and -exit barriers.
By contrast, critics argue the WGTCP suffers from a misplaced focus on what is feasible, rather than what is necessary, for a multilateral agreement, its overly ambitious approach to prohibiting all conduct which impedes market access rather than distinguishing barriers which do not harm the competitive process\(^{337}\) and, its potential role as a platform to rehear old grievances about trade remedies.\(^{338}\)

The WGTCP is said\(^{339}\) to suffer from strong differences of opinion between a number of the major governmental players on both fundamental (for example, terms of reference and work program) and specific policy (for example, the coverage of dumping) issues.

The US Government has reportedly\(^{340}\) argued the WGTCP should focus on the impact of private anti-competitive conduct on trade, with particular emphasis being given to enforcement of competition laws by Member States, encouraging co-operation in enforcement and the harmonisation of national competition laws, with the impact of trade measures on competition being excluded from study.

\(^{337}\) PB Marsden, above n 197 at 92.

\(^{338}\) A W Wolff, above n 198 at unnumbered, who advocates the suspension of the WGTCP, regarding it's work as "worse than disappointing" and "a waste of valuable resources".

\(^{339}\) K van Miert, above n 212 at 15; B M Hoekman, above n 67 at 300; M C Malaguti, above n 91 at 139.

Another group of countries, including Japan, argue the WGTCP in its program of work should examine the impact of anti-competitive private conduct on trade, and of trade measures on competition, pointing to the general reference to the Group to study the interaction between trade and competition policies. 341

The EU 342 appears to favour the former view, arguing for a four-track approach containing a commitment from all WTO Members to adopt effective domestic competition rules and enforcement structures, identification of common competition rules or principles and procedures, establishing instruments of co-operation between competition authorities, and identification of procedural and material elements which could be made subject to the WTO's dispute settlement mechanism.

These inter-governmental differences appear to have been mirrored in international business initiatives examining trade and competition issues, with high level fora 343 reportedly 344 pointing to the lack of consensus and continued analysis of key issues such as contestability, dispute settlement, market access, and the appropriate forum for addressing such matters.

342 L Brittan and K van Miert, above n 320 at 456 - 457; J F Pons, above n 109 at unnumbered.
Independent observers\textsuperscript{345} have suggested the more productive approach for the WGTCP is to identify those competition policy measures most likely to impede or distort international competition, and advise on how such distortions and impediments can best be eliminated or reduced to acceptable levels with least interference in business and governmental decision-making.

Amongst the main benefits of adopting a competition-orientation to any future comprehensive multilateral trade and investment liberalisation negotiations would be the capacity to deal with a much wider range of policy instruments, more effectively improve the functioning of international markets, produce more substantial economic dividends by enhancing the dynamic gains from trade reform and add sustained momentum for domestic regulatory reform, and, not unimportantly, deliver greater policy coherence.\textsuperscript{346}

Another approach\textsuperscript{347} for the WGTCP would involve focusing upon prohibiting private anti-competitive practices which result in substantial barriers to foreign entry to a jurisdiction, and substantial lessening of competition in a market, such as horizontal and vertical restraints, mergers and abuse of dominance.

\begin{flushleft}
\textsuperscript{345} G Feketekuty, above n 5 at 6.
\textsuperscript{346} Ibid.
\textsuperscript{347} P B Marsden, above n 197 at 92; F Jenny, above n 204 at 21 - 22.
\end{flushleft}
Others\textsuperscript{348} suggest an even more modest agenda, with the WGTCP emphasising consensus-building amongst the WTO Member States, and outreach to other organisations with expertise in competition policy (such as the OECD).

Further proposals\textsuperscript{349} are for any work to be oriented toward uncovering factual details of any anti-competitive practices, concentrating in particular on developing solutions to actual, rather than theoretical, problems. Priority areas are likely to include the trade in paper and glass (in particular, involving Japan), construction services (again, Japan), steel (generally), and heavy electrical generating equipment (Europe and Japan).

Regardless, progress under the WGTCP is expected\textsuperscript{350} to be slow, with few signs of any substantive consensus on whether and how to address competition policy issues within the multilateral trading system; the first official report of the Working Group issued in late 1998 recommended merely that discussions continue.\textsuperscript{351}

\section*{Developing/Transitional Country Interests}

While the agenda of the developed and industrialised nations tends to attract greatest attention within the WTO, developing and transitional economies are numerically the largest group amongst the Organisation’s 130-plus country members.

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\begin{itemize}
\item \textsuperscript{348} M E Janow, above n 123 at 282 - 283.
\item \textsuperscript{349} A W Wolff, above n 198 at unnumbered.
\item \textsuperscript{350} B M Hoekman and P Holmes, above n 282 at 1; M Matsushita, above n 340 at 40.
\item \textsuperscript{351} World Trade Organisation, above n 333 at 50.
\end{itemize}
The interests of developing countries in competition law and policy are substantially different from those of developed economies.

The key issues for developing countries in efforts to internationalise competition law and policy include building the capacity to deal with the possible anti-competitive behaviour of large/dominant multinational firms, and having their interests taken into account in cross-border mergers which affected them.\textsuperscript{352}

The absence of effective and transparent competition laws and policies can discourage market entry by competitive multinational firms which are accustomed to working with such laws and policies in their home and other markets.\textsuperscript{353}

At mid-1996, some 37 developing/transitional economies had substantive competition laws, with a further 21 countries in the process of either revising or adopting such laws.\textsuperscript{354} There are also growing demands upon individual administrations and multilateral agencies for technical advice and assistance.\textsuperscript{355}

\textsuperscript{352} E M Fox, above n 125 at 7; B M Hoekman and P Holmes, above n 282 at 3.
\textsuperscript{354} B M Hoekman, above n 216 at 16 - 17.
\textsuperscript{355} L Brittan, above n 14 at unnumbered; P Brusick, above n 178 at 478.
Active and effective domestic competition laws and policies are regarded as essential prerequisites for developing countries, if they wish to minimise any adverse effects of multilateral agreements in this area.

Developing countries have been cautioned to proceed with care when creating effective domestic competition law and policy systems, both in terms of substantive law and its enforcement, recalling at each step that competition policy tools are blunt, not sharp surgical, instruments.

For those without experience in the field, a rules-based approach is recommended, focusing on maximising the interplay of market forces, with the mobility of resources, deregulation and facilitating contestability being the means for promoting competition, rather than relying on competition laws themselves.

Developing countries have also been encouraged to ensure competition laws and business regulation favour competition and new entry by firms, avoid creating monopolies through perverse regulations or ill-conceived privatisation, give competition policy the widest interpretation so as to capture all government actions, and commit to sustained free trade.

356 B M Hoekman, above n 216 at 20.
357 Although the veracity of some of the efforts of some developing countries has been questioned: F M Scherer, “Competition Policy Convergence: Where Next?” (1997) 24 Empirica 5 at 10.
358 R S Khemani, above n 12 at 149; P S Crampton and C L Witterick, above n 209 at 60.
359 R S Khemani, above n 12 at 149.
360 B M Hoekman and P Holmes, above n 282 at 6; A Fels, above n 475 for a draft model code for developing and transitional economies.
The interests and needs of transitional economies from command/planned to market orientation fall between those of developing and developed nations. Competition authorities in transitional economies can face challenges very different from their colleagues in established market systems.

Most fundamentally, transitional economies have generally inherited economic systems lacking competitive structures and habits of competition, in particular a notable lack of experience in using price signals to determine production, distribution and consumption decisions. Corporate-style entities have traditionally operated to meet political and social requirements, not those of commerce (such as profitability).

Effective competition laws and policies are required to preserve the benefits of deregulation, and prevent privatised state monopolies or other dominant firms from putting in place their own barriers to competition, in effect replacing the old regulatory regime.\textsuperscript{361}

There also appears to be a tendency for managers from disaggregated components of former state-owned enterprises to maintain old habits of co-operation rather than learn new practices of competition, the former of which can take the form of cartel agreements operating in the guise of industry associations.\textsuperscript{362}

\textsuperscript{361} P S Crampton and M Barutciski, above n 19 at 6.
\textsuperscript{362} World Trade Organisation, above n 22 at 57; R Pittman, above n 96 at unnumbered.
Market foreclosure is regarded\textsuperscript{363} as much easier, and the capacity of new entrants to effectively challenge existing players much lesser, in these circumstances. If the consequences of failure, including difficulties of exiting the market, are thus higher, then the incentive to enter the market is that much diminished.

Experience to date indicates transitional economies from central and eastern Europe appear to favour the EU model of competition policy, with ten regional economies entering into formal Europe Agreements with the Union.\textsuperscript{364}

Key elements of these Agreements are progressive opening of markets by the central/eastern European countries and on-going convergence of competition laws with those of the Union. The transitional economies have, in particular, committed themselves to applying the entire case law on competition arising from the EU Treaty.\textsuperscript{365}

\textsuperscript{363} M J Reynolds, "EU: Competition Policy in the Aftermath of Central Planning" (1997) \textit{International Business Lawyer} 453 at 453.

\textsuperscript{364} A Schaub, "EC Competition System - Proposals for Reform" (unpublished paper given to the Fordham Corporate Law Institute, New York, 1998) at 1 reports that at March 1998 negotiations were underway with six candidate countries (Poland, Czech Republic, Hungary, Estonia, Slovenia and Cyprus) for earlier membership, and with further five (Romania, Bulgaria, Slovakia, Latvia and Lithuania) for later membership. If fully realised, the E.U. would expand to 25 member countries. Also, A M Van den Bossche, "The International Dimension of EC Competition Law: The Case of the Europe Agreement" (1997) \textit{European Competition Law Review} 24 for general discussion.

\textsuperscript{365} M J Reynolds, above n 363 at 454; J F Pons, above n 109 at unnumbered.
Any engagement by developing and transitional countries in multilateral efforts on competition policy, it has been argued, should be used selfishly to reinforce domestic efforts to build strong competition laws at home:

"Developing countries should take seriously the advice to make their own markets more competitive and use the opportunities offered by the WTO to achieve this to the fullest extent.... The promotion of competition in developing country markets is in their own interest, and they should as far as possible seek to retain their freedom to manoeuvre over the policy model they might adopt."366

The introduction of effective competition law and policy regimes would usefully reinforce to the populace that the arrival or take-off in market forces does not mean the complete abandonment of all rules and security for players in the marketplace. Indeed, the enactment of domestic competition statutes can be a prerequisite for other liberalising laws and policies.367

A number of developing and transitional countries have recognised the close linkages between competition and trade law and policy, both in the domestic and the international environment.368

366 B M Hoekman and P Holmes, above n 282 at 21.
367 R Pittman, above n 96 at unnumbered.
The perceived benefits for developing and transitional economies from bringing competition issues explicitly into the WTO framework include accelerating and deepening economic development, reinforcing trade liberalisation and economic deregulation, dealing with restrictive business practices (especially by multinational enterprises) and generally educating themselves on competition law and policy issues.

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While developing and transitional countries appear willing to learn from the experience of developed nations, they are not necessarily willing to accept domestic models, and those of an anti-trust nature, as the default framework for any multilateral system. Comprehensive approaches are preferred over narrower alternatives.\footnote{Communications to the WTO Working Group on the Interaction between Trade and Competition Policy, from: India, WTO Doc WT/WGTCP/W/24, 10 July 1997, unnumbered; Nigeria, WTO Doc WT/WGTCP/W/16, 2 July 1997, unnumbered.}

The Case Against a Role for the WTO

While there are substantive arguments in favour of expanding the WTO's role in the competition policy domain, there are also a number of strong practical objections to the Organisation taking on responsibility for multilateral competition policy.

First, the WTO itself\footnote{A Hoda, "WTO: Working Group on Trade and Competition Policy" (1997) \textit{International Business Lawyer} 449 at 450.} has conceded realising any general framework for multilateral co-operation in competition policy will be long and arduous, and beset by many problems.

Even extending the reach of the WTO in areas where it has disciplines would only address a small fraction of the problems which would need to be dealt with under a comprehensive international competition regime.
The WTO’s existing coverage of competition policy issues is very limited (with the GATS and TRIPs, for example, having no explicit competition policy obligations\textsuperscript{376}), with the Organisation not requiring Member States to have national competition laws or policies, let alone minimum standards.\textsuperscript{377}

Key competition policy matters where the WTO lacks reach are seen\textsuperscript{378} to include non-enforcement of national competition laws which causes distortions to trade, competition laws which exempt trade (export/import) cartels, and domestic regulatory regimes which impact upon economic structures and thus affect trade.

In essence, the current WTO is seen\textsuperscript{379} to be a weak base for further work in this area with higher priorities elsewhere in the conventional multilateral trade agenda. Opponents of using the WTO have argued\textsuperscript{380} it is not clear what practical competition problems the Organisation would be expected to solve.

\footnotesize{376} Although they are indicative of the changing role of the WTO, moving into information provision and regulatory areas: J D Richardson, above n 64 at 363.

\footnotesize{377} P J Lloyd, above n 31 at 18; J I Klein, above n 10 at unnumbered.

\footnotesize{378} P Nicolaides, above n 15 at 6.


Second, there are substantial and complex differences in the conceptual and practical issues of competition law, policy and enforcement, compounded by the trend in competition matters to move away from per se towards 'rule of reason' approaches which contrasts with the prohibition basis of WTO rules (or permitting them in designated circumstances).

There are significant differences in the approach to trade policy (which stresses prohibition of actions or permission only in designated circumstances) and competition policy (which has moved away from per se prohibitions, to more judgmental 'rule of reason' approaches).

Third, there is a strong risk any agreement on rules or principles, beyond the most general and imprecise (and certainly agreement on sound substantive principles) is unlikely in the near future - in short, a 'lowest-common-denominator' outcome which would be meaningless and weaken national competition law enforcement.

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381 P B Marsden, above n 197 at 98; Canadian Competition Bureau, above n 42 at unnumbered.
382 P J Lloyd, above n 31 at 18; P B Marsden, above n 330 for a general discussion.
383 E M Fox, above n 273 at 34; J I Klein, above n 10 at unnumbered; D I Baker, A N Campbell, M J Reynolds and J W Rowley, above n 206 at 449.
384 A D Melamed, above n 108 at unnumbered; A W Wolff, above n 81 at unnumbered.
The diversity and inexperience of many WTO members\(^{385}\) which do not have, or have only limited experience with, national competition laws and policies may well produce a multilateral agreement which was worse than having no agreement at all, with the substance of any such instrument being negotiated 'down' to the standard of developing countries.\(^{386}\)

Fourth, the WTO is ostensibly a multilateral body regulating government actions and not the private actions which are often the main concern of competition policies, and it would be an enormous change (cultural and operational) for the Organisation to investigate and rule on private actions.\(^{387}\)

Ancillary to this is the lack of standing of individuals or companies in the WTO system, which can be significant when many of the competition policy actions in most countries originate from private complaints to government and/or cases initiated by private individuals or firms in domestic courts.\(^{388}\)

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\(^{385}\) According to J I Klein, above n 380 at unnumbered, roughly half of the WTO members do not even have, with most of the remainder having only limited experience with, competition laws.

\(^{386}\) B M Hoekman, above n 67 at 301; A W Wolff, above n 81 at unnumbered.

\(^{387}\) P J Lloyd, above n 31 at 18; E M Fox and J A Ordover, above n 89 at 15; B Hindley, above n 245 at 334.

\(^{388}\) P Nicolaides, above n 219 at 141; Canadian Competition Bureau, above n 42 at unnumbered.
Fifth, inevitable extension of the WTO dispute settlement mechanism into competition law enforcement would involve the Organisation in complex evidentiary contexts, a task for which it seen to lack experience and for which it is not suited.\textsuperscript{389}

If the WTO’s dispute settlement processes were extended to reviewing individual decisions of national competition authorities, it is argued\textsuperscript{390} this could interfere with prosecutorial and judicial discretion and decision-making, and involve the WTO Panels in inappropriate reviews of case-specific and highly confidential commercial information.

Sixth, and ancillary to this, the punitive powers of the WTO are currently limited,\textsuperscript{391} with compensation and suspension of privileges intended to be only temporary. They do not extend to traditional remedies such as injunctions and orders for divestiture which exist under some national competition laws.

\textsuperscript{389} EM Graham and J D Richardson, above n 202 at 547; A D Melamed, above n 108 at unnumbered; Vautier and Lloyd, above n 25 at 126; A W Wolff, T R Howell and J R Magnus, above n 177 at unnumbered.

\textsuperscript{390} J I Klein, above n 10 at unnumbered; E M Graham and J D Richardson, above n 202 at 564 - 565; Canadian Competition Bureau, above n 42 at unnumbered; while sharing this view, J Rill, above n 204 at unnumbered, sees some latitude for the WTO potentially playing an informal, non-binding mediatory-style role.

\textsuperscript{391} K M Vautier and P J Lloyd, above n 25 at 127; Canadian Competition Bureau, above n 42 at unnumbered.
As one commentator observed: "Unless expressly authorised by the Contracting Parties, (the WTO has) no independent right of initiative, no right of investigating Members' policies, no right of censure, no right to decide on its own, and definitely no right to impose penalties on Members..."

"It can only authorise another Member to take counter-measures which are, in effect, an act of retaliation. But retaliation in the form of re-imposing border restrictions is... hardly the first or second-best means of correcting distortions to competition."

Ultimately, a completely articulated and enforceable global competition code, whether under the auspices of the WTO or any specially created supranational authority is seen to be ambitious, or more likely unachievable without a set of rules at the highest level of generality, which in turn would result in uncertainty and conflict of interpretation and application.

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392 P Nicolaides, above n 219 at 141.
393 E M Fox, above n 93 at 15.
394 M J Trebilcock, above n 20 at 295; P B Marsden, above n 197 at 95. According to J I Klein, above n 380 at unnumbered: "... WTO antitrust rules would be useless, pernicious, or both, and would only serve to politicise the long-term future of international antitrust enforcement, including through the intrusion of trade disputes disguised as antitrust problems."
- Competition Policy in the Millennium Round

Despite the substantial hurdles confronting any substantive negotiations on competition law and policy within the agenda for the anticipated Millennium Round, significant players, such as the EU, have called for such negotiations.\textsuperscript{395}

Under a model being proposed by the EU,\textsuperscript{396} the basic architecture for a WTO agreement on competition would have a number of core characteristics, which taken together can be regarded as having fairly broad and deep coverage.

First, there would be core principles and common rules on the adoption of competition policy and its enforcement. These rules would address, inter alia, substantive coverage of domestic competition law, enforcement, limits on the exclusions from competition law (both sectoral and due to government regulation), application of the principles of non-discrimination and transparency, and rights of access for private parties to administrative and judicial proceedings.

\textsuperscript{395} European Union, above n 321 at 4 - 12.

\textsuperscript{396} Ibid.
Second, basic principles on anti-competitive practices which have a significant impact on international trade and investment. This would involve a common rule on ‘hard core’ cartels as serious intrusions upon competition laws, reviewing exemptions relating to export cartels, common criteria for assessing the foreclosure effects of vertical agreements or dominant positions, and principles aimed at encouraging convergence of procedural requirements for international mergers.

Third, provisions relating to international co-operation, in particular on notification, consultation and surveillance of anti-competitive practices with an international dimension. These provisions would also embrace both positive and negative comity, while making allowance for the capacities of developing countries.

And, fourth, application of WTO dispute settlement procedures, adapted to the specific requirements of competition law. The main emphasis of WTO dispute settlement would be to ensure domestic competition law and enforcement structures comply with the binding provisions agreed multilaterally.

However, such proposals are unremarkable. According to one commentator:397 “What is unnatural, even incredible, is that a fifty-year-old multilateral trading system could continue so long without such negotiations to integrate trade, investment and competition policy.”

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397 J D Richardson, above n 64 at 339; emphases in original.
One approach to redressing this shortcoming is a plurilateral agreement on trade-related antitrust measures (TRAMs) within the multilateral, rules-based trading system.

Modelled on the WTO’s TRIPs, the proposed TRAMs would set minimum standards for market accessibility (as distinct from market access), dealing with cartels and horizontal restrictions, national treatment for investors, and mergers and acquisitions which have international spillovers. Over time, the TRAMs could be extended to bring dumping claims under competition rules.

Another configuration of a potential TRAMs would see little more than the adoption of common norms on horizontal restraints (especially export cartels, but also market sharing and price fixing) and replacing antidumping rules with competition laws.

Multilateral attention would also be given to administrative and procedural aspects of competition law and policy to ensure transparency and due process, along with a broadening of the grounds for ‘non-violation’ actions and giving the WTO a competition advocacy mandate through its Trade Policy Review Mechanism (TPRM).

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399 B M Hoekman, above n 216 at 12 - 15.

400 Ibid at 6.
A further configuration of the TRAMs\textsuperscript{401} would not seek to be comprehensive in scope, rather it would focus on achieving consensus on core elements or provisions.

These elements would include national governments: undertaking to establish a competition law, with appropriate scope and independence in investigation; committing to the principles of national treatment and non-discrimination; applying common substantive approaches to cartels, abuse of dominance and mergers; and, facilitating co-operation between competition authorities.

Disputes over whether domestic competition laws conform with obligations under the TRAMs would be accommodated under existing WTO mechanisms, with the overall compliance and conduct of participating nations subject to peer review through a Competition Policy Review Mechanism (CPRM),\textsuperscript{402} modelled on the WTO's Trade Policy Review Mechanism (TPRM).

\textsuperscript{401} Canadian Competition Bureau, above n 42 at unnumbered; L Brittan, "Competition Policy and the Trading System: Towards International Rules in the WTO" (unpublished paper given to the Institute of International Economics, Washington D.C., 1997) at unnumbered; L Brittan, above n 14 at unnumbered.

\textsuperscript{402} P B Marsden, "The Impropriety of WTO 'Market Access' Rules on Vertical Restraints" (1998) 21 (6) World Competition 5 at 16 for a discussion of some of the advantages of such a mechanism.
Another model, under the acronym of TRAPs, would deal with private anti-competitive practices, such as cartels, refusal to deal, exclusive dealing arrangements, predatory pricing and standard setting, with effective cooperation in enforcement between national competition authorities, and mutual recognition of judgments.

Development and delivery of the TRAPs would take place on an incremental or installment basis, rather than through a comprehensive code-style approach, as happened with the negotiation of the GATS.

A further model, under the nomenclature of TRACLAP, would see the prohibition of export cartels under national competition laws, limitations on the use of extra-territoriality and government-inspired restraints, such as state trading enterprises, and trade-distorting industry policy, and wider use of non-violation actions under the WTO. Anti-dumping arrangements would ultimately be subsumed into competition law.

Insofar as the multilateral trading system endeavours or is able to produce any broadly-based rules on competition law and policy, developing countries should emphasise bans on horizontal restraints (such as price fixing and market sharing) and specifically a ban on export cartels.

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404 "Trade-Related Aspects of Competition Law and Policy": B Hindley, above n 245 at 333; the concepts may be different in styling but are very similar in substance.
Other characteristics which developing countries should pursue include replacing anti-dumping actions with domestic competition law enforcement, and strengthening broader competition advocacy and dispute settlement procedures within the WTO. 405

Developing countries could also productively press for the examination of issues relating to the contestability of domestic markets, and the transparency of prevailing regulatory regimes. 406

Further, developing countries could also look for more effective procedural disciplines. Such disciplines may well become more important for developing countries than any strengthening of substantive disciplines. 407

Key features of these procedural disciplines would include greater transparency in administrative mechanisms, regulations and procedures, separation of investigation and prosecution from adjudication functions, the safeguarding of sensitive commercial information, provisions for significant penalties, and appropriate checks and balances to ensure due process.

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405 B M Hoekman, above n 216 at 2.
406 B M Hoekman and P Holmes, above n 282 at 2.
While developing countries can expect to reap substantial economic dividends, in the forms of accelerated economic growth and development, from more effective use of competition law and policy\textsuperscript{408} they may also need to adopt a cautious approach to commitments on implementation.

Some commentators\textsuperscript{409} have recommended developing countries press for ‘periods of grace’ of 5 years for developing and 10 years for least developed countries in implementation of any undertakings.

They have also proposed more generous approaches to exceptions or exemptions for dealing with smaller enterprises within such countries, special treatment for specific dynamic and growth-oriented sectors considered essential for economic development, and safeguards to preserve socio-cultural values.

However, taken as a whole, developing countries should not be sanguine about meeting even these modest ambitions (and especially those related to strengthening administrative and procedural disciplines), recognising the substantial vested interests in developed countries which are likely to oppose them.\textsuperscript{410}

\textsuperscript{408} C R Frischtak, B Hadjimichael and U Zachau, above n 336 at 2 and 20 - 23.
\textsuperscript{409} P Brusick, above n 178 at 479.
\textsuperscript{410} B M Hoekman, above n 216 at 2.
Reform Models

Although expansive multilateral models may have attracted relatively greater attention, less ambitious approaches have been advocated, and attracted support from, a number of quarters.

An Intermediate Solution

The maximalist approach of a global competition code has been criticised as being neither feasible or necessary,\(^{411}\) with critics advocating instead an intermediate approach modelled on supplementing existing WTO rules\(^{412}\) or extending the WTO’s TRIPs agreement.\(^{413}\)

Extending the approach adopted in the TRIPs would involve multilateral commitments on the national enforcement of existing domestic competition laws. This would involve undertakings on the procedures to be followed by competition authorities, expanding the capacity for private actions, and setting down standards of performance to ensure national enforcement procedures were effective and expeditious.

\(^{411}\) E M Fox, above n 273 at 34; P B Marsden, above n 197 at 94 - 95; P J Lloyd and G Sampson, above n 92 at 703; D I Baker, A N Campbell, M J Reynolds and J W Rowley, above n 206 at 450; J I Klein, above n 380 at unnumbered; A W Wolff, above n 81 at unnumbered.

\(^{412}\) E U Petersmann, above n 277 at 34.

\(^{413}\) A Mattoo and A Subramanian, above n 188 at 96.
The focus on enforcement harmonisation would have an advantage over alternate models which often stress action on substantive law, by recognising substantive law is broadly similar in the major jurisdictions, and agreement is likely to be more readily achieved when nations simply undertake to implement their own laws without any obligations on their content.

The core elements of such intermediate approaches on enforcement would include that redress should be pursued in the first instance under national administrative and judicial processes, with remedies under multilateral procedures being recourse of last resort, and foreigners, whether as producers or consumers, would have the same standing and access to enforcement procedures as nationals (that is, the WTO pillar of National Treatment).414

Other important elements would involve moving from the presumption enforcement is the primary responsibility of public sector agencies to allowing greater capacity for private enforcement, with attendant moves from administrative to judicial enforcement, and a broadening of the definition of ‘interested parties’ in domestic enforcement matters to include, for example, foreign producers who may not have a presence, but nevertheless have a commercial interest, in the relevant market.

\[\text{\footnotesize 414 \cite{Ibid at 96 - 98.}}\]
Nevertheless, as with other multilateral approaches to competition policy, a modest global agreement on enforcement could be difficult to achieve, reflecting the strong desire of national governments to retain independence of policy action in determining their national interests, which would be constrained if they were required to submit their enforcement policies and practices to global review.

Some commentators regard as more achievable efforts akin to mutual recognition, reflecting the legitimate desire of national governments to control anti-competitive conduct in their own jurisdictions, while also realising their mutual interests in co-operating to prevent such conduct harming one or more of their markets.

A mutual recognition approach would embrace the concepts of positive and negative comity: positive comity involves assurances by national governments their competition authorities will enforce their own rules to prevent anti-competitive practices in their jurisdiction harming their trading partners; while negative comity involve offering assurances competition authorities will enforce their own rules without intruding on the jurisdiction of other nations.

There are, however, a number of limitations on the effectiveness of positive comity.

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415 P B Marsden, above n 197 at 93.
Most notably, effective positive comity requires compatibility of national objectives and capabilities in international competition matters,\textsuperscript{416} and a very high level of trust between national governments and competition agencies, given the concern evidence exchanged under such comity arrangements may be (mis)used for trade purposes. Areas of particular vulnerability are seen\textsuperscript{417} to involve international cartels and market access enforcement.

Other limitations include the requirement the impugned conduct is contrary to the law of the requested country (without which competition authorities in that country would lack jurisdiction for an investigation),\textsuperscript{418} and the difficulties where the behaviour or matter subject to complaint relates to a government measure, or implicates the vital interests of the recipient of the request for assistance and co-operation.\textsuperscript{419}

**Minimalist Multilateralism**

Some commentators\textsuperscript{420} have proposed what could be called ‘minimalist multilateralism’ - that is, the minimal degree of multilateralism necessary to achieve objectives of modest ambition.

\textsuperscript{416} A B Zampetti and P Sauve, above n 3 at 21; A W Wolff, above n 81 at unnumbered.

\textsuperscript{417} J I Klein, above n 10 at unnumbered.

\textsuperscript{418} A B Zampetti and P Sauve, above n 3 at 21; P S Crampton and M Barutciski, above n 19 at 30.


\textsuperscript{420} E M Fox, above n 273 at 11; M J Trebilcock, above n 20 at 295 - 296.
This model builds on the assumption international problems call for international solutions, while at the same time recognising diversity is desirable and should be preserved. It also accepts the lack of general consensus (and vision) on competition issues within the global trading system.

One form of this model would see national enforcement of existing law and shared principles of law, and recourse to impartial and objective dispute resolution.

Substantive principles in this model would include a market access rule (under which markets would not be blocked by artificial restraints which harm competition), and an anti-cartel rule (excepting a nation may adopt specific, transparent derogations to deal with internal market problems). Such principles would be incorporated into national competition laws.

Other important principles would require nations not permit any anti-competitive act where the principal effect is harm to another contracting party, enforcement of National Treatment principles, bringing anti-dumping rules into line with price-predation rules, and maintaining a transparent ‘negative list’ of those activities/sectors not covered by any agreement.

Enforcement would take place in the first instance by the injured nation requesting the competition authorities of the injuring nation to enforce the latter’s relevant competition laws in its own jurisdiction or, failing this, allowing the injured nation to bring an action in its own jurisdiction.
Where disputes cannot be resolved by conciliation between nations or their courts of competent jurisdiction, enforcement would take place through a panel of experts from the disputing nations. The panel would be empowered to issue orders for a nation to enforce its competition laws.

Another ‘minimalist-style’ model would largely focus on building a culture of competition, within national, regional and multilateral institutions.

Key elements of this model would include expanding and making greater use of co-operative enforcement mechanisms existing between competition authorities in developed countries, extending technical assistance to competition agencies in developing countries and those looking to create competition laws, and expanded use of peer review procedures to raise the quality of competition regimes.

Other variations on such ‘minimalist multilateralism’ would see multilateral agreements on either a single or small number of substantive issues.

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421 J I Klein, above n 380 at unnumbered.
Proposals have been put forward for single-issue agreements on market access, where nations would have and enforce domestic laws prohibiting commercial conduct which unreasonably impaired market access, with particular attention to horizontal and vertical restraints.

Still another variation focuses in the first instance on the processes, rather than the substance, of negotiations, with one commentator proposing an installment approach, under which participating countries would sequentially reach agreement on those issues where there was consensus under a framework of continuing negotiations (building on essential WTO principles of national treatment, most favoured nation, and transparency).

While this approach would have the advantage of flexibility, the inherent disadvantages are acknowledged as including any such agreement would be piecemeal, lack comprehensiveness and result in a potential "jumble of rules of competition policy which may not necessarily be related with each other."

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422 E M Fox, above n 86 at 12 - 15 for a more detailed outline; M C Malaguti, above n 91 at 143.

423 M Matsushita, above n 104 at 5; M C Malaguti, above n 91 at 143, takes a similar view identifying, more broadly, business practices which artificially foreclose access to the relevant market.

424 M Matsushita, above n 104 at 3 - 4, which he points out has been, and remains, the approach adopted by the WTO and its Members in widening and deepening the GATS.

425 Ibid. at 3.
Regionalism

While considerable attention has been focused upon various multilateral models (of differing ambition) for dealing with competition law and policy issues in international trade and commerce, much less attention has been given to regional models.

Yet, according to some commentators,\textsuperscript{426} regional approaches to competition policy issues may well be optimum for those open economies which trade and invest intensively with each other, where effective enforcement of international commitments is important, and there is commonality of interests and systems.

However, the effectiveness of regional approaches may be highly sensitive to the stage(s) of regional economic integration.

It has been argued\textsuperscript{427} at lower stages of integration, competition policy is useful in eliminating trade barriers, but progress beyond this point requires closer and deeper economic integration before common competition rules can be implemented within the regional group.

But, after some point in the integration continuum, increasingly strict enforcement of competition laws and policies would become counter-productive (most notably when economic efficiency considerations place strains on regional cohesion and the less economically robust countries/regions of the grouping).

\textsuperscript{426} P Nicolaides, above n 58 at 137 - 139.

\textsuperscript{427} P Nicolaides, above n 219 at 143.
Regional approaches also have some clear advantages over multilateral models. Prominent amongst these advantages are such groupings are usually based on like-minded countries with commonality of views, having close commercial and economic relations.

Confidence between governments, at officials and political leadership levels, tends to be greater at regional levels which in turn produce better environments for meaningful negotiations, and thus potentially for outcomes.

Other advantages of regional models are greater confidence participating countries can manage the pace and substance of negotiations, without fear the processes will be taken over by the larger players who tend to dominate multilateral mechanisms, and trade-offs based on mutual concessions may be more readily identified and agreed amongst smaller groups of countries with closer ties. 428

Further advantages include the authorisation and monitoring of exemptions from, and compliance with, competition rules tends to be more effective at the regional level, and the returns from co-operation on competition policy are likely to rise with the intensity of economic integration and trade, which tends to be greater in substantive regional groupings.

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428 P Nicolaides, above n 58 at 121.
One such model\(^{429}\) would involve common competition principles embodied in rules and procedures adopted by national governments, with enforcement being the responsibility of national competition agencies where there were no external effects or independent regional competition authorities. Compliance with the common competition principles would rest on a common judicial process.

**Individualism**

While expansive models have attracted support from a range of quarters, an influential view\(^ {430}\) holds the most appropriate approach and remedy to problems in competition law and policy can be found in the application of well-constituted national competition laws.

One of the simplest, and potentially most straightforward, competition law and policy reforms would involve a single action by individual governments, namely the inclusion within domestic competition laws of a National Treatment principle.

That is, in developing and administering competition laws, a nation cannot treat foreign producers or consumers any less advantageously than it treats domestic producers and consumers.

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\(^{429}\) S Bilal and M Olarreaga, above n 132 at 161.

\(^{430}\) World Trade Organisation, above n 22 at 31.
The main advantages of this simple approach are its capacity to deal with beggar-thy-neighbour conduct (such as export and import cartels) and selective enforcement which are based on discrimination between domestic and foreign producers and consumers. 431

Inclusion of the national treatment principle in competition laws and policies would diminish the capacity of governments to apply opaque and subjective ‘public interest’ tests, which create the potential for differential treatment of domestic and foreign firms. 432 It would also assist in mitigating political pressure to use competition law and policy to achieve ‘market access’ outcomes. 433

No Model At All

There is a not insubstantial view, 434 including within the WTO, 435 that one of the most effective form of competition policy is free trade, given a wide range of anti-competitive practices would not be possible under genuine free trade.

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431 E Iacobucci, above n 66 at 30.
432 Organisation for Economic Co-operation and Development, above n 419 at 5.
434 Associated with the Chicago School of economic thinking: World Trade Organisation, above n 22 at 38.
435 J Seade, above n 88 at 478.
Against this background, one vigorous reform model is to have no ‘model’ at all. That is, competition policy is unnecessary at both national and international levels; the most effective form of competition policy is unfettered market competition; and, the best approach for governments to competition policy may be pursuit of international free trade.

Both Hong Kong and Singapore, which practice virtually free trade in goods, services and capital, argue they do not need national competition policies.\(^{436}\)

The ‘no model’ view\(^ {437}\) argues collusion and exploitation of dominant or monopoly powers are only feasible strategies in the longer term when there are government-sanctioned barriers to market entry and other special privileges.

It also holds that privately created imperfections in markets are either temporary, because any profits will serve to attract new competitors, or they reflect the legitimate superiority of the products or technologies of incumbent players.

In this situation, the appropriate role for competition policy is to ease entry into markets by new players, not only by limiting undue government influence but also by preventing unambiguously adverse business practices, such as horizontal cartels.\(^ {438}\)

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\(^{436}\) P J Lloyd, above n 31 at 19.


\(^{438}\) A W Wolff, above n 81 at unnumbered.
A moderate variation\textsuperscript{439} of this argument is the risks of 'market failure' have to be weighed against the risks of 'government failure', the latter of which lead to additional market distortions, inherent in any government intervention in the market place, including in the design and implementation of competition policy and its impact on international trade.\textsuperscript{440}

However, free trade is not regarded\textsuperscript{441} as a perfect substitute in all circumstances for active and effective domestic competition policies: trade can also act as a transmission mechanism for anti-competitive conduct, for example through collusion between firms in trading partner countries.

An important outcome of 'competition between competition policies' may well be a 'race to the top', as countries respond to incentives to pursue 'better' competition policies than their trading partners.\textsuperscript{442} The most notable of these incentives would be the appeal of the most efficient competition policy regime to inherently competitive firms and/or foreign investors.

As one commentator\textsuperscript{443} observed: "If each nation is permitted to pursue independent policies in accordance with its circumstances, the race to the top prediction implies that competition policies will evolve in a pro-competitive, but independent, manner."

\textsuperscript{439} E U Petersmann, above n 277 at 10.
\textsuperscript{440} J Seade, above n 88 at 478; I De Leon, above n 294 at 43 - 44.
\textsuperscript{441} P Nicolaides, above n 27 at 26.
\textsuperscript{442} E Iacobucci, above n 66 at 24, and 24 - 26, for a discussion of the economic theory underpinning this approach.
\textsuperscript{443} E Iacobucci, above n 66 at 28.
"Encouraging competition among competition policies will encourage each country to find optimal, pro-competitive policy in order to capture rents through international trade in imperfectly competitive markets. Compelled convergence of competition policies would undermine the race to the top..."

Other arguments used in favour of competition between competition rules are that it would result in governments moving closer and more quickly towards best practice through policy experimentation, reduce the risk of regulatory capture by those likely to be subject to any over-arching competition/regulatory regime, and provide greater respect for commercial and cultural diversity.

It would also ameliorate the risk that countries could adopt the 'wrong' substantive law or harmonise to a 'wrong' standard, and thus generate inefficient policy. A corollary of this argument is there is a need to identify and agree upon what constitutes best practice, which is not always readily achievable.

However, critics counter such approaches can lead to a 'race to the bottom', producing laxity of substance and enforcement in competition laws and policies. Such competition could also be welfare-reducing, by creating uncertainty in competition policy.

444 E U Petersmann, above n 277 at 12 - 13; P Nicolaides, above n 15 at 41 - 44, for a discussion of the arguments for and against such an approach.
445 E Iacobucci, above n 66 at 28.
446 Organisation for Economic Co-operation and Development, above n 419 at 7.
447 A Jacquemin, "Towards an Internationalisation of Competition Policy" (1995) 18 The World Economy 781 at 786.
They also argue the presence of substantial non-traded (particularly the services) sectors and other market imperfections in national economies mean even liberalised import competition will not amount to effective competition.

Other commentators consider any race to the bottom would not be a matter of the quality of the competition law and policy regime, but rather the rigour with it is enforced and the reluctance of some countries to introduce such laws and policies in the first place.

Local producers, in the absence of effective domestic competition laws, would be free to abuse whatever market power they may have, notably the formation of cartels, while producers in vertically integrated sectors and in markets typified by differentiated products could be insulated from international competition.

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448 M J Trebilcock, above n 20 at 270; World Trade Organisation, above n 22 at 30; J Levinsohn, above n 37 at 339 - 340.
449 A Jacquemin, above n 2 at 107.
450 L Waverman, above n 125 at 37.
452 J Levinsohn, above n 37 at 340.
Further substantive arguments\textsuperscript{453} for having in place effective competition laws and policies within a free trade framework include the impediments to trade which are not the result of trade policy - such as transport costs, lack of information about market conditions, and diversity in regulatory environments, and differences in technological standards - can result in imperfect competition where there are only a small number of market players.

A particularly important argument is despite the fast growth in international trade and progress in trade liberalisation (unilateral, bilateral, regional and multilateral) it has been reported\textsuperscript{454} around 80 per cent of manufactures produced in developed countries\textsuperscript{455} are sold domestically.

Similarly, the majority of production in many countries still takes place in non-tradable sectors - that is, sectors which are not directly exposed to international competition (for example, the public sector and many types of services), suggesting trade liberalisation will have relatively lesser impact\textsuperscript{456}.

Having examined the potential mechanisms and processes for internationalising competition law and policy within the global trading system, the study will now look at a number of the key issues in competition law and policy.

\textsuperscript{453} World Trade Organisation, above n 22 at 51; P S Crampton and M Barutciski, above n 19 at 7.
\textsuperscript{454} World Trade Organisation, above n 22 at 51.
\textsuperscript{455} OECD measure.
\textsuperscript{456} World Trade Organisation, above n 22 at 51.
Key Issues in

Competition Law and Policy
Any meaningful discussion of the actual or potential linkages between competition and trade law and policy will necessarily require an understanding of the key policy issues. This section examines a number of those issues, seeking to identify both the general issues, and the points of harmony and tension.

### Dumping

Dumping was one of the earliest elements of trade policy and practice subject to the GATT\(^\text{457}\) when it was formed in the post-War period, reflecting the widely held perception dumping was unfair to domestic competitors and would undermine respect for the international, rules-based trading system.

The original objective of the GATT parties was not to prohibit national anti-dumping arrangements, but rather to set in place mechanisms\(^\text{458}\) to avoid the proliferation of anti-dumping measures which would diminish the benefits of other trade liberalisation initiatives (principally, at the time, tariff concessions). In effect, the world trading system does not encourage anti-dumping laws; rather, it tolerates them.\(^\text{459}\)

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\(^{458}\) GATT 1947 Article VI.

\(^{459}\) E M Fox, above n 8 at 179.
Indeed, the GATT/WTO provisions on anti-dumping are the only rules which allow government measures (that is, anti-dumping duties) to offset alleged private sector anti-competitive behaviour (that is, dumping). And, while such rules may be enforced by governments, anti-dumping actions are generally initiated by private parties against other private parties, seeking government support for sanctions which are GATT-consistent.\footnote{PS Watson, J E Flynn and CC Conwell, above n 145 at 297.}

GATT Article VI required the application of an injury test in anti-dumping cases, and any countervailing duties not exceed the margin of dumping, with later work improving on procedural and transparency requirements.

The WTO has fairly well-recognised rules on dumping, permitting Member States to impose anti-dumping measures (either countervailing duties or accepting price undertakings) in response to pricing actions by foreign enterprises, where they cause material injury to an established industry or threaten material injury to the establishment of a domestic industry.\footnote{World Trade Organisation, above n 22 at 68.}

The basic definition of dumping is introducing a product “into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”\footnote{The Anti-Dumping Agreement, Article 2.1.}
Where there are no sales of the product in the ordinary course of trade in the domestic market of the exporting country, a constructed price is estimated based on the comparable price of a like product exported to an appropriate third country, taking into account costs of production, administration and sales, and reasonable profit.\textsuperscript{463}

The Anti-Dumping Agreement,\textsuperscript{464} which contains the WTO’s dumping rules, also sets out procedural and substantive rules for applying anti-dumping measures, in particular banning the use of voluntary export restraints and orderly marketing arrangements. There are also agreed definitions of market-sharing, stricter conditions for causality and proof of injury.\textsuperscript{465}

\textsuperscript{463} The Anti-Dumping Agreement, Article 2.2.

\textsuperscript{464} Or more properly, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

\textsuperscript{465} G N Horlick and E C Shea, “The World Trade Organisation Antidumping Agreement” \textsuperscript{(1995) 29(1) Journal of World Trade} 5 at 23 - 31, on the key elements of the Agreement, particularly those relating to investigations (Articles 5.2, 5.3 and 5.4), calculation methodology and information (Articles 6.8 and 6.10), negligible import share (Article 5.8), sales below cost (Article 2.2), and ‘sunset clauses’ for anti-dumping rulings (Article 11.3).
Ironically, these disciplines are likely to stimulate greater recourse by protectionist-minded parties to (anti)dumping arrangements. Further reforms are seen to be necessary to eliminate the substantial administrative discretion available to dumping agencies, and to challenge the concept (per se, and for its bias and vagueness) of 'unfairness' which underpin (anti-)dumping regimes.

The importance for developing countries of substantive reforms to anti-dumping laws is underscored by the high usage of such actions by developed countries, generally and disproportionately against developing countries, often for protectionist purposes.

It has been estimated at mid-1996 WTO Members maintained 776 anti-dumping measures (either anti-dumping duties or price undertakings affecting exporters), of which 72 per cent were imposed by developed countries (the remaining 28 per cent by developing countries).

466 BM Hoekman and PC Mavroidis, above n 31 at 27; PS Watson, J E Flynn and CC Conwell, above n 145 at 297; also, C Morgan, "Competition Policy and Anti-Dumping: Is It Time for a Reality Check?" (1996) 30(5) Journal of World Trade 61 at 69 - 75, for a discussion of some of the strengths and weaknesses in the Anti-dumping Agreement from a competition policy perspective.


468 RS Khemani, above n 353 at 482.

469 BM Hoekman, above n 216 at 9 - 10, which includes a tabular representation of the countries against which measures were in force in June 1995 and June 1996.
Similarly, of the 317 new investigations into allegations of anti-dumping launched by WTO members in the two years to June 1996, two-thirds were directed against firms from developing countries, who otherwise account for just under one-third of world trade (in 1993).\textsuperscript{470} However, an increasing number of developing countries are responding with anti-dumping regimes of their own.\textsuperscript{471}

The often concurrent existence of competition and dumping laws within national jurisdictions can create tensions between the two streams, especially given the differences in the underlying principles, and substantive criteria and procedures for evaluating business conduct.

From the standpoint of principle, the primary orientation of competition law and policy is to preserve competition, while dumping law and policy are ostensibly protectionist (that is, protecting competitors).\textsuperscript{472}

\textsuperscript{470} The U.S. Department of Commerce reportedly found 'no dumping' in zero cases in 1989 and 1990, and a mere 2 per cent in 1991 and then 1 per cent in 1992; that is, almost all dumping complaints were upheld in that four year period: G N Horlick and E C Shea, above n 465 at 5.

\textsuperscript{471} B M Hoekman, above n 216 at 10, reports at mid 1996 some 54 predominately developing and transitional economies had notified anti-dumping legislation to the WTO.

\textsuperscript{472} P A Messerlin, "Should Antidumping Rules be Replaced by National or International Competition Rules?" (1995) 18(3) World Competition 37 at 37; World Trade Organisation, above n 22 at 69; R S Khemani, above n 12 at 145; P Brusick, above n 273 at 158; B M Hoekman and P C Mavroidis, above n 31 at 27.
Key tensions between competition and (anti)dumping laws and policies include: definitions of ‘relevant market’, where the former is more careful and objective, while in the latter it is ‘defined’, usually subjectively, by the complainants; and, definitions of ‘market participants’, where the former often embraces current and potential players, while the latter focuses on existing, domestic industry.

Other tensions include: the assessment of market practices, where the former looks at anti-competitive effects, while the latter disregards such considerations; and, injury and causal relationships, where the former focuses upon the impact upon the competitive market place, while the latter is concerned with the damage suffered by import-competing firms.\textsuperscript{473}

Anti-dumping laws generally foreclose enforcement agencies (which are usually not competition authorities) from examining the efficiency dividends of alleged cases of dumping, generally emphasising (either explicitly or implicitly) the (subjective) concept of ‘fairness’.\textsuperscript{474} Not surprisingly, dumping laws and policies usually fail competition policy tests.\textsuperscript{475}

\textsuperscript{473} P A Messerlin, above n 472 at 40 - 44; B M Hoekman and P C Mavroidis, above n 31 at 31; C Morgan, above n 466 at 69 - 75.


\textsuperscript{475} D J Gifford, above n 474 at 1055; E U Petersmann, above n 277 at 30; A Fels, “Trade and Competition in the Asia Pacific Region” (unpublished paper given to the Economic Society of Australia, Adelaide, 1995) at unnumbered; S Nagaoka, above n 433 at 19.
A confidential study by the Organisation for Economic Co-operation and Development (OECD) of anti-dumping practices in Australia, Canada, Europe and the US produced in 1995 reportedly\(^{476}\) found that in the overwhelming majority of cases where anti-dumping procedures were applied, there was no credible threat to competition in the market place. The study also found the anti-dumping ‘remedies’ applied generally delivered competition-reducing outcomes.

Ironically, from the perspective of substantive criteria and procedure, anti-dumping law generally requires a complaint be lodged by the domestic industry with a dominant position and/or requiring a degree of collective and concerted action which itself, absent any formal authorisation process, may be actionable under competition law.\(^{477}\)

Problems with the application of dumping rules are compounded by the sometimes comparable treatment of ‘dumped’ and ‘subsidised’ goods in some jurisdictions, which are otherwise materially different: while dumping is generally a pricing practice engaged in by the private sector, subsidies are payments by government to firms.\(^{478}\)

\(^{476}\) G Niels and A T Kate, above n 474 at 38.

\(^{477}\) F M Scherer, above n 280 at 14; World Trade Organisation, above n 22 at 69.

\(^{478}\) A O Sykes, above n 457 at 13.
The EU and the US constitute a useful study in comparative approaches to dealing with (anti)dumping matters.\textsuperscript{479}

Anti-dumping actions on trade between EU Members are expressly prohibited by the Treaty of Rome, and are only allowed in cases where the imports originate outside the Union.\textsuperscript{480}

Complaints of cross-border price discrimination and predatory pricing within the Union are addressed under competition rules,\textsuperscript{481} with findings by the Commission of predatory pricing (akin to dumping) being comparatively rare.\textsuperscript{482}

An important characteristic of the EU's anti-dumping regime is the 'Community Interest Test',\textsuperscript{483} which requires a comprehensive investigation of all the arguments for and against the imposition of dumping measures - that is, taking into account the interests of non-industrial and private end-users.

\textsuperscript{479} While they may have discernible differences in their 'national' approaches to anti-dumping, they reportedly found sufficient common ground during the Uruguay Round to prevent meaningful reforms to the GATT Anti-Dumping Code sought by almost all other major trading nations: G N Horlick and M A Meyer, "The International Convergence of Competition Policy" (1995) 29(1) The International Lawyer 65 at 73.


\textsuperscript{481} Article 86.

\textsuperscript{482} Just two cases in the 16 years to 1996: Meldoc, O.J. L 348/50 (1986), and Tetra Pak II, O.J. L 72/1 (1992).

\textsuperscript{483} Council Regulation 3283/94, Article 21.
While the Commission may refuse to impose anti-dumping measures where they were otherwise sustained by formal investigation and threshold tests, experience shows the Community Interest Test has rarely been invoked.\textsuperscript{484}

The US approach to dumping, by contrast, has seen a number of policy shifts since its first statute in the early years of the twentieth century.

While the original Anti-dumping Act and subsequent amendments\textsuperscript{485} focused on predatory and discriminatory pricing, subsequent judicial decisions\textsuperscript{486} adopted a wider perspective, with later legislation\textsuperscript{487} broadened the scope by targeting sales of foreign producers at prices below cost and/or sales in the US at prices below those in the home market.\textsuperscript{488}

\textsuperscript{484} Under its predecessor, Council Regulation 2423/88.
\textsuperscript{485} 15 U.S.C, Section 72, enacted in 1916; Anti-dumping Act of 1921, Chapter 14;
\textsuperscript{486} Trent Tube Division vs United States, 741 D Supp 921 (1990); U.S.X Corp vs United States, 682 F. Supp. 60 (1988), deciding U.S. anti-dumping law targeted more than just predatory pricing. However, the U.S. Supreme Court in United States vs Matsushita, 475 US 116 (1986) held that international price discrimination per se was an acceptable business strategy.
\textsuperscript{487} Trade Act, 19 U.S.C, Section 1677b (b), (174).
\textsuperscript{488} However, this was circumscribed by Brooke Group Ltd vs Brown Williamson Tobacco Corp, 113 S. Ct. 2578 (1993), and Matsushita Elec. Indus. Co vs Zenith Radio Corp, 475 US 574 (1986), when the Supreme Court established the recoupment of losses test as a determinative one in dumping and predatory pricing cases.
The US approach has come in for strident criticism\textsuperscript{489} for its highly protectionist effects, including insulating American producers from competition which would generally be accepted as efficient and reasonable, and disadvantaging exporters using such products in their own production streams.

The Americans have also retained anti-dumping provisions within otherwise trade-liberalising agreements (for example, the North American Free Trade Agreement), despite the preference of their partners (especially, Canada) for the abolition of dumping, or failing this its replacement by competition rules.

While differences in competition law and policy between the NAFTA partners reportedly played a role, the political influence of domestic pressure groups was also important.\textsuperscript{490}

Critics of anti-dumping within the international rules-based trading system\textsuperscript{491} argue anti-dumping actions are contingent protection for inefficient and uncompetitive domestic producers to restrict legitimate foreign competition, used to harass actual/potential competitors, with most anti-dumping actions being contrary to the intention and spirit of the GATT/WTO.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{489} D J Gifford, above n 474 at 1092 - 1093.
\item \textsuperscript{490} B M Hoekman and P C Mavroidis, above n 31 at 35.
\item \textsuperscript{491} P J Lloyd, above n 31 at 11; World Trade Organisation, above n 22 at 70; J Levinsohn, above n 37 at 338; P K M Tharakan and P J Lloyd, "Competition Policy in a Changing International Economic Environment: An Overview" (1998) 21 (8) \textit{The World Economy} 997 at 998; S Bilal and M Olarreaga, above n 132 at 158, add counter-vailing duties and safeguards measures to the list.
\end{itemize}
\end{footnotesize}
Yet, in the near forty year history of the GATT (to 1986), only two formal complaints were ever lodged by Member States: the first, in 1955, by Italy against Sweden; and, the second, thirty years later, by Finland against New Zealand (both of which were upheld).\(^{492}\)

The sectoral incidence of anti-dumping complaints often reflects the anti-competitive outcomes of government industry policies (with sheltered or government-favoured industries being more likely to complain of ‘dumping’)\(^{493}\) and macroeconomic (mis)management (with an inverse correlation between economic growth and the incidence of dumping claims\(^ {494}\)).

Furthermore, where alleged cases of dumping (proven or not) involve remedial action in the form of voluntary restraint-style undertakings, requiring exporters to raise prices and/or reduce volumes exported, these arrangements can operate as de facto export cartels, and hence can be anti-competitive.\(^{495}\)

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\(^{493}\) A O Sykes, above n 457 at 40 - 41; M A A Warner, above n 87 at 34; Organisation for Economic Co-operation and Development, above n 419 at 6.

\(^{494}\) Organisation for Economic Co-operation and Development, above n 311 at 8.

\(^{495}\) F M Scherer, above n 280 at 14; P J Lloyd, above n 31 at 1; E U Petersmann, above n 277 at 30; S Bilal and M Olarreaga, above n 132 at 159; S Nagaoka, above n 433 at 4; A O Sykes, above n 457 at 40.
The better approach is seen to involve removing dumping from the trade policy realm of the WTO and placing it within a competition policy framework, relying on efficiency-based criteria.

Advantages of such an approach would include giving greater weight to economic efficiency and consumer benefit (rather than inefficient domestic producers), diminution of government discretion (often subject to vested interest pressures), and allowing greater account to be taken of wider market conduct not covered by the more narrowly defined ‘dumping’ rules.

Appropriate considerations in assessing ‘dumping’ claims under competition policy would include concepts such as the ‘relevant market’, the significance of market share, with redress being limited only to those cases which had anti-competitive effects.

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496 PA Messerlin, above n 472 at 37; P J Lloyd, above n 31 at 11; R S Khemani, above n 12 at 145; M C Malaguti, above n 91 at 150 - 151; A O Sykes, above n 457 at 39; it has been suggested the repeal of anti-dumping laws would likely produce greater world consumer welfare than would antitrust enforcement itself: E M Fox, above n 86 at 16.

497 Organisation for Economic Co-operation and Development, above n 311 at 8; B M Hoekman and P C Mavroidis, above n 31 at 49.

498 I De Leon, above n 467 at 167.

499 P Brusick, above n 273 at 158; P A Messerlin, above n 472 at 50 - 54.
Similar standards could be used in evaluating anti-dumping claims as are applied to allegations of predatory pricing by domestic firms.  

Such an approach would take into account the interests of consumers rather than just producers (in anti-dumping matters, usually only one or a small handful in number), as has been done by the European Union, and Australia and New Zealand as part of their ANZCERTA treaty.  

However, the confidential OECD study mentioned earlier found the overwhelming majority of anti-dumping cases studied would have failed price predation tests.  

Another approach would involve the sequential enforcement of anti-dumping and competition rules. This would see anti-dumping regulations enforced under the explicit threat of competition actions.  

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500 E U Petersmann, above n 277 at 31; J Levinsohn, above n 37 at 344; B M Hoekman and P C Mavroidis, above n 31 at 29 argue, from an economics perspective, predatory dumping is the exception, not the rule implied by supporters of anti-dumping arrangements.  

501 Above n 146.  

502 As reported in G Niels and A T Kate, above n 474 at 38, only 10 per cent of cases studied for the U.S., less than 1 per cent of cases studied for the European Union, and zero cases for Australia and Canada, would have plausibly even been considered as predation.  

503 P A Messerlin, above n 472 at 50 - 52.  

504 The E.U. has already moved in this direction, when the European Court of Justice overturned a Commission determination on dumping because the latter had not taken into account competition related factors which may have been damaging to the complainant industry: Extramat Industry SA vs Council of the European Communities (Case No C-358/89; Decision of 11 June 1992).
Put simply, anti-dumping agencies would carry out their investigations under the supervision of competition authorities who would be able to intervene, including taking over an application, where the proposed outcome was anti-competitive or efficiency-compromising.

A complementary approach would require the nature and extent of contestability in the exporter's home market, as determined by a competition agency in that market, to be a precondition for an anti-dumping investigation.

This would require a determination of whether the implied 'unfair trade' test (that is, market access restrictions) characteristic of anti-dumping complaints was satisfied, and the convergence of the pricing tests of dumping rules with the price discrimination tests of broader competition law.

Most importantly, from a broader competition law and policy perspective, it would involve a fundamental shift from the existing 'injury to competitors' (that is, the domestic industry producing the like-product) to an 'injury to competition' (that is, injury to the importing country as a whole) approach.

An inevitable outcome of both approaches would be diminished use of dumping for ostensibly trade-protectionist purposes.

505 B M Hoekman and P C Mavroidis, above n 31 at 27 - 28; G Niels and A T Kate, above n 474 at 29.

506 B M Hoekman and P C Mavroidis, above n 31 at 47.
Enforcement

Enforcement is, self-evidently, a significant element of any law and policy regime, including competition law and policy, with differences in substance, process and sanctions having potentially powerful effects on the nature and pattern of international trade and commerce.\(^{507}\)

Weak enforcement of domestic competition laws and policies can be as pernicious for market access as State-imposed barriers, and comparable to the absence of competition laws and policies (that is, a poorly enforced competition regime can be worse than no regime at all, and can create market access problems comparable to traditional forms of trade protectionism).\(^{508}\)

Inadequate enforcement in one nation can also deter new entrants from a market thus distorting trade in favour of existing players in that market, and used for industry policy purposes.\(^{509}\) Conversely, over-vigorous enforcement, and/or 'excessive' penalties (in the eyes of potential entrants) could discourage entry to that market, thus amounting to de facto protectionism.

\(^{507}\) J O Haley, above n 73 at 305; P S Crampton and M Barutciski, above n 19 at 7.

\(^{508}\) Ibid at 7 - 8.

\(^{509}\) A B Zampetti and P Sauve, above n 3 at 21; E M Fox, "Developing Criteria for Assessing Degree of Actual Enforcement of Nations' Competition Law, with a Particular View to Market Access/Trade Problems" (unpublished paper given to the OECD Trade Committee, Paris, 1995) at 2; P B Marsden, above n 402 at 22.
Measuring the vigour of enforcement is fraught with difficulties. Key elements which need to be taken into account include the nature of the anti-competitive conduct (for example, cartel, abuse of dominance), and the nature of the industry (for example, standardised and homogenous goods, versus differentiated, higher technology products).

Other elements include the degree of competition expected in the market (for example, the nature and extent of market and regulatory barriers to entry), and the nature of the nation's legal system (for example, the breadth of discovery and transparency).  

The major enforcement regimes operating around the world tend to fall into two types, that of the US and that of the European Union. Key characteristics of the US system are criminal prosecutions, treble damages suits, and a heavy emphasis on judicial processes, while those of the EU are administrative penalties and enforcement by administrative agencies.

Further, the US system, in part reflecting the duality of enforcement, is regarded as more exposed to political influence on enforcement matters than is the case in the EU where competition agencies are regarded as more independent.

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510 E M Fox, above n 509 at 3, and 7 - 12 for a potential quantitative approach to enforcement, using measurable indicia.

511 M Matsushita, above n 104 at 8.

512 J O Haley, above n 73 at 310, for a discussion of the then prevailing penalties.

513 Federal Trade Commission, and the Antitrust Division of the Department of Justice.

514 J O Haley, above n 73 at 310.
The role of the judiciary in enforcement also differs noticeably between the two jurisdictions, with the Courts in the US playing a central role in the development of competition law through judicial decision-making, as well as actively participating in enforcement. By contrast, in the EU administrative agencies take a leading role in the imposition of financial penalties, with the judicial and administrative courts having more of a reviewing role.\footnote{Ibid at 311.}

Investigatory powers also differ markedly between the two jurisdictions, with those of the US competition authorities considerably broader and more coercive (with access to, for example, extensive discovery and reporting requirements, and judicial contempt sanctions) than those of their European counterparts (who are more reliant on surprise site searches for evidence).\footnote{Ibid at 312.}

Regardless of these differences, it is a major leap to suggest one system is any more effective than another, given the near-impossibility of measuring the incidence of anti-competitive behaviour and/or the deterrent effect of existing or alternative systems.\footnote{Lower levels of enforcement activity may reflect lesser incidence of anti-competitive behaviour, rather than necessarily weaker enforcement. E M Fox, above n 509 at 7 - 12, for a quantitative approach to enforcement, using measurable indicia.}
Greater convergence and/or harmonisation of the enforcement of national competition regimes would require proponents to confront a number of significant challenges, not least of which are the adequacy of national competition law and policy regimes.

More specific issues include substantive differences on key matters such as abuse of dominance, mergers, and horizontal and vertical arrangements, as well as the nature and extent of exceptions, exemptions and special treatment, transparency in the administration of competition laws, the place (if any) of private actions, burdens and standards of proof, the reach and effectiveness of judicial review, and differences in national penalty regimes for anti-competitive conduct.

A significant issue would be the nature and extent of discretion of competition and/or prosecutorial agencies regarding enforcement (either investigation and/or prosecution). While some may regard the exercise of such discretions as discriminatory (and protectionist of domestic markets/players), it is unlikely sovereign governments would readily compromise on such discretion.

518 R Pitofsky, above n 13 at unnumbered.
519 H Spier, above n 24 at 13; E M Fox, above n 509 at 5 - 7.
521 E M Fox, above n 509 at 11, pointing out the U.S. is likely to be a particularly vigorous opponent of any incursions into such discretion.
Another important issue is the effective protection of confidential information exchanged between national competition enforcement agencies, most notably that involving trade secrets and other proprietary information, inappropriate disclosure of which would damage the interests of the relevant firm and potentially related and other national firms.

Essential safeguards are seen to include requiring national competition agencies in possession of, or otherwise empowered to collect, such information to notify the relevant firm(s) of their intention to exchange this material, and in doing so seeking the firm’s comments on the potential exchange.

Ensuring such effective safeguards is likely to be problematic, reflecting the apparent difficulty of competition authorities reaching agreement on the definition of confidential information, differences in national legal systems on the treatment of confidential information in competition proceedings, and in the sanctioning of competition law violations.

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522 R B Starek, above n 1 at 38 - 40, for discussion of problems on the exchange of confidential information under U.S. law; and, N Hachigian, “Essential Mutual Assistance in International Antitrust Enforcement” (1995) 29(1) The International Lawyer 117 at 127 - 132, and T Lampert, above n 118 at 217 - 219, for similar discussion on exchanges between the E.U. and the U.S.

523 United States Council for International Business, above n 344 at 3.

524 F Jenny, above n 204 at 14 - 15.
Such co-operative arrangements are expected to be successfully realised in only a small number of developed countries (for example, in alphabetical order, Australia, Canada, the European Union, New Zealand and the US), largely on bilateral bases, which have similar legal systems, comparable economic experiences and the necessary high levels of mutual trust.

Taken as a whole, efforts to force convergence and/or harmonisation of national enforcement regimes are likely to have little chance of success, with such endeavours only creating confusion and any outcomes probably tending towards being ineffectual.

In general terms, one country is not going to assist another where they have contrary competition laws and policies: “It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack”.

The more pragmatic approach would appear to be accepting that enforcement of laws, policies and regulations are deeply rooted in national cultures and traditions, with selection and operation of enforcement systems being matters of national prerogative.

525 International Bar Association, above 222, for a general discussion of the strengths and weaknesses of different approaches to the exchange of confidential information.

Basic principles such as transparency and due process, and comparability of penalties across jurisdictions are considered to be reasonable objectives. Attention will also have to be given to the conditions for the exchange of confidential information, including that acquired through use of compulsory powers.

Some commentators see greater utilisation of right of private action as a means for strengthening enforcement within individual jurisdictions, even where this was limited solely to injunctive relief or awards of actual damages, and expanding judicial reviews of decisions of competition enforcement agencies.

However, others caution against the over-liberal recourse to private actions given their potential to be used for harassment of competitors or other illegitimate purposes.

Still others see the better approach being an international agreement requiring participating nations to guarantee due process, whether it be administrative, civil or criminal. Key elements of such an instrument would be a requirement for competition authorities to treat seriously any well-founded complaint filed by a private party, and this complaint not be rejected without good reason.

527 M Matsushita, above n 104 at 8.
528 N Hachigian, above n 522 at 147 -150.
530 P S Crampton and C L Witterick, above n 209 at 54.
531 M Matsushita, above n 123 at 10.
Enforcement of competition law and policies through the WTO mechanism has also attracted attention.\textsuperscript{532}

Particular problems likely to be encountered by the WTO's dispute settlement mechanism include the collection of information, the effective protection of confidential information (especially that which is privately-held), the treatment of expert analysis, penalties and remedies, standing, the interests of third parties (especially private actors), precedent, evidence and standard of proof.\textsuperscript{533}

A more productive approach may be to limit the WTO's role to assessing the compatibility of substantive national competition law and policy regimes with any internationally agreed core competition principles.\textsuperscript{534}

\textsuperscript{532} P C Mavroidis and S J Van Siclen, above n 30, for an extensive discussion of the modalities, strengths and weaknesses of using the WTO's dispute settlement mechanism to adjudicate competition law and policy disputes, under a range of scenarios.

\textsuperscript{533} P C Mavroidis and S J Van Siclen, above n 30 at 44.

\textsuperscript{534} Ibid at 20; P B Marsden, above n 402 at 16, on a Competition Policy Review Mechanism.
Exceptions and Exemptions

The presence of exceptions and exemptions offered by governments in national competition law and policy regimes is a significant factor in undermining their efficiency, and limiting their effectiveness. Many of the sectors exempted are those where anti-competitive practices are more prevalent.

Such forms of special treatment generally fall into two main categories: explicit exemptions, which are conferred by legislation and/or regulation; and, implicit exemptions, which occur when competition law and policy are displaced by industry-specific regulatory regimes.


536 E M Fox, above n 93 at 16 - 17; World Trade Organisation, above n 22 at 47; P S Watson, J E Flynn and CC Conwell, above n 145 at 302 question, given the poor enforcement record and ineffectual remedies imposed on cartels, whether anti-cartels laws are being effectively observed.

537 World Trade Organisation, above n 22 at 31.
Exemptions from competition law and policy in developed countries tend to be more prevalent in sectors which are subject to industry-specific regulation.\textsuperscript{538} These include banking, broadcasting, defence, primary industry, public utilities, postal services, state-owned enterprises and transportation.\textsuperscript{539} Small and medium sized business are also major beneficiaries of such special treatment.\textsuperscript{540}

Such exceptions have been created to reinforce the claimed high national importance of those sectors should not be exposed to effective competition, other regulatory regimes applying in those sectors, and the social goals being pursued by public entities (for example, in transport and telecommunications).

Table 5 gives an overview of some of the main activities and areas of exempt conduct within selected OECD member countries, and the European Union.\textsuperscript{541}

\begin{itemize}
\item \textsuperscript{538} Gordon \textit{vs} New York Stock Exchange, 422 US 659 (1975), holding pervasive government regulation is inconsistent with antitrust liability.
\item \textsuperscript{539} Organisation for Economic Co-operation and Development, above n 311 at 9; P Nicolaides, above n 58 at 132; E M Graham and J D Richardson, above n 202 at 552 - 553.
\item \textsuperscript{540} World Trade Organisation, above n 22 at 47.
\item \textsuperscript{541} Organisation for Economic Co-operation and Development, above n 311 at 20.
\end{itemize}
Table 5: Exemptions from the Application of Competition Policy: By Type\textsuperscript{542}

<table>
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<tr>
<th></th>
<th>United States</th>
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\textsuperscript{542} Edited version of Ibid.
Table 5 indicates, of the OECD countries studied and the EU, exceptions and exemptions (by generic type) were generally more available in Germany and the EU (especially for cartels and block exemptions, respectively), with most of the countries reported providing exceptions and exemptions for intellectual property rights, co-operatives and associations, and intra-firm agreements.

The nature and extent of sectoral reach, allowing for exceptions and exemptions, are seen to be an important barometer of the strength/weakness of competition law regimes. Other important indicators include independence (from political interference) and transparency in decision-making on competition policy matters.

Table 6 highlights a number of examples of sectoral exemptions from the application of competition law and policy in selected OECD member countries and the EU.

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543 B E Hawk, above n 66 at 17.
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<tr>
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**Codes:**
- **AG** = certain types of agreement
- **CA** = cartels and recommendations
- **ME** = mergers
- **NM** = natural monopoly
- **RPM** = retail price maintenance
- **SE** = statutory exemptions

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544 Edited version of World Trade Organisation, above n 22 at 48, reporting on Organisation for Economic Co-operation and Development, above n 311 at Table 8.
As Table 6 indicates, by country, Japan and the United Kingdom appear to be the most generous in providing sectoral exemptions, while the EU and the US are least inclined to provide such special treatment.

By sector, exemptions appear most prevalent in the agricultural and fisheries, and the various transport sectors, and least available in the energy sector (possibly because, in many countries, these sectors are subject to either separate regulation or 'shield of the State' arrangements).

The presence and reach of exceptions creates tensions between nations, particularly where there are differences in their types and sectoral breadth/depth. What may be exempt under competition policy in one country may be captured in another; what may be prohibited per se in one jurisdiction may be subject to 'rule of reason' tests in another.

One of the most controversial exceptions (and potentially limiting factors to the extension of competition policy) is the treatment of government and its entities under competition policy.

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546 Table 6 shows only the presence of certain exemptions, which is not necessarily indicative of their intensity.

547 P Nicolaides, above n 58 at 132 - 133; also, sub-section of this study dealing with 'Government Conduct'.

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The European Union, for example, is unusual in that its competition policy regime applies to any public policy which may confer an advantage on an enterprise, to any law which may lead enterprises to collude or abuse their dominant positions in the market, and to any firm or agency owned by the State.

Containing and/or winding back the nature and extent of exceptions and exemptions is likely to be both difficult and necessary, with one approach being transparency based models.

Under one model, nations would place on a public register all exemptions offered and/or market distortions caused by government actions, with claims of ‘excessive exemptions’ being subject to dispute settlement before the World Trade Organisation.

Another important source of tension relates to the relationship between competition law and policy, and government regulation.\textsuperscript{549}

These tensions arise from legal principles which require legislation of general application, such as competition laws, to defer to specific legislation, thus allowing statutes regulating a sector to override general competition law\textsuperscript{550} which generally reflect the different national attitudes to the appropriate dividing line between market forces and government intervention.\textsuperscript{551}


\textsuperscript{550} Organisation for Economic Co-operation and Development, above n 25 at 8.

A prominent example of such tensions exists in the US, where mergers in particular industries may be exempted from review by competition authorities if the merger is approved by the appropriate regulatory agency.\(^{552}\)

Regulated industries which receive special treatment under competition laws are often associated with some of the most severe competition problems.\(^{553}\)

Governments seek to intervene in the operation for economic (for example, to correct what are perceived to be ‘market failures’\(^{554}\)) or political (that is, electoral) reasons. However, such interventions can also produce ‘government failure’, when the resulting distortions to market conduct are inefficient in pursuing their stated objective and/or their costs outweigh their argued benefits.\(^{555}\)

The international competition implications of such government regulatory arrangements can include foreclosure of relevant domestic markets to foreign competitors, as well as raising the input prices for tradable goods and services (for example, regulation of power utilities).

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\(^{553}\) World Trade Organisation, above n 22 at 42; G Hewitt, above n 549 at 178 - 179.

\(^{554}\) Which economists say arise, inter alia, when the private costs/benefits of an activity diverge from their social costs/benefits.

\(^{555}\) P Nicolaides, above n 214 at 7.
Generally, governments have failed to design and implement clear frameworks for competition and regulatory policy and their respective agencies, evident in the absence of transparent, operational demarcation of approaches and responsibilities between economy-wide competition authorities and (the often numerous) sector-specific regulatory agencies.\textsuperscript{556}

Primary amongst these operational differences are the mechanisms used by the two disciplines: while competition policy relies on prohibitions or rules-of-reason, regulatory policy tends to depend upon commandments (that is, prescriptions of actions required of the regulated firms), which can cover aspects of commerce such as costs, prices, and access arrangements.\textsuperscript{557}

Other key differences include: while competition authorities focus on reducing market power, regulatory agencies are often charged with attenuating the effects of such power; competition authorities tend to look for structural remedies to problems, while regulatory agencies impose and monitor different behavioural conditions; and, competition authorities apply an ex post enforcement approach (except in merger cases), while regulatory agencies generally apply ex ante prescriptive approaches.\textsuperscript{558}

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\textsuperscript{557} P Nicolaides, above n 214 at 12.
\textsuperscript{558} Organisation for Economic Co-operation and Development, above n 551 at 173 - 174.
\end{flushright}
If anything, the inherent tensions appear likely to get worse, as sector-specific regulation and supervision are gaining ground at the expense of generalised competition policy for most of the newer areas of competition policy.\footnote{559}{E Hope and H Thorsen, above n 556 at 265, acknowledging the exceptions of Australia and New Zealand.}

Problems arise when governments seek to preserve traditional 'safe-havens' (sectors, industries and even firms) from competition through interventionist regulation,\footnote{560}{RS Khemani, above n 12 at 151; A Schaub, above n 2 at 229.} and with the incompatibility of different regulatory (and resulting business systems) between trading nations.\footnote{561}{A Fels, above n 475 at unnumbered.}

Prominent forms of regulation which have anti-competitive effects, and impede liberal trade include technical standards, either 'voluntary' or mandatory, which can restrict market access for products,\footnote{562}{A business survey of competition law concerns identified general economic regulation, labour regulation and product standards requirements as important hurdles to increased market penetration in domestic markets: Business and Industry Advisory Committee, "BIAC Report on the Survey of Business Competition Law Concerns" (unpublished paper presented to the OECD Conference on Trade and Competition, Paris, 1999) at 3.} and certification and licencing for services.\footnote{563}{Organisation for Economic Co-operation and Development, above n 287 at 4; M Matsushita, above n 340 at 32.}
Where such standard-setting and/or enforcement is delegated to the private sector (even under government oversight), domestic firms have an incentive to raise the degree of difficulty for foreign firms seeking to enter and/or expand into the affected national market.564

State aids, in the form of investment, research and development, and training supports (which are often provided by governments to national firms to 'compensate' them for the loss of border protection565) also impede competition. Regulations covering environmental protection measures, and labour standards are also regarded566 as important barriers to competition. Government procurement arrangements can also be added to the list.567

Sectors which receive preferential treatment under national competition law and policy often include transportation (especially maritime), telecommunications and public utilities. Defence and related industries are usually receive blanket exemptions, while financial and labour markets are subject to sector-specific competition/regulatory regimes.568

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564 Organisation for Economic Co-operation and Development, above n 419 at 3; A W Wolff, above n 198 at unnumbered.
565 P Nicolaides, above n 219 at 137.
566 A Fels, above n 475 at unnumbered.
567 A B Zampetti and P Sauve, above n 3 at 15.
568 E M Graham and J D Richardson, above n 59 at 34.
The EU and the US constitute a useful comparison of approaches to reconciling potential tensions between competition and regulation policies, with the former appearing to take the ‘harder line’ than the latter.\textsuperscript{569}

Judicial authorities in the EU have held Member States shall not introduce or maintain in force measures of a legislative or regulatory nature which render ineffective competition rules,\textsuperscript{570} and this constraint extends to delegating regulatory-style powers to private sector operators.\textsuperscript{571}

In the US, by contrast, competition laws do not apply to States acting in their sovereign capacities.\textsuperscript{572} US law applies a two-pronged test, under which State regulation is not in violation of national competition laws if (i) the challenged restraint is affirmatively expressed as State policy and (ii) the policy is actively supervised by the State itself.\textsuperscript{573}

However, regulations are not always imposed upon business against their will. Rather, they can be sought and used by incumbent firms as a form of ‘regulatory protection’ against the disciplines of competition from potential, new entrants, without serving any valid efficiency-enhancing function.\textsuperscript{574}


\textsuperscript{572} Sherman Act, 15 U.S.C, Sections 1 - 7; Parker vs Brown, 317 US 341 (1943).


\textsuperscript{574} World Trade Organisation, above n 22 at 42.
Differences in regulatory approaches and systems can also result in a disparity in the operating conditions of businesses in different countries. The resulting business frameworks and methods, developed to comply with regulatory interventions, can distort international competition and act as a barrier to trade.

Often the resulting ‘business culture’ can become more complex and deep-rooted, and difficult for competition law and policy to alter, especially where there has been ‘regulatory capture’ by industries or firms opposed to market liberalisation.

However, effective competition laws and policy regimes can play a facilitative role in regulatory reform, allowing governments to reduce direct market and price regulation. Competition law can safeguard the interests of consumers, play pro-competitive advocacy roles and so promote political support for regulatory reform.

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575 M Matsushita, above n 340 at 33.
576 E Hope and H Thorsen, above n 556 at 267; E M Graham, above n 251 at 5: regulatory capture can happen when the regulatory agency has a closer affinity or identity with the industry/firms it is meant to be supervising than the government whose policies it is meant to be implementing. Avenues for ‘regulatory capture’ include formal consultative mechanisms and exchanges of personnel. Also, World Trade Organisation, above n 22 at 43, for discussion.
577 Organisation for Economic Co-operation and Development, above n 27 at 5 - 6; and, Organisation for Economic Co-operation and Development, above n 551, for a general discussion on the relative roles, functions and domains of the economy-wide competition authorities, and sector-specific regulatory agencies.
Extra-territoriality

The extra-territorial application of competition laws has become an important aspect of enforcement, and is claimed\textsuperscript{578} to be justifiable in an increasingly globalised economy.

This argument holds (absent any effective multilateral instrument covering private sector conduct) multinational enterprises are able to engage in anti-competitive business practices with impunity in a 'twilight zone' where no State can fully exercise jurisdiction, yet the harmful effects of such conduct may be felt in one or more countries.\textsuperscript{579}

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\textsuperscript{578} E M Fox, above n 8 at 177; although it is a less than first-best solution: M Matsushita, above n 340 at 46 - 47.

\textsuperscript{579} E M Fox, above n 8 at 177; P S Crampton and C L Witterick, above n 209 at 65; M C Malaguti, above n 91 at 144; F Jenny, above n 204 at 5; M Matsushita, above n 123 at 1. "Anti-competitive conduct, like environment pollution, does not respect national boundaries" R B Starek, above n 1 at 34; according to A B Zampetti and P Sauve, above n 3 at 14, in "... many instances (global firms) may even be able to take advantage of (restrictive trade and policies), extracting rents in the process."
\end{flushleft}
Nevertheless, the extra-territorial application of national laws, particularly by the US, remains a source of tension within the global trading community, the cause of conflicts with other States and has been likened to 'legal imperialism'.

A key springboard for the extra-territorial application of national competition laws is the 'effects doctrine' under which such laws are applicable to foreign firms if restraints upon competition were intended or did effect the home territory.

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580 It has been said the U.S. has been 'exporting' its antitrust laws for well over half-century, beyond jurisprudence, through the imposition of U.S.-style antitrust systems upon Germany and Japan during the post-war occupation period: RB Starek, above n 1 at 30.

581 World Trade Organisation, above n 22 at 76; although problems of extra-territoriality and/or conflict of domestic laws are common to any branch of legislation: MC Malaguti, above n 91 at 118.


583 D I Baker and W T Miller, above n 6 at 83. For counter-actions by foreign courts, for example: British Nylon Spinners Ltd vs Imperial Chemical Industries Ltd (1953) 1 Ch 11 (Eng C.A. 1952). However, it should be noted the U.S. Supreme Court initially adopted a restrained approach to extra-territorial reach holding in American Banana Co vs United Fruit Co, 213 US 347 (1909) that the Sherman Act did not apply to conduct taking place wholly outside the U.S.

584 First enunciated in United States vs Aluminium Co. of America, 148 F. 2d 416 (2d Circ.) (1945).
However, while usage of an ‘effects test’ has grown, it is controversial and beset by shortcomings. These deficiencies include the lack of consensus amongst nations on its recognition, and where it is recognised the definitions used vary.\textsuperscript{585}

The ‘effects doctrine’ has also generated its own legal uncertainties, most notably jurisdictional conflicts, especially where specific activities are considered under different national laws, with both authorisation and prohibition being potentially applicable to the same case. Not surprisingly, the ‘effects doctrine’ lacks internationally applied enforcement rules.

The US has sought to implement extra-territorial reach in the competition law and policy area through both judicial decision-making, and formal policy.

In the former case, the adoption of an ‘effects test’ approach extended the jurisdiction of US Courts to conduct which occurs in foreign State but allegedly has anti-competitive effect in any part of the US.\textsuperscript{586}

\textsuperscript{585} U Immenga, above n 273 at 47.

\textsuperscript{586} United States \textit{vs} Aluminium Co. of America, 148 F. 2d 416 (2d Circ.), 1945; Continental Ore \textit{Co vs Union Carbide and Carbon Corp}, 370 US 690 (1961); and, Pacific Seafarers \textit{Inc vs Pacific Far East Line Inc}, 393 US 1093, regarding conduct by U.S. firms largely outside the United States. T E Kauper, above n 545 at 83 - 85, for discussion of prospective extensive application of U.S. law to cartels operating outside that country.
In the latter instance, the US Department of Justice in successive International Antitrust Guidelines\textsuperscript{587} has defined the extra-territorial reach of the Sherman Act as embracing foreign activities which have a direct, substantial and reasonably foreseeable effect on US commerce (with the term 'commerce' being given wide meaning to cover both inter-state and foreign trade).

However, these Guidelines have attracted criticism\textsuperscript{588} for the absence of substantive legal analysis of key topics such as mergers and joint ventures, distributional restraints, and intellectual property issues.

The 'effects test' has been criticised\textsuperscript{589} as allocating jurisdiction too generously, with the attendant risk governments (and/or Courts) will increasingly seek to claim concurrent, even conflicting, jurisdiction.

A number of foreign governments, such as Australia, Britain, Canada, France, Germany, New Zealand, and the Netherlands, have erected barriers to the extra-territorial reach of US laws in the forms of 'blocking statutes'.\textsuperscript{590}

\textsuperscript{587} "Antitrust Enforcement Guidelines for International Operations" of 1988, when the U.S. Department of Justice repealed the famous footnote 159, which limited relevant anti-competitive conduct abroad to that which had an 'in-bound' effect on U.S. commerce (CCH, Trade Regulation Reports 50,013); and, the reaffirmed, at s 3.122 of the 1995 "Antitrust Enforcement Guidelines for International Operations" (CCH Trade Regulation Reports, 50,144).

\textsuperscript{588} R B Starek, above n 1 at 37.

\textsuperscript{589} M J Trebilcock, above n 20 at 276.

\textsuperscript{590} For example: the United Kingdom's Protection of Trading Interests Act (1980); Canada's Foreign Extraterritorial Measures Act (1984); Australia's Foreign Proceedings (Excess of Jurisdiction) Act No 3 (1984); and, South Africa's Protection of Business Act No 99 (1978).
Some jurisdictions have also introduced 'claw-back' statutes\textsuperscript{591} which provide their Courts with the discretionary power to either not enforce a foreign competition law judgement, or order only a portion of the judgement be enforced.

Apparently mindful of international opposition, US Courts\textsuperscript{592} have sought to moderate the operation of the 'effects test' by requiring consideration of balancing factors, such as international comity and the interests of foreign States through a 'jurisdictional rule of reason', under which the enforcement interests of the US are weighed against the prejudice to comity in foreign relations which may result from an extra-territorial assertion of jurisdiction.

\textsuperscript{591} Provisions of the United Kingdom, Australian and Canadian statutes cited above deal with 'claw-back'. Elements of U.S. extra-territorial enforcement which have caused international tension include broad discovery rights, private enforcement, class actions, treble damage remedies, and criminal punishment.

\textsuperscript{592} Timberlane Lumber Co vs Bank of America, 549 F. 2d 597 (9th Circ., 1976); Mannington Mills Inc vs CongolE.U.m Corp, 595 F. 2d 1287 (3rd Circ., 1979).
Nevertheless, US courts still appear unlikely to decline jurisdiction\textsuperscript{593} with the US Supreme Court ruling\textsuperscript{594} international comity would only militate against exercising jurisdiction where the defendants were required by foreign law to act in ways prohibited by US law, or where compliance with the laws of both countries was otherwise impossible.

Reflecting an expansive approach to the 'effects test', the US has also attempted to impose its antitrust laws on US subsidiaries of foreign firms allegedly engaged in anti-competitive practices which impede export opportunities for US firms.

In the Pilkington Glass Case,\textsuperscript{595} for example, it was alleged, inter alia, restrictive distributional arrangements in Europe impaired effective market access by US competitors - that is, US jurisdiction was asserted where adverse effects were claimed on US activities in foreign markets, even though no effects occurred inside US territory.


\textsuperscript{594} \textit{Hartford Fire Insurance vs California,} 113 S. Ct. 2891 (1993). However, the minority in this split (5 - 4) decision held for a narrower reading of the Sherman Act to avoid bringing the U.S. "... into sharp and unnecessary conflict with the legitimate interests of other countries..." (Id at 2922). J P Griffin, above n 43 at 163 - 167, for discussion of the majority and minority views, and the implications thereof, including the recent \textit{United States vs Nippon Paper Industries Co,} 109 F 3d 1 (1st Circ, 1997), which adopted an expansive approach to extra-territorial reach.

\textsuperscript{595} \textit{United States vs Pilkington PLC, and Pilkington Holdings Inc} 1994-2, Trade Cas (CCH) 70,842 (D Ariz 1994).
US authorities have also successfully challenged anti-competitive practices between companies which did not sell directly into the American market, with the US Government seen to be asserting that international law does not preclude it claiming jurisdiction based on 'direct, substantial and reasonably foreseeable effects' within the US.

Nevertheless, some commentators contend the US is moving away from unilateral actions, especially as a means for addressing market access issues, preferring instead to see foreign governments implement their own competition laws (providing these laws and their enforcement are considered by US authorities to be effective).

Unilateral action (involving the extra-territorial reach of its own antitrust laws) by the US is expected to be limited to situations where the other jurisdiction has not taken sufficient or effective action, and even then US competition authorities will only move after prior consultation with their colleagues in the other country, mindful of the impediments which an unco-operative or antagonistic counterpart can create.

The US is also likely to make greater use of bilateral agreements, with extensive and robust positive comity provisions, to deal with what may otherwise require extra-territorial jurisdiction.

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597 J P Griffin, above n 102 at 68.
598 M H Byowitz, above n 223 at 35 - 36; J P Griffin, above n 102 at 69.
599 D P Wood, above n 529 at 1; C D Ehlerman, above n 403 at 121.
The competition rules of the EU have also been given extra-territorial reach through decisions of the European Commission and the European Court of Justice (ECJ).600

The European Commission asserted extra-territorial jurisdiction for its competition policy when it applied601 what amounted to an ‘effects test’, setting down criteria for whether an agreement would affect competition within the then Common Market, or was defined to have such an affect.

The ECJ has also held602 the Union’s competition laws were applicable where there was a conspiracy which had the object or effect of restricting competition and was implemented within the EU. The Court has elsewhere603 used an ‘economic unit doctrine’ to impute liability to foreign companies operating subsidiaries within the Union.


601 Grosfillex-Fillistorf (1964), O.J. (58), 915, 3 C.M.L.R. 237; and, Societe Technique Miniere vs Maschinenbau Ulm GmbH, Case 56/65, 1966 E.C.R. 235, 5 C.M.L.R. 357 (1966), holding the effect can be direct or indirect, actual or potential; and, Volk vs Varecke, Case 5/69, 1969, E.C.R. 295, C.M.L.R. 273 (1969), holding the effect must be appreciable, which is less than substantial.

602 Ahlstrom Osakeyhtio and Others vs EC Commission, (1988 2 CLMR 901), also known as the ‘Wood Pulp Case’. However, it remains unclear as to whether the jurisdiction established in the Wood Pulp Case covers conduct of foreign enterprises in foreign countries which adversely affects the export or investing opportunities of E.U. companies in the market(s) of those foreign countries: M Matsushita, above n 4 at 1108; J P Griffin, above n 43 at 174 - 175, suggests that it does, pointing to The Community vs Atochem SA, 1989 O. J. (L 74) 21 (1990) and, The Community vs Buchmann GmbH, 1994, O. J. (L 243) 1, (1994), 5 C.M.L.R. 547.

603 ICI Ltd, J R Geigy AG, and Sandoz AG vs EC Commission (1972) E.C.R. 617, 787 and 845, respectively.
This reach has also been extended to instances where the parties and the conduct occurred outside the Union, but had operational effect within the Union and where the subsidiary could be accountable for the conduct of its parent operating outside the Union.

Article 85 (which deals with restrictive practices) has been applied where the practices have as their object or effect the prevention or distortion of competition in the common market, and such impact be perceptible or noticeable.

EU competition rules have also been given extra-territorial reach through the Union’s Merger Regulation, which gives the European Commission jurisdiction over mergers outside the Union where the aggregate value of the turnover of all undertakings exceeds prescribed thresholds (ECU 5 billion world-wide, and ECU 250 million each of at least two of the parties within the Union).

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608 Merger Regulation, Article 1(2); and, Gencor/Lonrho, Case IV/M 619 (24 April 1996), cited in 1997 O. J. (L 11), 130, 4 C.M.L.R. 742; I E Schwartz, above n 600 at 99 - 105, for discussion.
Given actual presence (that is, a subsidiary) in the EU is not required, foreign firms which distribute or market products within the Union could be caught by the Merger Regulation.\textsuperscript{609}

An alternate and practical approach to the extra-territorial application of competition law and policy may be greater reliance on positive comity arrangements.\textsuperscript{610}

The EU has also signalled\textsuperscript{611} a desire to intensify its co-operative relationship with the US, building on existing positive comity arrangements, and to establish similar mechanisms with other, suitable countries.\textsuperscript{612}

While business may be concerned by the application of extra-territorial authority, the scope in practice for such assertions are considered\textsuperscript{613} to be limited, especially where the enterprise(s) concerned do not have a legal presence in the relevant jurisdiction.

\textsuperscript{609} Merger Regulation, Article 1, requiring the merger have “a Community dimension”.

\textsuperscript{610} R Pitofsky, above n 13 at unnumbered.

\textsuperscript{611} A Schaub, above n 364 at 15.

\textsuperscript{612} However, E.U. law has held comity does not militate in favour of declining to exercise jurisdiction in the exercise of Community competition law: \textit{Aluminium Imports from Eastern Europe}, 1985 O. J. (L 92) 1; \textit{IBM vs Commission}, Cases 60/81R and 190/81R, 1981 E.C.R. 2639 (1981).

\textsuperscript{613} World Trade Organisation, above n 22 at 76; A Fels, above n 475 at unnumbered.
Other limiting factors include the difficulty experienced by enforcement agencies obtaining information not located within the home jurisdiction where the firm does not wish to co-operate, and the presence in some countries of 'blocking statutes' to prevent their firms from disclosing information in situations involving extra-territorial reach.614, 615

Further limiting factors include the availability of foreign sovereign immunity, foreign sovereign compulsion and 'act of state' doctrine616 as defences against actions where the defendant is a government, governmental agency or corporation, or a state-sanctioned actor, including from the private sector.617

614 Although such statutes have been criticised for their tendency to escalate rather than reduce bilateral trade tensions: Canadian Competition Bureau, above n 42 at unnumbered.

615 The U.S. responded in the 1995 "Antitrust Enforcement Guidelines", above n 587 which stated at Section 4.2 that "the mere existence of (blocking statutes which prevent persons from disclosing documents or information for use in U.S. proceedings) does not excuse noncompliance with a request for information from one of the Agencies." However, a lack of legislative clarity has weakened the application of this provision: P S Crampton, above n 582 at 103.


The US, for example, adopts a fairly narrow approach to what is called the 'foreign sovereign compulsion defence', which applies a threshold of true compulsion - that is, the firm has no choice but to obey\textsuperscript{618} and refusal to comply would give rise to penal or other severe sanctions.\textsuperscript{619} Such a defence would not extend to the commercial conduct in the US of foreign sovereigns, or their state-trading enterprises.\textsuperscript{620}

Lesser thresholds of permission, recommendation, approval or knowledge and endorsement of a foreign sovereign have not been accepted by US Courts\textsuperscript{621} or competition authorities.\textsuperscript{622}

It has been said\textsuperscript{623} the successful use of extra-territorial application of national competition laws is difficult to achieve without the co-operation of the other foreign government, in which case the conduct is not the unilateral extra-territorial application of laws complained of.


\textsuperscript{619} Above n 615, at Section 3.32.

\textsuperscript{620} Foreign Sovereign Immunities Act, of 1976; TE Kauper, above n 545 at 85.


\textsuperscript{622} Above n 615 requires the "order must come from the foreign government acting in its governmental capacity".

\textsuperscript{623} R Pitofsky, above n 13 at unnumbered; H Spier, above n 24 at 9.
The unilateral, extra-territorial enforcement of national competition law and policy regimes can also be counter-productive, by undermining the appeal to, and/or commitment of, those countries without effective competition laws and policies: for example, developing and transitional economies. As such, when viewed in a wider perspective, unilateral/extra-territorial enforcement actions can be a 'negative sum' tool.624

Government Conduct

While competition law and policy have traditionally been directed towards the conduct of private sector enterprises, they have equal if not more salience to the conduct of government.625

Governments themselves act in anti-competitive ways, and/or ways which facilitate anti-competitive conduct by private and public sector enterprises, with some commentators suggesting:

“Few private restraints are comparable to government restraints in terms of their potential for distorting competition and trade”626, with few likely to survive if competition principles were applied to them.627

624 P S Crampton and M Barutciski, above n 19 at 2.
625 M E Janow, above n 20 at 112; B M Hoekman and P C Mavroidis, above n 285 at 148.
627 A Fels, above n 475 at unnumbered.
Others\textsuperscript{628} take a similar view: "... the liberalisation of governmental measures restricting trade and investment and other forms of deregulation can often be the most effective means of preventing or remedying anti-competitive business practices, by introducing greater competition into the market."

Prominent amongst the anti-competitive conduct of government are national competition laws which discriminate against foreigners - in effect, the absence of national treatment.

Examples include not challenging what can be called 'beggar-thy-neighbour' activity (for example, export cartels) adopted by foreign governments, and executive/administration decisions foregoing or pursuing less rigorously enforcement against anti-competitive behaviour where the net cost falls on foreigners.\textsuperscript{629}

\textsuperscript{628} World Trade Organisation, above n 22 at 74; P S Watson, J E Flynn and CC Conwell, above n 145 at 300.

\textsuperscript{629} M E Janow, above n 20 at 112.
Other areas of government action which may impair competition include cartels and/or monopolies (such as statutory marketing arrangements) sustained by government involvement,\(^{630}\) State aid\(^ {631}\) and subsidies, voluntary export restraints, permissive approaches to the protectionist use of anti-dumping laws,\(^ {632}\) and generally poorly thought-out and/or implemented government interventions in the marketplace.\(^ {633}\)


\(^{631}\) The European Commission has flagged its intention to modernise its regime on State aid (per Article 94 of the EC Treaty), focusing on the introduction of group exemptions (the first of which is likely to cover the activities of small and medium sized enterprises) and codification of control procedures: A Schaub, above n 364 at 5 - 9; also, E G Stuart, “Recent Developments in EU Law and Policy on State Aids” (1996) *European Competition Law Review* 226, for a general discussion of the application of E.U. rules on state aids, especially those relating to employment, industry, and research and development.

\(^{632}\) E M Fox and J A Ordover, above n 89 at 31; P J Lloyd, above n 31 at 10 - 11.

Government practices also include special treatment under competition laws and policies for government business enterprises, and policies promoting small-sized or cultural/racial minority-owned firms, the maintenance or promotion of indigenous cultures, assurances of services to geographically peripheral or isolated areas or declining regions, and underpin government revenue.634

Other areas of special treatment include government procurement practices,635 government-business relations (in particular, the use of industry associations),636 excessively broad application of 'State sovereignty', 637 and State aids and subsidies to their trading enterprises.638

More specific examples include distribution laws which offer protection to small businesses from new (usually larger) competitors (for example, in France and Japan), the use of 'administrative guidance' (for example, in Japan), broadcasting laws which limit access/ownership by foreigners to mass media and publishing enterprises, 'buy national' programs, and essential services laws which constrain competition to postal and telecommunications utilities in return for delivering a universal (that is, nation-wide) service, in particular to regions where it is uncommercial to do so (as is the case in Australia).


635 ME Janow, above n 20 at 115 - 116.

636 Ibid at 114 - 115.

637 EM Fox and JA Ordover, above n 89 at 30.

638 Ibid at 31.
In short, almost any governmental action can have anti-competitive effect, depending on its design and implementation, with the over-breadth of such interventions in shielding anti-competitive conduct being problematic for both home and foreign countries.

While the attention of commentators, negotiators and policy analysts has focused on the actions and conduct of national governments, others argue some of the most restrictive, and potentially competition-restricting laws and policies may be found at subordinate levels, such as states, provinces or municipalities.

Taken as a whole, according to one influential observer "... the liberalisation of governmental measures restricting trade and investment and other forms of regulation can often be the most effective means of preventing or remedying anti-competitive business practices, by introducing greater competition into the market, especially in those instances where such governmental measures are more prevalent."

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639 The European Court of Justice has held, in Inno vs ATAB, Case 13/77 (1977) E.C.R. 2115, that Member States must abstain from adopting or maintaining in force measures which are susceptible to eliminating the effet utile of the competition provisions of the Treaty of Rome (in particular, Articles 3(g), 5, 90, as well as 85 and 86).

640 E M Fox, above n 8 at 178.


642 World Trade Organisation, above n 22 at 31.
Industry policy is one of the most significant areas where governments transgress on competition policy - that is, where governments give preferential treatment (either by special treatment in ways which are inconsistent with, or explicit exception from, competition law and policy).

Competition policy must be clearly distinguished from industry policy. While competition policy is about creating competition in the market place, industry policy is generally oriented towards providing preferential treatment to selected firms or industries, generally (heavily) discounting the anti-competitive consequences.

Overcoming the tensions will, in part, require delineation, from a competition policy perspective, of impermissible and permissible industrial policy.

Specific aspects of industry policy which are regarded as problematic for competition law and policy include differential treatment of research and development initiatives, joint production ventures, and sectoral/industry specialisation agreements.

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643 A Jacquemin, above n 2 at 100 - 101; D J Gifford, above n 474 at 1050, and at 1071 - 1082, for a general discussion of the anti-competitive and protectionist effects of U.S. industry policy.

644 For example, to develop 'national champions' or 'preserve' jobs in declining industries: M J Reynolds, above n 363 at 453; deliver subsidies and subsidy-like benefits to favoured firms: E M Graham, above n 251 at 1; or, to achieve preferred market structures: F M Scherer, above n 16 at 61; K van Miert, above n 212 at 20 argues "National champions are for sport, not economies."

645 M J Trebilcock, above n 20 at 280
Impermissible government action would involve situations where the harm caused to global welfare\textsuperscript{646} exceeded the benefit to that nations' citizens in correcting a perceived market imperfection\textsuperscript{647} or otherwise defending a national interest.

Such an approach is not without its own difficulties, for example in obtaining and evaluating the necessary information, and distinguishing the true from the stated motivation of the relevant government in pursuing an industry policy (or any other) intervention.

. Horizontal Arrangements

Horizontal arrangements amongst competitors are generally oriented towards eliminating or minimising competition amongst participants. Such arrangements, usually in the form of cartels, can operate to fix prices, allocate quotas and/or divide between them customers or territories in order to control a market.\textsuperscript{648}

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\begin{itemize}
  \item \textsuperscript{646} Global welfare is taken to be the total of consumer benefit and producer profits in all countries, not just the home jurisdiction: E M Fox and J A Ordover, above n 93 at 459.
  \item \textsuperscript{647} A concept and practice itself much debated.
  \item \textsuperscript{648} The distinction between horizontal and vertical restraints in some circumstances is not always clear cut, for example in dual distribution systems (where a supplier of a product also acts as a dealer in that product, in actual or potential competition with distributors) and in franchising arrangements involving manufacturing licences: H H P Lugard, "Vertical Restraints Under EC Competition Law: A Horizontal Approach?" (1996) \textit{European Competition Law Review} 166 at 169.
\end{itemize}
Almost all nations have laws prohibiting private cartel arrangements, although some allow justifications, for example for ‘crisis’ or ‘depression’ cartels. At the same time, most countries respect as lawful government actions ordering or allowing, and supervising, cartel activity.\(^{649}\)

Competition law and policy generally distinguishes between two generic types of horizontal arrangements.

The first of these are often called ‘hard core’ cartel arrangements, which operate to fix prices, reduce output or allocate consumers/regions to individual suppliers, and have the predominant purpose of shifting economic benefit from consumers to producers, and are unambiguously detrimental to efficiency and broader welfare.\(^{650}\) They are generally subject to per se prohibition, and there are no defences available.\(^{651}\)

The second are ‘soft core’ cartel arrangements, which can deliver justifiable efficiency dividends and are not subject to per se prohibitions. Examples include research and development consortia, co-operative arrangements for setting product standards, and strategic alliances for knowledge/technology transfer.

\(^{649}\) Earlier treatment in this study of ‘sovereign compulsion’.

\(^{650}\) World Trade Organisation, above n 22 at 40; The OECD adopted a “Recommendation regarding Effective Action Hard Core Cartels” in 1998, above n 113, calling on Members to legislate to prohibit hard core cartels.

Some enforcement authorities regard international cartels as more significant than their domestic counterparts, reflecting their tendency to be highly sophisticated and extremely broad in their impact (both in terms of geographic scope and the amount of commerce affected).

One-third of criminal investigations by the US Department of Justice (USDOJ) involve suspected international cartel activity, involving firms located in over 20 different countries, with similar trends in the European Union.

The USDOJ, for example, has identified (and prosecuted) conduct ranging across: agreed-upon prices; agreed-upon volumes of sales worldwide; market share allocation on a country-by-country basis; exchanges between conspirators of otherwise competitively sensitive information, such as sales figures, prices bid or charged; and, sophisticated mechanisms used by the conspirators to monitor and enforce their illicit agreements.

However, this view on the iniquity of international cartels has been challenged on the basis increasing globalisation of commerce, investment and trade diminishes the capacity of potential cartel members to effectively engage in such conduct. Lower barriers to entry mean a larger number of firms would need to join an international cartel for it to be effective, activity which would attract the attention of competition law authorities.

652 J I Klein, above n 78 at unnumbered.
653 L Brittan, above n 130 at unnumbered
654 J I Klein, above n 78 at unnumbered, who also provides a number of specific examples of prosecutions, and the resulting penalties (either consent or imposed).
655 Organisation for Economic Co-operation and Development, above n 419 at 2.
The EU is reportedly reviewing its policy regime covering horizontal cooperation agreements, reflecting the view such arrangements are increasingly important to business in globalised and more dynamic markets, their efficiency dividends can offset any anti-competitive effects (for example, relating to collusion between the parties, and exclusion/foreclosure of competitors), and criticism EU rules are unclear and somewhat outdated.

Key reforms in the EU are likely to focus on developing and implementing more comprehensive analytical frameworks for the examination of horizontal arrangements in general, giving greater emphasis to economic criteria in determining agreements which are neutral or pro-competitive and those which are anti-competitive, and the establishment of 'safe havens' for participating undertakings below prescribed market shares.

- **export cartels**

Export cartels, which are intended to orchestrate the export of designated products, are generally used to serve national industry policy goals by biasing the exporting country’s terms of trade in favour of, and so shift economic benefit to, the exporting country.

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656 A Schaub, above n 364 at 22 - 24.

657 In economic terms, the ratio of export prices to import prices.

658 F M Scherer, above n 16 at 43 - 54, for a general discussion; and, D J Gifford, above n 474 at 1082 - 1090, for a discussion of Voluntary Restraint Agreements (VRAs) and U Immenga, above n 617 at 129 - 143, for discussion of the application of Voluntary Export Restraints (VERs). VERs have been greatly circumscribed in the Uruguay Agreement on Safeguards, which states they cannot be applied without fulfilling the requirements of the safeguard clause of Article XIX of the GATT.
Export cartels can take a number of forms: 'pure export cartels', whose activities are directed exclusively towards foreign markets; and, 'mixed export cartels', involving arrangements which impair competition in both the home and the foreign market.

'Pure export cartels' are generally regarded as being outside the jurisdiction of domestic competition law and/or are explicitly exempted from the application of such laws, on the basis their impact is felt beyond, and/or they involve a wealth transfer back to, the home country.659

Such cartels receive differential treatment under EU law, depending on their territorial effects. Export cartels are prohibited where they restrict trade between Member States,660 however, they are not necessarily prohibited where the effects are felt outside the Union and do not affect trade between Member States.661

659 U Immenga, above n 617 at 96.
660 European Treaty, Article 85; no notification is required, and there is no supervision.
661 Bulk Oil vs Sun, 1986 E.C.R 559; Decision of the Commission (Junghans), 1977 O.J (L 30/10) 14; Decision of the Commission (Goodyear Italiana), 1975 O.J (L 38/110) 12. Export cartels are captured by E.U. law even where they have unintended consequences for competition within the Union: Suiker Unie vs Commission (1975) E CR 1663 (Joined Cases 40 - 48, 50, 54 - 56, 111, 113 and 114/73).
The US generally prohibits such cartels, although exemptions are allowed for export associations created solely for the purpose and actually engaged in export trade (ostensibly groupings of smaller to medium sized firms formed to develop countervailing power against foreign, import cartels).

'Mixed export cartels' are often subject to the same considerations as 'pure export cartels', although some countries provide special exemptions for the former where the domestic restraint or its effects are ancillary to the export trade.

Either way, the core objective of export cartels is an aggressive, 'beggar-thy-neighbour' attitude to other nations in the world economy, sending the clear message conduct which would be unacceptable in the home market is permissible if the adverse effect is felt in foreign markets.

State trading enterprises with exclusive exporting privileges, for example in primary commodities or resources, are substantially the same as export cartels - seeking to exploit market power in export markets.

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662 Sherman Act, Section 1; also, U Immenga, above n 617 at 97 - 99 for the evolution of U.S. law on export cartels.

663 Webb-Pomerene Export Trade Act, 15 U.S.C, Sections 61 to 65 (1918).

664 The exemption provided to pure export cartels under U.S. law (Webb-Pomerene) does not apply to mixed export cartels: United States vs US Alkali Export Association, 325 US 196 (1945); also, United States vs Minnesota Mining and Manufacturing Co, 92 F. Supp. 947 (D Mass. 1950) regarding the operating characteristics of export cartels.

665 U Immenga, above n 617 at 125; World Trade Organisation, above n 22 at 64.
Some types of export cartels have been defended on the basis they can improve competition by enabling smaller exporting firms to achieve economies of scale in distribution and information on foreign markets, or to countervail the buying power of foreign import cartels. But, they can also prove to be anti-competitive where they control a significant proportion of the market.

Dealing with export cartels in the international trading system can be particularly problematic. On a bilateral level, importing countries can find it difficult to initiate enforcement actions given the evidence necessary to prove the existence of the cartel is generally located outside their jurisdiction (usually in the source country, where the export cartel enjoys some degree and form of home government preferment).

At the multilateral level, WTO rules have little effect on purely private export cartels.

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666 F M Scherer, above n 16 at 45; Organisation for Economic Co-operation and Development, above n 311 at 8.
667 U Immenga, above n 617 at 124 reports a U.S. Federal Trade Commission study released in 1967 found firms benefiting from Webb-Pomerene exemptions were generally large firms operating in concentrated industries, with few indications the export cartels were necessary to provide countervailing power against foreign import cartels.
668 J I Klein, above n 10 at unnumbered; M A A Warner, above n 87 at 17.
While the consultation provisions of the General Agreement on the Trade in Services (GATS) and Agreement on Trade-Related Intellectual Property (TRIPS) could be useful, they are not regarded as sufficiently specific on outcomes, and the national treatment provisions of the GATS and GATT are also limited in their effect (applying only to inter-Member trade, and to imports not exports, respectively).

In the cases of state-owned or -sanctioned international trading arrangements, GATT rules prohibit such enterprises being used to impose quantitative restrictions on exports, although they do not prevent such bodies being used to exert market power in export markets through the prices they charge. More explicit government-sponsored export cartels are likely to contravene general GATT rules which prohibit export restrictions.

Nevertheless, the broader economic impact of export cartels has been disputed with some commentators arguing there is little evidence they are either widespread or cause significant harm, with few instances where they have the sustained power to raise prices significantly on international markets.

669 World Trade Organisation, above n 22 at 64.

670 GATT Article XI, and notes to that provision.

671 A Mattoo and A Subramanian, above n 188 at 106; D A Hay, above n 65 at 94.

672 World Trade Organisation, above n 22 at 64.
import cartels

A less common form of horizontal arrangement are import cartels, which are formed by domestic buyers/importers to limit market access by and/or balance the perceived market power of foreign competitors/suppliers.

Methods used include boycotts of, and/or collective refusals to deal with, foreign sources, as well as excluding or imposing discriminatory terms upon foreign players for membership of key trade associations, which can impair their access to necessary product/service certification arrangements.673

While a number of the practices of import cartels (such as price fixing, market division and consumer allocation) are subject to per se prohibitions, national competition laws often apply a 'rule-of-reason' approach to co-operative arrangements, such as standard setting and joint purchasing.674

Such arrangements are often authorised by the home government if importers are faced with dominating foreign suppliers, and if competition on domestic markets is not likely to be substantially restrained.675

673 M Trebilcock, above n 16 at 87; A W Wolff, T R Howell and J R Magnus, above n 177 at unnumbered.
674 World Trade Organisation, above n 22 at 57.
Most countries have double-standards when dealing with trade-based cartels: while they exempt or adopt permissive attitudes toward export cartels, or limit the reach of their laws to outbound trade, they prohibit import cartels including competitor agreements to boycott foreign goods.\textsuperscript{676}

The US, for example, has traditionally adopted a strongly prohibitory approach to cartels (and other types of horizontal agreements), applying per se rules of criminal liability for price-fixing and market allocation arrangements, although export, and joint research and development cartels are exempted.\textsuperscript{677} The EU provides similar exemptions while also allowing for specialisation agreements.\textsuperscript{678}

Taking effective action against transnational cartels is generally not a matter of the adequacy of substantive law.

More important problems are seen\textsuperscript{679} to include the difficulty of obtaining substantive information and useable evidence, which is underscored where one jurisdiction holds confidential evidence of interest to another competition authority, and where the cartel is shielded by State action or privilege, and hence outside the reach of competition authorities.

\textsuperscript{676} F M Scherer, above n 16 at 54 - 55; E M Fox and J A Ordover, above n 89 at 19.
\textsuperscript{677} U Immenga, above n 617 at 108 - 114, for a discussion, and also the section of this study on extra-territoriality.
\textsuperscript{678} M J Trebilcock, above n 20 at 280.
\textsuperscript{679} E M Fox and J A Ordover, above n 89 at 18; World Trade Organisation, above n 22 at 64.
Achieving successful prosecutions of alleged cartels is far from easy, in part reflecting the gap between investigative and prosecutorial procedures on the one hand, and the international scope of such activities.\(^\text{680}\)

A prosecution by US competition authorities in the mid 1990s of General Electric and De Beers\(^\text{681}\) for allegedly conspiring to raise the price of industrial diamonds was dismissed by the US Court on the basis of inadequate evidence, much of which was outside the reach of the US agencies.\(^\text{682}\)

. \textbf{Intellectual Property/Research and Development}

Intellectual property rights (IPR) and the conduct of research and development (R&D) generate a number of special issues in competition and trade law and policy, some of which are anti- and others of which are pro-competitive.

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\(^{680}\) J I Klein, above n 10 at unnumbered; P B Marsden, above n 197 at 99.

\(^{681}\) World Trade Organisation, above n 22 at 65, for discussion.

\(^{682}\) Also, \textit{FTC vs Compagnie de Saint Gobian Pont-a-Mousson}, 636 F. 2nd 1300 (D C Circ, 1980) on the inability of an enforcement agency to serve and enforce compulsory process against a target located in a foreign jurisdiction.
Competition authorities seek to balance two arguments in intellectual property protection: recognising the legitimate expectation of the innovator to be rewarded for their costs and risks; and, concerns overly generous/rigorous intellectual property protection can undermine the diffusion of the new technology.

However, countervailing arguments, which point to the potential tension between competition law and intellectual property law, include IPRs can generate and/or contribute toward positions of market power (although national competition agencies and courts have moved towards a ‘rule of reason’ approach in evaluating such matters).

683 A proposition challenged by F M Scherer, above n 16 at 59, who argues, on average, a far more important consideration for the innovator is ‘first mover advantages’ - that is, gaining the competitive edge by being the first in the marketplace with the new product.

684 For example, European Directive 91/250, O.J. L 122/42, and Sega Enterprises vs Accolade Inc, 977 F 2nd 1510 (9th Circ, 1992), regarding the circumstances where the decompilation and reverse engineering of computer software may be permitted; and, Lotus Devel. Co vs Borland International Inc, 49 F 3d 807 (1st Circ, 1995), and Dell Computer Corp, S. Ct. 804 (1996), regarding the extension of intellectual property rights to industry standards.
Elements of competition law and policy which are likely to come into play when considering IPR and R & D arrangements include provisions relating to cartels/conspiracy (where an IPR/R & D arrangement is used to fix prices, allocate markets or customers, or other collusive practices which reduce competition) and abuse of dominance/monopolisation (where the arrangement results in price and non-price predation, and/or market foreclosure in the supply and distribution of essential inputs or products). 685

Important anti-competitive aspects of IPR are the exclusive, monopoly rights granted under IPR laws. 686 For example, if the duration and/or scope of the IPR 'over-compensates' for the cost of the R&D, then the IPR(s) can inefficiently distort and/or restrict competition and trade. The IPR holder can use licencing arrangements to similar effect. 687


687 United States vs Automobile Manufacturers Association, Trade Case # 72,907 (C D Cal 1969), Intel Corp vs ULSI System Technology Inc, 995 F 2nd 1566 (Fed Circ., 1993), and Intel Corp vs United States International Trade Commission, 946 F2nd 821 (Fed Circ, 1991), regarding the potential anti-competitive effects of cross-licencing arrangements; and, also, Organisation for Economic Co-operation and Development, above n 419 at 5.
Intellectual property licencing agreements amongst competitors, such as patent pooling, can also facilitate cartels which fix prices, limit production, facilitate market sharing\textsuperscript{688} and allow market division\textsuperscript{689} and through these have adverse effects on the pace of technological change and dynamic efficiency.

Conversely, IPR arrangements can have pro-competitive benefits, and reflect rational commercial responses to dynamic market conditions. Activity likely to fall into this category include joint ventures in R&D, and strategic alliances involving high technology, products with short life cycles or in areas of rapid technological change\textsuperscript{690}.

Ultimately, it is not possible to be ex ante prescriptive about the implications for competition of the various forms of IPR/R&D/strategic alliance processes.

\textsuperscript{688} WTO (1997), at 72; J H Barton, above n 686, for general discussion of the anti-competitive elements of intellectual property rights.

\textsuperscript{689} United States vs Westinghouse Electric Co, 648 F 2nd 642 (9th Circ, 1981); Nungesser \textit{vs} Commission (Maize Seed), ECJ 258/78 (1982).

\textsuperscript{690} E M Fox and J A Ordover, above n 89 at 29; R S Khemani and L Waverman, above n 685 at 144; under U.S. law joint ventures are subject to rules of reason tests, where their (anti-) competitive and efficiency dividends are assessed: National Collegiate Athletic Association \textit{vs} Board of Regents of the University of Oklahoma, 486 US 85 (1984); Broadcast Music Inc \textit{vs} Columbia Broadcasting System, 441 US 1 (1979).
While a particular situation may be conducive to the exercise of market power (in the direct\textsuperscript{691} and other related markets), there may be offsetting efficiency gains.

As such, a case-by-case, 'rule of reason' model may be the better approach in which a balance is struck between: market structures which deliver lower prices and more sophisticated products for consumers;\textsuperscript{692} and, 'over protection' which impedes the diffusion of new technology and 'under protection' which hinders technological innovation.\textsuperscript{693}

The emerging 'essential facilities' doctrine has the potential to create problems for innovation and investment in intellectual property creation and development.\textsuperscript{694}

\textsuperscript{691} For example, Digidyne vs Data General Corp, 734, F 2nd 1336 (9th Circ, 1984); Alaska Airlines Inc vs United Airlines, Inc, 948 F 2nd 536 (9th Circ, 1991); Radio Telefis Eireann and Independent Television Publications Ltd vs Commission, C 241/91 and 242/91 (6 April 1995); and, J H Barton, above n 686 at 443 - 444, for a discussion of inter-market leveraging in the technology sector.

\textsuperscript{692} RS Khemani and L Waverman, above n 685 at 147; J H Barton, above n 686 at 440.

\textsuperscript{693} E M Graham, above n 145 at 106.

In the European Union, for example, when a competitor owns an ‘essential facility’ (that is, something to which access is necessary for a rival firm to compete), and refuses to give access to this facility either per se or on reasonable, non-discriminatory terms, they are likely to find themselves in contravention of Union competition law.695

Technological innovation can also create a special problem within competition policy, commonly known as the ‘appropriability dilemma’.696

This situation arises when the technology innovator cannot secure the full value of the knowledge or innovation created, and the amount which may be recovered does not offset the costs incurred in creating the innovation: in short, the expected returns do not cover the costs.

The ‘appropriability dilemma’ underpins arguments for intellectual property protection by providing the innovator with a limited monopoly right to work and/or licence a new technology, and so increase its appropriable value. Innovators are, quite reasonably, keen to minimise the leakage of such intellectual property, although such conduct could be construed as anti-competitive.697

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696 E M Graham and J D Richardson, above n 59 at 30; World Trade Organisation, above n 22 at 72.
It has been argued\textsuperscript{698} dominant firms engaged in high-technology activities should be given significant latitude in their technological decisions. While dominant firms can manipulate competition against actual or potential rivals to their own advantage, in this view such decisions are generally unlikely to be harmful to dynamic efficiency (which underpins technological change).

Commercial practice indicates\textsuperscript{699} vertical and horizontal co-operation between firms in higher technology industries is common, and is usually driven by pro-competitive and efficiency-enhancing motivations (for example, economies of scale/cost sharing in expensive research and development).

Intellectual property rights also have an inherent vulnerability to misappropriation, moreso than other forms of property, and the capacity to be incompatible with efficient trade and effective competition where they allow right holders to prevent parallel imports,\textsuperscript{700} which can be associated with cartel-style practices such as price fixing, market sharing and/or production limitation.\textsuperscript{701}

\textsuperscript{698} J A Ordover, above n 697 at 480 - 481.

\textsuperscript{699} Ibid.

\textsuperscript{700} Under which a product made legitimately in one market cannot be imported into another market, in effect a form of geographic segmentation of the international market: E M Graham and J D Richardson, above n 202 at 552.

\textsuperscript{701} World Trade Organisation, above n 22 at 72; A Fels, above n 475 at unnumbered; United States vs Pilkington PLC and Pilkington Holdings Inc, 1994-2, Trade Cas (CCH) 70,842 (D Ariz 1994); M H Byowitz, above n 223 at 29 - 30: The matter was settled by a consent decree, which opened the market for the underlying technology.
Ultimately, according to some commentators,\textsuperscript{702} competition enforcement agencies must be sensitive to the unique features of high-technology markets, which drive its competitive dynamics.

In this view, the major priority for competition authorities must be to enhance contestability for future waves of invention and innovation,\textsuperscript{703} key to which is their avoiding scrutinising complex business strategies through the narrow prism of static efficiency, looking instead at dynamic efficiency (in terms of the preservation of longer term incentives for investment in human, intellectual and physical capital).

While developing countries have a clear stake in a rigorous international IPR system, they also have a strong interest in ensuring such a system is not abused. Any efforts towards harmonisation of rules should be viewed with caution, to ensure any ‘clarifications’ do not serve the interests of IPR owners alone.

Developing countries have a strong interest in applying an international exhaustion rule, similar to that used within the EU under its own competition policy, when dealing with parallel imports. This would allow domestic buyers to purchase patented and branded products wherever they find the most favourable prices, which would be fully compatible with the TRIPS agreement.\textsuperscript{704}

\textsuperscript{702} J A Ordover, above n 697 at 479.
\textsuperscript{703} World Trade Organisation, above n 22 at 64.
\textsuperscript{704} B M Hoekman and P Holmes, above n 282 at 12; the full and proper title of which is “Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods”.

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The TRIPS agreement also encourages countries to defend themselves against anti-competitive abuses of IPR through the creation of effective competition laws and agencies.\(^{705}\) In particular, it extends the harmonisation of national intellectual property laws to IPR granting procedures, sanctions for infringements and infringement procedures, and relies on application of the national treatment principle.\(^{706}\)

However, the TRIPS agreement has been criticised\(^{707}\) for continuing to allow Member States to specify in national legislation restrictive practices which constitute an abuse of IPRs that can have anti-competitive effects.

One option for dealing with the inherent, structural conflicts between IPR protection laws, and competition law and policy (as well as abuses of IPRs) could be the development of detailed, but not exhaustive, lists of elements which are inherent in such monopoly arrangements but acceptable under 'rule of reason' standards.\(^{708}\)

Another option is to recognise multilateral instruments such as TRIPS can act as wider platforms for competition policy, in the form of competition for innovation - that is, by effectively defending IPRs, TRIPS can encourage more contestable trade in higher technology products.

\(^{705}\) Articles 31 and 40; World Trade Organisation, above n 22 at 73; the TRIPs agreement will also harmonise the law of copyright, trademarks, geographical indications, industrial designs, patents, and trade secrets: H Ullrich, “TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy” (1995) 4(1) Pacific Rim Law and Policy Journal 153 at 154.

\(^{706}\) H Ullrich, above n 705 at 178, and 180.

\(^{707}\) P Brusick, above n 273 at 159.

\(^{708}\) U Immenga, above n 617 at 96.
However, in applying competition policy to TRIPS, key considerations will be relevant markets, market power and the potential for imitative competition, so intellectual property protection is available and enforceable in similar terms across the global marketplace.\textsuperscript{709}

\textbf{Market Access and Market Contestability}

Market access provisions are regarded\textsuperscript{710} as an essential element of substantive competition laws, tackling head-on anti-competitive restraints which impede entry to markets.

Effective market access is considered\textsuperscript{711} a more relevant concept in a globalising world economy typified by increasingly intense international competition.\textsuperscript{712}

That is, barriers to entry by foreigners are no longer confined to the border, with effective market barriers arising from both government and institutional impediments. In simple terms, ‘effective market access’ is the sum of trade, competition and other policies and the interaction between them.

\textsuperscript{709} H Ullrich, above n 705 at 195.

\textsuperscript{710} E M Fox and J A Ordover, above n 89 at 20; E M Graham and J D Richardson, above n 202 at 548; P B Marsden, above n 197 at 99.

\textsuperscript{711} S Ostry, above n 95 at 30.

\textsuperscript{712} S Ostry, above n 551 at 27 - 31, for a potted history of market access in trade and competition policy, both multilateral and bilaterally between the U.S. and Japan.
This view has been challenged by other commentators who regard market access as an outcome, not an objective, of competition law and policy. But, while effective competition regimes are a necessary, they are not a sufficient, condition for effective market access.

In the latter view, the primary objective of competition policy is to defend the competitive process, and not to advance the interests of individual firms/industries (as is the inherent nature of market access and often trade policy), and thus competition policy should not attempt to guarantee a right of market access for particular firms/industries.

In short, eliminating barriers to market access can only ensure businesses have the opportunity to compete in a market, and does not deliver any pre-determined outcomes (such as market shares). Poor market performance (because of local preferences for home-market goods, or consumer dislike for the imported product) do not equate with systemic deficiencies in market access.

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714 D P Wood, above n 626 at unnumbered.

715 Ibid.

716 A Fels, above n 475 at unnumbered.
Similarly, the efficient behaviour of incumbent firms in the market place may 'naturally' limit market entry, even though the market may be contestable and without barriers to entry. In such situations, any interventions to facilitate the entry of new players may result in the loss of efficiency (which is a core objective of competition policy).\textsuperscript{717}

However, competition law and policy can, incidentally, improve market access where it causes the dismantling of cartels, anti-competitive vertical restraints and/or prevents mergers which would lessen competition.

The US has traditionally regarded competition law as a complement to trade law in achieving market access,\textsuperscript{718} with key laws\textsuperscript{719} allowing either the US Government or a private plaintiff to take action against foreign restraints directed at US exporters and exports.

\textsuperscript{717} P C Mavroidis and S J Van Siclen, above n 30 at 13.

\textsuperscript{718} B M Hoekman and P Holmes, above n 282 at 2, who observe the E.U. is increasingly following a market-access driven agenda in international competition law and policy issues.

\textsuperscript{719} Sherman Act, Section 7; (15 U.S.C # 6a) and, Foreign Trade Antitrust Improvements Act, of 1982 (15 U.S.C # 6a). The Sherman Act, of 1890, was followed by the Clayton Act, of 1914, which expanded U.S. competition law by outlawing specific anti-competitive actions such as tying, exclusive-dealing agreements, and requirements contracts.
Official Guidelines issued by the US Government in 1988\textsuperscript{720} and in 1995\textsuperscript{721} proclaimed, respectively: a major purpose of US anti-trust enforcement was to defend American export and investment opportunities against privately imposed restrictions; and, US authorities would be more forceful in asserting extra-territorial jurisdiction over cartel activity which restricted the American access to foreign markets.

Artificial private barriers to markets can be erected in a number of ways, all of which are tantamount to foreclosure of the market.

Participants in a cartel can create mechanisms to exclude foreign competitors by, for example, binding domestic distributors where such networks are costly or difficult to construct, while a monopolist can act in much the same way by tying-up non-duplicable distribution systems or requiring financially beholden wholesalers/retailers to refuse to deal with foreign sources of supply.

They can also enter into exclusionary contracts with suppliers-buyers which preclude the latter having similar arrangements with anyone else, as well as the assignment of exclusive territories (either in geographic or market segment terms) to distributors.\textsuperscript{722}

\textsuperscript{720} Above n 587.


\textsuperscript{722} W S Comanor and P Rey, above n 66 at 466.
Private sector impediments to market access have attracted growing attention in recent years as external trade barriers have come down, although some of these private-sourced barriers may be condoned by governments or be residual private/public restraints which have otherwise escaped the WTO’s purview.\textsuperscript{723,724}

Dealing with shortcomings in market access is not primarily a lack of competition law relating thereto. Rather, the problems relate to the lack of clarity as to what the existing law demands, the lack of enforcement of existing laws, and possible gaps in the coverage of hybrid private-public restraints to market access.\textsuperscript{725}

\textsuperscript{723} The OECD has been unable to find any convincing evidence that private anti-competitive practices have become more important and pervasive restrictions on market access as trade barriers are reduced: J R Shelton, above n 68 at 70.

\textsuperscript{724} Such issues underpinned the Fuji Film/Kodak action before the WTO. The WTO Panel in the matter found: there was no impairment of U.S. market access rights; restrictions on certain marketing strategies did not affect importers disproportionately; and, there was nothing in Japanese public policy indicating foreigners were excluded from Japanese distribution systems: T Takigawa, "Reflections on US/Japan Photographic Film Dispute: Examination of Market Access Barriers in WTO" (unpublished paper given to the Pacific Economic Co-operation Council Conference on Trade and Competition Policy, Montreal, 1997), for a discussion of a number of the core issues of the Kodak/Fuji matter. P B Marsden, above n 330 at 533, speculates Fuji could well prevail in an antitrust action against Kodak before a U.S. Court for alleged comparable anti-competitive conduct, although he also conjectures Japan could well have lost an action before the WTO if the matter had been determined on a ‘rule-of-reason’ basis.

\textsuperscript{725} E M Fox and J A Ordover, above n 89 at 23; problems which are likely to increase when China ultimately joins the WTO and the dividing line between private and public restraints is especially opaque: E M Fox, above n 86 at 20.
The use of ‘market access’ as a de facto test for the effectiveness of competition laws and policies has been criticised\(^\text{726}\) for what amounts to its anti-competitive nature, with accusations that measuring market access involves identifying market share quotas, which in turn invites collusion and insulation from poor commercial judgement.

**contestability of markets**

An alternative approach to market access has been proposed,\(^\text{727}\) in the form of a more comprehensive ‘international contestability of markets’ model, which seeks to at least preserve, if not enhance, competitive processes in both national and international marketplaces.

Under this approach, a market would be deemed internationally contestable when characterised by competitive conditions where rivalry between firms is not unduly distorted because of anti-competitive actions by governments or the private sector, and incumbent firms behave competitively to forestall entry by rival firms.\(^\text{728}\)

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\(^\text{726}\) E M Graham and J D Richardson, above n 398 at unnumbered. They also use the term “market accessibility”, which is synonymous with contestability.


\(^\text{728}\) E M Graham, above n 251 at 1.
However, full contestability will not necessarily deliver the economist’s ideal of perfect, free market competition. This less-than-idealised outcome reflects a number of constraints which remain even in highly contestable markets.

These constraints include: those inherent in all market-based activity, such as economies of scale and advantages due to strong customer loyalty in niche markets; incumbency advantages deriving from a long familiarity with local business, cultural and legal conditions; and, ‘natural barriers’, such as nature, distance and geography.729

Market contestability can also be impaired because participants (both private and public) are effectively sheltered by government regulations and other policy interventions whose effect is largely, even solely, to create barriers to market entry.730 These barriers include permits, quotas, licences, and preferential procurement arrangements.731

Measuring contestability is not without its own problems, with quantitative measures being indicative rather than definitive, taking into account factors such as industry concentration, market shares, prices and profits.

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729 E M Graham and R Z Lawrence, above n 213 at 6; also, I De Leon, above n 294 at 44 - 49, for a critique of the neoclassical economic theory which underpins competition law, arguing industrial organisation theory (with its emphasis on efficiency) and public choice theory (with its emphasis on interest group activity) are more relevant.


731 E M Graham and R Z Lawrence, above n 213 at 6.
A variation of the contestability approach has been proposed in the form of ‘equality of competitive opportunity’, rather than the ‘larger market shares in any given market’ measure which underpins the ‘market access’ view. 732

Amongst the main advantages of this approach are the requirement for regulators to differentiate the various segments of those markets which can be supplied by new market entrants without undermining public policy objectives, and so decompose and make more transparent the costs of such interventions.

Promoting effective market contestability through the WTO is seen as particularly challenging. Achieving this objective may require a fundamental change in the raison detre of the Organisation, moving it away from its existing orientation of balance-of-concessions negotiated reductions in trade barriers.

One proposal for redressing this shortcoming would see contestable market access as the overarching principle of the WTO system, defining the limits on Member States in impairing such access.

732 M Matsushita, above n 4 at 1004; P Nicolaides, above n 214 at 20 - 21, a concept he regards as analogous with Article 90 of the Treaty of Rome, which prevents Member States from limiting competition in markets.

733 P S Watson, J E Flynn and CC Conwell, above n 145 at 348.

734 Ibid at 352 - 359.
Such a principle would have application in the GATT, GATS and TRIPS Agreements, as well as a proposed Agreement on Investment, with an Exceptions Agreement put in place to constrain government activity which impaired and/or nullified benefits accruing from other Agreements and provide guidance to panels called under the Dispute Settlement Understanding.

Mergers

One of the most active areas of international competition law and policy would appear to be mergers, in particular those between firms in similar industries joining together across national borders.

Around 60 (and rising) jurisdictions have some form of pre-merger notification requirement,735 in contrast to the mere four less than thirty years ago.736

While the growing number of countries enacting and enforcing substantive merger laws creates greater transparency, the multiplicity of jurisdictions with such laws also brings the attendant disadvantages of higher transaction costs for merging parties, enhanced risk of divergent determinations in various jurisdictions, and the potential for sub-optimal outcomes when viewed against global economic welfare.737

735 J Rill, above n 204 at unnumbered.
736 Canada, Japan, the United Kingdom and the U.S., in 1972: A N Campbell and M J Trebilcock, above n 552 at 89.
737 Ibid.
It has been estimated a multinational corporation involved a potential merger can be required to comply with the notification requirements of as many as thirty jurisdictions.\textsuperscript{738}

Competition policy tends to distinguish between three main types of mergers: horizontal; vertical; and, conglomerate.\textsuperscript{739}

Horizontal mergers occur with the joining together of two or more firms in the same line of business, operating in the same geographic area. While horizontal mergers may be undesirable given they reduce the number of competitors in a market, they also have the capacity to deliver greater economies of scale and so lower prices, and through this improve consumer welfare.

\textsuperscript{738} United States Council for International Business, above n 344 at 4, who also point out the U.S. Hart-Scott-Rodino Act has had far broader application than originally expected, with the Act applying to 4700 mergers in U.S. fiscal year 1998, way beyond the several hundred originally contemplated.

\textsuperscript{739} World Trade Organisation, above n 22 at 40; M A A Warner, above n 87 at 20 - 22.
Taken as a whole, there is no a priori answer to the desirability or otherwise of a horizontal merger, with any determination being based on careful consideration of the specific circumstances of the products/industry concerned (analogous to the 'rule of reason'\textsuperscript{740} approach).\textsuperscript{741}

Vertical mergers occur with the joining of businesses engaged in different stages of production and marketing within an industry. Such mergers are generally undertaken to realise efficiencies by reducing costs through internalising the various stages of production and distribution.

While such arrangements are more likely to deliver efficiency gains, these have to be balanced against the potential adverse effects on competition, in particular the capacity to raise entry barriers or foreclose integrated firms from the market where the merged business would operate.\textsuperscript{742}

\textsuperscript{740} The 'rule of reason' approach in competition law and policy means the legality of a practice is assessed in the context of its economic effects in the relevant market(s). Its counterpart, 'per se rules' indicate a specified practice is prohibited outright, given such conduct in considered unambiguously harmful: World Trade Organisation, above n 22 at 41.


\textsuperscript{742} J Clark, "Background Note (on) Efficiency Claims in Horizontal Agreements" (1999) 1 (3) \textit{OECD Journal of Competition Law and Policy} 249, for a discussion of the role of efficiency considerations in mergers, the role and types of efficiencies, and the trade-offs between efficiency and anti-competitive effects in merger situations.
Conglomerate mergers take place with the integration of firms operating in unrelated areas of business. They do not raise competition policy concerns because they generally do not increase the market power of the new firm in relevant product markets, although they can give rise to disquiet about potential for cross-subsidisation and reciprocal arrangements which limit competition across markets.

Effectively, the main question for competition authorities in assessing mergers is their potential to substantially increase the capacity of the relevant firm to exercise market power.

Key quantitative measures used by competition agencies in evaluating mergers include impacts on market shares or concentration levels in the relevant product/geographic market, and less tangible indicators such as the nature and extent of barriers to new entrants.

Table 7 provides an overview of some of the merger notification systems and thresholds within selected OECD member countries, and the European Union.
Table 7: Merger Notification Systems and Thresholds in Selected OECD Countries

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<th>Notification System</th>
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743 Organisation for Economic Co-operation and Development, above n 311 at 21, summarising Organisation for Economic Co-operation and Development, “Merger Cases in the Real World: a Study of Merger Control Procedures” (1994); Notification Thresholds for Australia were not reported.
Table 7 indicates the OECD countries studied and the EU generally rely upon compulsory systems of notification for mergers, with thresholds being asset- or turnover-based, with failure to notify of the merger usually leading to fines and orders for divestiture (although the Canadians retain the capacity for imprisonment).

Different jurisdictions also use distinct statistical methods to assess merger thresholds: while the US uses a concentration measure, Canada adopts a straight market share test. 744

The laws of almost all developed nations prohibit anti-competitive mergers, although some jurisdictions allow competition authorities to take into account any industry policy advantages of the merger, or permit a minister to over-rule a competition agency’s negative decision on industry policy grounds. 745

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744 M A A Warner, above n 87 at 20.
745 E M Fox and J A Ordover, above n 89 at 26.
Industry policy issues which can come into play during mergers include preservation of jobs and the creation of ‘national champions’, although these arguments have been challenged on efficiency and ‘beggar-thy-neighbour’ grounds. Such firms, insulated from effective competition, seldom, if ever, become world-class competitors.

There has also been a tendency, although it has diminished in recent years, for merger control to be used to screen foreign investments on purely non-competitive grounds.

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746 E M Fox, above n 279 at 726, argues decision-making by E.U. competition authorities on mergers tends to be more politicised and driven by industry policy pressures than that of their U.S. counterparts.

747 E M Fox and J A Ordover, above n 89 at 27; B E Hawk, above n 66 at 15.

748 F M Scherer, above n 357 at 12; World Trade Organisation, above n 22 at 47.

749 Organisation for Economic Co-operation and Development, above n 311 at 10; B E Hawk, above n 66 at 15.
The European Union and the US constitute a useful study of their respective approaches to mergers, not least because virtually every major merger in the industrialised world engages the EU and/or the US’ interests.


A N Campbell and M J Trebilcock, above n 552, for a general discussion of the differences of the two regimes.

G N Horlick and M A Meyer, above n 479 at 67.
On the one hand, there are a number of notable similarities between the mergers laws and regulations of the EU and the US, for example: the basic objectives are broadly similar, with both being primarily concerned with the potential market power which could be exercised over price and non-price dimensions of competition; many of the main provisions are broadly framed, leaving substantial discretion to competition authorities for case-by-case decision making; and, prohibition, dissolution, divestiture and consent orders are common penalties and remedies.

However, there are also important differences, for example, while: the EU adopts a relatively higher threshold of dominance a result of which would see competition significantly impeded,\footnote{Merger Regulation, Article 2(3); also, Alsatel \textit{vs} Novasam, (1990) 4 C.M.L.R. 434, and Recital 15, Regulation 4064/89, regarding market share thresholds; and, \textit{Pilkington} - \textit{Techint/SIV}, Case No IV/M 358 (25 June 1994), and \textit{Kali + Salz/MDK/TrE.U.hand}, Case No IV/M 308 (14 December 1993), regarding joint and collective dominance.} the US applies the potentially more lenient substantial lessening of competition or tendency to create a monopoly;\footnote{Clayton Act, 15 U.S.C, Section 7.} and, while the EU focuses more heavily on behavioural factors in assessing potential anti-competitive effects, the US gives significant weight to structural (market shares) evidence.

Further differences include, while: the EU imposes extremely lengthy and onerous filing requirements, the US requires relatively light initial filings; and, the EU imposes tight, fixed time limits on notifications and processes, the US approach is more open-ended.
(The EU has signalled a desire to move away from what it regards\textsuperscript{756} as reacting to "unnecessary notifications". The preferred approach is to replace the existing "excessively rigid system" of compulsory or quasi-compulsory notifications with one where the EU competition authorities focus on mergers having greater policy importance or more likely to result in serious restrictions on competition.)

The EU and the US also adopt similar approaches to dealing with mergers in third jurisdictions which have implications for their home markets: the EU applies its merger rules to companies with no facilities within the Union (where their operations meet certain financial thresholds),\textsuperscript{757} while the US adopts an 'effects' test on US commerce or marketplace.\textsuperscript{758}

\textsuperscript{756} A Schaub, above n 364 at 4 and 11 - 13 for more detailed discussion, noting at 11 that when the original Merger Regulation came into force in 1990 the Commission dealt with about 50 merger cases annually, a figure which had increased fourfold by 1998.

\textsuperscript{757} Merger Regulation, Article 3.

Taken as a whole, while there appears to be meaningful convergence in the substantive aspects of merger laws between the EU and the US, the (important) remaining differences are procedural, with priority areas for action including the treatment of efficiencies, differences in review thresholds, the regulatory burden and availability of precedent to guide practitioners.\textsuperscript{759}

Not surprisingly, mergers are regarded\textsuperscript{760} as an important area for greater international co-operation, given they can have implications (such as market foreclosing and price-raising effects) beyond the borders of the nation(s) in which the merger is taking place.

From a procedural perspective, the national jurisdiction approach to assessing international mergers requires the business parties to comply with different administrative application and review procedures (often seeking much the same information about the proposed transaction, albeit in varying forms of reporting) with unnecessary and duplicative compliance costs for business and administrative costs for the competition authorities involved.


\textsuperscript{760} P B Marsden, above n 197 at 102.
With individual national jurisdictions often having different competition policy objectives, the business parties to the potential merger confront the real risk their proposal may be approved by a majority of jurisdictions only to be frustrated by the action of one competition authority.\textsuperscript{761}

Cases-in-point include: the Aerospatiale-Alenia/de Havilland merger, where the application was approved by the Canadian, but denied by the European Union,\textsuperscript{762} competition authorities; the Boeing/McDonnell Douglas\textsuperscript{763} application which was endorsed by the US, but initially resisted by the European Union,\textsuperscript{764} authorities; and the Montell joint venture arrangement.\textsuperscript{765}

\textsuperscript{761} Around 10 per cent of merger notification filings in the U.S., required by the Hart-Scott-Rondino Act, involve at least one company headquartered in the European Union, with over 20 per cent of those notified to the European Commission under the Merger Regulation also subject to notification under Hart-Scott-Rodino: J P Griffin, above n 43 at 182 - 183.

\textsuperscript{762} Aerospatiale-Alenia de Havilland, Case IV/M 053, 1991, O.J. L 334/42.


\textsuperscript{764} Although the Boeing - McDonnell Douglas merger was eventually consummated following some commercial concessions by Boeing: World Trade Organisation, above n 22 at 67, and F Romano, above n 221 for discussion. Romano attributes the friction in handling the matter to the different approaches of E.U. and U.S. competition authorities to mergers - while the E.U. focuses on whether the proposed concentration will create or strengthen a dominant position, the U.S. looks at whether the merger may substantially lessen competition in the relevant market.

\textsuperscript{765} Re Montedison SpA, 5 Trade Reg Report (CCH), 23,749; Case IV/M. 269 (1994) O.J. L 332/48, under which the E.U. revisited its original approval to take into account conditions imposed by the U.S. FTC; also, Ciba-Geigy/Sandoz, Case, IV/M 737 (1997), O.J. L 201.
The Gillette - Wilkinson Sword merger\textsuperscript{766} was reportedly\textsuperscript{767} subject to regulatory intervention within 14 individual competition policy jurisdictions, each with different tests and requirements.\textsuperscript{768} Mergers have also been prevented in the US following successful private actions in State jurisdictions.\textsuperscript{769}

National competition agencies have challenged\textsuperscript{770} the claim cross-border mergers are being complicated by the necessity for multiple reviews, pointing to the increasing, informal consultative arrangements between them. Merger parties, they argue, can simplify the merger process, in particular multi-agency investigations, by authorising the sharing of confidential information.\textsuperscript{771}


\textsuperscript{767} F M Scherer, above n 16 at 2; P J Lloyd, above n 31 at 15.

\textsuperscript{768} A notable outcome of this broad-reaching process was that the two parties were required to separate in three jurisdictions - Australia, Britain and the United States.

\textsuperscript{769} Where the proposed merger (Minorca SC acquisition of Consolidated Gold Fields) was not challenged by national competition authorities from Britain, the E.U. or the United States: A Jacquemin, above n 447 at 784.

\textsuperscript{770} J J Klein, above n 10 at unnumbered.

\textsuperscript{771} There have been a number of instances where firms have voluntarily waived their rights for the confidential treatment of documentation when under investigation by E.U. and U.S. competition authorities, for example: Microsoft (World Trade Organisation, above n 22 at 66; and, J Rill, "Comments and Discussion" on J D Richardson, "Multilateralising Conventions in R Z Lawrence (ed), "Brookings Trade Forum 1998" (1998) 378 at 379); BT/MCI (M J Reynolds, "The European Union Perspective" (1995) International Business Lawyer 492 at 492; M H Byowitz, above n 223 at 30 - 31); and, WorldCom/MCI (A D Melamed, above n 108 at unnumbered).
The international business community, while acknowledging the benefits of the exchange of confidential information to facilitate merger approvals, has expressed profound concerns relating to the effective preservation of that confidentiality.\textsuperscript{772}

They have also called for changes to arrangements for dealing with multi-jurisdictional merger reviews, including reducing to a minimum the information required, harmonisation and transparency in procedural and substantive requirements, clearer time frames, and raising notification thresholds.

Proposals for procedural reform have included lighter initial filings, harmonisation of waiting periods before mergers can take effect, placing time limits on competition agencies to review applications, standardisation of rules of discovery when evidence is located abroad,\textsuperscript{773} and the relaxation of confidentiality rules to permit exchanges of information between agencies examining the same transaction.\textsuperscript{774}


\textsuperscript{773} M J Trebilcock, above n 20 at 282 - 283; A N Campbell and M J Trebilcock, above n 552 at 106 - 115 for an extensive discussion of different reform models.

There have also been proposals to lift the transparency of national notification requirements, and changes thereto, as well as reconsideration of the need for merging firms to file notices in countries where a merger appears unlikely to have any significant local impact, and to ensure the compliance costs for the business parties are proportional to the competition law concerns of genuinely affected jurisdictions.  

Other suggestions have included uniform notification procedures for transnational mergers, involving a basic set of questions merger parties would be required to provide to all relevant competition agencies, in addition to existing national laws in key jurisdictions.

Another variation would see voluntary schemes where the merger parties make more burdensome and substantive filings in one or more jurisdictions in exchange for comparable offsetting filings in other jurisdictions.

The main benefits of such simplified approaches would include lower administrative costs for competition agencies and compliance costs for the business parties, higher levels of transparency and reduced uncertainty, reductions in regulatory arbitrage, and added pressure for convergence in relevant national laws and regulations.

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775 United States Council for International Business, above n 344 at 5.
777 P S Crampton and M Barutciski, above n 19 at 6.
778 A Jacquemin, above n 2 at 106.
Substantive reforms may have to be limited to merger review agencies in OECD member nations committing to a set of non-binding merger review guidelines and possibly accepting a lead review agency. However, procedural differences are likely to remain, reflecting substantive differences between competition laws, not just the administrative styles of competition agencies.

A key, and much debated, element of merger analysis concerns the treatment of efficiencies.

In broad terms, competition authorities are implicitly called upon to balance two seemingly competing arguments: on the one hand, mergers can have anti-competitive effects, by reducing the number of players in the market place; yet on the other hand, such arrangements have the potential to deliver beneficial efficiency dividends.

The conundrum for competition authorities is that the anti-competitive effects are more readily identifiable and tangible, while the efficiencies are often much less so.

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779 J Rill, above n 204 at unnumbered.
780 C A Varney, above n 341 at 3.
Advocates of the ‘efficiencies’ viewpoint argue a pro-efficiency merger is fully compatible with the broader efficiency-enhancing objective of competition law and policy, while opponents contend measuring such efficiencies ranges between extremely difficult to impossible and even then are difficult to balance against the loss of competition resulting from the merger.782

The EU and the US again constitute a useful comparison, this time in the treatment of efficiencies under competition law and policy.783

The EU has generally adopted a receptive approach to efficiencies, exempting from its prohibitions on agreements which distort or restrict competition784 any agreement, decision or concerted practice which “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a faire share of the resulting benefit....”785

782 J P Griffin and L T Sharp, above n 781 at 653 - 654; E M Fox, above n 279 at 730 - 732 for arguments against allowing efficiency arguments in merger analysis.
784 Article 85(1) of the Treaty of Rome.
785 Article 85(3) of the Treaty of Rome.
However, the European Court of Justice has imposed a limit on the anticompetitive effect/efficiency dividend trade-off under Articles 85 and 86, holding anti-competitive arrangements (such as mergers) and/or conduct (such as resulting abuse of dominance) must not eliminate effective competition, which has been equated with dominance of the relevant market.

The EU's Merger Regulation adopts a complementary approach to that of Articles 85 and 86 of the Treaty of Rome, requiring the Commission to take into account efficiencies provided they advantage consumers and their realisation does not constitute an obstacle to competition.

However, the efficiency dividends must substantially exceed the detriment to competition in the market place and flow-on to consumers, with the efficiency-defence not allowed once dominance has been found.

In the US, while efficiency arguments have been available under competition law, their role has been ambiguous, with comparatively few instances of successful application.

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786 Appendix 2 for text of these Articles.
789 Article 2(1)(b).
790 For example, Aerospatiale-Alenia de Havilland, Case IV/M 053, 1991, O.J. L 334/42; Accor/Wagon-Lits, Case IV/M 126, 1992, O.J. L204/1; and, MSG Media Service, Case IV/M 469, 1994, O.J. L 364/1.
791 Merger Regulation, Article 2 III.
American Courts\textsuperscript{792} and competition authorities\textsuperscript{793} have generally adopted a practical and pragmatic compromise under which the efficiencies defence is allowed only where the likelihood of efficiencies is extremely high, and of anti-competitive effects is relatively low. However, efficiencies presented under pre-merger notifications can validly influence prosecutorial discretion in challenging the proposed transaction.\textsuperscript{794} At the same time, the burden of proof of net efficiencies (the gains from efficiencies versus the adverse consequences of a loss of competition in the market place) for consumers is very high,\textsuperscript{795} with enforcement agencies generally reluctant to apply substantive analysis to efficiency claims.\textsuperscript{796}

\textsuperscript{792} The Supreme Court held in \textit{Brown Shoe Co vs United States}, 370 US 294 (1962), and \textit{United States vs Philadelphia National Bank}, 374 US 321 (1963), and \textit{Ford Motor Co vs United States}, 405 US 562 (1972) that efficiency is no defence once an anti-competitive finding has been established. However, lower Courts appear more open to efficiency arguments in dealing with merger matters: for example, \textit{Federal Trade Commission vs University Health Inc}, 938 F 2nd 1206 (11th Circ, 1991), \textit{Federal Trade Commission vs Owens-Illinois Inc}, 681 F. Supp. 27 (D D C 1988), requiring strong evidence of efficiencies, and the claimed benefits will be passed on to consumers.

\textsuperscript{793} U.S. Department of Justice and Federal Trade Commission, above n 751 Paragraph 4, requires "(t)he expected net efficiencies must be greater the more significant the competitive risk."

\textsuperscript{794} Section 7a of the Clayton Act, 15 U.S.C 18a (Hart-Scott-Rodino Act); P D Camesasca, above n 783 at 23.

\textsuperscript{795} \textit{United States vs Long Island Jewish Medical Centre and North Shore Health System Inc}, 938 F. Supp. 121, where efficiencies were examined despite anti-competitive effects not being established.

\textsuperscript{796} J P Griffin and L T Sharp, above n 781 at 656 - 657.
Monopolisation and Abuse of Dominant Position

Concerns over monopolisation and/or abuse of dominant position are an important driver of competition law and policy around the world.797

Abuse of dominance798 arises when a single firm (or even a small number of dominant firms - sometimes referred to as 'collective dominant position'799) with a high degree of market power uses that power to foreclose markets and prevent entry by potential competitors, and/or to substantially influence prices or the business behaviour of potential competitors. In short, an ability to prevent effective competition.800

Monopolisation and/or abuse of dominant position can manifest themselves in a range of forms of market conduct, such as exclusive dealing, market foreclosure through vertical integration, tied selling, control of essential/scarc facilities, price and non-price predation, and price discrimination.801


798 Sometimes referred to as 'misuse of market power'.


800 A definition developed by the European Court of Justice in United Brands vs Commission, Case 27/76 (1978) E.C.R. 207.

801 S Van Siclen, "Abuse of Dominance and Monopolisation" (1996) <http://www.oecd.org/daclp/abs01.htm> at unnumbered; World Trade Organisation, above n 22 at 42; S Turnbull, above n 694, for a discussion of a number of these forms of conduct, in the context of barriers to market entry, under European competition law.

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Adverse and undesirable effects of monopolies can include lower levels of output, higher prices, misallocation of economic resources, and wealth transfers from consumers to producers, as well as potential distortions to the administrative and political-executive process.

National competition authorities generally do not become concerned with firms holding substantial market share, which may be the natural market-based outcome of firm-efficiency and energetic competition. What they are concerned about is the way in which any market power is exercised. 802

In evaluating claims relating to dominant position by monopoly or other substantial firms, competition authorities need to recall competition policy is not about preventing the acquisition of market power per se, but the abuse of any dominant position. That is, monopoly does not prove abuse of dominant position, nor are those exercising market power always monopolies.

In doing this, competition authorities need to carefully consider a number of factors. These include the nature and degree of barriers to market entry and innovation in the market, 803 the number and size of competitors and the availability of substitutes. 804

802 M E Janow, above n 20 at 105; S Van Siclen, above n 801 at unnumbered; M A A Warner, above n 87 at 22; Organisation for Economic Co-operation and Development, above n 419 at 4 - 5.

803 S Van Siclen, above n 801 at unnumbered; World Trade Organisation, above n 22 at 42.

Additional considerations in determining ‘collective dominant positions’ include the adoption of parallel conduct by the parties and/or agreements between the participants to act independently of market forces.

Determining abuse of dominance in most jurisdictions involves several distinct steps: defining the relevant market; determining whether the firm(s) concerned are dominant by considering factors such as market share and barriers to entry; and then determining whether the behaviour was abusive in the context of national competition laws.

More particularly, they need to consider whether the firm(s) concerned have sufficient market power to engage in predatory conduct in the expectation of financial benefit, whether there is a clear pattern involving numerous instances of abuses or just an isolated instance, and whether there are plausible alternative explanations which suggest the conduct is consistent with legitimate, competitive business practice.

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807 S Van Siclen, above n 801 at unnumbered; S Turnbull, above n 694 at 97 - 98, for discussion of barriers to entry in the context of E.U. law.
Competition and judicial authorities also take into account market shares, although individual jurisdictions have adopted noticeably different thresholds after which a dominant position can be presumed to exist. For example, while the market share threshold in the EU is around 40 to 45 per cent, the US tends toward a threshold of 70 per cent for dominance and 80 per cent for monopolisation.

However, in seeking to redress perceived problems created by dominant firms, competition authorities must be sensitive not to penalise leading firms which have achieved their pre-eminence in the marketplace through efficient performance, innovation and genuine entrepreneurship.

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809 U.S. Supreme Court, in United States vs Aluminium Co of America, 148 F2nd 416 (1945); also, S Van Siclen, above n 801 at unnumbered, M E Janow, above n 804 at unnumbered.

810 "The successful competitor, having been urged to compete, must not be turned upon when he wins.": Judge Hand, in United States vs Aluminium Co of America, 148 F 2nd 416, 430 (2nd Circ., 1945): also, U.S. Supreme Court in United States vs Grinell Corp, (384 US 563 (1966); A N Campbell, J W Rowley and M J Trebilcock, above n 797 at 463; M A A Warner, above n 87 at 22; Organisation for Economic Co-operation and Development, above n 419 at 4; Canadian Competition Bureau, above n 42 at unnumbered.
That is, they need to clearly distinguish between situations where ascendancy or leadership in market was achieved through respectable, vigorous competition, and that which may be regarded as predatory or otherwise anti-competitive, a differentiation which can be very difficult to make.\textsuperscript{811}

For this reason many jurisdictions focus upon the economic efficiency of any market-leading position,\textsuperscript{812} rather than size/scale per se\textsuperscript{813} as even small firms can have market power in niche segments, which they can abuse.\textsuperscript{814}

In this respect, national competition regimes tend to apply laws somewhat differently depending on how the position of market dominance was achieved.

Where such a position was achieved through legitimate commercial competitiveness, then dominance is generally not actionable. However, if the dominant position is potentially created through a merger/takeover then they may be actioned.\textsuperscript{815}

\begin{itemize}
\item [\textsuperscript{811}] R Smith and D Round, “Competition Assessment and Strategic Behaviour” (1998) \textit{European Competition Law Review} 225, for a general discussion of the ‘structuralist’ vs the strategic behaviouralist’ approaches to determining abuse of dominant position and redation.
\item [\textsuperscript{812}] \textit{Business Electronics Corp. vs Sharp Electronics Corp.}, 485 US 717 (1988), regarding the effects of the application and effect of per se illegality to non-price vertical restraints upon distribution and marketing efficiencies.
\item [\textsuperscript{813}] M E Janow, above n 20 at 105; Canadian Competition Bureau, above n 42 at unnumbered.
\item [\textsuperscript{814}] E M Graham and J D Richardson, above n 59 at 22.
\item [\textsuperscript{815}] World Trade Organisation, above n 22 at 66.
\end{itemize}
However, it is also often the case market power is rooted in some government-sourced regulatory and/or trade barrier, which if removed, would address the problem at its root-cause.\textsuperscript{816}

Defences against allegations of abuse of dominance include the firms concerned have approximately equal bargaining power, there are recognisable efficiency objectives, and/or the conduct was likely to prove profitable.\textsuperscript{817}

The spread of privatisation in developed, developing and transitional economies has also created a range of issues for national competition laws, in particular, relating to the conduct of dominant or monopoly firms, with effective competition policies ensuring deregulated and/or privatised former state monopolies do not re-form as private monopolies/dominant firms.\textsuperscript{818}

There are also differing national approaches in laws dealing with monopolisation and/or abuse of dominant position. The EU and the US are, again, useful examples of such differences.

\begin{footnotesize}
\begin{enumerate}
\item[816] M A A Warner, above n 87 at 22; E M Fox and J A Ordover, above n 93 at 459; D P Wood, above n 626 at unnumbered; World Trade Organisation, above n 22 at 74; also, P S Watson, J E Flynn and CC Conwell, above n 145 at 300.
\item[817] S Van Siclen, above n 801 at unnumbered.
\item[818] World Trade Organisation, above n 22 at 47.
\end{enumerate}
\end{footnotesize}
The European Union applies a relatively low threshold in finding dominance, often on fairly narrow definitions of markets and wide definitions of abuse, and imposes a variety of constraints on the dominant firm.

These constraints cover excessive pricing, obligations to continue dealing with existing customers, and sometimes a requirement to deal with new customers. They also prohibit dominant firms using exclusive contracts where they shelter too much, or significantly increase, market share.

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819 E.U. law is founded in Article 86 of the Treaty of Rome; also, Case 27/76, United Brands vs Commission of the European Communities, (1976) 6 ECLR 637, for a judicial definition of ‘dominance’; Case 85/76, Hoffman-La Roche vs Commission, (1979) 6 E.C.R. 945, on the issue of market shares.

820 Case 85/76, Hoffman-La Roche and Co vs Commission, (1979) E.C.R. 461, where the mere existence of large market share was taken to infer dominance. Dominant position is defined under E.U. law as where a firm has “the ability to act to an appreciable extent independently of its competitors, customers, and ultimately its consumers”, and is reflected in its ability to raise prices: Renault/Volvo, Case IV/M 004, 1990 O. J. C 281/2; Societa Italiana Vetro SpA and Others vs Commission, (1992) E.C.R. II - 1403, Cases T-68/89, T-77/89, and T-78/89.


822 The European Court of Justice has held abuse to cover not just practices which cause direct damage to consumers, but also have detrimental impact on effective competitive structures. For example, it held a firm can abuse its dominant position without actually exercising or relying on its dominance: Case 6/72, Europemballage Corporation and Continental Can Company Inc vs EC Commission, (1973) E.C.R. 215; and, Re Continental Can Company Inc and Europemballage Inc, O.J. (1972) L 7/25.
By contrast, the US 823 adopts a relatively permissive approach toward unilateral behaviour of firms with substantial market power, 824 giving particular attention to performance and efficiency considerations. 825 This approach reflects the view that society is better off if firms are allowed to compete vigorously, even if such dominance disadvantages competitors and increases a firm's market power. 826

This thinking accepts where a monopolist or firm with a dominant market position seeks to exploit this power by raising prices, it encourages new competitors to enter the market which has a remedial effect on this dominance (absent any government-imposed barriers to market entry). 827

The treatment of monopolies within domestic competition laws has implications for international trade and competition, with the absence of meaningful, substantive law and/or weaknesses in its enforcement adversely impacting upon international commerce.

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823 U.S. law in this area is founded on Section 2 of the Sherman Act, although judicial interpretation has gone through several evolutions during the intervening century: M E Janow, above n 804 at unnumbered, for a brief, potted history of this evolution.

824 However, there are notable exceptions, such as the pursuit of Microsoft by U.S. competition agencies: United States vs Microsoft (CCH 71,096); and, W S Comanor and P Rey, "Competition Policy Towards Vertical Restraints in Europe and the US" (1997) 24 Empirica 37 at 42 - 44, for discussion.

825 M E Janow, above n 804 at unnumbered.

826 E M Fox and J A Ordover, above n 89 at 26.

827 This approach underpins the concept of contestability, which has been discussed elsewhere in this study.
This can happen: first, where a dominant or monopoly domestic firm is able to use its position to leverage a comparable situation in other (including export) markets through practices such as predatory pricing and/or cross-subsidisation; and, second, where such a firm is able to foreclose its home market through, for example, contract-based vertical restraints in an essential distribution network, to potential import-competitors.

Some commentators regard minimum national standards for abuse of dominance as sufficient for facilitating international trade and commerce, rather than a single harmonised set of global rules.

Key characteristics of these minimum national standards include applying a ‘market power’ threshold, under which there would be a need to show the existence of significant market power and/or negative effects on competition in order to prevent interference in a commercial activity.

It would also mean ensuring domestic monopoly laws avoid direct output/price regulation, focusing instead on anti-competitive conduct used to acquire or preserve monopoly power, and introduction of ‘national treatment’ ensuring no discrimination against foreign-based or -owned firms.

829 A N Campbell, J W Rowley and M J Trebilcock, above n 797 at 464.
Predation and Pricing Practices

One of the more egregious forms of market power involves the practice of predation. In short, this occurs where a dominant firm (or group of firms) preys upon new entrants, using price and/or non-price mechanisms, ostensibly to drive (keep) the existing (prospective) player(s) out of the market.\(^{830}\)

Predation involves the strategic,\(^{831}\) temporary deployment by predator firms of those attributes which are so attractive to consumers (for example, prices that are so low) either potential competitors are deterred from entering, or existing players exit, the market.

Beyond this short term predation, the successful predatory firm then operates to enhance its market power and recover any short term losses incurred during the predation period by raising prices and/or reducing quality/supply.

There are a number of strategic situations in which a potential predator could expect this strategy to be successful.\(^{832}\)

\(^{830}\) For a European perspective, Hilti vs Commission of the European Communities (1991) E.C.R. II-1439, regarding the use of pricing strategies which were found to be motivated by a desire to destroy existing and deter potential new competitors.

\(^{831}\) R Smith and D Round, above n 811, for a general discussion of the strategic behaviour approach to determining predatory conduct.

The first of these situations occurs where the predator has sufficient financial backing to sustain a 'price war' longer than its rivals. Indeed, such a 'price war' may not be necessary per se if the existing or potential competitor believes the predatory enterprise has the capacity to prevail, and thus they decline the commercial battle.

The second involves predatory conduct where the established firm behaves aggressively, seeking to create a reputation in the market for being 'tough', thus deterring all but the hardiest and/or equally aggressive potential competitors.

Competition authorities generally adopt a two-tiered approach in assessing possible cases of predation.833

The first tier involves examining the structure of the market, in particular the degree of market power exercised by the alleged predator and the nature and extent of barriers to entry, to determine whether the alleged predator would be able to exercise market power if the claimed predation was successful.

833 World Trade Organisation, above n 22 at 67; E P Mastromanolis, above n 832 at 220 - 222, for a general discussion.
The second tier, which comes into play if the first tier is satisfied, involves a detailed examination of the alleged predator’s costs and prices. Some jurisdictions presume predation where prices are set below average variable costs, with prices above such costs being a rebuttable presumption to the contrary. 834

While theoretically appealing, genuine cases of predation are considered to be rare 835 (the exception appearing to be the highly capital-intensive aviation industry 836) as well as being extremely difficult to identify and prove. 837

US Courts have imposed a test of capacity to recoup losses during the alleged predation, which has been difficult to prove, 838 while the European Courts have tended to focus on firms using their dominant position in one market to indulge in predatory conduct and pricing in other markets. 839

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834 The U.S. Supreme Court has used a two-step test to determine predatory pricing: the price set by the defendant was below cost; and, the defendant had a reasonable prospect of recouping the losses caused by the below-cost selling: **Brooke Group Ltd vs Brown and Williamson Tobacco Corp**, 509 US 209 (1993). By comparison, the European Court of Justice has stated a price was below average variable cost was conclusive evidence of predatory intention: **AKZO Chemie BV vs Commission**, Case C- 62/86, 1991 E.C.R. 1359 (CJ).

835 S Bilal and M Olarreaga, above n 132 at 158; G Niels and A T Kate, above n 474 at 31.

836 E M Graham and J D Richardson, above n 59 at 19.

837 M E Janow, above n 804 at unnumbered; World Trade Organisation, above n 22 at 50; D A Hay, above n 65 at 85; U Immenga, above n 617 at 37.


It is also important to distinguish between business behaviour which is predatory and that which is normal, rivalrous commercial practice, in particular what can be called 'meeting the competition'. Market experience indicates a firm is only displaced by a competitor which is able to deliver sustained (as distinct to temporary) lower prices, higher quality or other forms of superior performance.

Competition policy in some jurisdictions seeks to capture pricing practices, beyond predation, which can prove harmful to competition, such as price discrimination and cross-subsidisation.

Price discrimination is said to occur when the prices charged by an enterprise to its clients are not justified by the costs of supply, even where this is not associated with any predatory intent.

The EU adopts a relatively harder line on such practices, especially where a dominant supplier fails to deal equitably with regular customers and this situation affects intra-Union trade, while the US allows the defence of aligning prices with market conditions established by competitors.

840 D A Hay, above n 65 at 86; D P Wood, above n 641 at 493.
841 World Trade Organisation, above n 22 at 50.
842 Ibid, at 67.
843 E P Mastromanolis, above n 832, for a general discussion of the E.U. and the U.S. approaches to predatory pricing.
Cross-subsidisation, while not always captured by national competition laws, is a pricing-related issue which arises in the area of monopolies and/or abuse of dominant position, and can be regarded as potential form of predatory pricing.\textsuperscript{844}

Quite simply, cross-subsidisation can occur when a firm leverages the profits earned in one market (whether product or geographic) where it has a monopoly or dominant position to sell at lower-than-otherwise prices in another market. Dumping can be viewed as a form of cross-subsidisation.

A number of competition policy responses have been proposed for dealing with alleged predation.

These range from the so-called Chicago School view\textsuperscript{845} which argues true predation is, in reality, likely to be rare, with any government regulation more likely to hinder genuine price competition than catch anti-competitive behaviour, and as such efforts to define pricing standards should be abandoned.

Other models\textsuperscript{846} have included rules based on a definition of costs of production, below which prices can be considered to be predatory, and a rule of reason approach recognising the problems associated with finding satisfactory, definite rules.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{844} World Trade Organisation, above n 22 at 68.
\item \textsuperscript{845} Ibid at 38 - 39, for discussion.
\item \textsuperscript{846} Such as those of Areeda-Turner, noted in M Matsushita, above n 340 at 50.
\end{itemize}
\end{footnotesize}
Some commentators\textsuperscript{847} regard the difficulties associated with proving predation as a driving force behind the recourse to, and support for, anti-dumping actions, where the burden of proof is less onerous.

\textbf{Private Conduct}

Commercial conduct by private sector enterprises has long been the focus of efforts to internationalise competition laws.

One of the earliest attempts to develop a multilateral rules-based trading system, in the form of the Havana Charter for the International Trade Organisation in the late 1940s, proposed a specific chapter (Chapter V) on restrictive business practices.

Under the draft Chapter V each Contracting Party was to take appropriate measures and co-operate to prevent business practices by private or public commercial enterprises from affecting international trade which would restrict competition, limit access to markets or foster monopolistic control. An investigation procedure to be carried out by the proposed International Trade Organisation was also put forward.

However, the presence in the draft Charter of the provisions on restrictive business practices was one of the causes of the failure of participating nations to adopt the Charter.\textsuperscript{848}

\textsuperscript{847} D A Hay, above n 65 at 86.
\textsuperscript{848} Other reasons include U.S. Congressional concerns the Charter did not meet U.S. national interests, and wider concerns at the invasiveness on national sovereignty of other provisions dealing with employment, industrial and economic development, and commodity policies: M C Malaguti, above n 91 at 120 - 121.
Prominent forms of private sector restraints which have the potential to limit market access include horizontal agreements, abuse of dominance and vertical restraints, and are seen\(^{849}\) as representing real threats to the effective realisation of the objectives of the World Trade Organisation.

Competition authorities often experience difficulty in separating private restraints from government policy, leading some commentators\(^{850}\) to argue certain private anti-competitive conduct can be enabled by government policy: for example, decisions by competition authorities not to effectively enforce relevant competition laws and policies may be protectionist, substituting for state-imposed barriers to trade.\(^{851}\)

While the 'state action doctrine' immunises some private action taken pursuant to articulated government policies and actively supervised by the State, the resulting private sector conduct must be the outcome of deliberate State intervention and not merely the result of an agreement amongst private parties.\(^{852}\)

\(^{849}\) Ibid, at 117.

\(^{850}\) B M Hoekman and P C Mavroidis, above n 285 at 148; E M Fox and J A Ordover, above n 89 at 16; B E Hawk, above n 66 at 8; World Trade Organisation, above n 22 at 51; M C Malaguti, above n 91 at 119.

\(^{851}\) E Iacobucci, above n 66 at 19; D P Wood, above n 529 at 2.

One commentator\textsuperscript{853} has observed when the OECD surveyed a number of its developed country members in the early 1990s on the interaction between competition and trade policies, the great majority of the examples provided by member governments were not purely private sector practices but arrangements in which government was an essential participant.

Beyond a small number of anti-dumping cases and voluntary export restraints (which are now prohibited by the WTO), the list covered government purchasing and distribution monopolies in South Korea (for beef), Canada and Taiwan (alcohol), and Japan, Taiwan and Thailand (tobacco), as well as the uranium cartel (supported by the Australian Government), and barriers to entry in retailing and marketing (Japan).

Taken as a whole, neither competition and/or trade law and policy are considered\textsuperscript{854} capable of dealing with cases involving a combination of private and public restraints, or government-supported private restraints.

\textsuperscript{853} B Hindley, above n 245 at 335.

\textsuperscript{854} G Feketekuty, above n 39 at 289.
In most developed and developing countries, enforcement of competition law and policy is generally the prerogative of public agencies.

However, this general monopoly power raises a number of important issues, including the extent to which private interests remain unactioned because of the competition agency's (or its political master's) perception of the national/public interest, and/or where the interests of foreign firms may not be consistent with those of domestic firms or the home country.

In the US, private parties have the capacity to bring a wide range of actions before the judicial system, with an apparent trend in some countries toward either permitting or promoting a greater role for private parties in the enforcement of competition law. In other countries, such as the United Kingdom, private actions are rare, and seen as likely to remain so.

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855 D P Wood, above n 641 at 495.
856 As many as 95 per cent of all antitrust actions in the U.S. are reportedly instigated by private enterprises: J Levinsohn, above n 37 at 336.
857 World Trade Organisation, above n 22 at 44.
(Public consultations in Canada exploring whether to permit rights of private action before the Canadian Competition Tribunal for non-criminal matters reportedly drew widespread adverse reaction, and as a result its subsequent deferral.)

However, the differences between the US and the EU may not necessarily be as wide or as clear cut as generally believed.

For example, rights to private action in the US are not unlimited, with the complainant being required to demonstrate a direct and material injury to their commercial interests by the alleged anti-trust violation, while the European Commission is required to ensure anyone with sufficient interest must be heard.

The standard of proof also varies between, and within the jurisdictions: while the US requires the existence of injury to be proven 'as a matter of fact and with a fair degree of certainty', within the EU the thresholds for alleged breaches of Articles 85 and 86 include 'a high degree of probability' in the United Kingdom but 'the balance of probabilities' in Ireland.

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859 P S Crampton and M Barutciski, above n 19 at 23.
860 For example, Zenith Radio Corp vs Hazeltine Research Inc, 395 US 100 (1969), on the issue of 'material'; Adams vs Pan Am World Airways, 828 F 2d 24 (D C Circ 1987), on the issue of 'direct'; and, Hawaii vs Standard Oil Co, 405 US 251 (1972), on the issue of 'commercial interests'.
861 P C Mavroidis and S J Van Siclen, above n 30 at 37.
One key advantage of allowing a greater capacity for private enforcement862 of competition laws and policies is its potential to liberate scarce public resources to investigate and prosecute those cases with greater economic, public policy and/or jurisprudential significance.863 It is also seen to help overcome under-enforcement by under-resourced agencies.864

However, a disadvantage of expanding the right of private action is the potential for private plaintiffs to invoke such rights for harassment or opportunistic purposes,865 or those which they were not originally intended such as environmental or labour standards issues.

A complicating issue, for which there appears no clear cut answer, is whether a foreign firm, not incorporated and having no other legal presence in the particular jurisdiction, would have standing to file a competition law case, even when it could be seen to have a legitimate interest to advance or defend.866

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862 A business survey of competition law concerns found company respondents particularly valued the availability of private rights of action, damages and injunctions as remedies, petition rights, and rights to appeal a competition authority decision, although they were neutral on whether there should be rights to intervene in actions brought by competition authorities: Business and Industry Advisory Committee, above n 562 at 2.
863 World Trade Organisation, above n 22 at 44.
864 D P Wood, above n 529 at 4.
865 P S Crampton and M Barutciski, above n 19 at 31; American Bar Association, above n 858 at 2; J P Griffin, above n 43 at 194, describes aspects of private actions, in particular treble damages and challenges to transactions not disputed by governments, as 'rogue elephants”.
866 World Trade Organisation, above n 22 at 75.
State Trading Arrangements

The impact of State trading enterprises has long been a concern in international trade relations. Article XVII.3 of the GATT, for example, recognises State trading enterprises can function in ways which create serious obstacles to international trade. The GATS has similar provisions (Article VIII).

Dealing with State trading enterprises is seen as generating particular problems, most notably their activities straddle trading rules applying to State measures but also of enterprise behaviour, and are subject to varying degrees of coverage by national competition laws.

In many cases, it can be difficult to discern whether the adverse impact on international trade from the conduct of State trading enterprises is the result of governmental measures of general application, government discretionary activity or the autonomous conduct of the enterprise itself.

The WTO rules (GATT Article XVII, and GATS Article VIII) suggest the criteria of government control are not generally applicable in determining whether a State trading enterprise is subject to the relevant governments' WTO obligations. Yet there is nothing in the WTO rules to suggest autonomous behaviour by State trading enterprises contrary to those rules would escape the obligations of WTO Members. 868

867 Ibid, at 74 - 75.
868 Ibid, at 59.
While the GATT (Article II:4) allows Members to maintain import monopolies, it imposes a number of constraints on their activities and practices.

For example, state import monopolies must not operate so as to provide protection in excess of the bound rate, state enterprises must not discriminate in their importing decisions on the basis of country of origin but make decisions on the basis of commercial considerations,\(^869\) and State trading operations must not be used to sustain import restrictions inconsistent with broader GATT rules on such measures.\(^870\)

Ensuring compliance by WTO Members was to be undertaken through transparency and notification of information about the activities of State trading enterprises, although the WTO itself admits "the transparency arrangements have not worked well..."\(^871\)

In the case of services, the GATS operates in a broadly similar way to the GATT, with the basic obligation being to ensure the State trading enterprise (or enterprises/monopolies with exclusive rights) does not impair the competitive relationship between domestic service providers and those of other Members, as required under the Most Favoured Nation (MFN) principle and Members' specific commitments.\(^872\)

\(^{869}\) GATT Article XVII:1.

\(^{870}\) A general anti-circumvention clause: Notes to GATT Articles XI, XII, XIII, XIV, and XVIII.

\(^{871}\) World Trade Organisation, above n 22 at 59.

\(^{872}\) Ibid, at 61.
Taken as a whole, national competition laws have only a limited role in dealing with State trading enterprises, which often enjoy exemption from such laws and policies.

However, there are some exceptions, such as the European Union, where competition law applies to both the measures of member governments relating to state enterprises and enterprises with special or exclusive rights, as well as to the market behaviour of such enterprises.

Articles 30 and 37 of the Treaty of Rome, for example, have been used to ensure the elimination of measures which have the same effect as quantitative restrictions, while Article 90 requires State measures not be inconsistent with other rules of the Treaty, including those on competition and the free movement of goods and services. 873

. Subsidies and Countervailing Duties

Subsidies and countervailing duties are indicative of the confusion between trade and competition policies. 874

While countervailing duties (ostensibly, anti-subsidies) are permitted under the GATT (that is, trade policy) to offset the effects of subsidies on international trade, in some jurisdictions (such as the European Union) subsidies are treated as a matter for competition policy.

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873 Ibid, at 60.
874 P J Lloyd, above n 31 at 11.
Countervailing duties under the WTO cover two distinct types of subsidies, one which raises competition concerns (being those subsidies used for industry development or preference purposes) and one which does not (those which have little effect on competition in the market, or market shares).

Similarly, while countervailing duties have generally attracted considerable attention amongst competition and trade law and policy authorities, comparatively little progress was made in disciplining competition-distorting subsidies during the first 40 years of the GATT.\textsuperscript{875}

The Uruguay Round of trade liberalisation negotiations produced a modest step forward in dealing with subsidies, by introducing a definition of subsidies, prohibiting all non-general (that is, specific) subsidies above a de minimis level which affect production of goods, regardless of whether they are exported, and requiring all Members to notify the WTO annually of all subsidy arrangements in their jurisdiction.\textsuperscript{876}

\textsuperscript{875} The exception being the solid, but limited, prohibition of export subsidies by developed countries agreed in the Subsidies Code concluded during the Tokyo Round: \textit{Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade}, GATT, BISD 26S/56 (1980).

\textsuperscript{876} There were, however, four exemptions, being subsidies for: research and development; regional development programs; adapting production facilities to new environmental requirements; and, the de minimis subsidisation level of 1 per cent: G N Horlick and M A Meyer, above n 479 at 70 - 71 for discussion.
However, these new rules have been criticised as being weak, with the WTO's emphasis remaining on the countervailing of subsidies by other members when goods are traded internationally, and for the preservation of noticeable gaps.

In the latter case, export subsidies or domestic subsidies not extended to imports are generally not prohibited, while non-industry specific subsidies or industry-specific research and development subsidies are not actionable.

These special treatments exist despite the fact all subsidies, even those which do not directly impact upon the competitive process, discriminate amongst producers of different products/nations, and thus are inconsistent with the efficiency objective of liberal competition and trade policy.

State aids may require particular attention, with one commentator suggesting where such assistance comes in the form of export subsidies they should be unilaterally countervailable.

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878 Ibid, at 15.
879 M Trebilcock, above n 16 at 103.
Non-export subsidies which are otherwise covered by the WTO Agreement on Subsidies should be non-actionable (that is, the subsidy arrangement is the least-trade-distorting policy instrument available to the government concerned to advance legitimate and prescribed domestic policy objectives).\(^880\)

Yet again, the EU and the US constitute an interesting study in contrasts. While the EU competition authorities pursued an active program of activity in an attempt to control subsidies, their counterparts in the US have given relatively little attention to government subsidies which distort competition in the market place.\(^881\)

**Vertical Restraints**

Vertical restraints have a long history within competition policy, and centre on the capacity of firms to foreclose markets to actual or potential competitors, whether domestic or foreign, and/or undertaken by ownership or contract.

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\(^{880}\) Although the Organisation for Economic Co-operation and Development, above n 311 at 6, considers there is sufficient vagueness in the Agreement to permit abuse.

\(^{881}\) G N Horlick and M A Meyer, above n 479 at 68 - 69, observing at 69 the US' official stance on subsidies is illusory, describing the U.S. as "major, albeit uncoordinated, user of subsidies"
Generic examples of vertical market restraints include exclusive dealing (which impose restrictions on a firm's choice of suppliers or buyers), exclusive territories (which place restrictions on the geographic area where the firm can locate, operate or source/supply), and resale price maintenance (restrictions on prices to be charged by downstream firms).\footnote{882}{World Trade Organisation, above n 22 at 41; F M Scherer, above n 16 at 70 - 87, H H P Lugard, above n 648 at 168 - 171; Organisation for Economic Co-operation and Development "Competition and Trade Effects of Vertical Restraints" (1999) OECD Doc No. COM/DAFFE/CLP/TD(98)47 FINAL 1 at 5 - 7, for general discussion.}

Although conceptually such restraints may appear inconsistent with competition policies which seek to promote contestable markets, competition agencies in reality experience a degree of difficulty in evaluating their impact: while vertical restraints may impose restrictions on the ability of a firm to compete freely, they can also enhance business efficiency and consumer welfare, and the net balance is not always obvious a priori.\footnote{883}{M E Janow, above n 20 at 106; World Trade Organisation, above n 22 at 41; D A Hay, above n 65 at 87 - 93 for general discussion.}

For example, where a producer designates exclusive territories, assigning separate geographic areas to different retailers, the producer may generate incentives to the retailers to undertake commercial activities which are of benefit to the consumer (for example, delivering a superior service) and/or, where there is improved co-ordination along the different levels of a vertical supply chain. In short, such restraints on competition can work to enhance consumer welfare.
Ultimately, the net effects (that is, between anti-competitive and efficiency-enhancing influences) are likely to depend on, inter alia, the type of restraint, the collective market share of the firms practicing the restraint, the nature of the market, the duration of the restraint, and whether the dates for expiry/renewal of the restraint (where they exist) are staggered or grouped together.884

For these reasons, countries with modern competition laws tend to subject non-price vertical market restraints to 'rule of reason' treatment under competition law, in contrast to per se prohibition. Most jurisdictions only prohibit anti-competitive vertical restraints which do not have offsetting efficiency dividends.885

Factors taken into account by competition agencies in making a determination include the existence of legitimate efficiency considerations, the definition of the relevant market, and the time and costs of, and impediments to, creating alternate systems886 as well as the degree of substitutability (either by product or geographic market) and the nature and extent of government barriers to market entry by potential competitors.887

884 Organisation for Economic Co-operation and Development, above n 882 at 7.
885 P B Marsden, above n 402 at 9; also, Organisation for Economic Co-operation and Development, above n 882 at 7 - 10, for a discussion of criteria used in determining the economic efficiency of vertical restraints, such as intra-brand competition, market structure, degree of competition, and the short-run/static and long-run/dynamic competition.
886 World Trade Organisation, above n 22 at 56; U Immenga, above n 617 at 35; M A A Warner, above n 87 at 18 - 19, for a discussion of the problems associated with defining a 'market'.
887 Organisation for Economic Co-operation and Development, above n 882 at 10.
Vertical restraints have also attracted varying treatment in different competition policy jurisdictions. On the one hand, vertical co-operation and integration may be considered acceptable if rival firms have similar opportunities for co-operation and integration, with such arrangements being indicative of market liberalism and openness.

By contrast, vertical co-operation and integration can create concerns for competition authorities where new entrants to the market-place confront greater vertical co-operation/integration costs than existing players, which then forecloses or limits entry of the new player(s).

Achieving effective foreclosure requires the simultaneous presence of three key elements. The foreclosing firm must: first, have significant market power; second, be able to out-bid its actual and potential competitors to keep the market foreclosed; and, third, be able to sustain the monopolised price in the foreclosed market. Achieving and maintaining these conditions is not easy.888

Even identifying vertical restraints is not always simple or clear-cut. While competition authorities in western industrialised nations generally seek hard evidence, usually found in the form of contracts, the personalised relationships which form the foundation of much business practice in Asia means such evidence is considerably more difficult to find.889

889 W S Comanor and P Rey, above n 66 at 467.
Most vertical restraints are found in the distribution chain, limiting the autonomy of the firm (either a wholesaler or retailer) to do business with another supplier. Vertical restraints can also be price-raising, although they generally focus on restricting access to distribution networks.

Ultimately, the effectiveness of any vertical restraint in foreclosing market access is dependent on the capacity and willingness of the potential new entrant to build its own independent supply chain, which will very much be determined by their commitment and plans for the market, as well as resources.

More important considerations may well be the presence of government-mandated regulations, such as laws on incorporation, distribution, importation and investment, which foreclose markets and protect vertical arrangements, especially where they impair or prevent the potential competitor building their own, competing distribution networks. 890

However, competition and regulatory agencies must exercise considerable care to ensure any 'market-opening' interventions do not allow new entrants to free-ride on the endeavours of their more established competitors, especially where they discourage market players from incurring the costs of developing distribution networks under the threat of being required to share or transfer such assets to a potential rival. 891 Such situations would impair the nature and degree of competition in a market.

890 P B Marsden, above n 402 at 20 - 21.
891 An issue relevant in the 'essential facilities' stream.
The inherent trade and commercial tensions created by the existence of vertical restraints can be compounded by differences in national laws.

EU law,\textsuperscript{892} for example, prohibits tight territorial restraints, which reflects the importance attached by the Union to market integration and free movement. This bans all agreements which restrict, prevent or distort competition or affect trade between Member States.

However, the EU recognises there are potential benefits from vertical restraints in improving the production or distribution or goods, or promoting technical or economic progress\textsuperscript{893} (for example, exclusive distribution arrangements can stimulate competition between products of different manufacturers,\textsuperscript{894} and they can be the only way for a new supplier to enter and compete in a new market\textsuperscript{895}) and provides block exemptions, guiding such activity into a common, government-supervised frame.\textsuperscript{896}

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\textsuperscript{892} Article 85 (1) of the EC Treaty, as well as Commission determinations in, for example, the Fifth Report on Competition Policy, Para 13 (1976), and the Thirteenth Report on Competition Policy, Para 34 (1984). B E Hawk, "System Failure: Vertical Restraints and EC Competition Law" (1995) 32 Common Market Law Review 973, for a strongly worded critique of the E.U.'s approach to vertical restraints.

\textsuperscript{893} Article 85(3).


\textsuperscript{895} Recital 7 of the and the Exclusive Purchasing Block Exemption, O.J. 1983 L 173/5; O.J. 1983 L 281/24.

\textsuperscript{896} Article 85 (3), and Council Regulation 19/65; H H P Lugard, above n 648 at 172 - 174, for discussion.
(The EU is reportedly looking to shift its competition policy regime on vertical restraints from the current legalistic approach requiring compliance with sector-specific rules to an economic-effects based system embracing almost all sectors of distribution, to be achieved through a single block exemption regulation with wider application than existing instruments.

The new block exemption arrangement is expected to cover all vertical restraints concerning intermediate and final goods and services, and be based on a 'black clause (sometimes known as a 'negative list') approach - that is, dealing with what is not block-exempted instead of defining what is exempted.)

By comparison, US law is premised on the view that vertical behaviour can be efficiency-enhancing.

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897 A Schaub, above n 364 at 17 and 17 - 22, for detailed discussion; V Korah, above n 535, for a discussion of the operation of the group exemption process, and the related jurisprudence.

The US adopts a 'rule of reason' approach, prohibiting only those restraints which unreasonably restrict competition. However, certain types of vertical restraints, because of their manifestly anti-competitive nature, are per se unlawful (for example, fixing prices, dividing markets and/or allocating customers).

It has been observed in the eleven years to 1992 (that is, during the Reagan/Bush years) US competition authorities did not initiate a single action against vertical price or non-price restraints, with subsequent actions over the following three years generally settled on a consent basis.

Furthermore, the Vertical Restraints Guidelines announced in 1985 were left unimplemented by competition authorities and largely ignored by the judiciary before being withdrawn by the incoming Clinton Administration in 1993.

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899 Continental T V Inc vs GTE Sylvania Inc, 433 US 49. Prior to Sylvania the U.S. Supreme Court had held vertical price and non-price constraints were per se illegal: United States vs Arnold, Schwinn and Co, 388 US 365 (1967).

900 While Section 1 of the Sherman Act sets down these actions as per se illegal, the Supreme Court (Dr Miles Medical Co. vs John D Park and Sons Co, 220 US 373 (1911)) has adopted a 'rule of reason' approach to vertical non-price restraints.

901 W S Comanor and P Rey, above n 66 at 467.

902 Above n 898.

903 W S Comanor and P Rey, above n 824 at 40.
A controversial example of entry foreclosure is found in the exclusive, twenty year contracts aircraft producer Boeing negotiated with a number of American carriers (American, Continental, and Delta) to be their sole supplier of aircraft.\textsuperscript{904} Competition authorities in the EU regarded the Boeing arrangement as foreclosure, although Boeing responded there were no barriers to Airbus competing for such contracts (which they reportedly did).\textsuperscript{905}

Elsewhere,\textsuperscript{906} the US has ostensibly been accused of double standards in its approach to vertical restraints: while it is relatively tolerant of vertical restraints to competition in its home market, it is hostile toward such practices abroad, especially where they impede export opportunities for US firms.

Taken as a whole, vertical restraints which do not result in foreclosure (or other prohibited practices, such as resale price maintenance) are viewed benignly,\textsuperscript{907} having little impact on international trade and competition.

\textsuperscript{904} F Romano, above n 221, for a general discussion of the broad issues and general handling of the matter by E.U. and U.S. competition authorities.  
\textsuperscript{905} E M Graham and J D Richardson, above n 59 at 25.  
\textsuperscript{906} P B Marsden, above n 197 at 108; A Mattoo and A Subramanian, above n 188 at 106.  
\textsuperscript{907} E M Fox and J A Ordover, above n 89 at 25.
Proposals for reforming and simplifying enforcement of vertical restraint arrangements have focused on two tiers: firms with small market shares in unconcentrated markets, and similar firms seeking to enter new markets could be granted presumptive permission to practice limited vertical restraints; while vertical restraints which are widespread in their market and/or practiced by dominant firms could be subject to detailed and rigorous inquiry.

Differing approaches to dealing with vertical restraints also create tensions between trade and competition authorities. While competition authorities give considerable weight to efficiency considerations, and discount market access factors, trade officials take the opposite view, especially where one of the parties excluded is a foreigner.

Looked at another way, trade officials, who are generally concerned with opening markets, often find it difficult to understand the actions of a competition authority in approving a vertical restraint (on efficiency grounds) which foreclose entry to that market.

Having examined a number of the key issues in competition law and policy, the study will now put forward what the author considers to be a ‘best practice’ model for a multilateral instrument on competition law and policy.

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909 P B Marsden, above n 402 at 10.
A 'Best Practice' Model

In an ideal world, the competition and trade laws and policies would exhibit a high degree of coherence or complementarity, with little, if any, conflict or tension. However, given the realities of international commerce and the realities of international trade, competition, law, and policy, the study will give preference to the ambitious but achievable over the fantastic.

Competition and trade law and policy are not mutually exclusive. If anything, their goals can be mutually reinforcing, with both sets of policies seeking to enhance consumer welfare (whether as business user or the latter traditional concept of household or individual end-user) through increased overall efficiency, and the fostering of competitive market-oriented environments.

Against this background, the primary objective of a cohesive international system of competition and trade law and policies must be to realise the benefits of truly competitive markets and open trade and commerce between nations, at which, a commercial chain from producer to consumer with minimal, if any, wastage.
In an ideal world, the competition and trade law and policy would exhibit a high degree of coherence or complementarity, with little, if any, conflict or tension.

Some have gone so far as to suggest in the utopian world of pure free trade, competition laws and policies would be redundant. However, given the realities of international trade, commerce and investment, let alone economics, law and politics, this study will give preference to the ambitious, but achievable, over the fantastic.

Competition and trade law and policy are not mutually exclusive. If anything their goals can be mutually reinforcing, with both sets of policies seeking to enhance consumer welfare (whether as business user or the more traditional concept of householder or individual end-user) through increased economic efficiency, and the fostering of competitive market-oriented environments.

Against this background, the primary objective of a seamless international system of competition and trade laws and policies must be to realise the benefits of fully competitive markets, and free trade and commerce between nations: in effect, a commercial chain from producer to consumer with minimal, if any, impediments.
This part of the study will set down a number of the key matters, of modality and substance, which would be necessary within a 'best practice' model - which this study, proposes should operate under the auspices of the WTO, with the nomenclature of the Agreement on Competition Law and Policy (ACLP).

Such an Agreement would have a number of advantages, including:

- 'tidying up' the treatment of competition law and policy matters within existing international instruments (notably, the gaps and the patchwork of provisions within existing WTO agreements and OECD instruments);

- obviating the tendency for competition law and policy matters to be dealt with (variously) in numerous regional- and/or sector-specific instruments;

- introducing consistency and conformity in the interpretation of multi-national undertakings on competition law and policy; and,

- reinforcing efforts elsewhere in the multilateral rules-based trading system to move forward, in depth and width, with trade and investment liberalisation.

Concerted multilateral action would also assist national governments, especially those in developing/transitional economies, to overcome the resistance of domestic vested interests opposed to, and able to block, competition law and policy reforms.
This study does not start from a 'bottom-up' approach, developing a layered approach of what may be deemed by trade negotiators to be politically achievable. Rather, it adopts what is acknowledged as a more ambitious a 'top down' perspective, advocating a starting point of 'best practice' from which, if necessary, compromises can be made.

Such an approach has the advantage of identifying 'best practice',\textsuperscript{910} exploiting the transparency of negotiations to highlight the compromises, and thus enable economists to quantify the economic costs of 'second best' outcomes. However, it is not without its challenges, not least of which is the breadth and depth of coverage which may stretch the political will of some national governments.

Particularly challenging issues are likely to include national treatment and most favoured nation, determining the primary objective of competition laws and policies, the absence of domestics competition laws and policies in a number of nations, the role of bilateral and regional instruments, and the interaction of any competition rules with existing WTO agreements (in particular, anti-dumping).\textsuperscript{911}

\textsuperscript{910} In the view of the author.

\textsuperscript{911} For an expansive insight into the challenges likely to confront any ambitious multilateral text the annual reports of the Working Group on the Interaction Between Trade and Competition Policy of the World Trade Organisation: WTO Docs WT/WGTCP/1 (for 1997); WT/WGTCP/2 (for 1998); and WT/WGTCP/3 (for 1999).
This part of the study will outline both the general framework and the more specific substantive issues which should be included within the proposed ‘best practice’/ACLP model, codifying and making transparent the advocated course of action in explicit negotiating texts.

The styling of the proposed negotiating text, in a more ‘plain English’ form, reflects the current, general approach to such negotiations within multilateral trade-related fora, especially the various OECD instruments.

**Framework Issues**

Multilateral instruments of the style proposed in this study generally build on two pillars: first, framework issues, which set out some of the broader structural matters which set the parameters for the matter(s) at hand; and, second, substantive issues, which set down the particular positions adopted on the core tenets of the consensus being pursued.

- **Multilateral Platform**

Discrete, unco-ordinated national approaches to international competition law and policy are unlikely to prove adequate, let alone effective, in dealing with an increasingly globalised system of trade and commerce.
Important weaknesses of the domestic orientation of most competition law and policies include: their tendency to deal only with practices which impact upon/occur within the domestic economy; the difficulties often experienced in obtaining information and evidence from parties located in foreign jurisdictions; and, the significant differences between competition agencies and national legislatures on what amounts to permissible, and impermissible, (anti)competitive behaviour.

While the number of bilateral arrangements has increased in recent years (most of which involve the US as a counterpart, reflecting that country's preference for such models), these too suffer from significant weaknesses.

These weaknesses include their: failure to deliver convergence of substantive law; tendency to operate on a reciprocity of concessions basis; limited capture of bilateral trade; relatively modest gains; and, potential to be inherently discriminatory, and so inconsistent with the Most Favoured Nation principle which underpins the multilateral trading system.

Regional approaches to competition and trade law and policy have also been explored, to varying degrees of commitment and rigour, in a number of regional trade arrangements.

However, these too suffer a number of inherent shortcomings, including: their capacity to cover only a relatively limited share of the trade of member countries; creation of systemic frictions with external trading partners (that is, those not belonging to the regional arrangement); and, their limited focus on procedural, rather than substantive, subjects.
Against the background of the shortcomings of unilateral, bilateral and regional models to dealing with international competition law and policy matters, and their linkages with trade law and policy, the more productive approach is likely to be found in a multilateral instrument on competition law and policy.

There would be a number of clear advantages in making greater use of the WTO as the platform for such a multilateral instrument including: its near universal membership; its past successes in achieving binding rules which require Members to deliver on their commitments; and, the increasing effectiveness of its dispute settlement mechanism.

Other advantages (depending on the specific content of any WTO instrument) include: encouraging the spread of a culture of competition, especially to developing and transitional economies; reinforcing the domestic capacities of national competition agencies; mandating greater transparency as well as non-discrimination in domestic competition laws, policies and enforcement processes; and, tackling anti-competitive practices which have adverse effects on international trade and investment.

Furthermore, concerted multilateral action would greatly assist national governments to overcome the resistance (even outright opposition) of politically powerful vested interest groups which are able to block unilateral liberalisation and reform, which are likely to prove problematic in developing and transitional economies.
The better approach for creating a more comprehensive and effective international system of competition law and policy, to complement and reinforce the progressive liberalisation of trade and investment, would be to develop a robust Agreement on Competition Law and Policy (ACLP) under the auspices of the WTO.

Negotiating Text: Contracting Parties shall commit their respective jurisdictions to this Agreement on Competition Law and Policy, created under and to operate within the World Trade Organisation.

Contracting Parties shall ensure their competition laws and policies are not inconsistent with their commitments under this Agreement.

These commitments shall be the minimum obligations of Contracting Parties, which they may exceed in their national jurisdictions, or in bilateral or regional arrangements, insofar as these other undertakings are not inconsistent with their commitments under this Agreement.

- Developing and Transitional Countries

Developing and transitional countries have clear and distinct interests in the creation of an effective international competition law and policy regime, both to ensure equitable treatment with more developed countries and to act as a catalyst for the introduction or upgrading of domestic regimes.
For both groups of countries, effective and transparent domestic competition law and policy regimes can also play a constructive role in attracting competition-oriented multinational firms which are accustomed to working within such arrangements in their home and other foreign markets.

Developing countries, however, should proceed with care and caution, rather than alacrity, in creating domestic competition law and policy systems, both in terms of substantive law and its enforcement, recalling competition policy tools are blunt, not sharp surgical, instruments.

While transitional economies also need to adopt effective domestic competition law and policy regimes, the challenges they face are very different from those of developed and developing countries.

Transitional economies need to reorient economic and commercial systems lacking competitive structures and habits of competition, most notably the lack of experience in using price signals to determine consumption, distribution and production decisions.

They also need to facilitate structural adjustment away from small numbers of large firms generally accustomed to limited rivalry, which have traditionally been configured to operate within a centralised system of command and control. Managers in such firms often have learned habits of collusion or co-operation, ahead of competition.
The better approach for developing and transitional economies would be commitment to a multilateral agreement on competition law and policy, as a robust platform for implementing effective national competition law and policy regimes which emphasise contestability and the interplay of market forces.

Negotiating Text: Contracting Parties from developing and transitional economies shall legislate and enforce effective, market-oriented domestic competition law and policy systems at the earliest reasonable opportunity.

Without necessarily limiting or prescribing the specific content of such laws and policies, developing and transitional countries are encouraged to adopt a rules-based approach, maximising the interplay of market forces, deregulation of the economies and the contestability of markets.

Developed and other countries, and international agencies, with experience in the development and implementation of competition laws and policies should provide technical assistance in this work, either at their own initiative or upon request by developing and/or transitional economies.

Contracting Parties from developing and transitional economies shall have five years, and those from least developed countries shall have ten years, from the entry into force of, to come into full compliance with their commitments under, the ACLP.
Non-Discrimination

Non-discrimination is an essential principle underpinning the rules-based multilateral trading system operating under the auspices of the WTO. It also has resonance within a range of regional trade and investment arrangements.

This principle rests on two key pillars: national treatment; and, most favoured nation. National treatment requires contracting parties to treat foreigners no less favourably than own-nationals, while most favoured nation requires contracting parties to treat all other nations no less favourably than the most favoured nation.

Key areas where the principles of non-discrimination will have particular resonance in international competition law and policy include: extraterritorial application of laws; horizontal agreements (in particular, cartels); government conduct (especially the relative treatment of private and public enterprises); mergers; pricing practices (including dumping); vertical restraints; and, general enforcement, in particular access to legal processes.

The better approach would see competition laws and policies apply without discrimination to the conduct of legal persons regardless of their nationality, form of ownership or nature of business endeavour.
Negotiating Text: Contracting Parties shall ensure compliance of their competition law and policy regimes with the ACLP.

Such competition laws and policies shall include within them, and fully conform with, the principles of non-discrimination (most notably, national treatment and most favoured nation).

Contracting Parties regard these principles as non-exceptional, and no exceptions, exemptions or derogations shall be allowed.

- **Objectives**

Discussion and debate on the internationalisation of competition law and policy, and its interface with the global trading system, have generally coalesced around a number of core objectives.

These core objectives include the importance of global competition rules in improving the efficiency of the world economy, for both consumers and producers, and eliminating practices which impair competition in, and the contestability of, markets and through this broader commercial and economic liberalisation.

National competition policies have generally adopted a consumer orientation, focusing on the benefit for/cost to (and hence net benefit for) domestic consumers of a range of types of proscribed anti-competitive behaviour.
By contrast, international trade policies have tended to give greater weight to national producer interests, both in the arguments used to support greater market access or contestability, and/or protection of producers from foreign competition.

These approaches have involved two separate streams of analysis in which the impact of competition and trade policies on foreign consumers and producers have received seemingly little weight. Such discrete approaches would not be appropriate in a comprehensive international competition and trade law and policy system.

In this situation, the appropriate composite test would be 'global welfare'. That is, the total of consumer benefit and producer profits in all countries, not just the home jurisdiction, using dynamic efficiency tests.

A clear advantage of this more comprehensive approach would be the need for competition policy makers and enforcement agencies to take into account the interests of, and impact upon, foreign consumers and producers in their decision-making.

Implementation of an multinational competition law and policy regime is likely to be best achievable through the direct actions of individual governments.
Such a 'national conformity' approach would have several advantages, not least of which would be increasing the potential number of countries prepared to commit to a multilateral undertaking on competition law and policy, by reducing tensions relating to perceived incursions on 'national sovereignty'.

Importantly, it would also encourage competition between competition laws and policies, through which policy experimentation can facilitate dynamic progress towards even better practice, while ameliorating the risk that countries will converge toward and be bound to a static and/or 'wrong' substantive law and policy.

The better approach would involve individual nations committing through an expansive ACLP to implement Agreement-compatible national competition regimes which operate to enhance global welfare, and dynamic efficiency.

Negotiating Text: Contracting Parties accept the core objectives for the ACLP shall be the creation of a multinational framework of competition laws and policies which: (a) function to continuously improve the efficiency of national and the world economies; (b) eliminate conduct and practices which impair competition in, and the contestability of, markets; (c) complement and reinforce comprehensive trade and investment liberalisation, and (d) enhance global welfare, and dynamic efficiency.

Contracting Parties shall ensure their domestic competition law and policy regimes fully reflect these core and over-riding objectives.
Contracting Parties shall adopt a threshold of ‘global welfare’ in competition law and policy matters, both those with domestic and international dimensions. ‘Global welfare’ shall be taken to mean the total of consumer benefit and producer profits in all countries.

Furthermore, Contracting Parties shall proscribe anti-competitive conduct in their jurisdiction which causes, or has the reasonable expectation of causing, anti-competitive injury in the home nation or another Contracting Party.

- **Other Agreements**

Any multilateral agreement on competition and trade law and policy will need to accept the presence, and continuance, of a number of regional and/or bilateral instruments dealing with similar issues (albeit with varying degree of breadth, depth and commitment by the parties).

Common threads of these arrangements are emphases on co-operation in competition law and policy matters regarding notification, exchange of information and co-ordination of action, and consultation on actual or potential disputes. Some have embraced the practices of positive comity and negative comity.

Taken as a whole, it would be unrealistic to expect those nations participating in various sub-multilateral arrangements (for example, CER, EU, Mercosur or NAFTA) to completely abrogate their other commitments on competition and trade law and policy in favour of a multilateral agreement.
The importance attached by national governments to sub-multilateral agreements is reflected in that around one-quarter of the Member States of the WTO, by absolute number, participate in competition frameworks as members of regional arrangements, with the figure being higher if viewed on a national output or trade-shares basis.

The better approach is to ensure where bilateral, regional or other multilateral instruments deal with competition law and policy issues these undertakings be compatible with the ACLP.

Negotiating Text: Contracting Parties shall retain the prerogative to enter into bilateral, regional or other multilateral arrangements which have purposes in competition law and policy not inconsistent with the ACLP.

Where existing bilateral, regional or other multilateral arrangements contain provisions on competition law and policy which are inconsistent with the ACLP, the former shall be made consistent by the participating nations within a reasonable time frame.

- Trade Barriers

Efforts to more formally integrate competition law and policy into the multilateral rules-based trading system must be complemented by further liberalisation of trade and investment, recognising anti-competitive behaviour tends to be more prevalent in less liberal/more protected economies/sectors.
While competition and trade law and policy can be mutually reinforcing, action and progress in one policy stream must not be regarded as a substitute for less ambitious or slower action in the other.

Stronger competition laws and policies cannot compensate for weaker trade liberalisation, and the benefits of accelerated trade reform will be diminished when accompanied by inadequate competition laws.

Taken as a whole, the optimum outcome would be an international trading system typified by free trade and investment between nations, and liberal and contestable domestic markets operating within the framework of strong and effective national competition law and policy regimes.

Further liberalisation of trade and investment requires, inter alia, greater transparency in tariff and non-tariff barriers and in the rules which govern trade, and reductions in such barriers, whether on a unilateral, bilateral, regional or multilateral basis.

The better approach is for nations, individually and collectively, to accelerate and broaden their trade and investment liberalisation agenda and outcomes, through whatever mechanisms are available to them (ranging from unilateral to multilateral).

Negotiating Text: Contracting Parties recognise the complementarities between, and mutually reinforcing nature of, effective and extensive competition, and liberal trade and investment, policies.
Contracting Parties reaffirm their commitment to further, ambitious and comprehensive trade and investment liberalisation, through all mechanisms available to them.

- **Transparency**

Transparency of national competition laws and policies is essential for delivering greater certainty for the private sector and consistency in decision-making by enforcement agencies.

This requirement is especially important in areas where the principles of non-discrimination (especially national treatment) have less-than-fulsome application, for example in pricing practices (including dumping), market access, and horizontal arrangements and vertical restraints.

They are also important where there are intrusions into the competition law and policy domain by other policy instruments, most notably industry and regulatory policies.

Transparency of domestic competition laws and policies will be particularly important in areas relating (but not limited) to exceptions and exemptions, government conduct and treatment, merger applications, horizontal arrangements, and vertical restraints.
At the multinational level, greater transparency could usefully be achieved through a formalised Competition Policy Review Mechanism (CPRM), modelled on the WTO's Trade Policy Review Mechanism (TPRM), where national reviews, usually in an incidental way, often cover the competition policies of Member countries.

Any CPRM reviews could usefully focus on the effects of government policy on competition in particular areas, inter alia the impact of product standards and certification requirements on the contestability of markets, and the behaviour of state-trading entities and firms granted exclusive rights.

The better approach is for nations to ensure the highest possible standards of transparency in their laws, regulations and policies impacting upon competition, trade and commerce.

Negotiating Text: Contracting Parties shall be subject to regular and transparent reviews of their domestic competition law and policy regimes under a structured Competition Policy Review Mechanism, which shall operate similarly to the existing WTO Trade Policy Review Mechanism.

The primary focus of the CPRMs shall be to examine and evaluate the compliance of Contracting Parties with their commitments under the ACLP, while also having the capacity to play an advocacy, advisory and educative role to Members on competition law and policy matters.
WTO Council on Competition Law and Policy

The WTO, as a matter of conventional practice, operates a number of Councils to oversee the operation of the main agreements under its responsibility.

There are, for example, Councils or the like engaged with the General Agreement on Tariffs and Trade (dealing with industrial products), the General Agreement on Trade in Services (self-evidently, services), and on Trade-Related Aspects of Intellectual Property (self-evidently, intellectual property).

As such, to maintain consistency of organisational practice, the creation of an ACLP could reasonably be expected to involve the formation of a Council on Competition Law and Policy (CCLP).

Such a CCLP should not necessarily been seen, nor should it function, as an instrument of international bureaucratic intervention in domestic competition law and policy regimes.

However, a CCLP could play a useful advocacy, educative and co-ordinating role in building confidence in the operation of the ACLP, especially amongst Contracting Parties from developing and transitional nations.

The better approach would be the creation of a dedicated Council on Competition Law and Policy within the WTO system to add-value the operation of the proposed ACLP.
Negotiating Text: Contracting Parties agree to the formation of a Council on Competition Law and Policy, comprising Contracting Parties to the ACLP, to operate within the framework of the World Trade Organisation.

The primary responsibilities of the Council shall relate to the terms and conditions of the ACLP, and shall include, but not be limited to, (a) oversight of compliance by Contracting Parties with the terms of the ACLP, (b) monitoring of the performance and ensuring the transparency of the CPRMs, and (c) advising the governing Council of the WTO of appropriate developments and future directions in international competition law and policy per se and in relation to other WTO instruments.

The Council shall not have enforcement powers, although it shall have the authority to issue publicly opinions on the compliance of Contracting Parties with the ACLP.

. Substantive Issues

While the mechanisms and processes for the development of an ACLP will be important, of greater significance will be the terms and conditions of such an instrument. Axiomatically, this will very much depend on the substantive issues considered, and the positions agreed thereon.
Competition Policy

Not all countries, and not even all Members of the WTO, have domestic competition laws and policies. Where such laws and policies exist, there is room for debate on their comprehensiveness and robustness, and the effectiveness with which they are enforced.

It would not be inappropriate to describe the plethora of domestic competition laws and policies around the world as a patchwork, varying in both quantity and quality.

Any multilateral instrument on competition law and policy will need to clearly distinguish between competition versus anti-trust law and policy. While the two terms are sometimes regarded as synonyms, being used interchangeably, they have different foci and orientations.

'Competition policy' is the broader concept, involving the application of pro-competition rules to governments, their agencies and regulatory actions, as well as the private sector. By comparison, 'anti-trust' has narrower meaning and application, generally focusing on the anti-competitive behaviour of private firms.

Similarly, competition policy is about stimulating competition in, and the contestability of, markets, which means encouraging efficiency, commercial rivalry and preserving opportunities in the marketplace, and thus governance by markets rather than by firms.
The better approach would be the adoption of a competition policy, not an anti-trust, approach to encouraging pro-competitive, and dealing with anti-competitive, behaviour, embracing both the conduct of the private and public sectors.

Negotiating Text: Contracting Parties shall have competition laws and policies which shall not be inconsistent with their commitments under the ACLP.

Contracting Parties should favour the broader concept of competition policy in their compliance with the ACLP, and so facilitate the effective and non-discriminatory application of competition laws and policies to the conduct and practices of government, their agencies and business enterprises. Such laws and policies shall encourage competition and contestability of markets.

Contracting Parties from developing and transitional nations should have access to technical assistance on a reasonable basis from appropriate international agencies, such as the OECD and the WTO, and on a voluntary basis from developed countries, in their efforts to build domestic appropriate competition law and policy systems.
Competition and Industry Policies

Industry policy is one area where governments transgress significantly on competition policy.

Competition policy must be distinguished from industry policy. While competition policy is about facilitating competition in the market place, industry policy traditionally delivers preferential treatment to selected firms or industries regardless of the anti-competitive consequences.

Aspects of industry policy which are problematic for competition law and policy include differential treatment of research and development initiatives, joint production ventures, and sectoral/industry specialisation agreements.

Interventionist industry policies have relatively greater impact on competition law and policy in areas such as mergers (for example, the (misplaced) desire to create 'national champions'), horizontal arrangements (especially export cartels), and vertical restraints (for example, preservation of restrictive supply-chain arrangements).

The better approach would recognise the inherent tensions between competition and industry policies, with the former prevailing where there are otherwise irreconcilable conflicts.
Negotiating Text: Contracting Parties shall ensure domestic resolution of conflicts or tensions between competition laws and policy and industry policy do not result in the diminution of the comprehensiveness and/or effectiveness of competition laws and policies.

Where there are otherwise irreconcilable tensions between competition law and policy and industry policy, the former shall prevail.

- Competition and Regulation Policies

Regulated industries, which generally receive special treatment under competition laws, are often associated with some of the most severe incursions into market-based competition.

Prominent anti-competitive forms of regulation include technical standards which restrict market access for products, certification and licencing for services, sectoral exemptions from national competition regimes, and, state aids to preferred activities (for example, research and development) or sectors (under the rubric of 'industry policy').

Disconcertingly, from the pro-competition perspective, sector-specific regulations appear to be gaining ground at the expense of competition policy with general application, with growing tensions arising from the incompatibility of different regulatory (and thus business) systems between trading nations.
However, regulation is not always imposed upon business against their will. Rather, regulations have been sought by incumbent firms as a form of 'regulatory protection' against the discipline of competition from potential, new entrants; sector-specific regulators are also more prone to capture by vested interests than national competition agencies.

The resulting 'business culture' can become more complex and deep-rooted, and difficult for competition law and policy to alter, especially where there has been 'regulatory capture' by industries or firms opposed to market liberalisation and thus enhanced competition.

The better approach is to ensure the broadest and deepest application of effective competition law and policy regimes, with policy tensions between competition and regulatory policies being resolved in favour of the former.

**Negotiating Text:** Contracting Parties shall ensure legislation, regulations and other interventions shall be designed and have the effect of causing least interference in the competitive market place.

Such interventions which are said to be 'pro-competitive' shall clearly identify the problem to be dealt with, the anticipated impact of the intervention on the identified problem, and alternative approaches to the intervention.
Contracting Parties shall ensure domestic resolution of conflicts or tensions between competition and regulatory policy do not result in the diminution of the comprehensiveness and/or effectiveness of competition laws and policies.

Where there are otherwise irreconcilable tensions between competition and regulatory policies, the former shall prevail.

- Dispute Settlement

An effective dispute settlement mechanism is imperative to the integrity of a multilateral instrument on competition law and policy.

Determining the better form of a dispute settlement mechanism will need to take into account a number of factors, including the presence of the existing WTO mechanism, the concerns of sovereign nations regarding potential incursions into judicial and prosecutorial discretion, and the limitations of the WTO in dealing with private sector conduct.

Other issues which would need to be taken into account include the punitive powers of the WTO are limited with compensation and suspension of privileges intended to be only temporary, and the lack of clarity regarding the use of 'non-violation' actions against Member States.

The better approach would be to ensure domestic competition law and enforcement arrangements comply with the binding provisions agreed multilaterally under the proposed ACLP.
Negotiating Text: Enforcement of national competition laws and policies shall be the primary responsibility of relevant domestic competition enforcement authorities.

Rights to private actions shall be a matter for individual Contracting Parties within their own jurisdictions, but shall not be allowed in the WTO processes.

The WTO shall not perform the role of an appellate forum for decisions of domestic courts of competent jurisdiction regarding matters of national competition law and policy.

However, the Dispute Settlement Mechanism of the WTO may hear claims by a Contracting Party that another Contracting Party is not fully complying with their commitments under the ACLP.

The powers of the WTO's dispute settlement mechanism to impose penalties under the ACLP shall be comparable to those under other WTO instruments.

The WTO through the Competition Policy Review Mechanism (CPRM) can usefully collate the experiences of Contracting Parties in meeting their undertakings under the ACLP, to educate and inform existing and potential Parties.
Dumping was one of the earliest elements of international trade and commerce made subject to the multilateral rules-based trading system, under the then GATT. It has also been, and remains, one of the most controversial.

There are clear tensions between competition law and policy, which has the underlying objective of preserving and promoting competition, and dumping law and policy, which seeks to protect one group of competitors in a market place.

Dumping laws and policies are generally incompatible with competition law and policy tests. For example, dumping applications often involve a degree of collusion by industry players with a dominant position in the domestic marketplace, which would normally be considered anti-competitive.

Further, where dumping tests are satisfied the consequential remedial action, in the form of voluntary restraint-style undertakings requiring exporters to raise prices and/or reduce volumes exported (thus amounting to impose export cartel-style arrangements) are themselves inherently anti-competitive.
In effect, anti-dumping actions are contingent protection for inefficient and uncompetitive domestic producers to restrict legitimate foreign competition, useable for harassing actual/potential competitors, with most anti-dumping actions being contrary to the intention and spirit of the GATT/WTO system.

The better approach to dealing with allegations of dumping is to remove such matters from the trade policy stream, placing them instead within a competition law and policy framework.

Negotiating Text: Contracting Parties shall not maintain specific purpose legislation or agencies for the enforcement of claims of (anti-) dumping.

Such matters shall be dealt with by general competition enforcement authorities, using competition laws and policies of broad application, under rules pertaining to predatory pricing and/or price discrimination.

- Enforcement

Weak, inadequate or inconsistent enforcement of competition laws and policies can create distortions in commerce and trade. Gaps in competition law and policy have the potential to be used for strategic industry and trade policy purposes, and thus act as de facto forms of protectionism.
A particularly important issue is that of evidence collection. While competition agencies generally have effective powers (including of compulsion) to collect confidential information in the domestic legal environment, this does not extend to information held in a foreign jurisdiction.

Where such information is held in another country, competition officials tend to defer to the sovereignty of the other government and are thus reluctant to pursue extra-territorial investigations without the explicit permission or co-operation of foreign authorities.

The principles of positive and negative comity have a useful role to play in ensuring broad and effective cross-border enforcement of competition laws and policies. These principles can assist in overcoming problems relating to gaps or duplication in coverage of laws and policies, and alleviate tensions between governments and enforcement agencies in different jurisdictions.

To recall, positive comity means a party which considers anti-competitive conduct is being carried out in the jurisdiction of the other party which is adversely affecting its important interests can notify the other party accordingly, and ask the other party’s competition authorities to initiate appropriate enforcement activities.

By comparison, negative comity involves offering assurances competition authorities will enforce their own rules without intruding upon the jurisdiction of other nations, and is aimed at minimising conflict between deference and restraint.
The better approach would be to ensure effective and objective enforcement of comprehensive and robust national competition law and policy regimes, created and operating in compatibility with the ACLP.

Negotiating Text: Contracting Parties accept the principles of positive and negative comity for the enforcement of alleged anti-competitive behaviour.

Any exceptions for ‘important interests’ shall be narrowly defined, with national governments meeting high standards of transparency.

Contracting Parties shall enact domestic legislation to enable their competition enforcement agencies to participate in both negative and positive comity arrangements. They shall also legislate to allow the exchange confidential information, on bilateral bases.

The capacity to preserve the confidentiality of information shall be an important consideration in determining the suitability of individual, particular Contracting Parties to participate in such exchanges.

Nothing in this statement shall compel a jurisdiction to enter into such arrangements, or engage in the exchange of confidential information.

Contracting Parties, recognising the operational advantages, shall encourage appropriate co-operation between their own competition law and policy enforcement agency(s) and those of other Contracting Parties.
Contracting Parties shall ensure due process in the prosecution and adjudication of competition law and policy matters within their courts of competent jurisdiction, including national treatment of foreign persons, legal or natural.

- **Exceptions and Exemptions**

Exceptions and exemptions offered by governments to the application of national competition law and policy regimes are a significant factor in undermining their efficiency, and limiting their effectiveness. Sectors exempted tend to be those where anti-competitive practices are more prevalent.

Such exceptions and exemptions tend to be offered by governments for industry or social policy, or politico-electoral, reasons. Most governments offer generous exceptions and exemptions within their respective economies, although these are not wholly consistent when compared across national boundaries.

The presence and reach of exceptions creates tensions between nations, particularly where there are differences in the types and breadth/depth of such special treatment. What may be exempt under competition law and policy in one country may be captured in another; what may be prohibited per se in one jurisdiction may be subject to a 'rule of reason' test in another.
Particularly controversial forms of exceptions (and potentially limiting factors to extending the reach of competition policies) involve the treatment of government and its entities under competition policy. This is especially the case where government business enterprises are competitors with, or monopoly suppliers of essential services to, private sector players in contestable markets.

Another, more systemic, form of exception are those created by legal principles which require legislation of general application, such as competition laws, to defer to specific legislation, thus allowing statutes regulating a sector to override general competition law.

The better approach would be to minimise such exceptions and exemptions, and where they remain subject them to requirements of high levels of transparency and minimal distortions to competition.

Negotiating Text: Contracting Parties shall not provide or allow exceptions, exemptions or special treatment which in any way impair the non-discrimination (National Treatment and Most Favoured Nation) principles of the Agreement.

Where national governments provide exceptions, exemptions or other forms of special treatment, these must be transparent, subject to regular review, and designated on a ‘negative list’\textsuperscript{912} basis.

\textsuperscript{912} A negative list approach provides exceptions, exemptions and/or special treatment only for those activities, issues, firms et al specifically contained on the list, with all other activities etc being captured.
Extra-Territorial Application of Laws and Policies

The extra-territorial application of national laws, particularly by the US, remains a source of tension within the international trading community.

These tensions have been reflected in the enactment by a number of developed countries of 'blocking statutes', while some jurisdictions have introduced 'claw-back' statutes which give their Courts discretionary power to either not enforce a foreign competition law judgement, or order only a portion of the judgement be enforced.

The extra-territorial application of national competition laws builds upon an 'effects test' doctrine enunciated by Courts in a number of jurisdictions.

Usage of the 'effects test' doctrine has oscillated, reflecting the lack of consensus amongst nations on its recognition (and where it is recognised the definitions used vary), and inter-jurisdictional conflicts where both authorisation and prohibition are potentially applicable to the same case.

Other limiting factors include the difficulty experienced by enforcement agencies obtaining information not located within the home jurisdiction where the defendant firm does not wish to co-operate, and the presence in some countries of 'blocking statutes' to prevent their firms from disclosing information in situations involving extra-territorial reach.
The better approach, reflecting the importance of comity between nations in international relations in general and cross-border competition law and policy matters in particular, is to encourage nations to move away from the extra-territorial application of laws.

Negotiating Text: Contracting Parties shall not engage in the extra-territorial application of their competition laws and policies regarding conduct within another Contracting Party.

Where a Contracting Party considers another Contracting Party does not have a competition law and policy regime meeting its commitments under the ACLP, and/or is not adequately enforcing said regime, then the matter shall be referred to the WTO’s dispute settlement mechanism for determination.

Where a Contracting Party invokes extra-territorially its domestic competition law and policies upon conduct occurring within another Contracting Party, the latter Contracting Party shall have a right of recourse to the WTO’s dispute settlement mechanism for violation of the Agreement.
**Government Conduct**

Although competition law and policy have traditionally been directed toward the conduct of private sector enterprises, they have equal if not more salience to the conduct of government.

Governments act in anti-competitive ways, and/or ways which facilitate anti-competitive conduct by private and public sector enterprises, which often eclipse in their impact on competition and trade any conduct by the private sector.

Key aspects of government conduct with anti-competitive effect include national competition laws which discriminate against foreigners (that is, the absence of national treatment), sustain the presence of cartels (private or public), State-aid and subsidies, and permissive approaches to the protectionist use of anti-dumping laws.

They also include special treatment under competition laws and policies for government business enterprises, and policies promoting small-sized or cultural/racial minority-owned firms, the maintenance or promotion of indigenous cultures, assurances of services to geographically peripheral or isolated areas or declining regions, and underpinning government revenue.

The better approach would see the conduct of government, and of its agencies and business enterprises, made fully and effectively subject to comprehensive and robust national competition law and policy regimes.

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913 E M Fox and J A Ordover, above n 89 at 15.
Negotiating Text: Contracting Parties shall ensure the conduct of the State made fully and effectively subject to comprehensive and robust national competition law and policy regimes, and such conduct does not nullify or impair the benefits of the ACLP.

Contracting Parties shall expressly prohibit export and import cartels, and similar arrangements such as orderly marketing arrangements and voluntary export restraints, by the private or public sectors.

Disputes concerning such allegations shall be dealt with by the WTO dispute settlement processes in the first instance.

- **Horizontal Arrangements**

Horizontal arrangements between competitors can work to eliminate competition amongst participants. Such arrangements, usually in the form of cartels, can operate to fix prices, allocate quotas and/or divide between them customers or territories in order to control a market.

Almost all nations have laws prohibiting private cartel arrangements, although some allow justifications, for example, for crisis or depression cartels. At the same time, most countries respect as lawful government actions ordering or allowing, and supervising, cartel activity.
Competition law and policy generally distinguish between two generic types of horizontal arrangements: 'hard core' cartel arrangements, which are unambiguously detrimental to efficiency and broader welfare; and, 'soft core' cartel arrangements, which can deliver justifiable efficiency dividends and are not subject to per se prohibitions.

Cartels can also be further categorised into export and import cartels: the former are generally used to serve national industry policy goals by shifting economic benefit to the exporting country; while the latter are formed by domestic buyers/importers to limit market access by foreign competitors/suppliers.

Export cartels generally fall outside of national competition laws in most major industrialised nations, requiring at most authorisation or registration. The tolerance of export cartels by home countries imparts a 'beggar-thy-neighbour' message to other nations, namely conduct which would be unacceptable in the home market is permissible if the adverse effect is felt in foreign markets.

Dealing with export cartels in the international trading system can be particularly problematic. On a bilateral level, importing countries can find it difficult to initiate enforcement actions given the evidence necessary to prove the existence of the cartel is generally located outside their jurisdiction.
At the multilateral level, WTO rules have little effect on purely private export cartels. The consultation provisions in a number of WTO instruments may be useful, but not are sufficiently specific and the national treatment provisions are also limited in their effect.

In the case of import cartels, while a number of practices (such as price fixing, market division and consumer allocation) are prohibited per se, national competition laws often apply a 'rule of reason' approach to co-operative arrangements, such as standard setting and joint purchasing.

Such arrangements are often authorised by the home government if importers are faced with dominating foreign suppliers, and if competition on domestic markets is not likely to be substantially restrained.

Other practices engaged in by import cartels include boycotts of, and/or collective refusals to deal with, foreign sources, as well as excluding or imposing discriminatory terms upon foreign players for membership of key trade associations, which can impair their access to necessary product/service certification arrangements.

The better approach for dealing with cartels, either export or import, is through outright prohibition within the ACLP.
Negotiating Text: Contracting Parties shall take all legislative and enforcement actions necessary to prohibit the creation, maintenance and/or presence of cartels of any form within their jurisdictions.

Failure by a Contracting Party to take such action against cartels, of any form, origin or wherever found, shall constitute violation of the ACLP for the purpose of the WTO’s dispute settlement mechanism.

Contracting Parties recognise their obligations for positive comity in enforcement have particular relevance in the prohibition and prosecution of cartel-related conduct.

- Intellectual Property/Research and Development

Intellectual property rights (IPR), and the conduct of research and development (R&D), generate a number of special issues in competition and trade law and policy.

For example, intellectual property licencing agreements amongst competitors can facilitate cartels which fix prices, limit production and/or allow market sharing; but, they can also be efficiency-enhancing.

Indeed, vertical and horizontal co-operation between firms in higher technology industries are common, and usually driven by pro-competitive and efficiency-enhancing motivations (for example, economies of scale/cost sharing in expensive research and development).
While many aspects of IPR can be addressed within competition law and policy under the headings of horizontal and vertical restraints, and mergers and abuse of dominant positions, there are cases where the behaviour of, and collaboration between, firms is likely to enhance global welfare. Transactions which are likely to fall into this category include joint ventures in R&D, and alliances involving high technology.

Competition authorities, quite properly, seek to balance two arguments invoked in discussion of intellectual property protection: recognising the legitimate expectation of the innovator to be rewarded for their costs and risks; and, concerns overly generous/rigorous intellectual property protection can undermine the diffusion of the new technology.

The better approach to dealing with IPR issues within the framework of competition and trade law and policy is for legislators and enforcement agencies to recognise the differential features of high-technology markets which drive its competitive dynamics, by adopting a 'rule of reason' model.

Negotiating Text: Contracting Parties recognise the differential and special characteristics of the intellectual property process, including in the creation, development, diffusion and defence of intellectual property rights.
Contracting Parties shall adopt within their national legislation and enforcement processes a 'rule of reason' approach to the relationship between intellectual property rights and competition law and policy, with the intention of enhancing the contestability and the dynamic efficiency of the invention and innovation processes.

Contracting Parties recognise the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) shall be the primary instrument in this area and shall prevail on all aspects of IPR except those relating to competition law and policy, where the ACLP shall prevail, when and where there are inconsistencies.

- **Market Access and Market Contestability**

Market access is an outcome, not an objective, of competition law and policy. The better objective for competition policy is market contestability.

The primary objective of competition policy is to defend the competitive process, and not advance the case of individual firms/industries (as is the inherent nature of outcomes-driven market access, and often industry and trade policies), and thus competition policy should not attempt to guarantee a right of, or promote, market access for particular firms/industries.

However, competition law and policy may, incidentally, improve market access where it results in the dismantling of impediments (for example, cartels, anti-competitive vertical restraints and/or prevents mergers) which lessen competition.
The use of 'market access' as a de facto test for the effectiveness of competition law and policy can be criticised for its inherently anti-competitive nature, given measuring market access involves identifying market share quotas, which in turn invites collusion and what is tantamount to 'reverse protectionism' (that is, rather than governments defending existing players in the home market, they aggressively champion their interests in foreign markets).

The better approach would be a comprehensive 'international contestability of markets' model, which seeks to at least preserve, if not enhance, competitive processes in both national and international marketplaces.

Under this approach, a market would be deemed internationally contestable when characterised by competitive conditions where rivalry between firms is not unduly distorted by anti-competitive actions by governments or the private sector, and incumbent firms behave (constructively) competitively to forestall entry by rival firms.

In these circumstances, the competitive process, including the liberality of market access, would not be distorted or impaired by potential barriers, including traditional trade barriers, investment rules, structural impediments, regulatory regimes and private sector anti-competitive practices.
Negotiating Text: Contracting Parties shall not be required to ensure market access outcomes, such being incompatible with genuine competition policy.

Rather, Contracting Parties shall ensure their competition law and policy regimes (including by legislation, regulation and enforcement) stimulate significantly the contestability of markets.

Key elements of the 'contestability of markets' shall be opportunity for genuine competition, rather than outcomes from competition, and the elimination of distortions or impairments to efficient competition in the forms of, inter alia, trade barriers, investment rules, structural impediments, regulatory regimes, and other private and public sector anti-competitive practices.

Conduct of, or sanctioned by, Contracting Parties which results in 'nullification or impairment' of the contestability of markets, shall be actionable under the WTO's dispute settlement mechanisms.

- Mergers

Mergers are one of the most active areas of international competition law and policy, not least where the conduct involves firms in similar industries joining together across national borders.
Mergers per se are neither good nor bad from a competition law and policy perspective. Rather, the main question for competition authorities in assessing mergers is their potential to substantially increase the capacity of the newly created firm to exercise market power - that is, the likely conduct of the merged enterprise on competition in the market place.

Mergers are an important area for greater international co-operation given they can have implications (such as market foreclosing and price-raising effects) beyond the borders of the nation(s) in which the merger is taking place.

From a procedural perspective, the national jurisdiction approach to assessing international mergers requires the business parties to comply with different administrative application and review procedures (often seeking much the same information about the proposed transaction, albeit in varying forms of reporting), with unnecessary and duplicative compliance costs for business and administrative costs for the competition authorities involved.

With individual national jurisdictions often having different competition policy objectives, the business parties to the potential merger confront the real risk their proposal may be approved by a majority of jurisdictions only to be frustrated by the action of one competition authority, as has happened.
The better approach, recognising a single multilateral model-text on mergers is unlikely for the foreseeable future, is for major industrialised nations, in particular, to converge towards a simplified system of merger review and approval.

Negotiating Text: Contracting Parties shall move towards a simplified and harmonised system of merger notification, review and approvals.

Contracting Parties from developed and industrialised nations shall be expected to show leadership and take the first concrete steps in this work.

Contracting Parties agree key elements of the simplification and harmonisation of merger laws shall include, but not be limited to: (a) standardisation of notification procedures for mergers; (b) reducing the information merger parties are initially required to provide to competition authorities; (c) relaxation of confidentiality rules to allow greater exchanges of information; (d) convergence of time frames between national jurisdictions; and, (e) the capacity of one jurisdiction to take a 'lead agency' role in individual merger assessments.

- Monopolisation and Abuse of Dominant Position

Competition law and policy authorities are not generally concerned with firms holding substantial market share, which may be the natural market-based outcome of firm-efficiency and energetic competition. What they are concerned about is the way in which any market power is exercised.
Abuse of dominant position can manifest itself in a range of forms of market conduct, such as exclusive dealing, market foreclosure through vertical integration, tied selling, control of essential/scarc facilities, price and non-price predation, and price discrimination, with undesirable effects such as lower levels of output, higher prices, misallocation of economic resources.

Competition authorities need to carefully consider a number of factors in assessing claims of abuse of dominance.

These include the nature and degree of barriers to market entry, whether the firm(s) concerned have sufficient market power to engage in predatory conduct in the expectation of financial benefit, there is a clear pattern involving numerous instances of abuses or just an isolated instance, and there are plausible alternative explanations which suggest the conduct is consistent with legitimate, competitive business practice.

They should also take into account whether the market power which underpins the perceived abuse of dominance is rooted in some government-sourced regulatory and/or trade barrier, which if removed, would address the problem at its root-cause.

The better approach is for competition law and policy makers, and enforcement agencies to focus upon the economic efficiency of any dominant position and the conduct of the relevant firm(s), rather than size/scale per se.
Negotiating Text: Contracting Parties shall ensure their domestic laws, institutions and policies, in particular relating to industry, regulatory and/or trade policies, do not facilitate dominance of firm(s) and/or the abuse of any such positions.

Contracting Parties shall ensure their competition law and policy regimes focus on the conduct of firms with dominant positions in a marketplace, and the economic efficiency thereof, rather than size and/or scale per se in assessing abuse of dominance.

Contracting Parties shall not to penalise leading firms which have achieved their pre-eminent position in the market place through efficient performance and/or entrepreneurial initiative.

Contracting Parties imposing constraints or requirements on dominant firm(s) shall do so transparently and on a non-discriminatory basis.

- Predation and Pricing Practices

Competition law and policy must distinguish between business behaviour which is predatory and that which is normal, rivalrous commercial practice, in particular what can be called 'meeting the competition'.

Competition policy in some jurisdictions seeks to capture pricing practices, beyond predation, which can prove harmful to competition, such as price discrimination and cross-subsidisation.
Predation involves the strategic, temporary deployment by predator firms of those attributes which are so attractive to consumers (for example, prices that are so low) either potential competitors are deterred from entering, or existing players exit, the market.

Price discrimination can occur when the prices charged by an enterprise to its clients are not justified by the costs of supply, even where this is not associated with any predatory intent, while cross-subsidisation can occur when a firm leverages the profits earned in one market (whether product or geographic) where it has a monopoly or dominant position to sell at lower-than-otherwises prices in another market.

A number of competition policy responses have been proposed for dealing with alleged predation.

At one end of the intellectual range is the view true predation is, in reality, quite rare, with any government regulation more likely to hinder genuine price competition than catch anti-competitive behaviour, while other approaches have focused on alternate models derived from economic theories of prices.

The better approach to dealing with price-related aspects of competition law and policy is to ensure the efficient operation of market forces, such that contestability acts as an effective discipline on prices.
Contracting Parties in their competition laws, policies and enforcement shall adopt 'rule of reason' approaches to dealing with price predation and other pricing practices.

Contracting Parties in enforcing such pricing regimes shall take into account distortions or impairments to contestability, including from government industry, regulatory and/or trade policies, which diminish genuine price competition.

- **Private Conduct**

Commercial conduct by private sector enterprises has long been the focus of efforts to internationalise competition laws. Prominent forms of private sector restraints which have the potential to limit market access include horizontal agreements, abuse of dominance, and vertical restraints.

Competition authorities often experience difficulty in separating private restraints from government policy. Private anti-competitive conduct can be facilitated by government policy, for example decisions by competition authorities not to enforce relevant competition laws and policies may be protectionist, substituting for state-imposed barriers to trade.

Taken as a whole, competition law and policy is generally not capable of dealing with cases involving a combination of private and public restraints, or government-supported private restraints.
At the same time, the general monopoly power held by public agencies in competition law and policy enforcement raises a series of important issues, in particular the extent to which private complaints remain unactioned because of perceived national/public interest(s), and/or where the interests of foreign firms may not be consistent with those of domestic firms or the home country.

In some jurisdictions, private parties have the capacity to bring a wide range of actions before the judicial system, with an apparent trend toward either permitting or promoting a greater role for private parties in the enforcement of competition law. In other jurisdictions, private actions are rare.

The better approach to dealing with private conduct is to ensure it is effectively captured within national competition law and policy regimes, with the legal right to undertake private actions for alleged breaches of such laws being the prerogative of individual jurisdictions.

Negotiating Texts: Contracting Parties, recognising the differences in legal systems and rules, regard the standing of private persons, legal or natural, to initiate actions under competition law as a matter for individual jurisdictions.

However, any legal rights for private actions shall be limited solely to the relevant jurisdiction, and shall not extend to enjoin the conduct of other Contracting Parties.
Private actions shall not be allowed within the WTO processes, such standing being limited exclusively to Contracting Parties.

- **State Trading Enterprises**

State trading enterprises generate particular problems in competition law and policy. Their activities straddle trading rules applying to State measures and enterprise behaviour, and are subject to varying degrees of coverage by national competition laws.

In many cases, it can be difficult to discern whether the adverse impact on international trade from the conduct of State trading enterprises is the result of governmental measures of general application, government discretionary activity or the autonomous conduct of the enterprise itself.

The existing WTO rules suggest the criteria of government control are not generally applicable in determining whether a State trading enterprise is subject to the relevant governments' WTO obligations. Yet, there is nothing in the WTO rules to suggest autonomous behaviour by State trading enterprises contrary to those rules would escape the obligations of WTO Members.

Taken as a whole, national competition laws and policies have only a limited role in dealing with State trading enterprises, which often enjoy exceptions and exemptions from such laws and policies, although there are some notable exceptions (for example, the European Union).
The better approach would be to ensure full and effective coverage of the activities and conduct of State commercial and trading enterprises within the ACLP.

Negotiating Text: Contracting Parties shall apply their national competition laws and policies fully and effectively to State commercial, financial and trading enterprises, with minimal exceptions, exemptions or instances of special treatment.

Where Contracting Parties permit exceptions, exemptions or special treatment for a State commercial, financial or trading enterprise, this must be done transparently and on a non-discriminatory basis.

- **Subsidies and Countervailing Duties**

Subsidies and countervailing duties are indicative of the confusion between competition and trade policies.

While countervailing duties (ostensibly, anti-subsidies) are permitted under the GATT (that is, trade policy) to offset the effects of subsidies on international trade, in some jurisdictions subsidies are treated as a matter for competition policy.

To further confound the situation, countervailing duties under the WTO cover two distinct types of subsidies, those which raise competition concerns (for example, subsidies used for industry development or preference purposes) and those which do not (for example, those which have little effect on competition in the market, or market shares).
The Uruguay Round of trade and investment liberalisation negotiations delivered a modest step forward in dealing with subsidies, by introducing a definition and requiring all Members to notify the WTO annually of all subsidy arrangements in their jurisdiction.

However, these new rules suffer a number of weaknesses, with the WTO's emphasis remaining on the countervailing of subsidies by other members when goods are traded internationally, and the preservation of noticeable gaps.

The better approach, reflecting the market and competition distorting nature of subsidies, would be to work toward the elimination of all such arrangements.

Negotiating Text: Contracting Parties shall eliminate within a prescribed time frame all subsidies and similar arrangements which distort or impair competition and trade.

For developed countries this period shall not exceed five years, and for developing countries it shall not exceed ten years, from the entry into force of the ACLP.

Further, Contracting Parties shall, during the process of moving toward this outcome, make available any residual subsidies or similar arrangements on a transparent and non-discriminatory basis.
Vertical restraints are a significant issue within competition policy, and centre on the capacity of firms to foreclosure markets to actual or potential competitors, whether domestic or foreign.

Conceptually such restraints may appear inconsistent with competition policies which seek to promote contestable markets. However, competition agencies in reality experience a degree of difficulty in evaluating their impact: while vertical restraints may impose restrictions on the ability of a firm to compete freely, they can at the same time enhance business efficiency and consumer welfare.

Generally speaking, countries with modern competition laws tend to subject non-price vertical market restraints to 'rule of reason' treatment under competition law, in contrast to outright prohibition.

Vertical restraints have also attracted variable treatment in different competition policy environments.

On the one hand, vertical co-operation and integration may be considered acceptable if rival firms have similar opportunities for co-operation and integration, with such arrangements being indicative of market liberalism and openness.
By contrast, vertical co-operation and integration can create concerns for competition authorities where new entrants to the market-place confront greater vertical co-operation/integration costs than existing players, which foreclose or limit entry by the new player(s).

Taken as a whole, vertical restraints which do not result in foreclosure (or other prohibited practices, such as resale price maintenance) are generally viewed benignly, having little impact on, and as such need not be a significant issue in efforts to link, competition and trade law and policy.

The better approach to dealing with vertical restraints is to adopt per se prohibitions to more egregious practices such as price maintenance or foreclosure (for example, exclusive dealing/territories), while adopting a 'rule of reason' approach (stressing dynamic efficiency) to other vertical restraint-style practices.

Negotiating Text: Contracting Parties shall in their laws, regulations and policies affecting competition allocate transparently, vertical restraints which distort or impair the contestability of a market between those subject to per se prohibition and those subject to 'rule of reason' tests.

These listings, when combined, shall be exhaustive all forms of vertical restraints.
Contracting Parties shall favour allocating to the per se prohibited listing conduct such as price maintenance, and market foreclosure (in particular, exclusive dealing/territory arrangements).

Contracting Parties shall, when legislating or enforcing rules of reason approaches, apply dynamic efficiency and global welfare criteria.
Conclusion

The increasing globalisation of commerce and industry, and the declining importance of national boundaries, is putting pressure on existing community and analytical approaches to international competition and trade law and policy issues.

This study has identified a number of broad currents in the likely future directions for competition and trade law and policy within the international trading system.

More notably, these appear to be growing recognition amongst the academic, governmental and broader policy communities of the potential complementarity between competition and trade law and policies and the importance of building stronger bridges between the two streams.

However, there are also structural challenges for those engaging with closer relations, including issues relating to reduced jurisdiction (most notably, bilateral versus multilateral) and the (endogenous) firm-medium.
Competition and trade law and policy are not new issues on the international trade agenda, whether at the bilateral, regional or multilateral levels.

While the breadth and depth of treatment of competition and trade issues have varied considerably across time and instruments, the broad direction remains much the same - greater convergence, even closer integration between the two policy streams.

The increasing globalisation of commerce and industry, and the declining importance of national boundaries, is adding impetus for further constructive, analytical approaches to international competition and trade law and policy issues.

This study has identified a number of broad currents in the likely future directions for competition and trade law and policy within the international trading system.

Most notably, there appears to be growing recognition amongst the academic, governmental and broader policy communities of the mutual complementarity between competition and trade law and policy, and the importance of building stronger bridges between the two streams.

However, there are also structural challenges for those championing such closer relations, including tensions relating to preferred platforms (most notably, bilateral versus multilateral) and foci (enforcement versus substantive).
The essential message, and conclusion, of this study is the two streams must learn to work effectively together, for their combined and interactive effect is likely to be greater than the sum of their parts.

The multilateral route, in the form of a discrete agreement on competition policy within the WTO framework, while not without its challenges, is very much the better approach for competition and trade law and policy into the new millennium.
Appendix 1: Main US Competition Law Statutes

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<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
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<tbody>
<tr>
<td>Sherman Act (1890)</td>
<td>Declares illegal: collusive and restrictive practices (Section 1), and monopolisation of inter-state trade, or trade between the US and other countries (Section 2)</td>
</tr>
<tr>
<td>Wilson Tariff Act (1894)</td>
<td>Declares illegal restrictions on imports which have anti-competitive effect within the US (Section 73)</td>
</tr>
<tr>
<td>Federal Trade Commission Act (1914)</td>
<td>Unfair methods of competition are unlawful (Section 5), and gives the FTC the power to prescribe interpretative rules and general statements of policy regarding 'unfair practices'.</td>
</tr>
<tr>
<td>Clayton Act (1914)</td>
<td>Declares illegal: price discrimination (Section 2); exclusive dealing and tying contracts (Section 3); acquisitions of competing companies (Section 7); and, interlocking directorates (Section 8).</td>
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</table>

Section 2 (price discrimination) was revised in the Robinson-Patina Act (1936) and Section 7 (acquisitions) was revised in the Celler-Kefauver Act (1950).

914 P Nicolaides, above n 15 at 10.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Webb-Pomerene Act (1918)</td>
<td>Exempts from the application of the Sherman Act, agreements concerning export trade, providing there are no anti-competitive effects within the US (Section 2).</td>
</tr>
</tbody>
</table>
Appendix 2: Main Competition Rules of the Treaty of Rome

Article 3

".... the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(a) the elimination, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

.....

(b) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

.....

(g) a system ensuring that competition in the internal market is not distorted;

********
Article 3a

"1. ".... the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close co-ordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

*********

Article 7a

....

"The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."
Article 85

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerned practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have not connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
"3. The provisions of paragraph 1 may, however, be declared in applicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

**********

Article 86

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."
Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have not connection with the subject of such contracts.

*********

Article 90

1. In the case of public undertakings and undertakings in which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular those rules provided for in Article 6 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.
**********

Article 91

"2. .... products which originate in or are in free circulation in one Member State and which have been exported in another Member State shall, on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect...."

**********

Article 92

"1. Save as provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."
Appendix 3: The US and European Union Approaches to Competition Policy

<table>
<thead>
<tr>
<th>Activity</th>
<th>US</th>
<th>European Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Pro-Competition Policies</td>
<td>- the interstate commerce clause of the US Constitution</td>
<td>Treaty of Rome:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- free trade in goods (Articles 3, 9 and 30) and services (Articles 3, 52 and 59)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- free movement of labour (Articles 3 and 48) and capital (Articles 3 and 67)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- no policies contrary to the Treaty (Article 5)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- no discrimination (Article 7)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- no differential taxation (Article 95)</td>
</tr>
</tbody>
</table>

915 P Nicolaides, above n 27 at 45 - 47.
<table>
<thead>
<tr>
<th>Activity</th>
<th>US</th>
<th>European Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collusion, Concerted Action: (proscribed activities)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- collusive and restrictive practices (Sherman Act, 1890, Section 1)</td>
<td>- collusion that distorts intra-EC trade or competition (Article 85)</td>
</tr>
<tr>
<td></td>
<td>- restrictions on imports (Wilson Act, 1984, Section 73)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- per se illegal: price-fixing, output-fixing, tied dealings, market-sharing</td>
<td>- explicitly prohibited: price-fixing, output-fixing, market-sharing, applying dissimilar conditions, tied contracts</td>
</tr>
<tr>
<td></td>
<td>- non-price vertical arrangements mostly legal; vertical mergers mostly legal</td>
<td>- vertical restraints on parallel trade generally illegal (even if they increase trade)</td>
</tr>
<tr>
<td></td>
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<tr>
<td>- main provisions</td>
<td></td>
<td></td>
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<tr>
<td>- collusive behaviour</td>
<td></td>
<td></td>
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<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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<tr>
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</tr>
<tr>
<td>- effect on trade</td>
<td>- any collusive action that results in unreasonable restraints on trade</td>
<td>- restriction on cross-border trade that has an appreciable effect on competition</td>
</tr>
<tr>
<td></td>
<td>- covers intra-state trade and trade between the US and third countries (imports/exports), including export practices of foreign firms</td>
<td>- covers import trade, including export policies of foreign firms, only if intra-EC trade is affected</td>
</tr>
<tr>
<td></td>
<td>- export cartels with no anti-competitive effect on domestic trade (Webb-Pomerene Act, 1918)</td>
<td>- export trade not considered (unless export-restraining agreement prevents re-exports back to the EC)</td>
</tr>
<tr>
<td>- exceptions</td>
<td>- trade unions, agricultural organisations, banking, insurance, media, professions (medical and legal), public utilities, telecommunications, transport</td>
<td>- negative clearance when an arrangement results in: improvements in production and distribution, benefits for consumers, no unnecessary restrictions and no elimination of competition</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- block exemptions (eg exclusive dealerships, R &amp; D co-operation)</td>
</tr>
<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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<td>----------------------------------------------</td>
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</tr>
<tr>
<td>Monopolisation, abuse of dominance (proscribed activities)</td>
<td>- monopolisation (Sherman Act, 1890, Section 2)</td>
<td>- abuse of dominance that affects intra-EC trade (Article 86)</td>
</tr>
<tr>
<td>- main provisions</td>
<td>- unfair competition (Federal Trade Commission Act, 1914)</td>
<td>- prohibited abusive practices: imposing unfair prices or trading conditions, limiting production or markets, applying dissimilar trading conditions, tied contracts</td>
</tr>
<tr>
<td></td>
<td>- price discrimination, exclusive dealing, tying contracts, acquisition of competitors, interlocking directorates (Clayton Act, 1914)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- price discrimination (Robinson-Patina Act, 1936)</td>
<td></td>
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<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>- monopolisation, abusive behaviour</td>
<td>- mergers leading to dominance (Celler-Kefauver Act, 1950)</td>
<td>- size not unlawful</td>
</tr>
<tr>
<td></td>
<td>- size is not unlawful per se</td>
<td>- size not unlawful</td>
</tr>
<tr>
<td></td>
<td>- takeovers or mergers that raise market concentration</td>
<td>- takeovers or mergers that raise market concentration</td>
</tr>
<tr>
<td></td>
<td>- monopolist must have market power and intend to abuse it</td>
<td>- monopolist must have market power and engage in abusive practices</td>
</tr>
<tr>
<td></td>
<td>- monopoly is &quot;the power to control prices or exclude competition&quot; (market share, barriers to entry, number of competitors, pricing and marketing patterns)</td>
<td>- monopoly is &quot;a position of economic strength that allows behaviour independently of competitors&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- monopolist must have capability for dominance (own means to dominate plus absence of potential competition)</td>
</tr>
<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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</tr>
<tr>
<td>effect on trade</td>
<td>where there is neither overt market power or intent, suspect unfair behaviour must lessen competition substantially, meaning risk of market concentration or harm to competitors through economically unjustifiable prices or other unfair business conditions</td>
<td>any abuse of dominance that affects trade</td>
</tr>
<tr>
<td>price discrimination</td>
<td>monopolisation need only affect part of trade (instead of restraining trade)</td>
<td>not explicitly prohibited, unless prices do not relate to economic value</td>
</tr>
<tr>
<td></td>
<td>prohibited if it lessens competition substantially, unless price differentials are due to: cost differences, changing market conditions, meeting competition in good faith (Robinson-Patina Act, 1936)</td>
<td>predation (selling below cost) is harmful when practiced by dominant firm that intends to harm smaller competitor</td>
</tr>
<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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<tr>
<td></td>
<td>- predation is the sale below variable costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- unlawful discrimination is between US buyers/suppliers, not between the US and third countries</td>
<td></td>
</tr>
<tr>
<td>Extraterritoriality</td>
<td>- US law applies to all US and foreign private practices that affect US imports and exports (effects doctrine)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- exceptions provided by comity and sovereign immunity</td>
<td>- through effects doctrine, competition policy applies to foreign firms that conspire to distort trade and competition within the EC</td>
</tr>
<tr>
<td>Government Behaviour</td>
<td>- public companies</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- have no competition related obligation</td>
<td>- Member Governments may not encourage practices contrary to the Treaty (Article 5(2))</td>
</tr>
<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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<tr>
<td>------------------</td>
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<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>State Aids</td>
<td>have no competition-related obligation</td>
<td>- no incompatible distribution monopolies (Article 37)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- no anti-competitive behaviour by public firms (Article 90)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- no discriminatory procurement by public firms (Procurement Directive)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- transparency in financial relations between governments and public firms (Directive)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- no trade-distorting aids (Articles 92 to 94)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- no discriminatory public procurement (Procurement Directive)</td>
</tr>
<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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<td>--------------------------------</td>
<td>--------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>General Exceptions</strong></td>
<td>- acts of Federal and state governments (e.g., subsidies, distribution monopolies)</td>
<td>- Member Governments obliged not to pursue policies contrary to the Treaty (Article 5)</td>
</tr>
<tr>
<td></td>
<td>- state is immune from prosecution</td>
<td>- all sectors covered except coal and steel (ECSC)</td>
</tr>
<tr>
<td></td>
<td>- measures of foreign and trade policies</td>
<td>- statutory limitations on agriculture</td>
</tr>
<tr>
<td></td>
<td>- regulated industries</td>
<td>- no statutory provisions but some exemptions in transport, oil, electricity, gas, banking and insurance, and telecommunications on the basis of public interest (Article 36, 90 (2))</td>
</tr>
<tr>
<td></td>
<td>- industrial policy considerations not excepted</td>
<td></td>
</tr>
<tr>
<td><strong>Institutions, procedures</strong></td>
<td>- majority of cases before courts brought by private action, often seeking treble damages</td>
<td>- cases before Court brought by Commission</td>
</tr>
<tr>
<td></td>
<td>- Justice Department may initiate own investigations</td>
<td>- cases investigated by Commission (following own initiative or private complaints)</td>
</tr>
<tr>
<td>Activity</td>
<td>US</td>
<td>European Union</td>
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</tr>
<tr>
<td></td>
<td>- law enforced by courts</td>
<td>- law enforced by Commission, judicial review possible</td>
</tr>
<tr>
<td></td>
<td>- criminal proceedings possible</td>
<td>- no criminal proceedings</td>
</tr>
</tbody>
</table>
Appendix 4: Agreement on
Competition Law and Policy

Framework Issues

**Multilateral Platform:** Contracting Parties shall commit their respective jurisdictions to this Agreement on Competition Law and Policy, created under and to operate within the World Trade Organisation.

Contracting Parties shall ensure their competition and related laws and policies are not inconsistent with their commitments under this Agreement.

These commitments shall be the minimum obligations of Contracting Parties, which they may exceed in their national jurisdictions, or in bilateral or regional arrangements, insofar as these other undertakings are not inconsistent with their commitments under this Agreement.

**Developing and Transitional Countries:** Contracting Parties from developing and transitional economies shall legislate and enforce effective, market-oriented domestic competition law and policy systems at the earliest reasonable opportunity.

Without necessarily limiting or prescribing the specific content of such laws and policies, developing and transitional countries are encouraged to adopt a rules-based approach, maximising the interplay of market forces, deregulation of the economies and the contestability of markets.
Developed and other countries, and international agencies, with experience in the development and implementation of competition laws and policies should provide technical assistance in this work, either at their own initiative or upon request by developing and/or transitional economies.

Contracting Parties from developing and transitional economies shall have five years, and those from least developed countries shall have ten years, from the entry into force of, to come into full compliance with their commitments under, the ACLP.

**Non-Discrimination:** Contracting Parties shall ensure compliance of their competition law and policy regimes with the main tenets of the rules-based multilateral trading system.

Such competition laws and policies shall include within them, and fully conform with, the principles of non-discrimination (most notably, national treatment and most favoured nation).

Contracting Parties regard these principles as non-exceptional, and no exceptions, exemptions or derogations shall be allowed.
Objectives: Contracting Parties accept the core objectives for the ACLP shall be the creation of a multinational framework of competition laws and policies which: (a) function to continuously improve the efficiency of national and the world economies; (b) eliminate conduct and practices which impair competition in, and the contestability of, markets; (c) complement and reinforce comprehensive trade and investment liberalisation, and (d) enhance global welfare, and dynamic efficiency.

Contracting Parties shall ensure their domestic competition law and policy regimes fully reflect these core and over-riding objectives.

Contracting Parties shall adopt a threshold of 'global welfare' in competition law and policy matters, both those with domestic and international dimensions. 'Global welfare' shall be taken to mean the total of consumer benefit and producer profits in all countries.

Furthermore, Contracting Parties shall proscribe anti-competitive conduct in their jurisdiction which causes, or has the reasonable expectation of causing, anti-competitive injury in the home nation or another Contracting Party.

Other Agreements: Contracting Parties shall retain the prerogative to enter into bilateral, regional or other multilateral arrangements which have purposes in competition law and policy not inconsistent with the ACLP.
Where existing bilateral, regional or other multilateral arrangements contain provisions on competition law and policy which are inconsistent with the ACLP, the former shall be made consistent by the participating nations within a reasonable time frame.

**Trade Barriers:** Contracting Parties recognise the complementarities between, and mutually reinforcing nature of, effective and extensive competition, and liberal trade and investment, policies.

Contracting Parties reaffirm their commitment to further, ambitious and comprehensive trade and investment liberalisation, through all mechanisms available to them.

**Transparency:** Contracting Parties shall be subject to regular and transparent reviews of their domestic competition law and policy regimes under a structured Competition Policy Review Mechanism, which shall operate similarly to the existing WTO Trade Policy Review Mechanism.

The primary focus of the CPRMs shall be to examine and evaluate the compliance of Contracting Parties with their commitments under the ACLP, while also having the capacity to play an advocacy, advisory and educative role to Members on competition law and policy matters.
WTO Council on Competition Law and Policy: Contracting Parties agree to the formation of a Council on Competition Law and Policy, comprising Contracting Parties to the ACLP, to operate within the governing structure of the World Trade Organisation.

The primary responsibilities of the Council shall relate to the terms and conditions of the ACLP, and shall include, but not be limited to, (a) oversight of compliance by Contracting Parties with the terms of the ACLP, (b) monitoring of the performance and ensuring the transparency of the CPRMs, and (c) advising the governing Council of the WTO of appropriate developments and future directions in international competition law and policy per se and in relation to other WTO instruments.

The Council shall not have enforcement powers, although it shall have the authority to issue publicly opinions on the compliance of Contracting Parties with the ACLP.
Substantive Issues

**Competition Policy:** Contracting Parties shall have competition laws and policies which shall not be inconsistent with their commitments under the ACLP.

Contracting Parties should favour the broader concept of competition policy in their compliance with the ACLP, and so facilitate the effective and non-discriminatory application of competition laws and policies to the conduct and practices of government, their agencies and business enterprises. Such laws and policies shall encourage competition and contestability of markets.

Contracting Parties from developing and transitional nations should have access to technical assistance on a reasonable basis from appropriate international agencies, such as the OECD and the WTO, and on a voluntary basis from developed countries, in their efforts to build domestic appropriate competition law and policy systems.

**Competition and Industry Policies:** Contracting Parties shall ensure domestic resolution of conflicts or tensions between competition laws and policy and industry policy do not result in the diminution of the comprehensiveness and/or effectiveness of competition laws and policies.

Where there are otherwise irreconcilable tensions between competition law and policy and industry policy, the former shall prevail.
**Competition and Regulation Policies:** Contracting Parties shall ensure legislation, regulations and other interventions shall be designed and have the effect of causing least interference in the competitive market place.

Such interventions which are said to be 'pro-competitive' shall clearly identify the problem to be dealt with, the anticipated impact of the intervention on the identified problem, and alternative approaches to the intervention.

Contracting Parties shall ensure domestic resolution of conflicts or tensions between competition and regulatory policy do not result in the diminution of the comprehensiveness and/or effectiveness of competition laws and policies.

Where there are otherwise irreconcilable tensions between competition and regulatory policies, the former shall prevail.

**Dispute Settlement:** Enforcement of national competition laws and policies shall be the primary responsibility of relevant domestic competition enforcement authorities.

Rights to private actions shall be a matter for individual Contracting Parties within their own jurisdictions, but shall not be allowed in the WTO processes.
The WTO shall not perform the role of an appellate forum for decisions of domestic courts of competent jurisdiction regarding matters of national competition law and policy.

However, the Dispute Settlement Mechanism of the WTO may hear claims by a Contracting Party that another Contracting Party has/is not fully complying with their commitments under the ACLP.

The powers of the WTO’s dispute settlement mechanism to impose penalties under the ACLP shall be no less than those under other WTO instruments.

The WTO through the Competition Policy Review Mechanism (CPRM) can usefully collate the experiences of Contracting Parties in meeting their undertakings under the ACLP, to educate and inform existing and potential Parties.

**Dumping:** Contracting Parties shall not maintain specific purpose legislation or agencies for the enforcement of claims of (anti-) dumping.

Such matters shall be dealt with by general competition enforcement authorities, using competition laws and policies of broad application, under rules pertaining to predatory pricing and/or price discrimination.
Enforcement: Contracting Parties accept the principles of positive and negative comity for the enforcement of alleged anti-competitive behaviour.

Any exceptions for 'important interests' shall be narrowly defined, with national governments meeting high standards of transparency.

Contracting Parties shall enact domestic legislation to enable their competition enforcement agencies to participate in both negative and positive comity arrangements. They shall also legislate to allow the exchange confidential information, on bilateral bases.

The capacity to preserve the confidentiality of information shall be an important consideration in determining the suitability of individual, particular Contracting Parties to participate in such exchanges.

Nothing in this statement shall compel a jurisdiction to enter into such arrangements, or engage in the exchange of confidential information.

Contracting Parties, recognising the operational advantages, shall encourage appropriate co-operation between their own competition law and policy enforcement agency(s) and those of other Contracting Parties.

Contracting Parties shall ensure due process in the prosecution and adjudication of competition law and policy matters within their courts of competent jurisdiction, including national treatment of foreign persons, legal or natural.
Exceptions and Exemptions: Contracting Parties shall not provide or allow exceptions, exemptions or special treatment which in any way impair the non-discrimination (National Treatment and Most Favoured Nation) principles of the Agreement.

Where national governments provide exceptions, exemptions or other forms of special treatment, these must be transparent, subject to regular review, and designated on a 'negative list' basis.

Extra-Territorial Application of Laws and Policies: Contracting Parties shall not engage in the extra-territorial application of their competition laws and policies regarding conduct within another Contracting Party.

Where a Contracting Party considers another Contracting Party does not have a competition law and policy regime meeting its commitments under the ACLP, and/or is not adequately enforcing said regime, then the matter shall be referred to the WTO's dispute settlement mechanism for determination.

Where a Contracting Party invokes extra-territorially its domestic competition law and policies upon conduct occurring within another Contracting Party, the latter Contracting Party shall have a right of recourse to the WTO's dispute settlement mechanism for violation of the Agreement.
Government Conduct: Contracting Parties shall ensure the conduct of the State does not nullify or impair the benefits of the ACLP.

Contracting Parties shall expressly prohibit export and import cartels, and similar arrangements such as orderly marketing arrangements and voluntary export restraints, by the private or public sectors.

Disputes concerning such allegations shall be dealt with by the WTO dispute settlement processes in the first instance.

Horizontal Arrangements: Contracting Parties shall take all legislative and enforcement actions necessary to prohibit the creation, maintenance and/or presence of cartels of any form within their jurisdictions.

Failure by a Contracting Party to take such action against cartels, of any form, origin or wherever found, shall constitute violation of the ACLP for the purpose of the WTO’s dispute settlement mechanism.

Contracting Parties recognise their obligations for positive comity in enforcement have particular relevance in the prohibition and prosecution of cartel-related conduct.
Intellectual Property/Research and Development: Contracting Parties recognise the differential and special characteristics of the intellectual property process, including in the creation, development, diffusion and defence of intellectual property rights.

Contracting Parties shall adopt within their national legislation and enforcement processes a 'rule of reason' approach to the relationship between intellectual property rights and competition law and policy, with the intention of enhancing the contestability and the dynamic efficiency of the invention and innovation processes.

Contracting Parties recognise the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) shall be the primary instrument in this area and shall prevail on all aspects of IPR except those relating to competition law and policy, where the ACLP shall prevail, when and where there are inconsistencies.

Market Access and Market Contestability: Contracting Parties shall not be required to ensure market access outcomes, such being incompatible with genuine competition policy.

Rather, Contracting Parties shall ensure their competition law and policy regimes (including by legislation, regulation and enforcement) stimulate significantly the contestability of markets.
Key elements of the ‘contestability of markets’ shall be opportunity for genuine competition, rather than outcomes from competition, and the elimination of distortions or impairments to efficient competition in the forms of, inter alia, trade barriers, investment rules, structural impediments, regulatory regimes, and other private and public sector anti-competitive practices.

Conduct of, or sanctioned by, Contracting Parties which results in 'nullification or impairment' of the contestability of markets, shall be actionable under the WTO’s dispute settlement mechanisms.

**Mergers:** Contracting Parties shall move towards a simplified and harmonised system of merger notification, review and approvals.

Contracting Parties from developed and industrialised nations shall be expected to show leadership and take the first concrete steps in this work.

Contracting Parties agree key elements of the simplification and harmonisation of merger laws shall include, but not be limited to: (a) standardisation of notification procedures for mergers; (b) reducing the information merger parties are initially required to provide to competition authorities; (c) relaxation of confidentiality rules to allow greater exchanges of information; (d) convergence of time frames between national jurisdictions; and, (e) the capacity of one jurisdiction to take a ‘lead agency’ role in individual merger assessments.
Monopolisation and Abuse of Dominant Position: Contracting Parties shall ensure their domestic laws, institutions and policies, in particular relating to industry, regulatory and/or trade policies, do not facilitate dominance of firm(s) and/or the abuse of any such positions.

Contracting Parties shall ensure their competition law and policy regimes focus on the conduct of firms with dominant positions in a marketplace, and the economic efficiency thereof, rather than size and/or scale per se in assessing abuse of dominance.

Contracting Parties shall not to penalise leading firms which have achieved their pre-eminent position in the market place through efficient performance, innovation and genuine entrepreneurship.

Contracting Parties imposing constraints or requirements on dominant firm(s) shall do so transparently and on a non-discriminatory basis.

Predation and Pricing Practices: Contracting Parties in their competition laws, policies and enforcement shall adopt 'rule of reason' approaches to dealing with price predation and other pricing practices.

Contracting Parties in enforcing such pricing regimes shall take into account distortions or impairments to contestability, including from government industry, regulatory and/or trade policies, which diminish genuine price competition.
**Private Conduct:** Contracting Parties, recognising the differences in legal systems and rules, regard the standing of private persons, legal or natural, to initiate actions under competition law as a matter for individual jurisdictions.

However, any legal rights for private actions shall be limited solely to the relevant jurisdiction, and shall not extend to enjoin the conduct of other Contracting Parties.

Private actions shall not be allowed within the WTO processes, such standing being limited exclusively to Contracting Parties.

**State Trading Enterprises:** Contracting Parties shall apply their national competition laws and policies fully and effectively to State commercial, financial and trading enterprises, with minimal exceptions, exemptions or instances of special treatment.

Where Contracting Parties permit exceptions, exemptions or special treatment for a State commercial, financial or trading enterprise, this must be done transparently and on a non-discriminatory basis.

**Subsidies and Countervailing Duties:** Contracting Parties shall eliminate within a prescribed time frame all subsidies and similar arrangements which distort or impair competition and trade.

For developed countries this period shall not exceed five years, and for developing countries it shall not exceed ten years, from the entry into force of the ACLP.
Further, Contracting Parties shall, during the process of moving toward this outcome, make available any residual subsidies or similar arrangements on a transparent and non-discriminatory basis.

**Vertical Restraints:** Contracting Parties shall in their laws, regulations and policies affecting competition allocate transparently, vertical restraints which distort or impair the contestability of a market between those subject to per se prohibition and those subject to 'rule of reason' tests.

These listings, when combined, shall be exhaustive all forms of vertical restraints.

Contracting Parties shall favour allocating to the per se prohibited listing conduct such as price maintenance, and market foreclosure (in particular, exclusive dealing/territory arrangements).

Contracting Parties shall, when legislating or enforcing rules of reason approaches, apply dynamic efficiency and global welfare criteria.
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437


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