GLOBAL COMPETITION POLICY AND MARKET ACCESS

by

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ABSTRACT

The issue of global competition policy is particularly topical at the moment because, notwithstanding the recent breakdown in talks at the World Trade Organisation (WTO) Ministerial Conference at Cancún in September 2003, competition policy is very much on the world trade agenda. In this thesis I focus on a particular approach to global competition policy which I describe as the "market access approach". I argue that this approach impinges too greatly on national sovereignty and is also incoherent with both current trade obligations and the needs of the global economy. Chapter 1 provides an overview of the global competition debate and describes how the market access approach fits into the general context. Chapter 2 discusses the market access approach in more detail and argues that, as it seeks to "trump" legitimate domestic competition policy goals, it impacts too greatly on issues of national sovereignty. Chapter 3 examines whether the market access approach can be justified on the basis that it is coherent with existing trade commitments and argues that such an approach goes above and beyond those principles by bringing various public and private practices within the scope of WTO jurisdiction. Chapter 4 looks deeper into the question of the role of competition laws within the world trading system, arguing that a facilitative/regulatory approach is required, guided by the twin standards of efficiency and fairness. Ultimately I conclude that the market access approach is an unsatisfactory solution to the problems posed by the interaction of trade and competition policy and a refocusing of the global competition debate is required.

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INTRODUCTION

Why is the issue of global competition policy important? It is important for the simple reason that globalization results in accumulations of corporate power that have consequences beyond national boundaries. It is generally recognized that firms cannot be entrusted with ensuring competition amongst themselves because it is in their self-interest to build market share at the expense of other firms with the ultimate goal of being able to exploit consumers and other firms, reduce output and raise prices and otherwise act independently of their rivals: the "easy life" of the monopolist. In short, it is in a firm's ultimate self-interest to be neither efficient nor fair[1]. In modern industrial countries this tendency towards monopoly[2] is usually counter-balanced by competition laws which employ various means to ensure that markets are efficient and fair. However in a global context there is no such counter-balance and national laws[3] do not do the job for three reasons. Firstly, not all countries have competition laws or the means to enforce them. These countries, particularly developing countries, are increasingly exposed to the world trading system without adequate ways of controlling corporate power. Secondly, the increasingly cross-border nature of commercial transactions means that the home country of the monopoly is often not the same as the country in which the adverse effects of the monopoly are felt. Often, even if both countries have competition laws and have

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[1] This is the key paradox of competition policy. The tendency of a firm to try and build market power at the expense of its rivals is the very behaviour that constitutes "healthy" competition in a market. It is seen as beneficial behaviour until it is too successful at which point it is considered illegal. The purpose of competition policy is to determine "how much is too much?". See eg. David G. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford: Clarendon Press, 1998) at 313.

[2] In this context I am using the word "monopoly" in a loose sense to include market power achieved by more than one firm through collusion (for example a cartel) as well as a single firm monopolizing a market.

[3] For the purposes of this thesis references to "nation" and "national" should be taken as including the European Union.

sufficient evidence within their reach, neither country will have jurisdiction because the home country's competition laws are premised on there being adverse effects within that country and the affected country is prevented by principles of international law from taking extraterritorial action against firms in other countries[4]. Thirdly and most profoundly, national interests are not the same as global interests, so even if a country has jurisdiction to take action against a monopoly it may not be in its own self-interest to do so if that monopoly operates on a global scale and is contributing to the domestic economy at the expense of foreign importers[5]. Within the world trading system nations have the same profit-maximising self-interest as the corporations that they are charged with regulating.

As a result of these gaps in competition regulation, many aspects of cross-border corporate activity are unconstrained. This coupled with the fact that most significant accumulations of corporate power occur in the world's wealthiest nations adds fuel to the perception of developing countries and the anti-globalization movement[6] that world trade creates inequality in terms of both results and opportunity. A global competition policy would represent a commitment to limit the inefficient and unfair outcomes of corporate power on a global scale and, as such, would offer an important step towards enhancing the

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[4] The political unacceptability of attempting to enforce domestic laws against other nations was revealed by the various blocking laws that were enacted in response to the United States pursuit of the Uranium cases in the 1970s. See Daniel K. Tarullo, "Norms and Institutions in Global Competition Policy" (2000) 94 Am.J of Intl Law 478 at 481.

[5] There are some interesting arguments that the strategy of creating "national champions" with significant market power in order to compete on the world stage is a misguided strategy as it hinders productivity and growth. See eg. Michael E. Porter, "Competition and Antitrust: Towards a Productivity-Based Approach to Mergers and Joint Ventures" (2001) 46(4) Antitrust Bulletin 919 at 931-932

[6] The term "anti-globalization movement" is used in this context as shorthand to describe the diverse groups that are broadly anti-capitalist, anti-corporate or anti-free trade and who champion a variety of causes such as labour rights, environmentalism, feminism, the rights of indigenous peoples and the preservation of national or cultural identity. These groups are sometimes in conflict with each other but sometimes act in concert, for example through the agency of the People's Global Action network. The most visible

economic rationale and creating the perception of fairness that are essential to the progress of the world trade agenda.

The issue of global competition policy is particularly topical at the moment because, notwithstanding the recent breakdown in talks at the World Trade Organisation (WTO) Ministerial Conference at Cancún in September 2003, competition policy is very much on the WTO agenda. In 1996 the WTO set up a Working Group on the Interaction Between Trade and Competition that has been working steadily towards building a consensus on competition policy. The secretariat of the WTO stated in its 1997 annual report:

> "The issue is not whether competition policy questions will be dealt with in the WTO context, but how and, in particular, how coherent the framework will be within which this will be done."[7]

Many important questions remain to be resolved however and the issues are hotly debated both inside and outside of the WTO. A great deal of literature is currently being produced from various interest groups, lawyers and academics because there is a genuine feeling that bilateral and unilateral solutions to global competition problems are failing[8] and the need for a multilateral solution is becoming more and more pressing. However, in my view, there are two serious problems with the direction in which the debate is moving. Firstly, it is becoming overshadowed by the free trade agenda which is attempting to twist the notion of competition policy into rules that pursue free trade goals without considering

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mobilization of the movement was at the Seattle meeting of the World Trade Organization in November 1999.

[7] World Trade Organisation, Annual Report 1997, "Special Topic: Trade and Competition" vol.1 p. 30 at 32

[8] *See eg.* Eleanor M. Fox, "Can we Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy" (2003) 48(2) Antitrust Bulletin 355

the regulatory needs of the global economy. Secondly, it is failing to tackle the biggest barrier to a global competition agreement which is the impact such an agreement would have on national sovereignty.

In this thesis I focus on a particular approach to global competition policy which is currently fashionable and which I describe as the "market access approach". I argue that this approach impinges too greatly on national sovereignty and is also incoherent with both current trade obligations and the needs of the global economy. I present my arguments as follows: Chapter 1 provides an overview of the global competition debate and describes how the market access approach fits into the general context. In Chapter 2 I discuss the market access approach in more detail and argue that as it seeks to "trump" legitimate domestic competition policy goals it impacts too greatly on issues of national sovereignty. In Chapter 3 I discuss whether the market access approach can be justified on the basis that it is coherent with existing trade commitments and argue that such an approach goes above and beyond those principles by bringing various public and private practices within the scope of WTO jurisdiction. In Chapter 4 I look deeper into the question of the role that competition laws should play within the world trading system, arguing that a balanced facilitative/regulatory approach is required, guided by the twin standards of efficiency and fairness. Ultimately I conclude that the market access approach is an unsatisfactory solution to the problems posed by global competition and make some proposals for refocusing the policy debate.

1. THE GLOBAL COMPETITION DEBATE

Competition policy has been on the international agenda for many years. Long before the General Agreement on Tariffs and Trade (GATT) and the WTO came into existence the draft Havana Charter for an International Trade Organisation in 1949 included provisions relating to competition[9]. The Havana talks failed and the Charter never came into existence, but since then a number of international institutions have attempted to formulate a set of universally acceptable rules on competition. The OECD developed a series of non-binding recommendations on various aspects of competition policy including cooperation in relation to anti-competitive practices affecting international trade[10] and effective action against hard-core cartels[11]. Similarly UNCTAD has adopted a non-binding set of principles and rules for controlling restrictive business practices[12] and a model law on competition[13]. In 1996 the Singapore Ministerial Conference of the WTO decided to set up a Working Group on the Interaction Between Trade and Competition Policy which has performed a largely analytical role so far, but has working towards building a consensus on binding competition rules at the WTO. The most recent arrival onto the global competition stage is the International Competition Network (ICN) which is a more or less informal forum for international discussions between various national and regional regulators.

Against this backdrop of international institutions, the debate has raged amongst

[9] See Article 46 of Havana Charter for an International Trade Organisation, 24 March, 1948, U.N. Doc. E/C. 2/78

[10] OECD, "Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade" 27 July 1995, C(95)130/final.

[11] OECD, "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels" 25 March 1998, C(98)35/Final.

representatives of developed and developing countries, trade negotiators, antitrust officials, lawyers, academics and other interest groups. It is convenient at this stage, to break down the debate a little by reference to the various goals that are being advocated for global competition policy. It is possible to identify three main themes to the debate as follows. Firstly, the goal of developing a robust and comprehensive set of international rules on competition enforced by a supra-national regulator (which for the sake of brevity I shall call the "supra-national approach"). Secondly, ensuring that national and regional competition regulators cooperate with each other in the application of their own antitrust laws[14] to cross-border problems (the "cooperation approach"). Thirdly, promoting open markets by ensuring that restrictive business practices and the application of national competition laws do not impede free trade (the "market access approach"). I shall deal with these three themes in turn. There are other themes, for example the goal of getting all nations to converge on a particular model of competition laws (the "convergence approach") and the need to encourage developing countries to implement and enforce their own competition laws (the "capacity building approach"), but I shall not deal with these themes separately as it is generally agreed that they should be pursued in some shape or form but that they facilitate the unilateral application of national competition laws rather than representing a multilateral solution.

[12] UNCTAD, "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" Geneva: 1980 TD/RBP/CONF/10/Rev.2

[13] UNCTAD, Model Law on Competition, Geneva: 2002 TD/RBP/CONF .5/7

[14] "Antitrust laws" is the U.S. term for "competition laws". It is common to use "antitrust" and "competition" interchangeably as I do in this thesis.

(a) The Supra-National Approach

The notion of developing a comprehensive set of international competition laws to be enforced by a supra-national regulator is advocated by those who see large gaps in the current regulatory network and who do not believe they can be filled by national laws or bilateral arrangements. The particular problems that are of concern are accumulations of corporate power with global reach such as international cartels and global monopolies. An example of such a problem is the citric acid cartel which built up in the 1990s when producers of citric acid in the United States, Europe and China colluded with each other to fix prices and divide up the market. This cartel caused significant price rises in all countries which consume citric acid resulting in an overall transfer of wealth from importing countries to exporting countries and also possibly a double impact in developing countries because rival producers in those countries were effectively excluded from large parts of the market. The cartel was successfully prosecuted and fined in the United States, the European Union and Canada and eventually broke up, but there has been rapid consolidation in the industry since the break up of the cartel suggesting that producers are trying to re-establish their market power through merger rather than by secret agreement[15]. Another example of corporate power with global effects is the Microsoft Corporation which maintains over ninety per cent of the market share in PC operating systems through their Windows products which are used around the world[16].

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[15] See Margaret Levenstein, Valerie Suslow and Lynda Oswald, "International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies", February 2003, National Bureau of Economic Research Working Paper No.W9511 at 17-18

[16] There are also examples of accumulations of market power with benign effects. The De Beers diamond cartel arguably supports the economies of a number of poor African countries at the expense of consumers mainly in the United States and Japan. Also, permitting developing country exporters of commodities such

Their alleged high monopoly prices and stifling of innovation and competition has global implications but has only been tackled in the United States and the European Union by reference to effects and particular circumstances within those jurisdictions. Advocates of a supra-national approach to global competition argue that these ever more frequent examples of global market power can only be adequately dealt with by robust international competition laws enforced supra-nationally.

Probably the most ambitious attempt to formulate an international antitrust regime so far is the so-called "Munich Draft Code" (also known as the Draft International Antitrust Code)[17] which was published in 1995 and resulted from meetings of a private group of scholars who typically met in Munich, Germany. The scholars were primarily European but the United States and Japan were also represented. The Munich Draft Code envisaged the creation of a complete international competition law regime to be administered by an "International Antitrust Authority". It was generally seen as too ambitious and even a minimalist version of the Code based on 15 core principles has not attracted much support.

Another advocate of an international competition body is Harvard economist Frederic M. Scherer. In his book *Competition Policies for an Integrated World Economy*[18] he proposes that an "International Competition Policy Office" (ICPO) be created within the ambit of the WTO and be given both investigative and enforcement responsibilities[19]. He suggests a rolling program for the ICPO that begins primarily with

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as coffee, cotton and sugar to organize into cartels is seen as a possible solution to unfair trade in those commodities.

[17] Draft International Antitrust Code, reprinted in Frederick M. Abbott and David J. Gerber eds., *Public Policy and Global Technology Integration* (1997) at app.2.

[18] Frederic M. Scherer, *Competition Policies for an Integrated World Economy* (Washington DC: Brookings Institution Press, 1994)

[19] *Id.* at 92.

registration of cartels and large corporate operations, information gathering and recommendations for market corrections and develops into a fully functioning competition body which hears complaints from signatory nations and applies appropriate sanctions through the WTO. Two interesting aspects of Scherer's proposals are firstly that he envisages that the ICPO would begin its life as an information gathering and advisory body and secondly, that he specifies *de minimis* criteria for the jurisdiction of the ICPO[20]. As far as I am aware these proposals have not been taken up by other commentators, but offer intriguing solutions to the pervasive problems of national sovereignty that face the supra-national approach, as discussed in Chapter 2 below.

The "strong" versions of the supra-national approach described above appear to have fallen out of favour during the course of the nineties. Professor Eleanor Fox of New York University was one of the scholars who took part in the meetings leading up to the Munich Draft Code. She did not agree with the full form Code at the time (although she endorsed the minimal 15 principle version[21]) and argued in a subsequent article that,

> "such a comprehensive agreement with precise rules and a system for enforcement would straight-jacket nations into a single set of rules and could create an unaccountable and rigid bureaucracy."[22]

She points out that many of the rules proposed in the Munich Draft Code, such as the

[20] Specifically, the cartel or corporate operation would have to be responsible for 40 percent or more of world exports in any particular industrial category. *Id.* at 92.
[21] Eleanor M. Fox, "Toward World Antitrust and Market Access" (1997) 91 Am. J. Int'l L. 1 at 13
[22] Eleanor M. Fox, "International Antitrust and the Doha Dome" (2003) 43 Va. J. Int'l. L. 911 at 927.

proposed European-style prohibitions on abuse of a dominant position[23] and on vertical restraints[24] would be entirely unacceptable to (at least) the United States. Arguments such as these have led to weaker proposals for international agreements based around loose principles rather than rigid rules.

The principle sponsor of the "weak" version of the supra-national approach is the European Union (EU). In July 1995 the European Commission formed a "Group of Experts" who produced a report arguing for a multilateral competition framework based on a set of "minimum appropriate competition rules"[25]. The report also advocates cooperation and convergence strategies but argues that these are ultimately unlikely to produce the desired result. It envisages an international body which acts as a forum for drafting and reviewing the common principles, administers a register of anti-competitive practices and provides a dispute settlement mechanism[26]. This report formed the background for the EU submissions to the WTO at the Singapore Ministerial Meeting in 1996[27] and the WTO then set up its Working Group on the Interaction Between Trade and Competition Policy to study the issues raised by the report. The EU position, as it has developed since the 1995 report, still revolves around building a multilateral framework

[23] Article 14 of the Munich Draft Code prohibits a dominant firm from discriminating among trading parties, placing one at a competitive disadvantage, and making contracts subject to supplementary obligations that have no connection with the subject of the contract.
[24] Article 5 of the Munich Draft Code.
[25] European Commission, Directorate-General IV Competition *"Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules: Report of the Group of Experts"* (Brussels: July 1995)
[26] *Id.* at p.18.
[27] It is worth mentioning that some cynics suggest that the EU's introduction of competition and other issues (known as the "Singapore issues") to the WTO represents a classic negotiating strategy of adding items to the agenda so that the EU can be seen to give ground on those issues while holding fast its position on the issue it really cares about (in this case agricultural subsidies). This may or may not be true but it does highlight the wider context in which the debate about competition policy at the WTO is taking place.

agreement based on "core principles"[28]. An important development is that, whereas the 1995 report talks about an "international body" in the abstract, it is now clear that the EU sees the WTO as the appropriate forum for a framework agreement. In a submission to the WTO Working Group, the EU states that:

> "[g]iven the clear and undisputed link between trade and competition as well as the near global membership of the WTO with its 140 plus Members, we remain convinced that the WTO is the right and proper forum for multilateral action regarding the rule making on competition policy."[29]

Many see this move towards adoption of the WTO as the appropriate forum for global competition policy as inevitable, but it has undoubtedly had important implications for the direction of the global competition debate, in particular by shifting the focus towards the trade norm of "market access" (see below).

A modified version of the EU position has been endorsed by a number of commentators, Professor Eleanor Fox among them[30]. She has developed her arguments over the course of a series of articles and papers[31], in the latest of which she proposes that the WTO initiative should result in a set of "over-arching rules and principles, much like a

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[28] Working Group on the Interaction between Trade and Competition Policy, "Communication from the European Community and its Member States", 25 September 2000, WT/WGTCP/W/152.

[29] Working Group on the Interaction between Trade and Competition Policy, "Communication from the European Community and its Member States", 14 March 2001, WT/WGTCP/W/160 at para.3.

[30] Professors Graham and Richardson also agree broadly with the idea of creating an agreement on competition at the WTO. See Edward M. Graham and J.David Richardson, *Global Competition Policy* (Washington: Institute for International Economics,1997) at 577 to 578.

[31] See eg. Eleanor M. Fox "Anti-Trust, Trade and the 21st Century – Rounding the Circle" The Handler Lecture, The Record of the Association of the Bar of the City of New York (June 1993), "Towards World Antitrust and Market Access" (1997) 91 Am. J. Int'l L. 1, "International Antitrust: Against Minimum Rules, For Cosmopolitan Principles" (1998) 43 Antitrust Bulletin 5, "Competition Law and the Millenium Round" [1999] 2 J or Int'l Econ Law 665, "International Antitrust and the Doha Dome" (2003) 43 Va. J. Int'l. L. 911

European framework directive" which she calls the "Doha Dome" (after the Doha ministerial declaration of the WTO which began the current round of WTO talks)[32]. She envisages that the principles would include prohibitions of "hard-core" cartels, including both import and export cartels and also prohibition of "market-blocking, unjustified monopolistic practices". She suggests that nations could then adopt these principles by "adopting national law formulated in their own terms" in the same way that European directives are implemented by EU member states[33]. This last point highlights an important thread that runs throughout Fox's work: she argues that the EU, as a supra-national institution with integrated liberal trade law, competition law and industrial policy, represents an appropriate model for the world trade system[34]. She sees the WTO as becoming a regulator along the lines of the European Union although she acknowledges that the integration goals of the world trading system are currently more modest than those of the EU single market. This notion that the EU represents a model for the world has been criticized by Michael Trebilcock, Professor of Law and Economics at the University of Toronto. He argues that,

> "[i]n few, if any, other parts of the world do the special geo-political circumstances that led to the evolution of the European Union exist, and the prospects for creating the supranational institutions that have been central to the integration project of the European Union are close to non-existent." [35]

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[32] *See* Fox *supra* note 22 at 913-914.
[33] *Id.* at 928.
[34] See particularly Eleanor M. Fox "Towards World Antitrust and Market Access" (1997) 91 Am.J.In'l L.1.
[35] Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) at 671

Expanding on Trebilcock's comments, an objection to Fox's use of EU-style directives as a model for harmonization of global competition law is that it fails to take account of the central role that the European Courts (the Court of First Instance and the European Court of Justice) have played in harmonizing and enforcing European laws. Firstly, the Courts have provided judicial interpretations of particular concepts thus ensuring consistency of application throughout the EU. Secondly, the Courts provide an enforcement function where Member States have failed to fulfil their obligations under Community law by, for example, fining a Member State that has failed to adopt domestic legislation to implement a Community Directive. In addition, in the context of the recent expansion of the EU to include ten Central and Eastern European countries, the new Member States have been required to accept so-called "Europe Agreements" which require those States to accept EU laws in their entirety including all relevant jurisprudence of the European Courts. In other words European directives are not the end of the story: the various institutions of the EU work together to ensure that existing and new Member States apply EU laws and apply them in a uniform way. Fox's model appears to envisage harmonization simply through the adoption of framework directives but without anything like the robust institutional framework that is present in the EU. Such an approach would seem to be unrealistic and its weaknesses are discussed further in Chapter 2 below.

An interesting attempt to provide an economic rationale for a supra-national approach is the "global welfare" argument, associated most closely with three economists - Marc Bacchetta, Henrik Horn and Petros Mavroidis. The argument, in brief, is that domestic competition regulators have a clear self-interest in maximizing national welfare[36], but that the actions of national welfare-maximizing governments lead to some outcomes which, while being optimal for the country in question, are inferior for the world as a whole. Bacchetta *et al* describe these outcomes as "distortions" and argue that they provide an economic rationale for a multilateral competition policy agreement in order to maximize aggregate global welfare[37]. The implications of a global welfare calculation have not been fully worked out in order to suggest particular international rules although Crampton and Witterick have attempted to formulate some rules of thumb that will generally lead to increased global welfare:

> "As a general rule, vertical and horizontal restraints imposed by parties without market power are not likely to reduce total international welfare and therefore should not be prevented, regardless of their impact upon market access, unless there is a consensus that the restraint in question is of a type which unambiguously reduces total international welfare."[38]

Philip Marsden argues that the kinds of calculations involved in assessing aggregate global welfare and the impossibility of gathering all relevant date render it unworkable in practice[39]. Some of the implications of global welfare economics are discussed further in Chapter 4 below.

Three main lines of criticism can be identified against the supra-national approach.

[36] It should be noted that "welfare" in this context is used in the narrower "welfare economics" sense of allocative and productive efficiency.
[37] Marc Bacchetta, Henrik Horn, Petros Mavroidis, "Do Negative Spillovers from Nationally Pursued Competition Policies Provide a Case for Multilateral Competition Rules?", In Claus-Dieter Ehlermann and Laraine L. Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Oxford: Hart Publishing, 1997) at 8.
[38] Paul S. Crampton and Crystal L. Witterick, "Trade Distorting Private Restraints and Market Access – Learning to Walk Before we Run" (1996) 24 Int'l Bus Lawyer 467

Firstly, it is simply impractical and unrealistic to imagine that a consensus on competition policy could be reached given the current difference in approaches to competition policy between nations. Secondly, any attempt to create an international antitrust enforcer will lead to an unacceptable loss of national sovereignty. Thirdly, even if a global antitrust agreement were desirable, the WTO is not an appropriate institution to house such an agreement. All three of the above criticisms have been expressed by the United States, which has been the loudest critical voice so far and has, to an extent, polarized the debate into a United States versus European Union battle. The U.S. position is broadly that the WTO is not well suited to solving practical antitrust problems and should not be involved in reviewing decisions taken by regulators and courts in Member States. Joel Klein (the Assistant Attorney General for Antitrust during the Clinton administration) also argues that such involvement by the WTO "would inevitably politicize international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making"[40]. The U.S. position can be more easily understood in the context of their counter-proposal which I describe below under the heading "the cooperation approach", but suffice to say for now that the U.S. sees itself as being the hub of world antitrust in which it enforces it own laws (extraterritorially where necessary) and cooperates with nations by reference to various bilateral agreements[41]. They are concerned that competition rules at the WTO would both undermine the U.S. ability to operate its own antitrust laws in the minimalist way that they are currently

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[39] *See* Marsden *infra* note 42 at 248.

[40] Joel Klein, "A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust", Address before the OECD Conference on Trade and Competition (30 June 1999) at 6.

[41] This "hub" idea appears to be a favourite theme of current U.S. foreign policy. For example the U.S. is undermining the International Criminal Court by setting up a series of bilateral agreements with individual

applied and also are presumably concerned that their bargaining position is weaker in a multilateral forum such as the WTO than under a network of bilateral arrangements.

These criticisms are of course only really persuasive from a U.S. perspective, but there remain other more general criticisms based on the three main lines identified above. The lack of consensus point is made by Dr. Philip Marsden. He argues that even an international commitment to ban cartels would be almost impossible to achieve because of the difficulty of getting nations to agree on the detailed rules. He asks:

> "How can governments that have not yet developed [competition] laws – or that have actually rejected having such laws – be expected to negotiate and to be bound by international rules on how such laws should be enforced? Recent experience at the OECD alone indicates how difficult it has been for countries with developed competition law regimes to agree on what a hard-core cartel actually *is*, let alone how to prohibit it."[42]

He goes on to point out that, if nations are unable to agree on precise rules, they would have to resort to vague "lowest common denominator" principles which would create an open season for litigation if the principles were intended to be binding[43].

Daniel Tarullo presents an institutional argument against the EU/Fox proposals. He argues that a competition policy within the institutional framework of the WTO is unlikely to succeed in achieving any of the stated goals of a global competition framework.

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nations. The preference for a military coalition in Iraq rather than a United Nations security force can arguably be seen in the same light.

[42] Philip Marsden, *A Competition Policy for the WTO* (London: Cameron May, 2003) at 69.

> "Most of its rules are 'thou shalt not' – type commands, intended to limit governmental interference with trade flows. The WTO is not designed to help governments act more effectively to address a shared regulatory problem."[44]

He adds that, apart from being unworkable in practice, a competition code at the WTO could well undermine cooperation between national regulators and ultimately the authority of the WTO itself[45].

David Gerber has a different take on the institutional analysis. He argues that the EU/Fox proposal for an international framework of principles backed up with dispute resolution is based on fundamentally European experiences and, as such, is unlikely to be acceptable to other jurisdictions, particularly the United States. On the one hand:

> "From the perspective of European experience, the framework idea is familiar, congenial and validated by success on both the domestic and transnational levels. On the transnational level, it corresponds to the basic mechanism of European integration ... The basic competition law principles of the Rome Treaty have gradually been given form and effect through the interpretations and interactions of individuals, states, and regional institutions."[46]

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[43] *Id.* at 72.
[44] *Id.* at 489.
[45] Alan Wolff, a Washington trade lawyer, has presented similar arguments to Daniel Tarullo, but based on more clearly trade-oriented interests. See eg. A Wolff, "WTO Dispute Settlement and the Particular Problem of Trade and Competition Policy", Remarks at a Dispute Resolution in the WTO, Washington, 24 June 1998, quoted in Marsden *supra* note 42 at 186-187.
[46] David J. Gerber, "The U.S. – European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective" (1999) 34 New Eng. L. Rev 123 at 138

On the other hand:

> "There is little experience with this type of framework in the United States other than in the very special situation of constitutional law ... In general, U.S antitrust law is a heavily case-centred enterprise in which cases are understood in relation to each other rather than in relation to a general "framework" text."[47]

Gerber argues that these differences will need to be resolved before progress can be made towards a truly global approach to competition policy.

(b) The "Cooperation Approach"

In describing the cooperation approach to global competition policy it is important to emphasize that cooperation between regulators is seen as beneficial by almost all sides of the debate. Nobody seriously argues that antitrust regulators should *not* cooperate, or that it will not assist (albeit in an incomplete way) in solving some of the problems of international antitrust. However some see cooperation as sufficient *in itself* to achieve particular goals of global competition policy and it is this viewpoint that I describe as the "cooperation approach".

It is difficult to identify a particular paradigmatic problem for the cooperation approach in the same way as for the other two approaches described in this Chapter, however the problems faced by the U.S. Department of Justice in trying to enforce its antitrust laws against the Europe-based De Beers industrial diamond cartel is an example of the kind of problem that this project seeks to address. In that case the U.S. sought to bring an action against a number of companies for conspiring to raise the price of industrial diamonds. Most of the alleged conduct took place in Europe and the Department of Justice encountered considerable problems in gathering evidence from overseas and procuring the cooperation of European regulators. The court eventually entered a judgment of acquittal on the basis that most of the relevant evidence was outside the U.S. and beyond the reach of prosecutors. The goal of the cooperation approach is to address problems such as this while maintaining the integrity of national competition laws. As the preceding discussion relating to the supra-national approach has demonstrated, maintaining the integrity of its antitrust laws is a major concern of U.S. antitrust regulators, lawyers and academics so the cooperation approach has a natural fit with their viewpoint.

In a speech to the Fordham Corporate Law Institute in 1995, Joel Klein suggested three models which make up the cooperation approach as a whole. Firstly the close co-ordination and cooperation between competition authorities where they are involved in parallel investigations and enforcement activities. Secondly the model of "positive comity" in which agencies may request enforcement activities to be carried out in other jurisdictions by foreign regulators. Thirdly (and most controversially) the extra-territorial application of national laws where the effects of anti-competitive conduct in other jurisdictions are felt in the enforcing nation[48]. These models have been worked out more thoroughly by a number of academics including Judge Diane P. Wood and Harry First of

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[47] *Id.* at 139.
[48] Joel I. Klein, "International Antitrust: A Justice Department Perspective", address to the Fordham Corporate Law Institute, New York, 26 October 1995. Available on the DoJ website at http://www.usdoj.gov/atr/public/speeches/fordhamjik.txt.

NYU Law School and the agenda of the International Competition Network is largely driven by the goals of the cooperation approach. The form that the cooperation takes is often through formal and informal bilateral agreements and arrangements, notably those between the U.S. and the EU and the U.S. and Canada, and the advocates of cooperation highlight the increasing number of successful prosecutions of international cartels (for example the global vitamins and lysine cartels) through co-ordinated enforcement activity as evidence of the success of the project. Arguably, out of the three projects mentioned in this Chapter, the cooperation approach is the only one that is making real world progress outside of the debating fora.

The key criticism of the cooperation approach is that its reliance on bilateral agreements and unilateral extraterritorial application of laws means that it heavily favours those with a strong bargaining position on the world stage and, of course, nobody has a stronger bargaining position than the United States. Fox makes the point that:

> "[i]t is not a surprise that many Americans prefer things the way they are. Americans are not steeped in the postwar Western European tradition of community building. They have the tools of unilateralism, they fear the compromises of bargaining, and they abjure the 'relinquishment' of sovereignty."[49]

From a developing country perspective, the cooperation approach would appear to do little to address their concerns. Those countries that do not have competition laws are unable to either enter into reciprocal arrangements or to enforce laws against foreign companies. The cooperation approach seeks to address these particular concerns through "capacity building" initiatives at the OECD and the International Competition Network which are designed to help developing countries implement and enforce domestic competition laws. However a further concern is that, even if developing countries have effective competition laws, they completely lack the leverage on the world stage to make credible threats of extraterritorial enforcement against multinational companies. As such, developing countries would be very much dependent on being able to request industrial nations to take action against their own citizens through the "positive comity" model. This outcome has the obvious result that the large industrial nations would become effectively antitrust enforcers for the world, a position which conflicts seriously with their pursuit of national self-interest. This is a power issue that cannot be addressed through "capacity building".

A further criticism is that a world of national-only laws and bilateral agreements represents a very anaemic attempt to regulate global competition problems in that it fails to catch several of the problems of international competition. Fox develops this argument in detail in a recent article[50]. In summary she argues that the extra-territoriality and cooperation model contains significant gaps and illegitimacies in relation to all three key phenomena of world trade[51]. The three phenomena are "(1) inbound restraints, such as off-shore cartels targeted at the regulating nation, (2) outbound commerce: restraints in such commerce (e.g. export cartels) and restraints impairing a regulating nation's exports and foreign investment, and (3) restraints in world markets, such as anti-competitive mergers of firms operating in world markets"[52].

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[49] *See* Fox *supra* note 21 at 12.
[50] Fox *supra* note 8
[51] *See* Fox *supra* note 22 at 925.
[52] *See* Fox *supra* note 50 at 356.

The arguments against the cooperation approach are persuasive and, in my view, there are serious problems in viewing the cooperation approach as anything other than a half-measure solution to global competition problems.

(c) The "Market Access Approach"

It will be apparent from the above discussion that the global competition debate is becoming profoundly influenced by the world trade agenda. This influence is in some ways inevitable because of the reciprocal relationship between trade and competition: on the one hand competition policy is dependant on trade policy in the sense that competition problems would not arise on a global scale if trade were not itself global; on the other hand trade policy is dependant on competition policy because the benefits of removing governmental barriers to trade can be lost if private firms are able to maintain their own protectionist barriers through anti-competitive behaviour. What is less inevitable and less clear however is that trade policy norms, in particular the goal of market access, should 'trump' the competition policy norms of ensuring efficient and fair markets.

The main reason for the current market access spin to the global competition appears to be the institutional context of the debate. Firstly the most vigorous advocate of global competition policy is the European Union which, in the world trade context, is largely pursuing a free trade agenda based on the interests of European exporters. Secondly, most people look to the WTO, with its broad membership of nations and its established dispute resolution mechanism, as the only hope for housing an effective agreement on competition, and the WTO is unashamedly a trade-focused institution whose primary goal is to achieve free trade flows. It should be noted that the WTO working group is called the "Working Group on the Interaction Between Trade and Competition Policy" rather than simply the "Working Group on Competition Policy" and the working group's website says clearly that, "Work in the WTO on investment and competition policy has largely taken the form of responses to specific trade policy issues, rather than a look at the broad picture"[53]. (Similarly the OECD has a "Joint Group on Trade and Competition" and UNCTAD looks at various competition issues from a trade perspective.) Tarullo argues that,

> "the meaning, as well as the effectiveness, of a proposed competition-policy arrangement will depend substantially on the institutional context in which it is grounded. A competition arrangement in the WTO will be substantively shaped by the norms and procedures of the trading system. Elaboration of the rules will be heavily influenced by the market-access norms of trade policy."[54]

As the debate is largely taking place within this trade-focused institutional framework it is not surprising that the interface between trade and competition has been brought to the forefront of the debate, to the extent that it currently dominates the literature.

Whereas the supra-national approach described above sees the key problem of global competition policy as being accumulations of corporate power that have detrimental effects in other jurisdictions (e.g. international cartels and monopolies), the paradigmatic problem of the market access approach is the "trade and competition" issue

[53] Competition policy page of WTO website at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm
[54] Tarullo *supra* note 44 at 479

illustrated by the *Kodak/Fuji* case at the WTO[55]. That case involved a complaint by the United States on behalf of Eastman Kodak, that Fuji was able to take advantage of an exclusive wholesale and retail distribution network in Japan for its photographic film and that Kodak and other foreign film producers were unable to access this network in order to gain entry to the Japanese market. The key allegation was that Japan breached GATT obligations by tolerating the exclusive distribution arrangements set up by Fuji and thereby undermined the tariff concessions on consumer film made during earlier GATT rounds. The irony is that current U.S. antitrust thinking generally views vertical arrangements such as those in the *Kodak/Fuji* case as efficiency-enhancing and therefore unobjectionable from a competition point of view[56]. In other words, the U.S. was asking Japanese competition authorities to prevent behaviour that the U.S. authorities would not prevent themselves. The various alleged behaviours of Japan were found not to contravene GATT by the WTO Panel, but the conflict between trade and competition in this case is clear: from a trade perspective the market was foreclosed to foreign competitors and trade was restricted; from a competition perspective the Japanese market was efficient and did not harm consumers so no action under competition laws was necessary[57]. The market access approach to global competition policy seeks to find a solution to this kind of conflict between practices that are at the same time exclusionary and efficient by importing the trade norm of market access into global competition rules.

It is important to note at this stage that the different goals of the supra-national approach and market access approach do not necessarily entail different means. In fact

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[55] *Japan – Measures Affecting Photographic Film and Paper*, Report of the GATT/WTO Panel, 31 March 1998 [*Kodak/Fuji*]

[56] *See* Trebilcock et al *supra* note 35 at 680-681.

several of those who advocate a market access approach believe that the goals of both projects are consistent and both can be achieved through the agency of a global competition agreement. For example the European Union approach to market access is part and parcel of its general recommendations for a global competition agreement. In its communication to the WTO working group of 11 June 1997 the EU identified a number of possible areas of study for the working group which included identifying core principles that might be adopted at an international level and possible dispute settlement procedures (a supra-national approach) as well as identifying "which are the main anti-competitive practices that restrict international trade or development, or threaten to do so" (a market access approach)[58]. Similarly Eleanor Fox's proposal for global "linking-principles" on competition include an anti-cartel rule[59] (a supra-national approach) and a rule stating that there should be "no substantial unjustified market blockage"[60] (a market access approach). This view that the goals of the supra-national and market access projects are complementary is another reason why the trade and competition issue has become so closely entwined with the general debate on global competition policy.

In his book *A Competition Policy for the WTO*[61] Philip Marsden suggests a fivefold breakdown of the various proposals for a market access approach. For these purposes I will collapse his breakdown into three[62]. Firstly the EU proposal (which

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[57] This reflects a U.S. efficiency-based antitrust view. Not all competition regulators would necessarily view such vertical restraints in the same way.

[58] Working Group on the Interaction between Trade and Competition Policy, "Communication from the European Community and its Member States", 24 November 1997, WT/WGTCP/W/45.

[59] *See* Fox *supra* note 21 at 19.

[60] *Id.* at 23.

[61] Marsden *supra* note 42 at ch.V.

[62] Marsden's third and fourth categories are closely related to each other and his fifth category is the "global welfare" argument mentioned above. Marsden does not offer a link between this argument and "market access", in fact Hoekman and Holmes argue that "The pursuit of a market access agenda may result in outcomes that are detrimental from a welfare point of view" (Bernard Hoekman, Peter Holmes, "Competition Policy, Developing Countries, and the World Trade Organisation" 1 October 1999, World

Marsden admits is quite difficult to pin down precisely) is grounded in the recognition that EU competition laws are more sympathetic to competitors than many other competition regimes as they have been formed with the overriding goals of the European single market in mind, one of which is the goal of ensuring equality of economic opportunity. As such it is argued that companies from third countries face fewer market blockages based on anti-competitive behaviour when trying to access European markets than European companies attempting to expand abroad. The preamble to the 1995 report of the "Group of Experts" states that:

> "[our] strict competition policy guarantees companies from third countries that access to the Community market will not be compromised as a result of restrictive practices by European companies seeking to protect their traditional markets. But this guarantee calls for reciprocity! If other countries are less vigilant than we are with regard to the anti-competitive behaviour of their companies, access to their markets for Community products will be blocked."[63]

In other words, because the EU believes that its laws already resonate favourably with a market access approach, they would like to see world-wide competition laws based on a more or less European model. Another way of saying the same thing is that Europe is attempting to achieve the 'Europeanization' of world antitrust by expressly including a market access principle, a principle which is implicit in European competition law. (It is interesting to note Marsden's observation that, because the EU approach is more

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Bank Working Paper 2211). I submit that it is better seen as support for the supra-national approach in general rather than the market access approach in particular.

[63] *See supra* note 25 at 3

sympathetic to competitors attempting to access a market, it is not altogether unpalatable to U.S. trade negotiators as opposed to U.S. antitrust officials[64].) It is clear that the EU has had to adapt its position in order to try and achieve some sort of progress at the WTO and, as a result, has shied away from putting specific rules on the table. This is discussed in more detail in Chapter 2.

The second proposal identified by Marsden is that of a WTO agreement on "Trade Related Antitrust Measures" (TRAMs)[65]. This proposal is mainly identified with the work of Eleanor Fox, although others such as Professors Graham and Richardson have proposed something similar[66]. Fox's proposal is linked to the EU proposal but, unlike the EU (which is trying to avoid rattling the WTO cage too hard) she is able to work through the ideas more rigorously and propose some specific measures. She argues for a general principle that "there should be no substantial unjustified market blockage by public or private action"[67] and takes the reasoning a level deeper by looking at the very foundations of competition policy, arguing that a market access approach to competition policy accords with the core concern of equality of economic opportunity that provided the original justification for most competition laws. In this respect she appeals to a liberal model of antitrust similar to "ordoliberalism" (discussed in Chapter 4 below) which sees a robust competition law as a central constitutional guarantee of equality of economic opportunity. Fox contrasts this model with the conservative approach to antitrust (associated with the "Chicago School") which prefers a weak competition law that does not encroach too far on individual liberty. This liberty versus equality dichotomy is at the

[64] *See* Marsden *supra* note 42 at 163.
[65] The reason for the acronym "TRAMs" is to follow on from other WTO agreements such as the agreement on trade-related aspects of intellectual property rights (TRIPs)
[66] *See supra* note 30

heart of European and U.S. differences over competition policy (and much else[68]), but Fox argues that even U.S. antitrust has its roots in a liberal approach to distribution of economic equality and that one of the key principles embedded in this approach is "a right not to be fenced out of any substantial market by the leverage of a better situated competitor"[69]: in short, a market access principle. This supposed link between market access and fairness is criticized in Chapter 4 below.

The third approach to market access is essentially a proposal to ignore global competition policy altogether in favour of trade policy. This proposal is simply concerned with increasing market access opportunities for exporters, either by the introduction of "pro-competitive regulation" (such as agreements to open up telecoms markets to foreign competition) or by introducing "market access warranties" which guarantee that governments who agree to open up their markets actually do so. As this approach does not attempt to tackle directly the problems of global competition policy I shall not deal with it in detail here, other than to note that one of the arguments in favour of this approach is based on the notion that the introduction of foreign competition brings with it qualitative benefits to the competitive environment (such as possible improvements in product and technical innovations) that would not be realized with solely domestic competition[70]. The subject of pro-competitive regulation in the telecoms market is revisited in Chapter 3.

The most resonant criticism of a market access approach to global competition

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[67] *See* Fox *supra* note 21 at 23.
[68] This fundamental difference between the U.S. and Europe is captured in the following anecdote: "Of the three goals of the French Revolution; "liberty, equality and fraternity," the Europeans chose equality and fraternity, whereas we Americans chose liberty". Thomas C. Fisher, opening remarks from symposium "Competing Competition Laws: Do We Need a Global Standard?" (1999) 34 New Eng.L. Rev. 7.
[69] Eleanor M. Fox, "The Modernization of Antitrust: A New Equilibrium" (1981) 66 Cornell L. Rev. 1140 at 1181-1182

policy, is that it will inevitably favour producers in high income countries who seek market access and have the political power to persuade their governments to pursue international remedies to ensure that access. This is particularly relevant from a developing country perspective. Developing countries have a legitimate concern that the purpose of the market access approach is to help Western multinationals break into developing markets. Martin Khor, the Director of the Third World Network says, in relation to the EU's initial raising of the issue of competition at the Singapore Ministerial Conference of the WTO:

> "Some influential developing countries, and business groups within them, were ... unfavourably inclined to the issue as they felt that the EU proposal was aimed at ensuring greater market access for their transnational corporations in the markets of the developing world. The EU focus was seen as using the WTO to commit developing countries to introduce or tighten domestic competition laws to break down local monopolies or practices that helped local companies maintain their market shares, so that the larger transnational monopolies could break into or enlarge their share of the domestic markets of developing countries."[71]

Market access advocates would argue that developing countries also export, so a market access commitment is in their interests too, but the response would be that such a commitment, without further rules to prevent abuse of market power, would render developing countries vulnerable to multinational corporations. Developing countries are

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[70]*See* Marsden *supra* note 42 at 182-183.
[71] Martin Khor, "Competing Views on 'Competition Policy' at the WTO" available at Third World Network website http://www.twnside.org.sg/title/views-cn.htm

aware that, once foreign multinationals have been able to gain access to their markets, they will likely be able to offer lower prices due to scale economies achieved by operating on a global basis and will therefore drive less efficient domestic firms out of the market. This will lead to initially lower prices but then, once the domestic industry has been destroyed, the concern is that multinationals may well collude with each other in order to drive prices back up again, possibly to a higher point than they were before the multinationals accessed the market. The detriment to the developing country in this situation is obvious and a market access rule on its own would allow the multinationals in without subsequently disciplining them to keep prices low.

Another criticism of market access comes from a completely different perspective: that of United States antitrust lawyers, regulators and scholars. The concern here is not so much that market access will favour producers in high-income countries, rather, that it will favour producers and competitors in favour of consumers. This goes against the very grain of current U.S. antitrust thinking which, since the 1980s, has favoured a limited efficiency-only model of antitrust enforcement. Fox describes the clash as follows:

> "Principally, U.S. antitrust law proscribes only that which artificially lowers output and raises prices (with a few exceptions); even a dominant firm has the right to compete hard and may do so even if it excludes competitors ... Many American advocates believe that U.S. antitrust law is wiser policy and that a higher level of government intervention than that accorded by U.S. law degrades antitrust and harms competition and efficiency. Moreover, many U.S. antitrust enforcers, lawyers and scholars fear a shift of the antitrust/trade issue from the hands of antitrust experts to the hands of trade experts and a consequent shift of focus from what is

> anticompetitive and harmful to consumers to what is unfair and harmful to domestic producers."[72]

U.S. criticisms of the market access approach are full of Chicago School rhetoric, emphasizing the "purity" and "discipline" of a limited micro-economic approach to competition policy[73] and the "degradation of antitrust law"[74] that would result from introducing a European-style concern for the equal opportunities of competitors. As such, it can be seen that the U.S. opposition to market access is deeply rooted in the conflict between U.S. and EU approaches to competition policy, a conflict that came to a head in the *General Electric/Honeywell* merger case[75]. In that case the U.S. and EU came to opposite decisions on whether or not the merger should be blocked and some terse statements from both sides followed. The U.S. position was encapsulated in the following statement by Assistant Attorney-General Charles A. James:

> "Clear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors. Today's EU decision reflects a significant point of divergence."[76]

The response of market access advocates to the U.S. position is that long term consumer welfare is enhanced by increasing the level of competition through market access, even

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[72] *See* Fox *supra* note 21 at 12.

[73] See for example the preface to Richard A. Posner, *Antitrust Law* (2nd edition) (Chicago: University of Chicago Press, 2001)

[74] American Bar Association, *Report of ABA Sections of Antitrust Law and International Law and Practice on the Internationalization of Competition Law Rules, Coordination and Convergence* (January 2000) at 87.

[75] Commission Decision of 3 July 2001, Case No. COMP/M.2220 *General Electric/Honeywell*

[76] Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition, Department of Justice Press Release 3 July 2001.

though efficiency might be sacrificed in the short term. They would argue that U.S. antitrust law has too narrow a focus on cost/price margins and ignores the long term benefits of allowing fresh competition into the market. The U.S. would respond with the criticism that such long term benefits are extremely difficult if not impossible to quantify, so applying any policy that attempted to maximize such benefits would involve an unacceptable level of administrative discretion. The arguments go round in circles, with both sides seeing the other's point of view as representing "weaknesses" in their systems[77], but the key point to note is that the 'U.S. versus market access' debate is inextricably linked to the 'U.S. versus EU' debate[78].

Philip Marsden offers a criticism of the market access approach which is related to the U.S. criticism. To him "the operating principle, the defining and guiding force of any competition is merit-based reward ... this golden rule of competition should also guide competition policy"[79]. He argues that the market access approach would involve constraining certain types of corporate activity (in particular, exclusive dealing arrangements such as those in the *Kodak/Fuji* case) solely on the basis that the firm has achieved a market power or market share threshold. To him this violates the "golden rule" because it:

> "punishes companies for doing what they are supposed to be doing: trying to win. It sets a ceiling at an arbitrary level of success, thereby encouraging only half measures

[77] See for example Barry Hawk's list of "weaknesses" of the Freiburg school approach discussed below in Chapter 4. Barry Hawk, "System Failure: Vertical Restraints and EC Competition Law" (1995) 32 CMLR 973 at 977-8.

[78] Recent developments in European competition law suggest that the United States appear to be winning this debate for now arguably leading to a less trade-friendly approach to competition policy in the EU. It will be interesting to see what implications this will have for the global competition debate.

[79] *See* Marsden *supra* note 42 at 37.

and mediocrity."[80]

In Marsden's view such an approach is difficult to accept "as a matter of either economics or a concern for competitive 'opportunities'"[81]. He argues that the freedom to enter into exclusive arrangements is itself a competitive opportunity that would be blocked by a strict application of the market access principle. He goes on to say that:

> "in a competition for a contract, it is the competitors' respective abilities that should determine the winner, not their needs. If an exclusive arrangement has been freely entered into, then another trader always has the opportunity to make a more competitive offer. If some coercion or abuse of market power by a dominant party has deprived the rival of the *opportunity* to make a competitive offer, then that is certainly a matter for a competition authority"[82].

In substance, Marsden is offering the same interpretation as the U.S. antitrust regulators, and he cites with approval the views of the U.S. Department of Justice on the *General Electric/Honeywell* case mentioned above. As such the arguments against his position are the same as those against the U.S. position. The U.S./Marsden approach as described above requires an analysis of whether or not the rival's offer is "competitive" or has "merit" *before* the rival has entered the market. If the offer is competitive the competition authorities get involved to make sure the rival has the opportunity to enter the market but if the offer is not competitive the incumbent can continue with its exclusive arrangement

[80] Marsden *supra* note 42 at 221.
[81] *Id.* at 222.
[82] *Id.* at 223/4

as before. The question arises, how do you measure "competitive"? If the products or services are homogenous (for example commodities such as oil or agricultural products) you can look solely at price and say that if the rival is offering a lower price the offer is "competitive". But what about markets in which the products or services are differentiated? A focus on price alone would fail to take into account any increased value to consumers[83], but to quantify an increase in value to consumers would involve comparisons of attributes that are not necessarily alike and a prediction of how consumers will respond to the new product or service once it is introduced onto the market. The EU/Fox camp would argue that such an approach is much too narrowly focused on prices for consumers and other things that are "measurable" in micro-economic terms and fails to take into account any other benefits that might result from allowing a rival to enter the market.

Interestingly, Marsden diverges from the U.S. position by advocating that there should be a competition policy at the WTO, however Marsden's proposal is essentially that the WTO should adopt the fundamental "substantial lessening of competition" test of U.S. antitrust, so he differs from the American position only in being more ambitious. Marsden's proposal would seem to be unrealistic were it not for the fact that a number of European jurisdictions (notably, the UK and Ireland) are clearly moving toward a more U.S. style of competition law, and recent developments suggest the EU as a whole may also be moving in that direction.

In summary, criticism of the market access approach comes from two opposing

[83] Michael Porter of Harvard Business School offers an alternative model of antitrust to the current U.S. model, which takes into account value to consumers. See Michael J. Porter, "Competition and Antitrust: Towards a Productivity-Based Approach to Evaluating Mergers and Joint Ventures" (2001) 46(4) Antitrust Bulletin 919.

directions. On the one hand developing countries fear that a market access principle will give multinational corporations too much power, to the detriment of developing economies; the United States antitrust lobby on the other hand fears that it would arbitrarily limit the power of corporations, to the detriment of consumers.

The review of the literature on global competition in this Chapter is intended to reveal some of the labyrinthine twists and turns of the current debate and to also reveal the extent to which the debate is deeply rooted in the divergent approaches to competition policy of the United States and the European Union. The debate is dominated by the question of the interaction between trade and competition and out of this has come the market access approach which attempts to resolve this question by importing the trade norm of market access into proposals for global competition policy. The remainder of this thesis focuses in on the market access approach and attempts to analyze whether such an approach is really helpful in taking the global competition debate forward.

2. MARKET ACCESS AND SOVEREIGNTY

In order to exam the impact that a market access approach to global competition policy would have on national sovereignty, it is necessary to first examine what we mean by national sovereignty in the context of competition laws and then to look in more detail at the proposals for how the market access approach would be implemented and enforced.

(a) Sovereignty and the Policy Goals of Competition Laws

Sovereignty is an amorphous concept that generally means the supreme and unrestricted power of a State to make laws. Competition laws are often drafted in deliberately vague terms in order to fit a whole spectrum of different markets and different structures and behaviours within those markets. The wording of the laws themselves is generally less important than the underlying policy goals that are pursued in the application of those laws, usually by a competition regulator or through the courts. These policy goals are rarely written into the laws, but are often set out in administrative guidelines of the relevant national authority or sometimes are simply revealed through administrative or judicial action. Therefore, in relation to competition law, the concept of sovereignty is most readily understood as the ability of a State (and by "State" in this context I include international regional bodies such as the European Union) to decide for itself what policy goals should be pursued through its competition laws.

The policy goals that *can* be pursued through competition laws are numerous and diverse. The question of which of goals *should* be pursued is a source of great controversy between States demonstrating that the ability to select those goals is seen as a key aspect of national competence in the competition sphere. Sir Christopher Bellamy, President of the UK Competition Appeals Tribunal, highlighted the problem in his remarks at a New England School of Law symposium on global competition standards:

> "At present, there is little common view on the overriding objectives of competition law. The possibilities range from some kind of Jeffersonian idea of political liberty, through the invisible hand of Adam Smith, to the idea of competition improving consumer welfare by reducing prices and encouraging innovation. Some would add that such laws are there to protect small or medium firms, or the public, from the imperfections of the marketplace. Or perhaps the laws are there to prevent the emergence of over-mighty subjects, intent on denying consumer choice and ultimately subverting democracy itself. In Eastern Europe and some parts of South America, such laws are seen as a means of easing the transition from regulated economies to market based economies. In the EU ... one important objective is market integration. So, there is no real agreement on goals."[84]

In order to understand this lack of consensus about the policy goals of competition laws more clearly, and to understand that the ability of a State to set its own goals is considered as an important aspect of sovereignty, it is instructive to look at some recent demonstrated divergences in competition policy goals between nations who, from a global perspective, are at a similar stage of economic development. I present three examples that are also relevant to later parts of the thesis: firstly the differences between European and American approaches to merger regulation demonstrated in the *General*

Electric/Honeywell case (already touched upon above in Chapter 1); secondly, the differences between Canadian and U.S. merger control revealed in a recent decision of the Canadian Courts; and thirdly, the Japanese enforcement approach to *keiretsu* relationships between Japanese businesses.

In October 2000 General Electric (GE) and Honeywell announced plans to implement a merger worth U.S.$42 billion, at that time the largest ever industrial merger. The merger was quickly approved by the U.S. Department of Justice but the European Commission expressed concerns about the anti-competitive effects of the merger and announced an in-depth investigation. Finally on 3 July 2001 the European Commission issued a 155 page ruling announcing its decision to block the merger on the grounds that it would create or strengthen dominant positions in a number of markets[85]. There appear to have been a number of key concerns of the Commission which can be categorized in terms of the three types of effects that the Commission traditionally looks at in analyzing a merger: horizontal effects, vertical effects and conglomerate effects[86]. (1) In relation to horizontal effects, the two companies had large market shares in a number of markets and the merger involved horizontal overlap in some of these markets, aggregating the two firms' shares and eliminating a competitor. (2) In relation to vertical effects, the Commission looked at the integration of the engines businesses of both parties with the financial power of GE's financial branch (GE Capital), GE's aircraft purchasing and

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[84] Sir Christopher Bellamy, "Some Reflections on Competition Law in the Global Market", remarks at New England School of Law symposium "Competing Competition Laws: Do we need a Global Standard?" (1999) 34 New Eng. L. Rev. 15 at 17

[85] *General Electric/Honeywell supra* note 75

[86] See Mario Monti, "Antitrust in the U.S. and Europe: A History of Convergence", Speech presented at the General Cousel Roundtable of the American Bar Association, 14 November 2001, available at www.eurunion.org/news/speeches/2001/011114mm.htm and Stefan Schmitz, "How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger" (2002) 23 U Pa J Intl Econ L 325 at 373.

leasing operations (GECAS) and Honeywell's strong engine starters business, and determined that the vertical strength of the merged entities would not be replicable by competitors and would allow the combined firm to indulge in a variety of strategic behaviours that would drive their competitors from the market. (3) Lastly, conglomerate effects resulted from the combined company's potential ability to bundle its products across a broad range of product groupings, allowing them to set prices for bundles at unmatchable low levels causing rivals to lose market share and ultimately prevent them from earning the profits necessary to develop new products, thereby foreclosing the market. The thread that binds these concerns of the Commission is the adverse effect that the merger would have on *competitors* of GE and Honeywell.

Competitors have long been considered to be legitimate beneficiaries of European competition laws under the twin influences of the Freiburg School of antitrust thinking (about which more below in Chapter 4) and the overall process of European integration, both of which emphasize equality of economic opportunity and a concern for small and medium sized enterprises[87]. United States antitrust laws, on the other hand, although at one time also concerned with the opportunities of competitors[88], changed tack in the 1980s under the influence of "Chicago School" economics[89]. The Chicago School advocates a paired-down version of antitrust analysis that looks almost exclusively to neo-classical price models and the concept of allocative efficiency[90]. The Chicago approach generally views maximization of "consumer welfare", narrowly conceived as low prices

[87] For a general discussion of the development of European competition laws and the influence of the Freiburg School and integration see generally Gerber *supra* note 1 at chapter IX.

[88] *See generally* Rudolph J.R. Peritz, *Competition Policy in America 1888-1992: History, Rhetoric, Law* (Oxford: Oxford University Press, 1996) at 13-20

[89] The "Chicago School" is generally associated with economists such as George Stigler and Milton Friedman and lawyer-economists such as Richard Posner and Robert Bork

for consumers, as being the sole aim of competition laws and views protection of competitors as illegitimate in that it represents government intervention on behalf of less efficient firms. Although United States antitrust has moved on since the 1980s[91], the Chicago School emphasis on consumer welfare still dominates and, as a result, the European decision in *GE/Honeywell* met with a great deal of hostility. In particular, on the same day as the European Commission decision, Charles A. James, Assistant Attorney General for Antitrust at the Department of Justice issued a press release (partially cited above in Chapter 1) stating that,

> "Having conducted an extensive investigation of the GE/Honeywell acquisition, the Antitrust Division reached a firm conclusion that the merger, as modified by the remedies we insisted upon, would have been procompetitive and beneficial to consumers. Our conclusion was based on findings, confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either firm could offer individually. That, in our view, is the essence of competition.
>
> The EU, however, apparently concluded that a more diversified, and thus more competitive, GE could somehow disadvantage other market participants, Consequently, we appear to have reached different results from similar assessments of competitive conditions in the affected markets.
>
> Clear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors. Today's EU decision reflects a significant point of

[90] Chicagoans are not always clear about the distinction between "allocative" and "productive" efficiency, *see* Peritz *supra* note 88 at 239.

[91] In relation to the influence of Post-Chicago thinking, such as work on the strategic behaviour of firms *see generally* Michael S. Jacobs, "An Essay on the Normative Foundations of Antitrust Economics" (1995) 74 North Carolina Law Review 219

divergence."[92]

Although this statement rather clouds the issue by making the assumption that the U.S. authorities have the only correct understanding of what it means to "protect competition" (the European Commission would also claim that it was protecting competition, albeit with a different understanding of what "competition" consists of), it demonstrates that a difference in views as to the legitimate policy goals of competition laws was at the heart of the controversy[93]: the U.S. believes that competition laws should ensure better products or services at more attractive prices for consumers whereas the EU believes that competitors in general, and small and medium sized business in particular are legitimate beneficiaries of competition laws.

The second example of divergence between developed nations relates to the Canadian Federal Court of Appeal decision in *Canada (Commissioner of Competition) v. Superior Propane Inc.*[94]. In that case the Canadian Courts took steps towards an approach to merger control that takes much more account of productive efficiency (i.e. getting the most out of available resources) and rejects the U.S. focus on allocative efficiency. A detailed economic examination of that case is beyond the scope of this thesis but, in brief, it was found that the merger would result in higher prices for consumers due to the increased market power of the merged entity (the merger would create 100% market share in some markets), but that the merger would allow the companies to take advantage of

[92] U.S. Department of Justice Press Release, "Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition", 3 July 2001. Available at www.usdoj.gov/atr/public/press_releases/2001/8510.htm

[93] It is interesting to note that U.S. authorities did not object to the EU applying its competition laws to U.S. companies *per se*. Both the U.S. and the EU regularly apply their competition laws extraterritorially based on a "qualified effects doctrine". It was the underlying policy goals of EU competition laws rather than the application of the laws themselves that the U.S. objected to.

various economies of scale, thereby allowing them to reduce their own costs. Such a merger generally leads to a wealth transfer from consumers to producers, and the key issue for the court was whether such a transfer should be seen as bad, neutral or otherwise. In the U.S. where the antitrust laws are premised primarily on protection of consumers and, in particular, ensuring low prices for consumers, such a wealth transfer would be seen as bad and the merger would likely be blocked. However, the Canadian courts rejected this approach, holding that Canadian merger law (which includes an "efficiency defence"[95]) does not view such wealth transfers as conclusive and may determine that they are outweighed by the economies of scale resulting from the merger. The Competition Tribunal, in its redetermination of the case following the Federal Court of Appeal decision[96], went to great lengths to explain why differences between the Canadian and U.S. economies justified different policy objectives in merger control[97]. In particular the Tribunal argued that the smaller size of the Canadian economy justified a greater concern with obtaining economies of scale, sometimes at the expense of consumers[98]. The response from academics in the United States was revealing. Stephen Ross of the University of Illinois wrote an article in the Antitrust Law Journal entitled "Afterword – Did the Canadian Parliament Really Permit Mergers that Exploit Canadian Consumers so that the World can be More Efficient?"[99]. The Canadian Competition Tribunal said that "Professor Ross appears to be antagonistic to any approach that differs from the approach

[94] 11 C.P.R. (4th) 289 reversing 7 C.P.R. (4th) 385

[95] Section 96, Competition Act, R.S.C. 1985, c. C-34

[96] 18 C.P.R (4th) 417

[97] *Id.* at 469 to 482. Section H of the Competition Tribunal decision is entitled "Differences between Canadian and American Approaches to Mergers and Efficiencies"

[98] *Id.* at 142.

[99] (1996) 65(1) Antitrust Law Journal 641.

adopted in the United States"[100] and had the following to say about other American commentary,

> "American commentators ... have been quick to attack s.96 of Canada's Act [the efficiency defence] and always on the basis that it diverges from the approach under American antitrust law. In this, the commentators are entirely correct, but they ignore Canadian economic conditions and concerns, in particular, the comparatively small size of the Canadian economy."[101]

The *Superior Propane* case was a decision of the Canadian courts directed at a merger between Canadian companies so did not involve the international repercussions of *GE/Honeywell*, but it still created a good deal of controversy and demonstrates a clear divergence in approach between two economies that, from a global perspective, might be thought to be economically and culturally similar.

The final example relates to Japanese *keiretsu*, a term which relates to forms of affiliation between Japanese businesses. Paul Sheard describes three forms of *keiretsu*:

> "financial *keiretsu* or enterprise groups such as the Sumitomo group or the Mitsubishi group; vertical *keiretsu* or supplier networks centering on assembly firms such as Toyota or Matsushita; and distribution *keiretsu* or the networks of affiliated wholesalers and retailers that manufacturers of consumer goods use to distribute their product."[102]

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[100] *Superior Propane supra* note 96 at 481.
[101] *Id.* at 480
[102] Paul Sheard, "Keiretsu, Competition and Market Access" in Graham and Richardson *supra* note 30 at 501.

The Japanese tolerance of vertical *keiretsu* in the automobile and auto parts markets has caused particular tension in the context of U.S.-Japan trade relations with the U.S. Trade Representative alleging that, for most purchases of auto parts, Japanese automakers relied on traditional Japanese suppliers within their *keiretsu*, thereby preventing U.S. firms from competing in the Japanese market. This dispute is clearly directly relevant to market access, however for the time being, the interesting point is simply the policy goals that are revealed in Japan's enforcement approach to *keiretsu*. In the United States such affiliations would likely be subject to antitrust scrutiny and would be analyzed in terms of their "consumer welfare" impact on the relevant market. If the affiliations were found to operate to increase prices for consumers they would likely fall foul of the U.S. antitrust laws and enforcement action would be taken. In Japan however *keiretsu* have historical foundations based on loyalty and a sense of "fair play"[103], and for this reason they are generally viewed favourably irrespective of their economic impact on consumers. In most Western countries, industrial organization is seen as an economic phenomenon however in Japan *keiretsu* are understood as much in sociological terms as in economic terms and are therefore not necessarily seen as falling within the purview of competition policy. Mitsuo Matsushita describes the phenomenon as follows.

> "keiretsu systems are not necessarily arrangements in which contractual agreements are involved. Sometimes a keiretsu system is a de facto relationship among enterprises. For example, in automobile distribution, dealers that sell automobiles of

[103] Graham and Richardson state that, "years of acrimonious bilateral negotiations [between the U.S. and Japan] have revealed that Japanese auto and consumer electronics firms characterize loyalty toward and from their traditional suppliers as "only fair"", Graham and Richardson *supra* note 30 at 8.

> a manufacturer may remain loyal to the manufacturer and refrain from selling competing products simply because they expect, among other things, that it is the policy of the manufacturer to protect dealers, that the manufacturer would guarantee that the businesses of dealers continue, and that financial assistance would be forthcoming from the manufacturer if they faced business difficulties.
>
> There is a widespread view among manufacturers that if a dealer under their particular keiretsu goes bankrupt, the reputation of the manufacturer will be hurt. Also, if bankruptcy hits a dealer under the sponsorship of a manufacturer, it may affect the morale of all the dealers under this sponsorship. This may, in turn, drive the manufacturer to adopt the policy of providing some kind of measure to ensure that dealers will be protected if they get into serious financial trouble. ... Challenges to such sociological entities under the [Japanese anti-monopoly laws] would be difficult."[104]

It is clear from this passage that industrial structure in Japan is infused with cultural and sociological concepts that are not present in Western countries and that have a profound impact on the policy goals of Japan's competition laws.

The above examples demonstrate two points. Firstly competition law is an extremely powerful and versatile tool: as discussed in the introduction to this thesis, competition law is fundamentally about regulating the power relationships amongst corporations and between corporations and individuals. Secondly there are huge differences between even developed nations as to how they utilize this tool.

Each nation tailors its competition policy to fit its own particular economic and

[104] Mitsuo Matsushita, "The Antimonopoly Law of Japan" in Graham and Richardson *supra* note 30 at 191/2

cultural circumstances, for example a wealthy nation with huge economic resources such as the United States can use competition laws to protect its consumers from exploitation and high prices. However the kind of vigorous competition that pushes prices towards marginal cost (and therefore leads to low prices for consumers) can lead to rapid entry and exit of firms in the market, resulting in bankruptcy and unemployment. A less developed country without an adequate regulatory framework to protect citizens from bankruptcy and unemployment (for example easily accessible credit, unemployment insurance and employment retraining) might prefer to focus its competition policy on ensuring survival of companies by protecting smaller competitors from large firms with considerable market power. This is a point that is returned to below in Chapter 4.

Given the importance that nation's clearly place on choosing competition goals that fit their economic circumstances the question arises, is it legitimate to insist on a particular policy goal at supra-national level which overrides or 'trumps' national policy goals? The remainder of this chapter examines this question in relation to the market access approach to global competition policy by looking in more detail at the proposals of the European Union and Eleanor Fox and examining the impact of such an approach on national sovereignty.

(b) The EU Submissions to the WTO Working Group

In its submission dated 25 September 2000 to the Working Group on the Interaction between Trade and Competition Policy[105], the EU talks about a "multilateral framework

[105] Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Member States WT/WGTCP/W/152, 25 September 2000.

agreement on competition policy" with negotiations to be based around three key issues:

- core principles on domestic competition law and policy;
- cooperation modalities, including both case-specific cooperation and more general exchanges of experiences; and
- support for the reinforcement of competition institutions in developing countries, including through a more coherent and enhanced approach to technical assistance for capacity building[106]

It is the first of these that leads to a potential encroachment on sovereignty. The EU is careful not to mention the topic of enforcement, but presumably the only point of concluding an agreement that contains "core principles on domestic competition law and policy" would be if the WTO dispute resolution procedure could be invoked in the event that a Member State failed to implement one of those principles. In their subsequent submission dated 14 March 2001[107] EU representatives admitted that they had in mind that the WTO dispute settlement understanding (DSU) would apply to "the obligation of WTO Members to have a domestic competition law based on the core principles" but that "application of the DSU to individual decisions of competition authorities would be excluded"[108]. This distinction is difficult to understand. It is hard to imagine a circumstance in which a country's domestic competition law would be challenged without reference to a particular decision of a competition authority, and it would be an extremely ineffectual multilateral agreement if it required laws to be enacted in accordance with

[106] *Id.* at 4
[107] Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Member States WT/WGTCP/W/160, 14 March 2001.

"core principles" but then did not require those core principles to be implemented by domestic administrators applying the laws. In my view the EU has put forward very weak commitments to dispute settlement in its written communications to the WTO in order not to alienate WTO Members from its proposals, the basic strategy being to get an agreement on the table and then talk about how it should be enforced. This is the tried and tested "path of least resistance" approach to multilateralism that has been fundamental to the process of European integration since its earliest days[109].

Again, with the "path of least resistance" in mind, the EU is careful in its submissions to the Working Group not to introduce any controversial "core principles" that other WTO Members might object to, stating that,

> "[a]n approach based on core principles does not imply harmonisation and can take into account differences in national legal systems and institutional capacities. Moreover, such principles can be defined in a manner which reflects the need for progressivity and flexibility as regards the commitments assumed by developing countries, and in particular the least developed among them.
>
> Core principles could be largely based on transparency and non-discrimination, which are both central to the multilateral trading system and to domestic competition law regimes."[110]

This approach of course begs the question, what is the point of forging an agreement on core principles if they are already uncontroversial and consistent with all WTO Members'

[108] *Id.* at 3.
[109] Jean Monnet himself advised that leaders should "always choose the path of least resistance".
[110] 25 September 2000 Communication *supra* note 105 at 5

domestic competition regimes? It is clear that, in order to have any purpose, such an agreement would have to lay down criteria for domestic competition policy that are not necessarily acceptable to all. In my view what the EU has in mind is a "core principle" of market access.

Evidence that market access forms part of the EU's plan for a multilateral framework agreement comes from a number of sources. Firstly, the EU has openly advocated a market access approach to competition policy in the past. In its 24 November 1997 submission to the WTO Working Group the EU included a section headed "Key elements for an effective and efficient competition policy and their contribution to enhancing national and global economic welfare and *improving access to markets for all countries*"[111]. The submission stated that:

> "Competition laws and policies do not normally have specific trade objectives, such as promoting market access. However, in pursuing the goals of promoting economic efficiency and consumer welfare, an effective application of competition law is essential for tackling barriers to entry set up by business in the market or other anti-competitive practices which affect both foreign and domestic producers. As stated by Brazil at the 16 September meeting [of the WTO Working Group]: 'Competition policy can suppress barriers where trade policy is less effective. It is possible to imagine a country that strictly follows GATT rules but where cartels, exclusivity arrangements and other forms of restrictive practices prevail impeding market penetration. In that hypothetical case, competition policy could be very helpful to

[111] Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Member States WT/WGTCP/W/45, 24 November 1997 at 4 (emphasis added).

improve market access.'"[112]

This is a relatively strong statement of the market access approach to competition policy and it is noteworthy that the EU was able to cite another WTO Member in support of its arguments. The EU dropped this market access argument from its subsequent submissions to the WTO presumably in recognition of the fact that it was considered to be controversial. As discussed in Chapter 1 above, the market access approach has been attacked from two separate angles: firstly the developing country perspective that the market access approach will inevitably favour exporters from high-income countries[113] and secondly the U.S. perspective that the approach will favour competitors over consumers[114]. In addition there has been general resistance to the idea of negotiating *any* agreement on competition policy at the WTO, a view that was given particularly strong voice in the lead up to the Cancún Ministerial Conference in September 2003. In the 2003 Annual Report of the WTO Working Group on the Interaction Between Trade and Competition Policy a number of significant reservations to the idea of a multilateral competition agreement were noted, particularly from the developing country perspective.

> "developing countries were reticent about the development of a multilateral framework on competition policy, for a variety of reasons. These included not only the fact that, for some countries, competition policy was overshadowed by higher priorities but also a concern as to the extent to which the current proposals would allow for the preservation of policy space in regard to developmental objectives;

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[112] *Ibid.*
[113] *See* Khor *supra* note 71.
[114] *See* Fox *supra* note 72.

perceived difficulties arising from disparities between countries and/or their firms in respect of levels of development and competitiveness, experience in the adoption or implementation of competition laws and the capacity to implement such legislation; and the direct resource costs of a multilateral framework."[115]

Further concerns were expressed over implementing a multilateral competition agreement in Member States that currently have no domestic competition regime and it was noted that a Member State might actually choose to have *no* competition policy for valid policy reasons rather than simply due to lack of resources[116]. Given this level of opposition within the WTO Membership, the EU has had to gradually water down its 1997 proposal noted above and, in particular, has restricted its recommendations to vague principles rather than the particular policy goal of market access. Such an approach is consistent with the long history of consensus building within the European Union itself. However the fact that the EU no longer refers to market access explicitly in its submissions to the WTO does not mean that market access is no longer at the heart of the EU approach to global competition policy. Philip Marsden agrees with this proposition, saying that,

> "[t]o assert that the EU has given up on its market access approach in the face of concerns of a few academic commentators and American antitrust officials is disingenuous at the very least ... the EU's lead negotiators have admitted that market access is not off their agenda."[117]

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[115] Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/7 17 July 2003 at para 17.
[116] *Id.* at para. 18
[117] Marsden *supra* note 42 at 164/5

A second source of evidence that the EU has a "core principle" of market access in mind is that EU competition law is itself strongly premised on market access and non-foreclosure of markets. This focus comes from the broad goal of creating the European single market. The single market is based on the principle that trade within the Community should be carried out on a non-discriminatory basis and, in particular, that governments and private firms should not be able to foreclose markets from other firms within the Community. The provisions in the Treaty of Rome on free movement of goods constrain governmental power in this regard by preventing Member States from erecting tariff and quota barriers and, similarly, the competition law provisions constrain private firms from using their market power to prevent other firms accessing the market. It was apparent from an early stage in European integration that competition laws would be central to the process and that they would be applied with market access as an important goal. This approach to competition law is apparent in the following passage from a judgment of the European Court of Justice in an early case on Article 85 (now 81) of the Treaty of Rome which prohibits anti-competitive agreements:

> "an agreement between a producer and a distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental object of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States ... could not allow undertakings to reconstruct such barriers. Article 85(1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process."[118]

[118] Cases 56/64 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299 at 340

A number of more recent decisions of the European Commission also suggest that market access is still at the forefront of European competition policy. For example in a discussion of the economics of "bundling" (the selling of products as a single package rather than separately) in its controversial *GE/Honeywell* decision in 2001[119] the Commission stated that,

> "The various economic analyses [of bundling] have been subject to theoretical controversy, in particular as far as the economic model of mixed bundling, prepared by one of the third parties, is concerned. However, the Commission does not consider the reliance on one or other model necessary for the conclusion that the packaged deals that the merged entity will be in a position to offer will foreclose competitors from the engines and avionics/non-avionics markets."[120]

This clearly demonstrates that market access (or, in other words, preventing companies from foreclosing competitors from the market) was a major concern of the Commission irrespective of any particular economic analysis. Given that European competition law itself follows a market access approach, it is fair to assume that EU representatives would hope to see a similar approach at the global level. In fact the preamble to the 1995 "Group of Experts" report, noted above in Chapter 1[121] makes it clear that the EU has sought "europeanization" of global competition policy at least in relation to restrictive business practices.

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[119] *Supra* note 75
[120] *Id.* at para 352
[121] *Supra* note 25

The third source of evidence of an EU "core principle" of market access is that, generally, in its dealings with the WTO, the EU is pursuing a market access agenda. In a recent letter to their WTO counterparts EU Commissioners Pascal Lamy and Franz Fischler demonstrated the EU's strong commitment to market access by agreeing to a number of key concessions in order to secure market access commitments based on the Doha development agenda[122]. In particular, the letter suggests that the EU would be willing to make concessions on agricultural subsidies in order to kick-start negotiations on market access after the collapse of talks in Cancún in September 2003:

> "On agriculture, we believe that we have a historical opportunity for a breakthrough. The responsibility for showing the lead clearly lies with the major subsidising countries in the developed world. We are prepared to play our role in that respect, as two major reforms of the Common Agriculture Policy in the span of less than a year demonstrate. But there must be movement on all three pillars – market access, domestic support, and export support – in a balanced fashion. ... Market access continues to be a central issue in the negotiations, and one which will have to be carefully integrated in our overall approach on the three pillars. ... If an acceptable outcome emerges on market access and domestic support, we would be ready to move on export subsidies."[123]

Later in the same letter Lamy and Fischler state that,

> "Negotiations on non-agricultural market access have lost momentum and we must

[122] Letter from Pascal Lamy and Franz Fischler to WTO Colleagues, Brussels, 9 May 2004. Available at http://trade-info.cec.eu.int/doclib/docs/2004/may/tradoc_117097.pdf

regain it because we all know this is where the gains in the [Doha] Round will be the greatest. We suggest that negotiations focus on a simple, general and ambitious formula for market opening accompanied by a short set of qualifications or exceptions in country or product terms."[124]

This clearly demonstrates the EU's strong commitment to market access in the context of the WTO Doha Round as a whole, and it is important to remember that the suggestion for a multilateral agreement on competition policy must be seen in the context of WTO negotiations as a whole rather than as an isolated issue.

In summary, the EU's position appears to be that the "multilateral framework agreement on competition policy" at the WTO should include a "core principle" of market access and should ultimately be enforced through the WTO's dispute settlement understanding. While this position has not been expressly stated by the EU, the EU's champion in the academic world, Eleanor Fox, has been much more willing to set out this position in unequivocal terms. Her work is discussed in the next section.

(c) Eleanor Fox's Approach to a Multilateral Market Access Commitment

In her 1997 article entitled "Toward World Antitrust and Market Access"[125], Eleanor Fox sets out her "vision of liberal antitrust to fit the worldview of liberal trade" and states that,

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[123] *Id.* at 1 and 2

[124] *Id.* at 3.

[125] Fox *supra* note 21 at 2

> "Since market access is the trade/antitrust issue of most interest to the world trading system today, I focus, in this article, on a market access principle for the world. Such a principle, focused on the trade and competition intersection, would be an especially fitting subject for a WTO agreement, which might naturally be called the Agreement on Trade-Related Aspects of Antitrust Measures, or TRAMS."[126]

Her concept for global competition policy is a multilateral framework based on "linking principles of constitutional dimension"[127]. Fox's idea of "linking principles" is similar to the EU notion of "core principles" discussed above, and includes principles that "prohibit anticompetitive blockages of market access and transnational cartels, and provide a discipline for unjustified trade-restraining acts of states"[128]. In a key passage, Fox states that,

> "A linking-principle system could bring competition principles into harmony with the liberalized world trading regime, possibly in the context of the WTO. Substantive principles would be few and of major market importance, e.g. an anticartel rule and a market access rule. Nations would agree to adopt the consensus principles into their national law, using any nonparochial formulation of their choice."[129]

Concentrating on the "market access rule", Fox goes on to identify three particular areas of competition policy which are of concern for blocking market access. Firstly, "cartels with boycotts" where, for example, manufacturers in a particular nation tie up all

[126] *Ibid.*
[127] *Id.* at 14.
[128] *Ibid.*
[129] *Id.* at 19

available distributors in that nation in order to keep foreign competitors out of the market. Secondly, "vertical agreements or collaborations that tend to exclude market actors", for example where exclusive purchasing agreements operate to exclude outsiders from a market by denying them essential inputs or outputs. Thirdly, "monopolistic discriminations and exclusions", for example where a monopoly has control over a market and is able to discriminate against or exclude non-nationals. Fox believes that only the first area is currently dealt with by domestic competition laws and that both the second and third areas, while preventing free trade, are often permitted by domestic competition laws, particularly laws such as the antitrust laws of the United States which rely on neo-classical price models for their theoretical foundation. In order to tackle these problems Fox advocates that nations "agree to the general principle that there should be no substantial unjustified market blockage by public or private action (as well as no transnational cartels)"[130].

In relation to implementation and enforcement of this market access principle, Fox looks to the example of European Community legislation. She suggests that her market access principle would be adopted at the WTO in the same way that framework directives are adopted within the EU and that,

> "Each nation would then be responsible for implementing this principle in its national law. Implementation would include providing effective discovery, fair process and sufficient remedies, as well as enforcing the law.
>
> Opponents of a world system argue that nations would find it impossible to agree on a market access principle. This is not a problem under this proposal. Each nation

[130] *Id* at 23

would define for itself what it means by an "unjustifiable" market access restraint. Simply it must formulate its law in a credible, nondiscriminatory, clear and understandable way."[131]

Her idea is that the laws, once implemented, would be applied and enforced at a national level, but that there would be reciprocal rights of discovery and enforcement and ultimate recourse to the WTO dispute resolution panel "perhaps with authority to review the limited question whether the adjudicating nation properly applied the law"[132].

Fox's model of an EU-style "framework directive" drafted in general terms, allowing each nation to define for itself what it means by the "market access principle" coupled with a weak judicial role for the WTO panel is inconsistent with the European experience where the European Courts have had a central role in achieving the harmonization of laws across the EU. As discussed above in Chapter 1, the European Courts have taken a robust line in both laying down judicial interpretations of Community laws and in ensuring that Member States implement those laws correctly. In the context of the WTO, where there cannot be said to be anywhere near the commonality of interest that there is within the EU, an institutional mix that does not include a strong enforcement function would appear to be completely unworkable. However Fox goes on to recommend that,

"[t]he WTO would have duties to monitor the compliance of nations in adopting and enforcing the consensus principles of law. The WTO would monitor complaints by aggrieved nations. It could also entertain claims of nullification and impairment of

[131] *Id.* at 23 to 24

> trade obligations based on patterns of nonenforcement of the market access law. Remedies might include mandatory injunctions to implement the common principles, enforce the law, or open markets and they might include fines, and compensatory damages ..."[133]

This passage suggests a much stronger enforcement role for the WTO which would allow it to directly apply the "market access law" and impose remedies including forcing countries to open markets in accordance with that law. In my view, it is only with this more robust level of enforcement that a multilateral agreement on competition policy at the WTO makes any sense. Ultimately, if a WTO agreement on competition policy is to be in any way meaningful, the national competition laws of the Member States must be reviewable by reference to the agreement and a system of enforcement put in place.

In a subsequent article Fox makes it clear that the proposed multilateral agreement would have a role to play in determining the legality of private action as well as the validity of national laws. She suggests that,

> "Important questions of interface between competition policy and conflicting state action would be placed on an agenda for discussion and resolution, so that, for example, the mix between public and private action as alleged by the United States and Kodak with regard to Japan and Fuji Film could be treated as a coherent indivisible problem."[134]

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[132] *Id* at 24

[133] *Id.* at 24

[134] Fox *supra* note 22 at 928

As discussed in Chapter 1 above, the *Kodak/Fuji* case[135] involved both public and private restraints of trade within the Japanese market for photographic film. Fox's approach would involve reviewing both the Japanese competition measures that permitted the private action and the private action itself. This approach has clear and serious concerns in relation to national sovereignty and, mindful of this, Fox suggests an alternative, less ambitious model that roughly accords with the EU "path of least resistance" approach discussed above. Nevertheless Fox makes it clear that, in her view, the stronger market access model is "critical to world well-being"[136].

(d) The Impact of the Market Access Approach on National Sovereignty

The above discussion has refined what is meant by the "market access approach". It involves a supranational "market access rule" which is used as a standard to review domestic competition laws and which is enforced in some way by the WTO. Fox's formulation of the rule is "that there should be no substantial unjustified market blockage by public or private action"[137] and as I argue above, the only way that this rule becomes meaningful in the context of a WTO agreement is if the WTO were able to review national laws and decisions of national regulators in order to enforce compliance with the rule. Philip Marsden makes this same point, arguing in relation to Fox's market access principle that "for it to work at all, there must be multilateral review of decisions by competition authorities to tolerate exclusionary arrangements"[138]. It is immediately clear

[135] *Supra* note 55
[136] *Id.* at 931/2
[137] *Supra* note 130
[138] Marsden *supra* note 42at 209.

that this approach involves a policy goal of market access that would "trump" any other national policy goals where the two came into conflict. To understand the effect this would have on domestic competition policy it is instructive to return to the examples given earlier in the Chapter. Let us imagine that a WTO agreement containing Fox's market access rule were in place at the time of the GE/Honeywell merger. The U.S. Department of Justice cleared the merger on the grounds that it would lead to better quality products at lower prices for consumers, but that decision would become subject to review by the WTO who would look at the potential foreclosing effects of the merger and would likely determine that the merger represented a substantial market blockage by private action that breached the WTO agreement. The U.S. DoJ decision would be overturned but, further, the WTO could determine that U.S. antitrust law itself represents a substantial market blockage by *public* action as it is generally applied with consumer welfare in mind irrespective of any market blocking effects: the U.S. antitrust laws would be non-compliant with the WTO agreement.

Similarly the decision of the Canadian courts in *Superior Propane* would likely be incompatible with the WTO agreement. The merger was permitted despite the fact that it would give the combined company huge market share in some markets and there was evidence that Superior Propane had used tactics to prevent rivals entering the market, such as entering long-term contracts with customers and requiring them to rent their propane tanks from Superior Propane. For the Canadian courts, such effects were overridden by the goal of achieving economies of scale in the propane market, however such a goal would be "trumped" by a market access principle and the merger would likely be prohibited.

Lastly, the Japanese *keiretsu* involve clear issues of market access. As Paul Sheard describes,

> "Two market access issues are raised in relation to Keiretsu. One concerns the alleged closedness of part-supply systems and intermediate product markets. The second concerns the distribution system. Arguments about the distribution system have been raised at two levels: the final distribution system and the distribution system between firms in intermediate product markets." [139]

Sheard goes on to take issue with some of the market access arguments levelled at *keiretsu*, but it is clear that Japan's current tolerant policy towards *keiretsu* would come under scrutiny of a market access rule and may require Japanese authorities to take competition enforcement action against *keiretsu* contrary to national policy.

In each of the above examples, the market access approach would appear to "trump" national laws and therefore raises the prospect of significant objections on the grounds of breach of national sovereignty. Fox attempts to short circuit these objections by suggesting a "stylized choice of law" approach[140]. She advocates,

> "a methodology for internationalizing a market access principle while deferring to nations in the formulation of their own law and proposing that the law of the excluding nation should apply to claims of anticompetitive denial of market access"[141]

[139] Sheard *supra* note 102 at 522

However, while allowing each nation to draft its own laws, Fox's approach does not allow them to set their own policy goals: the national law must still embody the market access principle. She acknowledges this in a later article:

> "For the purpose of market access disputes, the law of the importing nation should apply – no matter where suit is brought – as long as the importing nation has adopted the required law and that law is non-parochial"[142]

As I argued earlier in this chapter, the ability of a nation to set its own policy goals is a key element of national sovereignty in relation to competition laws, so from that viewpoint, Fox's concession that nations should be allowed to draft their own laws provided they comply with the market access policy goal does not address the sovereignty concern. It is clear that the "market access rule" would override national policy goals wherever they came into conflict and would override them in relation to all domestic competition enforcement whether or not the case in question related to global issues or simply local issues. In its strongest form, the market access approach could amount to a commitment to use competition laws to restructure domestic industry in order to make markets accessible to foreign competitors. It would involve using the powerful and flexible tool of competition law purely for free trade purposes, where it currently serves a variety of purposes depending on the economic circumstances of the nation in question. In my view this renders the approach unworkable.

Of course national sovereignty is not an immutable concept. States frequently

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[140] Fox *supra* note 22 at 928

[141] Fox *supra* note 21 at 25.

sacrifice national sovereignty in order to achieve overarching supranational aims. The rule-making powers of international bodies such as the European Union and the WTO itself are carved out of national sovereignty and the question is always one of balancing the value that the State puts on maintaining sovereignty in the relevant area with the benefits from ceding that sovereignty in order to achieve the benefits of supranational regulation. For example the United Kingdom has decided, for now, that it is in its interest to maintain sovereignty over its national currency rather than joining the European single currency but, on the other hand, has agreed that the benefits of the European single market justify ceding sovereignty in relation to various other issues such as company law. European countries are familiar with the sovereignty balancing act and, similarly, membership of the WTO in itself involves a certain amount of sovereignty concession in relation to tariffs, quotas, border measures and various other discriminatory national laws. So beyond the question of workability, one must ask the further question of whether we should still strive towards a market access approach in the face of sovereignty concerns because it is nevertheless the best approach. The following two Chapters examine this question from two different perspectives

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[142] Eleanor Fox, "Competition Law and the Millennium Round" (1999) 2 J of Intl Econ Law 665 at 672, emphasis added

3. MARKET ACCESS AND EXISTING TRADE COMMITMENTS

In Chapter 4 I examine the fundamental question of the appropriate role of competition policy within the world trading system to determine whether the market access approach fulfils that role. For the purposes of this Chapter, I take the WTO trade agenda at face value and look at the more limited argument that the market access approach is necessary to give effect to the existing trade commitments of Member States. The argument goes that WTO Member States have signed up for a framework of trade rules that ensure the lowering of governmental barriers to trade and the removal of protectionist measures, therefore Member States should ensure that the efficacy of those trade rules is not compromised by industrial structure and, in particular, restrictions on trade by private firms within those States or by domestic competition laws that permit those restrictions. As Eleanor Fox puts it,

> "trade law has been liberalized. As the trade barriers fall like a waterline, the low tide reveals rocks and shoals – which are the private restraints and uncaught government restraints. Moreover, the freer trade engenders new, defensive restraints. Entrenched businesses, and nations themselves, face perverse incentives to rebuild border barriers for private and nationalistic ends, protecting the newly vulnerable national advantage ... Thus, trade liberalization sets the stage for private and hybrid abuses, suggesting the need for a voice for free trade and competition."[143]

As to the market access principle Fox appeals to the notion that it is integral to the world trading scheme as a whole and therefore should not be considered overly controversial:

"if the principle is just so simple and limited as suggested – no unreasonable restraint on market access – it is integrally related to the obligations of trading nations, and it may not be too much to ask all WTO members and prospective members such as China to accept such an obligation in order to receive the benefits of the liberal trading system"[144]

In order to assess this argument it is necessary to look at what "the obligations of trading nations" consist of and whether the market access principle really is "integrally related" or whether it goes above and beyond those obligations. Any discussion of trade principles is controversial as it touches on questions of the guiding principles of justice and equity that underpin the project of world trade. Some of these deeper questions are touched on in Chapter 4 but, for the purposes of this Chapter, I look principally at WTO trading obligations as they are enshrined in GATT and WTO documents.

(a) WTO Trading Obligations

Trebilcock and Giri explain the fundamental trading obligations of WTO Member States as follows:

"The National Treatment principle, along with the Most-Favoured-Nation (MFN) principle, constitute the two pillars of the non-discrimination principle that is widely

[143] Fox *supra* note 21 at 3/4
[144] *Id.* at 24

seen as the foundation of the GATT/WTO multilateral trading regime."[145]

The "most-favoured nation" principle means that each nation should be treated equally as a "most favoured" trading partner. The "national treatment" principle means that others should be given the same treatment as one's own nationals. The WTO's own document *Understanding the WTO*[146] describes the principles in more detail:

> "*Most-favoured-nation (MFN): treating other people equally.* Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.
>
> This principle is known as most-favoured-nation (MFN) treatment ... It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (article 4) ...
>
> *National treatment: treating foreigners and locals equally.* Imported and locally-produced goods should be treated equally – at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of "national treatment" ... is ... found in all the three main WTO agreements (Article 3 of GATT,

[145] Michael J. Trebilcock and Shiva K. Giri, "The National Treatment Principle in International Trade Law", paper presented at American Law & Economics Association 14th Annual Meeting, May 7-8 2004 at Northwestern University. Available at http://law.bepress.com/cgi/viewcontent.cgi?article=1007&content=alea

[146] World Trade Organization, *Understanding the WTO* (Geneva: WTO Information and Media Relations Division, 2003). Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf

Article 17 of GATS and Article 3 of TRIPS) ..."[147]

These two principles form the fundamental non-discriminatory basis of the WTO/GATT obligations, but it is worth noting the other principles listed in *Understanding the WTO*: Firstly, the principle of "freer trade: gradually through negotiation"[148] in relation to which the document refers to the transition from removing tariff barriers to increasing focus on non-tariff barriers but notes that,

> "Opening markets can be beneficial, but it also requires adjustment. The WTO agreements allow countries to introduce changes gradually, through "progressive liberalization". Developing countries are usually given longer to fulfil their obligations"[149]

Secondly, the principle of "predictability: through binding and transparency"[150] which refers to the stability benefits of requiring countries to comply with binding commitments not to raise trade barriers and to making trade rules as clear and public as possible. Thirdly, the principle of "promoting fair competition"[151] in relation to which the document states that,

> "[t]he WTO is sometimes described as a "free trade" institution, but that is not enirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair

[147] *Id.* at 10 to 11
[148] *Id.* at 11
[149] *Ibid.*
[150] *Ibid.*

and undistorted competition."[152]

Lastly the principle of "encouraging development and economic reform"[153] which refers to the goal of providing assistance to the three quarters of WTO Member States who are developing countries and countries in transition to market economies in order to help them to become integrated into the world trading system and to implement trade liberalization programmes.

(b) The Market Access Approach and Non-Discrimination

There is undoubtedly an intuitive link between market access and non-discrimination. After all a market that is open to all is, by definition, non-discriminatory. However there are various reasons why a market may be blocked but the blockage could not be described as "discriminatory", and it should be remembered that discrimination in the context of the WTO trading obligations means discrimination on the basis of nationality. It might be useful at this stage to present a threefold categorization of reasons why markets might be blocked to foreign competitors. Firstly there might be discriminatory measures, such as import tariffs, quotas, domestic subsidies or measures having an equivalent effect such as product standards that discriminate in favour of domestically produced goods. Such measures generally fall within the scope of existing trade rules. Secondly there might be "exogenous barriers to entry" into the market, in other words, barriers to entry that result from particular market conditions rather than as a

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[151] *Id.* at 12
[152] *Ibid.*

result of public or private action[154]. For example, the nature of the market might preclude transportation of goods between nations, because transportation costs are prohibitively high or because the goods are perishable. Similarly, the market may be a natural monopoly and only one large firm is able to realize all necessary economies of scale. The inability of rivals to enter the market on sufficient scale to compete with the incumbent monopolist means that the market is effectively closed to all except the incumbent. Exogenous barriers to entry may well cause a market to be divided up along national or regional lines but are generally considered to be simply a matter of market reality and not something that can or should be corrected through regulatory measures. Thirdly a market may be blocked because of "endogenous barriers to entry", that is barriers to entry that are created by or result from the behaviour of the firms within the market. For example a market may be dominated by a cartel of domestic firms who control supply and prevent rivals from entering the market. The market blockage is caused directly by the private actions of the members of the cartel, but also indirectly by the public action of the competition authority that tolerates the existence of the cartel. Daniel Tarullo provides another example of a market that is blocked by an endogenous barrier to entry but which is less obviously anti-competitive,

> "consider a domestic industry with ten unrelated producers, each of which has no more than a 15 per cent market share and has developed a sophisticated network of distributors and providers of after-sales services for its products. As a result, a new producer – foreign or domestic – will find it exceedingly difficult to break into the

[153] *Ibid.*

> market without large investments in a similar network. Yet the ten producers engage in vigorous competition, with no evidence of horizontal price-fixing or other restraints of trade. From the perspective of competition policy, there is little to complain of here. From the perspective of trade policy, on the other hand, the de facto exclusion from the market of a foreign producer may be the most important circumstance."[155]

It is third category of market blockages, endogenous barriers to entry, with which the market access approach to competition policy is concerned. Generally it seeks to remove all endogenous barriers to entry. Let us consider how Tarullo's example would be viewed through the lens of Eleanor Fox's market access principle "that there should be no substantial unjustified market blockage by public or private action"[156]. It is clear that there is a market blockage by private action (the behaviour of the firms and structure of the market) and through public action (the domestic competition policy that permits such an industry structure to exist). Much turns on the interpretation of "substantial" and "unjustified" but there seems little doubt that the market would, at the very least, be subject to WTO *scrutiny* under Fox's model. The important point is that the Tarullo example does not involve any measure which can be described as "discriminatory" on the basis of nationality. The market is blocked, but it is blocked to all potential rivals whatever their nationality: there is no reason in principle why foreign competitors could not enter the market provided they are willing to match or beat the prevailing competitive

[154] Antitrust lawyers and economists will often refer to public measures such as border tariffs as exogenous barriers to entry as they are independent of the actions of the players in the market, but for these purposes it is useful to treat them as distinct.
[155] Tarullo *supra* note 4 at 4
[156] *Supra* note 130

conditions. It is clear that Fox's market access principle would cover situations of market blockage such as the Tarullo example which would not be covered by either the national treatment principle or the most-favoured nation principle as there is no question of a discriminatory measure. In short, the market access approach to competition policy goes above and beyond existing WTO non-discrimination commitments.

Of course this is not to suggest that endogenous barriers to entry cannot also be discriminatory. For example a cartel that consisted of all firms within a domestic market and which accepted new domestic firms into the cartel but indulged in various tactics to keep foreign firms out of the market could well be considered discriminatory, and the failure of the domestic competition authority to take action against it might be characterized as disguised protectionism. Similarly a national competition policy that permitted collusion by domestic firms but outlawed the same behaviour by foreign firms selling into the market could well lead to market blockage and would be discriminatory. Arguably such discriminatory national policies would already be subject to existing GATT rules[157]. However, there is no suggestion that the market access approach to competition policy would be *limited* to this kind of discrimination and, as such, it would bring a vast range of non-discriminatory private and public action within the scrutiny of the WTO that currently falls outside of its scope.

In fact, one could go further and argue that a commitment to apply competition laws in such a way that guarantees foreign firms market access could well *itself* be discriminatory as it may artificially open markets to foreign firms that are less efficient or

[157] The WTO itself confirmed that "[competition] laws would fall within the scope of the National Treatment rule of Article III:4 [of GATT] to the extent that they affect the internal sale, offering for sale, purchase, transportation, distribution or use of goods." WTO Annual Report 1997, "Special Topic: Trade and Competition", Geneva 1997.

competitive than the domestic incumbents. Such a rule may operate to discriminate *in favour of* firms purely on the basis of their nationality. It might grant foreign firms "more-than-national treatment" which sits uneasily with the current trade principles of non-discrimination. In any event it is clear that the market access approach to competition policy exceeds existing trade commitments in relation to non-discrimination. The next section examines whether the approach is coherent with other trade principles.

(c) The Market Access Approach and Other Trade Principles

As described above, the principle of "freer trade: gradually through negotiation" is included in the WTO's own list of trade principles. It is worth briefly discussing here the broad sweep of world trade negotiations and locating the market access approach within that context. An obvious point to make is that the participants in world trade negotiations are the individual Member States and the various barriers to market access can be seen as the Member States' "bargaining chips". Those bargaining chips may consist of border tariffs, quotas, subsidies, anti-dumping remedies and various other non-tariff barriers and discriminatory measures. The typical trade negotiation takes the form of one State relinquishing a bargaining chip (for example, reducing tariffs in a particular sector) in return for other States doing the same. There are at least two common characteristics between the bargaining chips that are currently on the table in world trade negotiations: firstly, they are market blockages that result from public rather than private action, secondly they are restraints of trade that operate by reference to Member State borders (either at-the-border blockages such as tariffs, or behind-the-border discriminatory measures). The type of bargaining chips that the market access approach seeks to bring to the table and then sweep off in one go is the complete set of industrial structure issues and restrictive business practices that block markets, together with the domestic competition policies that allow them. I shall refer to these bargaining chips simply as "RBPs" (restrictive business practices) for the sake of brevity, but it is important to remember their dual private/public nature: they are actions of private firms that are tolerated by domestic competition regulators. These RBPs do not share the commonality with the bargaining chips currently on the table: firstly they involve restraints on trade resulting from *private* as well as public action; secondly, as discussed above in relation to non-discrimination, there is no necessary connection between these types of restraints and Member State borders. They may equally block the market from other *domestic* competitors. My argument is not that RBPs should be left off the negotiating table, simply that they are too important to be negotiated (or litigated) away *en masse* by reference to a market access principle in a multilateral agreement. RBPs should be dealt with on an industry by industry basis in the same way that tariffs and other bargaining chips are dealt with.

It is worth mentioning at this stage that there is a precedent for dealing with RBPs on an industry by industry basis in relation to the telecommunications industry. As Philip Marsden explains:

> "governments ... recognised that their telecommunications markets would not become or remain competitive if they simply restrained one another from discriminating against foreign suppliers ... A right of general entry had to be provided to new competitors – whether domestic or foreign – through pro-competitive

> 'asymmetric regulation' of major suppliers. Trade negotiators thus provided a *Reference Paper on Pro-competitive Regulatory Principles* to require that WTO Members ensure that their large incumbents provide sufficient entry points on satisfactory terms so that their competitors could connect to their networks."[158]

The WTO Reference Paper[159] represents an attempt to deal with RBPs specifically in relation to the telecoms industry. This allows Member States to focus their attention on the specific requirements of altering the competitive conditions in that particular industry in order to permit other competitors to enter the market. In my view this approach complies with the commitment to free trade "gradually through negotiation" and is in marked contrast to the market access approach to competition policy which seeks to deal with all such RBPs in a sweeping and untargeted fashion. The gradual negotiation approach is vital, particularly to developing countries as they are not necessarily in a position to analyze or negotiate broad sweeping commitments particularly if, as is the case with competition policy, they have little or no experience of the effects of those measures within their domestic economies. The WTO recognizes this in the passage from *Understanding the WTO* quoted above[160].

Turning now briefly to the principle of "predictability: through binding and transparency", this is applied mainly to tariff bindings, but the WTO states more generally that,

> "[w]ith stability and predictability, investment is encouraged, jobs are created and

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[158] Marsden *supra* note 42 at 54.

[159] Negotiating Group on Basic Telecommunications, *WTO Reference Paper on Basic Telecommunications* (24 April 1996)

consumers can fully enjoy the benefits of competition – choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable."[161]

Let us briefly consider Fox's specific proposal for a rule of "no substantial unjustified market blockage by public or private action"[162] in the light of this trade principle. The first point to note is that there are two extremely vague words in this rule: "substantial" and "unjustified". Even assuming that it is reasonably easy to determine whether there is a "market blockage" how would one go about determining whether that blockage were both "substantial" and "unjustified"? Would "substantial" be determined by reference to trading volumes blocked, potential market share that would be available to foreign competitors or some other criteria, such as the relative importance of the goods as inputs into other markets? Whichever criteria one chose would involve fairly speculative and arbitrary analysis about the potential future impact of "unblocking" the market. For example one might take drastic measures using competition laws to break up an exclusive dealing arrangement only to find that foreign competitors contribute very little to the market once that market is unblocked. How would one measure whether or not a market blockage was "unjustified"? If broad justifications were available based on domestic policy goals such as efficiency the multilateral principle would be of almost no effect. Perhaps Fox has in mind something along the lines of Article XX of GATT which lists a number of valid regulatory purposes that might justify discriminatory measures (for

[160] *Supra* note 149
[161] Understanding the WTO *supra* note 146 at 11
[162] *Supra* note 130

example measures that are "necessary to protect public morals"[163] or "necessary to protect human, animal or plant life or health"[164]) but the scope of even these fairly narrow justifications is regularly a point of controversy in cases before the WTO panel[165]. It is difficult to determine exactly how a concept of "substantial unjustified market blockage" could be refined to the extent that it represented a stable and predictable rule in accordance with the WTO's stated principles.

Lastly, in relation to the principle of "promoting fair competition"[166], I shall have much more to say about this in the next Chapter but, in anticipation of the arguments that I make in that Chapter, I will simply make the point here that "free trade" is not necessarily "fair trade" and the market access approach with its narrow focus on opening up markets fails to take into account, firstly, the important regulatory counterbalance that competition laws can provide to the operations of powerful corporations and, secondly, situations where the "fair" outcome might actually be a closed market rather than an open market, for example in relation to start-up industries in developing countries. "Free trade" and "fair competition" are not one and the same and the absence of checks and balances to correct unfair outcomes of open markets has been perceived as the main failing of the world trading system.

In summary, my argument is that the market access approach is incoherent with a number of key obligations of the world trading system, in particular, the principles of national treatment, most-favoured nation, freeing trade gradually through negotiation,

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[163] GATT, Article XX(a)
[164] GATT, Article XX(b)
[165] *See e.g. United States – Standards for Reformulated and Conventional Gasoline*, Report of the WTO Panel, WT/DS2/R (29 January 1996) (96-0326) and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the WTO Panel, WT/DS135/R (18 September 2000) (00-3353).
[166] *Supra* notes 151 and 152

stability and predictability, and ensuring fair competition. Whether or not one accepts all of the arguments presented in this Chapter, it seems clear that the notion of creating a multilateral agreement on competition policy which includes a "market access principle" is by no means closely aligned with existing trade obligations and may in fact breach them in certain respects: the market access approach involves a new type of trade commitment that should be seen as separate from, and in some ways divergent from, existing trade principles.

This is still not the end of the story however, as it should not be assumed that the status quo should be maintained in the world trading system, nor should it be assumed that existing trade obligations as enshrined in GATT and WTO agreements are necessarily the best thing for the global economy. There are widely acknowledged problems with the way that world trade is conducted, so perhaps the market access approach represents a new step that is desirable from a global perspective and represents an important new addition to existing trade commitments. The advocates of the market access approach would say that this is the case and would argue that the market access approach would produce the correct result in relation to, for example, the Japanese *keiretsu* discussed in Chapter 2 above. For example, Sheard explains the view of the U.S. trade lobby towards *keiretsu*:

> "There is a deep-rooted feeling in U.S. policy and business circles that the Japanese market is closed to imports, particularly of manufactures, that the closedness of the market is a primary cause of the large and persistent U.S. current account deficit with

> Japan, and that *keiretsu* are an important factor contributing to this closedness."[167]

As discussed in Chapter 2, the market access approach would view the tolerance of Japanese competition regulators towards *keiretsu* unfavourably and may well produce the result of opening up Japanese markets to foreign competition: the correct result from the point of view of the U.S. trade lobby. However the aim of multilateralism in world trade is not to favour particular interest groups but to produce the correct result from a *global perspective*. In the next Chapter I seek to look into the fundamental question of what role competition laws should play in the context of the world trading system and to examine whether the market access approach would adequately fulfil this role.

[167] Sheard *supra* note 102 at 504

4. MARKET ACCESS, EFFICIENCY AND FAIRNESS

(a) Competition Law within the World Trading System

The world trading system is based on the simple and elegant Ricardian principle of comparative advantage. The principle holds that countries should devote resources to producing and exporting the goods that they produce at a lower relative cost than other countries. In the absence of international trade, countries are unable to reallocate resources to producing and exporting their comparative advantage goods as they have to produce all goods domestically. This, in a nutshell, provides an economic justification for free and open trade between nations. If one were to enquire further and ask "why should we seek optimal reallocation of resources?" the answer would be simply that this leads to economic growth and increased living standards. This simple but powerful economic model holds that world trade is beneficial *in the aggregate*.

The problem with the economic model is apparent in the words "in the aggregate". Each reallocation of resources has real life consequences in terms of redistribution of wealth and power which can either be fair or unfair. There are winners and losers and the winners rarely, if ever, compensate the losers. For example, in Argentina at the end of the nineteenth century the invention of refrigeration enabled Argentinian beef producers to export around the world. Exports jumped from about zero to 400,000 tons per year between 1900 and 1913. US exports on the other hand went from about 150,000 tons per year to almost nothing over the same period. Argentina's economy was transformed as a result. GNP rose significantly and those who owned cattle or land gained. However those outside the cattle industry found that land rents had increased due to higher demand

and the price of meat had increased because so much was being exported. As a result they became worse off. The converse happened in importing countries such as the US where meat prices became cheaper but beef producers lost out. *In the aggregate* the world economy gained, but there were winners and losers both in terms of wealth and power, and the winners did not compensate the losers. It is these redistributive consequences of world trade that are too often ignored but create the greatest concerns about globalization.

In *Globalization and its Discontents*[168], Joseph Stiglitz asks,

> "Why has globalization – a force that has brought so much good – become so controversial? Opening up international trade has helped many countries grow far more quickly than they would otherwise have done. International trade helps economic developments when a country's exports drive its economic growth. Export-led growth was the centerpiece of the industrial policy that enriched much of Asia and left millions of people there far better off. Because of globalization many people in the world now live longer than before and their standard of living is far better."[169]

His answer is that globalization is controversial because of the hypocrisy of rich industrial nations who force open markets to serve their own ends, and pursue an unmeasured and unthinking approach to free trade without ensuring that citizens of poor countries are adequately protected by a regulatory safety net. Rich nations pay little or no attention to the fact that they have matured into their comfortable economic positions by sheltering themselves from world trade through protectionism and other border measures.

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[168] Joseph E. Stiglitz, *Globalization and its Discontents* (New York: W.W. Norton, 2002)

> "Most of the advanced industrial countries – including the United States and Japan – had built up their economies by wisely and selectively protecting some of their industries until they were strong enough to compete with foreign companies. While blanket protectionism has often not worked for countries that have tried it, neither has rapid trade liberalization. Forcing a developing country to open itself up to imported products that would compete with those produced by certain of its industries, industries that were dangerously vulnerable to competition from much stronger counterpart industries in other countries, can have disastrous consequences."[170]

While sheltered from trade flows industrial nations have developed networks of laws, regulations and governmental programmes that provide a safety net that protects citizens from the worst effects of corporate activity and free markets. For Stiglitz the "safety net" consists of "governmental activities [which] arise because markets have failed to provide essential services"[171]. He gives various examples including "social security systems and unemployment and disability insurance systems"[172], systems to create new jobs, including education to encourage entrepreneurship and bank financing to provide capital[173], and also "an adequate regulatory or competition framework"[174]. In other words Stiglitz argues that, while the WTO, the International Monetary Fund, the World Bank and other international bodies are institutionally set up for the purpose of facilitating free and open trade, insufficient attention is paid to providing regulatory safeguards that protect citizens

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[169] *Id.* at 4.
[170] *Id.* at 16 to 17.
[171] *Id.* at 55.
[172] *Ibid.*
[173] *Id.* at 59
[174] *Id.* at 56

where free and open trade leads to injustice.

This suggests a tension in world trade between facilitation and regulation. Economic analysis explains how resources can be reallocated and markets created in order to promote global economic growth and improve living standards and world trade rules largely focus on measures that *facilitate* these economic goals. However there is also the socio-political goal of *regulating* markets to protect citizens where a particular reallocation of resources mandated by economic theory leads to unfairness or injustice.

Professor Petersmann of the University of Geneva puts forward a human rights-based justification for a regulatory framework in the world trade system. He argues that market integration is politically unsustainable without constitutionally-embedded protections of human rights[175].

> "As a necessary consequence of the exercise of human rights in the economic area, economic markets ... need constitutional safeguards against abuses of power no less than political markets."[176]

> "in modern international law, as well as inside constitutional democracies and in EU law, justice as a legal concept must be defined and legally protected by constitutional guarantees of human rights and citizen rights. As human rights protect individual and democratic diversity, effective protection of human rights inevitably gives rise to market-based information mechanisms and coordination mechanisms whose proper functioning requires national and international constitutional constraints of "market

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[175] *See generally* Ernst-Ulrich Petersmann, "Theories of Justice, Human Rights and the Constitution of International Markets" 37 Loy. L.A. L. Rev. 407

[176] Ernst-Ulrich Petersmann, "Constitutional Functions of WTO 'Linking Principles' For Trade and Competition" (1999) 34 New Eng. L. Rev. 145 at 148.

failures" as well as of "government failures" in economic markets no less than in political markets."[177]

In other words, while the economic imperatives of world trade create certain economic market conditions that promote growth (facilitation), the protection of fundamental human rights mandates that the behaviour of actors within those markets be constrained by constitutional restraints (regulation). In fact Petersmann argues that the existence of a constitutional order is itself a principle of justice[178] but he highlights the fact that economic markets must first be constituted before these constitutional safeguards become relevant. In other words one must not fall into the trap of imagining that the facilitation of economic growth is irrelevant. As mentioned above, it is a question of counter-balancing facilitation with regulation.

To understand the role of competition policy within this model of facilitation and regulation it is necessary to ask the question of what competition laws are able to do. In what ways can competition laws *facilitate* economic growth and in what ways can they *regulate* markets? To return to basics, competition laws are fundamentally concerned with corporate power. While formulated differently from jurisdiction to jurisdiction, competition laws generally target three main ways of accumulating market power: firstly market power through collusion between firms (for example laws that prohibit cartels; secondly market power through exclusions of competitors (for example, laws against exclusive dealing and monopolizing or abuse of a dominant position); thirdly market power achieved through merger (for example merger control laws and notification

[177] Petersmann *supra* note 175 at 423
[178] *Id.* at 422

requirements). Moving towards a more general description, competition laws can be described as laws that promote and ensure competition within markets. However this is not the end of the enquiry as the question arises "what is 'competition' and why do we need it?". Many describe "competition" as a process and a means to an end rather than as an end in itself. It is an abstract notion that is perceived by its effects and consequences rather than as a thing in itself. Gerber explains that,

> "Competition is an abstract concept. It represents neither a concrete 'thing out there' nor a 'natural' category, but a cultural construct. One can 'see' something called 'competition' only where one's language, training and experience give that concept meaning ... Perceptions of competition are interwoven with images of its consequences."[179]

In other words, the concept of 'competition' can only really be understood in terms of its benefits and harms. Competition laws should be seen as directed towards achieving the benefits of competition which, from an economic point of view, are the efficient allocation of resources within a market and, from a socio-political point of view, are "the atomistic structure of buyers and sellers required for competition [which] decentralizes and disperses power"[180] and also the freedom of opportunity that is offered by a competitive market in which "individuals are free to choose whatever trade or profession they prefer, limited only by their own talent and skill and by their ability to raise the (presumably modest) amount of capital required"[181]. In other words the benefits of

[179] Gerber *supra* note 1 at 10.
[180] Scherer and Ross *infra* note 188 at 18.
[181] *Ibid.*

competition are that it can facilitate economic growth through efficiency and it can also provide a regulatory function by ensuring the fair distribution of power and economic opportunities. In short, the role that competition laws have to play in the world trading system is in ensuring efficiency and fairness in the operation of global markets.

Graham and Richardson in *Global Competition Policy* talk about this link between competition, efficiency and fairness:

> "Surprisingly, competition is not the objective of competition policy. Efficiency and fairness are the objectives, and when these conflict, the objective is to evaluate the trade-off between them."[182]

They go on to explain what they mean by "efficiency" and "fairness":

> "Competition policies around the world seek a blend of efficiency and fairness in their markets. Efficiency has a fairly clear economic meaning. It is a conservational objective; it aims to minimize waste. Efficiency is the ideal of getting the most out of the resources at hand. Examples are an efficient market that generates goods that buyers really want at least cost and an efficient charity that moves resources from one project to another so that the value of the good generated by those resources is at its highest. Likewise, an efficient society seeks the highest standard of living (material and nonmaterial) consistent with its available resources. ...
>
> The meaning of fairness, by contrast, is internationally nuanced and culturally distinctive. In the United States, it often means equality of opportunity or (in our context) free entry into a business endeavor. In other countries, it sometimes means

> that favored activity or loyalty should be rewarded, or that equity of process or outcome (market division according to historic shares) is valued. ...
>
> Efficiency and fairness are the prizes for competition policy; competition is a secondary objective or, more accurately, an instrument."[183]

They go on to say that efficiency and fairness are not opposites (an outcome can be both efficient and fair) but they often come into conflict (efficiency may have to be sacrificed to achieve fairness). Deciding on a particular approach to competition policy is always a question of balancing these two goals[184].

This balancing act is particularly important in the global economy. Whereas efficiency might be the overriding criteria where citizens are otherwise protected by a domestic regulatory safety net (such as in a competition dispute between the U.S. and Europe), fairness criteria become increasingly important where citizens of developing countries are involved: firstly, because the disparity in power between citizens of developing countries and multinational corporations can be very great and, secondly, because an international competition regime might be the *only* regulatory protection afforded to those citizens against foreign corporate activity.

In summary, my view is that ensuring a balance of efficiency and fairness is the appropriate role for competition policy within the world trade system and, as a result, any approach to global competition policy should be judged against these overarching goals. In the remainder of this Chapter I attempt to refine the meaning of efficiency and fairness in the global context and to analyze the market access approach by reference to these

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[182] Graham and Richardson *supra* note 30 at 8.
[183] *Id.* at 8 to 9.
[184] *Id.* at 9 to 10.

standards.

(b) Efficiency and Market Access

Efficiency is at the heart of economic analysis and has a range of meanings depending on the particular theoretical model that is applied. For example short-term efficiency in a single market can be a very different concept from long-term efficiency across an entire economy and, as mentioned above, different types of efficiency such as productive and allocative efficiency may conflict with each other. As such, the normative implications of different measurements and types of efficiency can diverge. The basis of most antitrust efficiency analysis is the "total surplus" or "consumer surplus" standards. It is easiest to understand the difference between these standards by reference to a graph (see figure 1 below). This graph is typical of the type of simplified price model that is used to represent a merger.[185]

In figure 1, the x and y axes represent price and quantity respectively and the line D represents the demand curve of consumers for the particular product. There are two firms in the market who compete vigorously with each other prior to a merger between them so that, pre-merger, both firms set price very close to average cost[186]. Before the merger, average costs were AC1 and the firms produced Q1 units at a price of P1. "Producer surplus" is defined as the excess of revenue over total costs, so the pre-merger producer surplus is zero because the revenue (P1xQ1) equals the total costs (AC1xQ1). "Consumer surplus" is defined as the excess of consumer benefits over spending. In other words, it is

[185] This exposition assumes an understanding of the basics of economic theory.

the difference between the price that a consumer would be willing to pay and the price that they have to pay. Pre-merger the consumer surplus is represented by the combined areas A+B+C. "Total surplus" is the sum of producer surplus plus consumer surplus, so is also A+B+C.

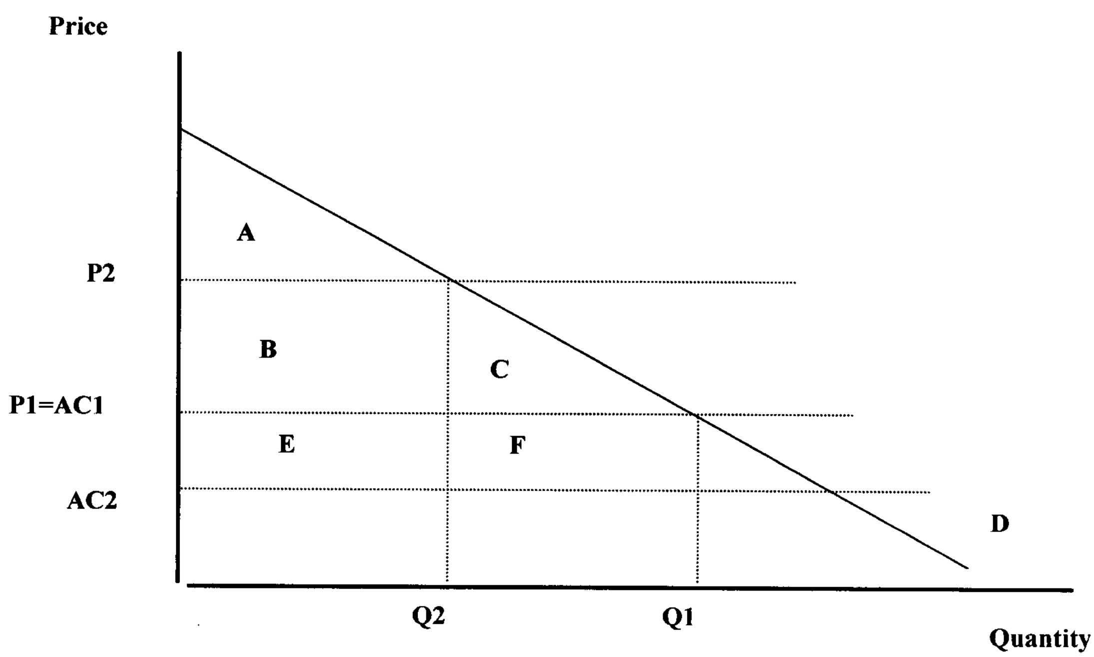

Figure 1

After the merger, the combined firm has market power and faces the downward-sloping industry demand curve D. The firm raises the price to P2 and drops output to Q2[187]. At the same time, due to economies of scale, the average costs of the firm drop from AC1 to AC2. Post-merger the firm's revenue is P2xQ2 and the total costs are

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[186] It is a simplifying assumption that firms in perfectly competitive markets maximize their profits by setting price at marginal cost. In this graph marginal cost is assumed to be the same as average cost.

AC2xQ2 so the producer surplus is now represented by areas B+E. The consumer surplus post-merger is represented simply by area A. The total surplus is now areas A+B+E.

Three effects of the merger should be noted: firstly area B which was consumer surplus before the merger is now producer surplus; secondly area C has been lost altogether and is known as the "deadweight loss" or the "social cost" of the monopoly; and thirdly area E has been added to surplus through cost savings (eg. economies of scale or scope). It is also important to note at this stage that the effects illustrated by the graph are broadly relevant to other accumulations of market power as well as mergers, so the model is of general use in discussing the economic rationale for competition policy. For example a monopoly achieved through growth rather than merger or a cartel will generally also set output and price at a level which creates a deadweight loss and a transfer of surplus from consumer to producer when compared with a perfectly competitive market. There may also be cost savings (for example through economies of scale or scope) resulting from a single-firm monopoly, although this is less likely to be an effect of a cartel.

There is a general consensus that deadweight loss (area C in figure 1) is bad for society (although there is a great deal of controversy about whether the deadweight loss of monopoly is significant in reality[188]) and that lower costs (areas E and F in figure 1) are beneficial to society. However the question arises whether or not the transfer of surplus from consumer to producer (area B in figure 1) should be treated as neutral or another

[187] The price rise results from the assumption that a profit-maximizing firm will set price and output where marginal revenue meets marginal cost. Marginal cost is assumed to be the same as average cost in this model and the marginal revenue curve is not shown.

[188] *See eg.* Scherer and Ross, *Industrial Market Structure and Economic Performance (3rd ed.)* (New York: Houghton Mifflin, 1990) at 661 to 667. The authors estimate that "the dead-weight welfare loss attributable to monopolistic resource misallocation in the United States lies somewhere between 0.5 and 2 percent of

negative aspect of monopoly power. The answer to this question really comes down to a value judgment and there are two broad approaches. Firstly the "total surplus standard" holds that the transfer is neutral because it is impossible to determine in the abstract whether the resources are "more valuable" in the hands of producers or consumers (and it must be remembered that wealth in the hands of producers does not necessarily mean that it is in the hands of wealthy industrialists, as the producers may be small business owners selling products to wealthy consumers or the producer surplus may result in transfers to shareholders, including institutional shareholders such as pension funds, or to workers). Secondly, the "consumer surplus standard" holds that placing resources in the hands of consumers is all important, so the transfer of resources from consumers to producers should be seen as negative. In other words the total surplus standard seeks to maximize total surplus, whereas the consumer surplus standard seeks to maximize consumer surplus alone. The normative implications of these standards for competition policy can be demonstrated by reference to the merger illustrated in figure 1. Applying the total surplus standard, the merger will be permitted providing that the increase in total surplus resulting from the merger (area E) is greater than the surplus lost (area C). Applying the consumer surplus standard, the merger will be blocked because there is a loss of consumer surplus (areas B+C) and no gain in consumer surplus. However, if there were some countervailing improvement in the product that resulted from the merger (for example a package of product components that increased value to the consumer) this would result in an outward shift of the demand curve and an increase in consumer surplus that could offset the loss in consumer surplus from the post-merger price rise. Therefore even the

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gross national product" but they admit that in coming to this estimate we must "cross our fingers and hope the errors from proceeding in partial equilibrium framework are not too serious" (p.667).

consumer surplus standard could potentially permit a merger to monopoly if there were countervailing benefits to consumers. There are various variations on these themes, for example a "price standard" approach would block a merger whenever prices to consumers increased, irrespective of any countervailing benefits, and a "consumer surplus plus efficiency defence" approach would permit the merger if the economies of scale or scope (area E) were greater than the loss in consumer surplus (areas B+C).

To turn to the relationship between market access and total and consumer surplus, let us consider a number of hypotheticals (which accord very roughly with the *Superior Propane, GE/Honeywell* and Japanese *Keiretsu* examples given above in Chapter 2). Firstly consider a merger such as that illustrated in figure 1 where two firms will join forces to monopolize the market. The economies of scale achieved by the merger would be very great, such that area E would exceed the sum of the deadweight loss and the loss of consumer surplus (areas B+C). However the economies of scale would not be replicable by existing and potential competitors, so would create a formidable barrier to entry for those seeking to access the market. Applying the total surplus standard would lead to approval of this merger as total surplus is increased by the merger (E>C). Also a "consumer surplus plus efficiency defence" approach would lead to approval of the merger as the cost savings are greater than the loss in consumer surplus (E>B+C). Applying a strict consumer surplus standard would lead to prohibition of the merger as there is a clear loss of consumer surplus (B+C). If a multilateral agreement on competition policy were in place that included a market access rule, such an agreement would likely mandate the prohibition of the merger because the non-replicable economies of scale would create a barrier to entry into the market, thereby representing a "market blockage". In this case the market access approach would accord with the consumer surplus standard, but would contradict the total surplus standard (or the consumer surplus plus efficiency defence approach).

To alter the hypothetical slightly, let us imagine that the merger would create a new firm which would be able to offer packages of products that were extremely desirable to consumers and would actually push out the demand curve to the extent that the increase in consumer surplus exceeded deadweight loss and transfer from consumers to producers (area A post-merger is greater than areas B+C pre-merger). In this situation both total surplus and consumer surplus standards would permit the merger. Again however, the market access approach would look at the "market blockage" created by the reduced costs of the merged company and would block the merger. In this situation the market access approach goes against both total surplus and consumer surplus standards.

Finally, leaving behind figure 1, let us imagine a situation in which a number of firms within a market compete vigorously with each other on price, but all available distribution networks are tied up by these firms through vertical integration. The vertical integration allows the firms to keep costs down and prices for consumers are low due to the price competition, however firms outside the market are unable to get a foothold in the market because they are unable to access the existing distribution network and there are high barriers to entry at the distribution level. Total surplus and consumer surplus standards would likely leave this market alone as consumer surplus is high, however the market access approach would look at the inability of potential new competitors to enter the market and would mandate regulatory action to free up the distribution network, for example by prohibiting the vertical arrangements. Again, in this situation, the market access approach goes against both total surplus and consumer surplus standards.

A common theme becomes apparent from these examples (and reiterates a point that was made above in Chapter 2): the market access approach focuses exclusively on endogenous barriers to entry. If there are any barriers to entry that can be removed or prevented through regulatory action, the market access approach will mandate that action. Barriers to entry are extremely important for efficiency concerns as, all other things being equal, removing barriers to entry into a market will make the market more competitive (or contestable), reducing the deadweight loss and increasing consumer surplus. Therefore there is some correlation between the market access approach and the consumer surplus standard. However, as the above examples demonstrate, low barriers to entry are not determinative of efficiency. Where regulatory action mandated by the market access approach would prevent cost savings being achieved, block benefits to consumers, or break up an efficient vertically integrated market, the market access approach could lead to inefficiencies, whether measured by the total surplus standard, the consumer surplus standard or a "consumer surplus standard plus efficiency defence" approach.

The above represents a very static efficiency analysis and dynamic efficiency factors may alter the outcomes. For example, one might argue that there are long-run benefits, in the form of increased product choice for consumers and increased innovation, to be achieved by removing market blockages that might outweigh any short-run loss of efficiency. This argument is often expounded by advocates of free trade and is based on the idea that there are *qualitative* benefits to be achieved by allowing new entrants (particularly foreign entrants) into a market. For example, a U.S. trade paper submitted to the OECD states that, "In some cases, foreign goods embody different perspectives on production methods, different product design and development ideas, and other physical or non-physical factors that are either unknown or unavailable in the importing country. Exposing domestic firms to these factors can lead to product and technological advancement that would not be possible with domestic perspectives and ideas alone."[189]

Such arguments based on potential innovation and other such intangible benefits are notoriously difficult to assess from an efficiency point of view due to what Posner describes as "an absence of a clear theoretical prediction concerning the relations between market structure and innovation"[190]. A counter argument could be expressed (in the Schumpeterian tradition[191]) that monopoly advances innovation and, as a result, a market access approach would harm innovation by increasing competition in a market. Therefore arguments for a market access approach based on dynamic efficiency are based on speculation about what might happen if foreign competitors access a market and cannot be said to be conclusive.

To sum up, the above serves to illustrate that the efficiency effects of such an approach are, at best, ambiguous. In some cases, as in the examples given above, applying a market access rule to competition problems would appear to result in significant inefficiencies, particularly when applying the total surplus standard. The point is that market access is not a proxy for efficiency.

It should be noted that the above analysis carefully avoids a discussion of whether the

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[189] United States, "Vertical Restraints Hypothetical Case" COM/DAFFE/CLP/TD(98)46 at 2.
[190] Posner *supra* note 73 at 20.

consumer surplus or total surplus standard is more appropriate for global competition policy. While arguments can be made that, in the context, of a national economy, the difference in marginal utility of income between producers and consumers is insignificant[192], the picture is much more complicated in the context of the global economy where producers may be in wealthy industrial nations and consumers may be in poverty-stricken developing countries or vice versa. This is where an efficiency analysis runs out of answers. While economists have sought to deal with these distributional issues (for example, the "balanced weights" approach to producer and consumer surplus adopted by the Canadian Federal Court of Appeal in the *Superior Propane* case) it is extremely difficult, if not impossible, to quantify the marginal utility of income particularly across different economies. Similarly an efficiency analysis fails to adequately take account of the fact that market power amounts to real power in that it allows firms to exploit and coerce others. This is why I argue that fairness criteria become particularly relevant where global competition problems involve developing countries. What to do about these redistributions of wealth and power that result from mergers, cartels and other market structures, ultimately comes down to a question of fairness.

(c) Fairness and Market Access

In *Globalization and its Discontents* Stiglitz says that,

[191] Austrian economist Joseph Schumpeter (1883-1950) argued that monopoly power is a precondition to technical progress.

"We are a global community, and like all communities have to follow some rules so that we can live together. These rules must be – and must be seen to be – fair and just, must pay due attention to the poor as well as the powerful, must reflect a basic sense of decency and social justice."[193]

He describes how many have put faith in the idea that maximizing economic growth will eventually result in benefits of that growth trickling down to all parts of society ("trickle-down economics"), in other words that focusing on facilitating economic growth will magically solve the regulatory problems of globalization. However this has demonstrably not occurred, particularly in developing countries and Stiglitz believes that this has resulted in a breach of the global "social contract that binds citizens together, and with their government"[194]. He says that

"Part of the social contract entails "fairness", that the poor share in the gains of society as it grows, and that the rich share in the pains of society in times of crisis."[195]

What do we mean by "fairness" in the context of the global economy? Perfect equality of income would appear to be both an impractical and undesirable goal. As a recent leader article in *The Economist* points out,

"A concern to level economic outcomes must express itself as policies that advance one group's interests at the expense of another's. This puts political and ethical

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[192] *See eg.* Posner *supra* note 73 at 24
[193] Stiglitz *supra* note 168 at xv
[194] *Id.* at 78.
[195] *Ibid.*

limits on how far the drive for economic equality ought to go. (Strictly practical limits, as well, since too noble a determination to take from the rich to give to the poor will end up impoverishing everyone.) It also means that perfect economic equality should never be embraced, even implicitly, as an ideal."[196]

However, the above passage fails to make two points. Firstly while it may not be desirable to seek to "level the playing field" in terms of global income, there is no reason why we should exacerbate existing wealth imbalances. It would seem to be a fundamental issue of global fairness to prevent large wealth transfers from poor countries to rich. Secondly the passage fails to distinguish between equality of economic *outcome* and equality of economic *opportunity*. Providing those in all countries with an equal opportunity to participate in the benefits of the global economy is another fundamental aspect of global fairness. Accumulations of market power can work against fairness in these terms by allowing powerful firms to coerce consumers into paying high prices (or sellers into accepting low prices in the case of monopsony power) or by preventing others from participating in economic opportunities. Therefore a competition policy which takes seriously the notion of global fairness must seek to limit market power in order to prevent these effects. A model of competition regulation based around the limitation of market power is offered by the "Freiburg School" (referred to briefly in Chapters 1 and 2 above).

The Freiburg School is principally associated with economist Walter Eucken and lawyers Franz Böhm and Hans Grossman-Doerth, all professors at the University of Freiburg in the 1930s, just as the National Socialists were taking power in Germany[197].

[196] The Economist, "A Question of Justice" March 13th 2004 at 13
[197] The socio-political context of the Freiburg school is examined at length in Gerber *supra* note 1 at chapter VII.

The Freiburg scholars agreed with the liberal notion of a free competitive economy, however they believed that the benefits of free markets could only be equitably distributed throughout society if the economy is imbedded in a constitutional framework or "order". The Freiburg version of liberalism became known as "ordoliberalism". The ordoliberals believed that competition was essential to the effective working of the economy and that the more competition in the economy, the better the economy functioned. However they believed that the competitive conditions prevailing in a market had to be carefully structured and enforced according to law. As a result, competition laws were central to the ordoliberal project and were understood, not just as any other laws on the statute book, but as the core of an "economic constitution" that determines the power relationships amongst citizens and between citizens and corporations. Gerber describes the importance of this ordoliberal concept of an economic constitution as follows:

> "It turned the core idea of classical liberalism – that the economy should be divorced from law and politics – on its head by arguing that the characteristics and the effectiveness of the economy depended on its relationship to the political and legal systems. The ordoliberals recognized that fundamental political choices created the basic structures of an economic system."[198]

The form of competition law that the ordoliberals envisaged as part of this economic constitution ensured "complete" competition by focusing attention on private economic power and ensuring that "no firm in a market has power to coerce conduct by other firms

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[198] *Id.* at 246

in that market"[199]. The ordoliberals saw this ability to coerce others through market power as fundamentally contrary to the effective working of the economy and the good order of society, and the coercion could take the form of the ability to increase prices but also the ability to prevent or hinder the activities of other firms in the market. In other words the legitimate constituents of ordoliberal competition included consumers, competitors and all other participants in the economy. This broad understanding of the harms of market power is key to an understanding of the ordoliberal concept of competition law.

Interestingly, Eleanor Fox has appealed to a liberal model of economic freedom similar to ordoliberalism in support of her market access approach to competition policy. In her article about U.S. antitrust law, "The Modernization of Antitrust: A New Equilibrium"[200] she states that,

> "The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentive for firms without market power are increased, and the results are acceptable and fair."[201]

She argues that concern with the competition process and the dispersion of power gives rise to certain rights.

> "The bases of these rights are varied. They reflect concerns for fairness, opportunity,

[199] *Id.* at 245
[200] (1981) 66 Cornell L. Rev. 1140
[201] *Id.* at 1154

> and autonomy for sellers without power. They reflect also the concern that individuals in a democratic society should be relatively free from great aggregations of power, lest those centers of power, however benign and progressive today, exploit them economically or control them politically tomorrow."[202]

One of the rights that Fox believes should be enforced under a liberal model of antitrust is "a right not to be fenced out of any substantial market by the leverage of a better situated competitor"[203]. In short, a version of the market access principle.

The link between this liberal (or ordoliberal) view of antitrust and the market access approach is intuitively appealing. After all, if the goal is to ensure equality of economic opportunity and dispersal of market power then would it not be best to simply ensure free and open access to all markets? However this intuition is shown to be false when it is understood that "free trade" does not always equal "fair trade". It is precisely because free trade is not always fair that it is impossible to collapse the regulatory function of global competition laws into their facilitative function. There is a pressing need for restraints on corporate activity in the global economy. In Freiburg School terms, a multilateral agreement on competition policy would form part of the constitutional framework that ensures that the benefits of the global economy are fairly distributed. In my view the liberal/ordoliberal model of competition policy is an appropriate one for global competition policy, but I disagree with Fox that there is a link between that model and the market access approach. A couple of examples will illustrate the point.

Firstly consider a situation in which a monopoly in a wealthy country exports a product to developing countries through an exclusive network of distributors and charges

[202] *Id.* at 1182

a vastly inflated monopoly price for them. This results in a vast transfer of wealth from consumers in poor countries to the producer in the rich country. Small producers in the poor countries are unable to gain a foothold in the market so bring an action at the WTO under the new multilateral competition agreement (which includes the proposed market access principle). The WTO panel finds that there has indeed been a market blockage and agrees to break up the distribution network of the monopoly. The result is that the small producers in the poor countries are able to compete with the monopoly so the monopoly's market power is reduced, it drops its prices and the wealth transfers from poor to rich countries are dramatically reduced. This would clearly be the fair result in terms of distribution of wealth and dispersal of power and in terms of the economic opportunities opened up for the developing country producers. However consider the situation where a number of producers of a commodity in a developing country export into wealthy nations and form a cartel in order to give them some increased bargaining power against their powerful buyers in developed countries. The cartel results in wealth transfers from rich to poor countries and, due to the ability of the cartel to control output, leads to price stability and therefore increased stability of the economy of the developing country. The cartel is challenged under the market access principle and, due to a finding that potential competitors are unable to access the market due to the behaviour of the cartel, the cartel is declared illegal by the WTO panel. In this situation the outcome is unfair. The break-up of the cartel in the developing country reduces the wealth transfers from rich to poor and also takes power away from the start-up industry in the developing country and gives it to the already powerful buyers in the developed countries.

The market access approach was fair in the first example but unfair in the second.

[203] *Id.* at 1181 to 1182

One might argue that these concerns could be dealt with by providing for an exemption for developing country export cartels but the point is simply this: market access is not a proxy for fairness any more than it is a proxy for efficiency. A market access principle may or may not result in a fair outcome, depending on the identity of the players already in the market and the identity of those seeking access to it. The market access principle will always favour the latter. While this might be fair if the incumbents are American or European multinationals and those seeking access are small firms from developing countries what if it is the multinational seeking access into fragile developing markets? The reality of political lobbying power must be taken into account. A market access approach to competition policy would represent a tool that can be used by firms seeking access to other markets. Clearly an already powerful and wealthy firm with lobbying access to the governments of rich countries would be in a much better position to make use of this tool than a small firm from a developing country. This is the essence of the developing country concern about the EU's proposals for a WTO competition agreement (see the quotation from Martin Khor, the Director of the Third World Network in Chapter 1 above[204]). The market access tool would likely fall into the hands of already powerful firms and, as such, would be much more likely to be used to exacerbate existing unfair power imbalances in the world trading system rather than to correct them.

In sum, the market access approach to global competition policy fails to offer a solution to unfair accumulations of power in the global economy and, as such, fails to provide the regulatory function needed to protect citizens from the worst imbalances of world trade. While there is a superficial link between the liberal/ordoliberal model of competition regulation and the idea of market access, a closer look reveals that the market

[204] Note 71

access approach is an incomplete solution to regulating market power as it always favours those seeking access to a market, whatever the existing power imbalances between the various firms. If the incumbents are already weak the market access approach will expose them to powerful competitors seeking to enter the market.

Competition laws should be understood as facilitative/regulatory measures that seek to ensure efficiency and fairness in markets where free trade and commerce and the behaviour of profit-maximizing corporations fails to do so. In my view, the market access approach fails to ensure either of these key goals of competition policy, and as a result the case for basing global competition policy on market access has not been made.

CONCLUSION

To return to the discussion in Chapter 1 of this thesis, where did the market access approach to competition policy come from? It came from a concern that national competition rules are holding up the project of free global trade, that private restraints on trade can block markets in the same way that border measures can. This is known as the "trade and competition" issue and has become the dominant theme in the debate about global competition policy. The market access approach is designed to tackle this issue but, as I have sought to demonstrate in this thesis, there are significant problems with this approach. Firstly, out of necessity, such an approach must encroach deeply on national sovereignty because it must "trump" all national competition laws in order to prevent such laws from blocking free trade. Secondly the market access approach is incoherent with, and potentially breaches, existing trade commitments. Thirdly, and most importantly, the market access approach fails to fulfil the role that competition law should play in the world economy which, in my view, is the mixed facilitative/regulatory function of ensuring efficiency and fairness in world markets. As a result of these findings my conclusion is that the market access approach is both unworkable and unjustifiable.

So where do we go from here? The discussion in this thesis suggests at least four proposals for refocusing the debate. Firstly, in relation to the national sovereignty problem discussed in Chapter 2, a solution to global competition problems should be sought that does not involve "trumping" domestic competition laws in their entirety. An approach which seeks to reinvent competition policy in order to turn it into a tool for furthering free trade is bound to come up against serious sovereignty concerns. However if the goal is to deal with only specific categories of global problems while leaving domestic networks of regulation essentially intact, this is much more likely to be an acceptable approach. F. M. Scherer in his 1994 book *Competition Policies for an Integrated World Economy*[205] puts forward a suggestion for global competition rules that are restricted to enterprises originating more that 40 percent of world trade in particular industrial categories[206]. In my view, this type of limit on the jurisdiction of an international body would go some way to alleviating the sovereignty concerns of nations. Such an approach is based on carving out jurisdiction from national competence in order to deal with problems of an international dimension, rather than overruling national laws in their entire application. It permits nations to pursue their own domestic policy goals where to do so does not impact the global economy.

The second proposal is that the debate be refocused away from the "trade and competition" issue. I question whether the amount of attention that is given to the interface between trade and competition is really justified. The concept of "solving" the trade and competition issue suggests that competition policy should accommodate trade policy norms or vice versa. If one takes seriously the notion of regulating as well as facilitating the process of world economic growth it becomes apparent that there is an inherent tension within trade and competition laws as there are tensions within any network of laws relating to the rights and obligations of citizens. Those very tensions define the citizen's sphere of action and here the ordoliberal concept of an "economic constitution", as discussed in Chapter 4, is instructive. The debate should refocus on the purpose of global competition policy which is to ensure the efficient and fair operation of markets where corporate self-interest and national competition rules fail to do so.

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[205] *Supra* note 18
[206] *Id.* at 94

A third proposal relates to the second: that the institutional context of the global competition debate be re-examined. As discussed in Chapter 1, the almost universal acceptance amongst contributors to the debate that the WTO is the appropriate institution to house a global competition agreement is arguably responsible for setting up the trade and competition issue as a "problem". Daniel Tarullo points out the WTO is driven by the market opening imperatives of trade policy and,

> "[h]ousing a competition arrangement in the WTO would inevitably favor the trade norms where the two conflict. Accordingly, forcing the square peg of competition policy into the round hole of trade policy will change the shape of the peg."[207]

Given the failure of recent attempts to even begin negotiations towards a multilateral agreement on competition at the WTO, most notably at the Ministerial Conference at Cancún in September 2003, perhaps it is time to rethink the institutional framework for a competition agreement. It may be time to revisit some of the proposals mentioned in Chapter 1 that were put forward in the mid-1990s (before the "trade and competition" issue became fashionable) and which suggested a separate international antitrust body. It is necessary to recognize that while the WTO, as an institution, is good at facilitating trade flows it is not so good at tackling the regulatory problems that result from them.

The last proposal is simply to avoid circular arguments about the merits and demerits of particular domestic competition regimes (particularly the European and U.S. models). The economic conditions in the world trading system are very different to those

[207] Daniel K.Tarullo, "Norms and Institutions in Global Competition Policy" (2000) 94 Am.J of Intl Law 478 at 479.

in any particular domestic (or even regional) economy and a global competition policy must take these differences into account. Ultimately this last proposal will be key to the success of the future debate as the move towards global competition rules will only succeed if people are able to consider *global* interests rather than national interests. Currently many nations are content to pursue beggar-thy-neighbour policies based on purely domestic calculations of efficiency and fairness, safe in the knowledge that voters generally align themselves with national interests. The hope is that as globalization proceeds and as people increasingly extend the boundaries of their economic activity eventually it may become politically acceptable for nations to agree to measures that are optimal for the collective good of the global economy rather than just for the domestic economy. I do not believe that day is soon, but what an extraordinary act of goodwill it would be if the industrial nations of the world, who have benefited so much from the process of globalization so far, were to put their self-interest aside and sign up to a multilateral competition agreement that takes seriously the needs of developing countries.

BIBLIOGRAPHY

BOOKS

David Begg, Stanley Fischer and Rudiger Dornbusch, *Economics* (7th ed.) (London: McGraw-Hill, 2002)

Robert .H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978)

Luis Cabral, *Introduction to Industrial Organization* (Boston: MIT Press, 2000)

David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Clarendon Press, 1998)

Edward M. Graham and J. David Richardson, *Competition Policies for the Global Economy* (Washington: Institute for International Economics,1997)

Barry Hawk, *United States, Common Market and International Antitrust: A Comparative Guide (2ed)* (New York: Prentice Hall,1990)

Kevin Kennedy, *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (London: Sweet & Maxwell, 2001)

Philip Marsden, *A Competition Policy for the WTO* (London: Cameron May, 2003)

Sylvia Ostry, *The Post-Cold War Trading System: Who's on First?* (Chicago: University of Chicago Press, 1997)

Rudolph J.R. Peritz, *Competition Policy in America 1888-1992: History, Rhetoric, Law* (Oxford: Oxford University Press, 1996)

Michael E. Porter, *The Competitive Advantage of Nations* (New York: Macmillan Press, 1990)

Richard A. Posner, *Antitrust Law* (2nd ed.) (Chicago: University of Chicago Press, 2001)

Peter M. Roth QC (ed.), *Bellamy & Child European Community Law of Competition* (5th ed.) (London: Sweet & Maxwell, 2001)

Frederic M. Scherer, *Competition Policies for an Integrated World Economy* (Washington DC: Brookings Institution Press, 1994)

Frederic M. Scherer and David Ross, *Industrial Market Structure and Economic Performance (3rd ed.)* (New York: Houghton Mifflin, 1990)

Joseph E.Stiglitz, *Globalization and its Discontents* (New York: W.W.Norton, 2002)

M. Treblicock, R.A. Winter, P. Collins, E. Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002)

World Trade Organization, *Understanding the WTO* (Geneva: WTO Information and Media Relations Division, 2003). Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf

ARTICLES AND PAPERS

American Bar Association, "Report of the ABA Task Force on International Trade and Antitrust concerning Private Anticompetitive Practices as Market Access Barriers" January 2000. Available at www.abanet.org/antitrust/reports

M. Bacchetta, H. Horn, P. Mavroidis, "Do Negative Spillovers from Nationally Pursued Competition Policies Provide a Case for Multilateral Competition Rules?" In Ellermann, Claus-Dieter and Laraine L. Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy.* (Oxford: Hart Publishing, 1997)

Alessandro Bertolini and Francesco Parisi, "The Rise of Structuralism in European Merger Control" (1996) 32 Stan. J. Int'l. L. 13

L.Brittan and K.Van Miert, "Towards an International Framework of Competition Rules" COM(96) 292 Final, 18 June 1996

Canadian Competition Bureau "Options for the Internationalisation of Competition Policy: Defining Canadian Interests" 10 May 1996. Available at www.strategis.ic.gc.ca

Peter C. Carstensen, "Symposium on Antitrust Law: Transparency in Antitrust – Do What We Say and Not What We Do: Some Reflections on Professor Grimes's Quest" (2003) 51 Buffalo L. Rev. 1001

Paul S. Crampton and Crystal L. Witterick, "Trade Distorting Private Restraints and Market Access – Learning to Walk Before we Run" (1996) 24 Int'l Bus Lawyer 467

Melaku Geboye Desta, "The Organization of Petroleum Exporting Countries, the World Trade Organization and Regional Trade Agreements" (2003) 37(3) Journal of World Trade 523

Gotz Drauz, " Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers under EC Competition Law" (2002) 25 Fordham Int'l L.J. 885

David S. Evans & Michael Salinger, "Competition Thinking at the European Commission: Lessons from the Aborted GE/Honeywell Merger" (2002) 10 Geo. Mason L. Rev. 489

Anne-Britt Everett and Thomas.W. Ross, "The Treatment of Efficiencies in Merger Review: An International Comparison" paper prepared for Canadian Competition Bureau 8 Oct 2002

Ariel Ezrachi, "Globalization of Merger Control: A Look at Bilateral Cooperation Through the GE/Honeywell Case" (2002) 14 Fla. J. Int'l L. 397

David J. Feeney, "The European Commission's Extraterritorial Jurisdiction Over Corporate Mergers" (2002) 19 Ga. St. U.L. Rev. 425

Harry First, "Evolving Toward What? The Development of International Antitrust" in Josef Drexl (ed.) *The Future of Transnational Antitrust: From Comparative to Common Competition Law* (Aspen Publishing, 2003)

Sharon E. Foster, "While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model" (2001) 15 Emory Int'l L. Rev. 467

Eleanor M. Fox, "The Modernization of Antitrust: A New Equilibrium" (1981) 66 Cornell L. Rev. 1140

Eleanor M. Fox, "Anti-Trust, Trade and the 21st Century – Rounding the Circle" The Handler Lecture, The Record of the Association of the Bar of the City of New York (June 1993)

Eleanor M. Fox, "The Central European Nations and the EU Waiting Room: Why Must the Central European Nations Adopt the Competition Law of the European Union?" 23/2 Brooklyn J. of Intl Law (1997) 351

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

Eleanor M. Fox, "Competition Law and the Millenium Round" [1999] 2 J or Int'l Econ Law 665

Eleanor M. Fox, "We Protect Competition, You Protect Competitors" (200?) 26(2) World Competition 149-165

Eleanor M. Fox, "International Antitrust: Against Minimum Rules, For Cosmopolitan Principles" (1998) 43 Antitrust Bulletin 5

Eleanor M. Fox, "International Antitrust and the Doha Dome" (2003) 43 Va. J. Int'l. L. 911

Eleanor M. Fox, "Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy" (2003) 48(2) Antitrust Bulletin 355

Eleanor M. Fox, "U.S. and European Merger Policy – Fault Lines and Bridges Mergers That Create Incentives for Exclusionary Practices" (2002) 10 Geo. Mason L. Rev. 471

Eleanor M. Fox, "Mergers in Global Markets: GE/Honeywell and the Future of Merger Control" (2002) 43 U. Pa. J. Int'l Econ. L. 457

E. Fox and J. Ordover "The Harmonization of Competition and Trade Law – The Case for Modest Linkages of Law and Limits to Parochial State Action" (1996)24 Int Bus Law 458

European Commission, Report by the Group of Experts (Luxembourg: OOPEC July 1995)

Dimitri Giatakos, Laurent Petit, Gaelle Garnier and Peter de Luyck, "General Electric/Honeywell – An Insight Into the Commission's Investigation and Decision", (2001) 3 Competition Policy Newsletter 5

David J. Gerber, "The U.S. – European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective" (1999) 34 New Eng. L. Rev 123

David J. Gerber, "Antitrust Law and Economic Analysis: The Swedish Approach" 8 Hastings Intl. & Comp. L. Rev. 1 (1984)

Dimitri Giotakos, "GE/Honeywell: A Theoretic Bundle Assessing Conglomerate Mergers Across the Atlantic" (2002) 23 U. Pa. J. Int'l Econ. L. 269

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

Kevin Guerrero, "A New 'Convincing Evidence' Standard in European Merger Review" (2003) 72 U. Cin. L. Rev. 249

A.Guzman "Is International Antitrust Possible?" (1998) 73 N.Y.U. L.R. 150

Robert W. Hahn and Anne Layne-Farrar, "Federalism in Antitrust" (2003) 26 Harv. J. L. & Pub. Pol'y 877

Norman Hawker, "Remarks on an Ethical Perspective of Antitrust Law", Before the Antitrust Task Force of the National Association of Attorneys General, Washington, D.C. (Oct. 1, 2003)

Eric S. Hochstadt, "The Brown Shoe of European Competition Law" (2002) 24 Cardozo L. Rev. 287

Bernard Hoekman and Petroc C. Mavroidis, "Economic Development, Competition Policy and the World Trade Organization" (2003) 37(3) Journal of World Trade 1

Erin E. Holland, "Using Merger Review to Cure Prior Conduct: The European Commission's GE/Honeywell Decision" (2003) Colum. L. Rev. 74

Edwin J. Hughes, "The Left Side of Antitrust: What Fairness Means and Why it Matters" (1994) 77 Marq. L. Rev. 265

Edward Iacobucci, "The Interdependence of Trade and Competition Policies" (1997) 21 World Competition 5

International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report (Washington: 2000) . Available at www.usdoj.gov/atr/icpac

Michael S. Jacobs, "An Essay on the Normative Foundations of Antitrust Economics" (1995) 74 North Carolina Law Review 219

William J. Kolasky, Deputy Assistant Attorney General, "Global Competition Convergence and Cooperation: Looking Back and Looking Ahead" Address at the American Bar Association Fall Forum (Nov. 7, 2002), available at http://www.usdoj.gov/atr/public/speeches/200442.pdf

William J. Kolasky, "Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels" (2002) 10 Geo. Mason L. Rev. 533

William J. Kolasky, "North Atlantic Competition Policy: Converging Toward What?" address before the BIICL Second Annual International and Comparative Law Conference, London, 17 May 2002. Available at www.usdoj.gov/atr/public/speeces/11153.htm

William J. Kolasky, "International Convergence Efforts: A U.S. Perspective", Address Before the International Dimensions of Competition Law Conference, Toronto. Available at www.usdoj.gov/atr/public/speeches/10885.htm

Margaret Levenstein, Valerie Suslow and Lynda Oswald, "International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies", February 2003, National Bureau of Economic Research Working Paper No.W9511 at 17-18

Imelda Maher, "Competition Law in the International Domain: Networks as a New Form of Governance" (2002) 29(1) Journal of Law & Society" 111

Imelda Maher, "Re-imagining the Story of European Competition Law" (2000) 20 Ox.J. of Legal Studies 155

Ryan Marth, "The Canadian Middle Road: Balancing Efficiency and Sovereignty in the Age of Multjurisdictional Merger Review" (2003) 12 Minn. J. Global Trade 221

Mario Monti, "Antitrust in the U.S. and Europe: A History of Convergence", Speech presented at the General Counsel Roundtable of the American Bar Association, 14 November 2001, available at www.eurunion.org/news/ speeches/2001/011114mm.htm

OECD, "Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade", 27 July 1995, C(95)130/final

OECD, "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels" 25 March 1998, C(98)35/Final

Ernst-Ulrich Petersmann, "Constitutional Functions of WTO 'Linking Principles' For Trade and Competition" (1999) 34 New Eng. L. Rev. 145

Ernst-Ulrich Petersmann, "Theories of Justice, Human Rights and the Constitution of International Markets" 37 Loy. L.A. L. Rev. 407

Michael J. Porter, "Competition and Antitrust: Towards a Productivity-Based Approach to Evaluating Mergers and Joint Ventures" (2001) 46(4) Antitrust Bulletin 919

Richard Posner, "The Chicago School of Antitrust Analysis" (1979) U.Pa.L.Rev. 925

Peter M. Roth QC, "Reasonable Extraterritoriality: Correcting the Balance of Interests" [1992] I.C.L.Q. 245

Frederic M. Scherer, "Efficiency, Fairness and the Early Contributions of Economists to the Antitrust Debate" (1990) 29 Washburn L.J. 243

Frederic M. Scherer, "Trade and Antitrust: Is Rapprochement Desirable? Is it Possible?" (2003) 47 N.Y.L. Sch. L. Rev. 153

Stefan Schmitz, "The European Commission's Decision in GE/Honeywell and the Question of the Goals of Antitrust" (2002) 23 U.Pa.J.Int'l Econ. L. 539

Eric J. Stock, "Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near Miss" (1999) 20 U. Pa. J. Int'l Econ. L. 825

Daniel K.Tarullo, "Norms and Institutions in Global Competition Policy" (2000) 94 Am.J of Intl Law 478

Daniel Tarullo "Competition Policy for Global Markets" (1999) J. Of International Economic Law 445

Michael J. Trebilcock, "Competition Policy and Trade Policy: Mediating the Interface" (1996) 30 Journal of World Trade 71

Michael J. Trebilcock and Shiva K. Giri, "The National Treatment Principle in International Trade Law", paper presented at American Law & Economics Association 14th Annual Meeting, May 7-8 2004 at Northwestern University. Available at http://law.bepress.com/cgi/viewcontent.cgi?article=1007&content=alea

Charles D. Weller, "Harmonizing Antitrust Worldwide by Evolving to Michael Porter's Dynamic Productivity Growth Analysis" (2001) 46(4) Antitrust Bulletin 879

Diane P. Wood, "International Harmonization of Antitrust Law: The Tortoise or the Hare?" (2002) 3 Chi. J. Int'l L. 391

UNCTAD, "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" Geneva: 1980 TD/RBP/CONF/10/Rev.2

UNCTAD, "Model Law on Competition" Geneva: 2002 TD/RBP/CONF .5/7

WTO Annual Report 1997 "Special Topic: Trade and Competition" Geneva 1997