

Nicolaides, Phedon

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Phedon Nicolaides\*

## Why Multilateral Rules on Competition Are Needed

*Even after the Uruguay Round overhaul, existing Gatt rules leave certain competition-distorting policies and practices unchecked. For various reasons the holes in the Gatt rules cannot be filled by the unilateral application of national competition regulations. It is therefore necessary to establish multilateral rules on competition.*

Now that the negotiations of Gatt's Uruguay Round are over, attention has naturally shifted to the work that remains to be done to implement the results of the Round and establish the World Trade Organisation (WTO). An issue that will preoccupy trade officials over the next year or two is the agenda of the WTO. There has already been discussion of the need to examine formally the link between trade and the environment. Another potential agenda item that is frequently mentioned is the link between trade and competition.

The question that arises is whether Gatt or the WTO should attempt to develop new rules and multilateral disciplines specifically on competition. The aim of this article is to argue that without such rules and disciplines, trade between national economies will not be completely free of distortions.

The following example is suggestive of why multilateral rules on competition are needed. In June 1993 the United States Supreme Court ruled that Lloyd's of London was liable for infringing US anti-trust law.<sup>1</sup> The fact that Lloyd's is based outside the United States did not protect it from the extraterritorial reach of US law. This is just one example of how national competition policies affect international transactions. More often, however, international trade is distorted not by the application of national policies but by the absence of both national and multilateral disciplines on anti-competitive private practices and public policies.

If firms can be held liable for breaking the law of other countries, then this is a prima facie case in favour of

establishing at least a multilateral understanding on how national laws may be applied extraterritorially. Moreover, as trade barriers are reduced, trade is increasingly affected by non-border policies and private practices. This also leads to the conclusion that there is a need for multilateral rules to discipline anti-competitive policies and corporate practices.

The existing trade system under Gatt cannot deal with problems caused, for example, by the actions of private firms which are outside the scope of Gatt, the non-enforcement of national competition rules, the exemptions granted by national policies to export or import cartels, the fact that multinational firms may not be effectively supervised by any single authority and, perhaps more worryingly, Gatt's apparent inability to control the anti-competitive effects of its own rules (e.g. antidumping and countervailing action).<sup>2</sup>

While these considerations suggest that multilateral rules on competition would be useful, it is by no means obvious what form they should take and how they should be enforced. Indeed, the literature has noted the possible conflicts between trade and competition policies but has not yet provided any detailed proposals as to how exactly these conflicts should be resolved.<sup>3</sup> In order to say which

<sup>1</sup> Robert Rice: Long Arm of American Law, in: Financial Times, 29 June 1993, p. 10.

<sup>2</sup> For analyses of the anti-competitive effects of quantitative trade restrictions see OECD: Obstacles to Trade and Competition, Paris 1993; and for the effects of anti-dumping action see P. Nicolaides, R. van Wijngaarden: Reform of Anti-dumping Regulations, in: Journal of World Trade, Vol. 27(3), 1993, pp. 31-54.

<sup>3</sup> See, for example, M. Matsushita: Coordinating International Trade with Competition Policies, in: E. Petersmann, M. Hill (eds.): The New GATT Round of Multilateral Trade Negotiations, Deventer 1988.

\* Minister Plenipotentiary at the Ministry of Foreign Affairs, Nicosia, Cyprus. The views expressed in this paper are strictly the author's own and should not be attributed to the Government of Cyprus.

rules should be adopted multilaterally we need to know more precisely what are the gaps in existing rules. Therefore, the purpose of this article is to explain how, even after the Uruguay Round overhaul, existing Gatt rules leave certain trade-distorting and competition-distorting policies and practices unchecked. It follows that new disciplines are necessary.

### Gatt and Competition

One of the most effective means of strengthening competition is to remove barriers to trade. Since Gatt's main aims are the gradual liberalisation of trade, the elimination of discrimination between different sources of imports, the elimination of discrimination between national goods and imports already circulating within customs territories, the elimination of quantitative restrictions to either exports or imports and the control of trade-distorting dumping and subsidies, Gatt certainly promotes competition between national markets.

International competition (i.e. between national markets) will be further strengthened now that the Uruguay Round is successfully concluded. There are rules on new issues (e.g. services), rules on formerly excluded areas (e.g. agriculture, textiles) and, in general, more trade barriers will be wiped away, including VERs and other trade-managing arrangements. Hence, Gatt and the forthcoming WTO provide a framework within which much can be done to strengthen competition.

More importantly, Gatt's existing provisions can be powerful instruments for removing distortions to competition. Although Gatt applies to public policies on goods, not private firms and their behaviour, normal Gatt disciplines may also apply when public policies permit or encourage private anticompetitive behaviour. More specifically, Gatt provisions are infringed when there is:

- discrimination between different sources of imports (Article I);
- discrimination between national products and imports (Article III);
- quantitative restrictions affecting imports or exports (Article XI);
- subsidisation of exports (Article XVI);
- dumping or subsidisation of imports that threatens to damage import-competing industries (Article VI and the Uruguay Round Agreements on the Implementation of Article VI and on Subsidies and Countervailing Measures);
- discrimination by state-trading companies (Article XVII);

discrimination by government procuring agencies (Agreement on Public Procurement);

discrimination by technical regulations, sanitary and phytosanitary measures and other administrative procedures (Agreements on Technical Barriers to Trade, on Sanitary and Phytosanitary Measures, on Preshipment Inspection and on Import Licensing Procedures);

nullification or impairment of expected benefits from trade liberalisation (Article XXIII).

The following is a more detailed review of the main provisions that contribute towards more vigorous competition between imported and domestic products.<sup>4</sup>

### Relevant Provisions

*Article III: National treatment on internal taxation and regulation.* Article III does not require identical or equal treatment. It requires treatment which is "no less favourable". This means that foreign products may be treated more favourably than domestic products in order to achieve equality of competitive opportunity. This means that the emphasis is on the results of the chosen policy instruments. They must not produce a result which de facto places foreign products at a competitive disadvantage.

Article III distinguishes between charges (taxes) and other policies or regulations that affect the internal sale, offering for sale, purchase, transport, distribution or use of like products. So, it aims to guarantee the equality of competitive conditions even though it is no easy task to achieve it. It is certainly difficult to prove that foreign products are disadvantaged when they are treated in the same way as domestic products.

*Article VI: Anti-dumping and countervailing measures.* This is probably the only provision that makes a reference to the actions of private firms. Contrary to popular misconception, it does not prohibit either dumping or export subsidisation by private firms. It only allows counter measures by the importing country without first requiring as normal prior use of the dispute-settlement procedure. Hence, Article VI cannot be said to regulate the behaviour of private firms. It only regulates the actions of governments that impose measures to restore "fair" competition.

Article VI can be used against dumping or subsidies that result in the export price of a product being lower than its "normal" value (i.e. domestic price or full cost of production) and as a result causes or threatens to cause

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<sup>4</sup> For a more detailed analysis with emphasis on the decisions of Gatt panels interpreting Gatt's Articles see B. Hoekman, P. Mavroidis: Competition, Competition Policy and the GATT, mimeo 1993.

material injury to domestic industries. Article VI makes no mention of "equitable" market shares as in Article XVI (see below). Any form of dumping or subsidisation that has the potential of causing injury is countervailable. Moreover, any subsidy (not only export subsidies) is actionable.<sup>5</sup> In this way importing countries can respond to other countries' domestic subsidies that are thought to give an "unfair" advantage to their exports.

*Article XI: Elimination of quantitative restrictions.* Gatt has several provisions that bear on quantitative restrictions. Article XI forbids quantitative restrictions on imports or exports. Article XII permits quotas for balance-of-payments reasons, Article XIII requires that any quotas under Article XII are erga omnes, and Article XIV allows for the waiving of the non-discrimination obligations.<sup>6</sup> But, the erga omnes obligation of Articles XI-XIV refers to non-discrimination between imports, not between imports and domestic products.

The Uruguay Round Agreement on Safeguards strengthens Gatt's general prohibition of quantitative restrictions because it also requires the elimination of grey-area measures (e.g. voluntary export restraints) whose legality has been in doubt for a long time. But, the Agreement at the same time permits the use of quotas (also selective quotas) to provide temporary protection to domestic industries that face serious injury from imports.

*Article XVI: Subsidies.* Article XVI urges Contracting Parties<sup>7</sup> to recognize that their subsidies may damage the interests of other Parties and to limit them accordingly. The Article uses stronger language in requiring Contracting Parties to avoid export subsidies, not to apply export subsidies to primary products when they result in more than an equitable market share and to cease any subsidies when they reduce the export price to a level lower than the domestic price. The subsidies code which was negotiated during the Tokyo Round defined in more detail the measures that were regarded as export subsidies and those which were mainly used to address domestic economic problems. This code has been revised by the Uruguay Round Agreement on Subsidies and has been incorporated into the main body of the Final Act of the Round. The Agreement elaborates further the different categories of subsidies that may distort trade and introduces the concept of "specific subsidies" which, with certain exceptions, are prohibited.

<sup>5</sup> The Uruguay Round Agreements on anti-dumping and on subsidies exempt de minimis dumping or subsidies (i.e. dumping or subsidisation at very small rates or dumping or subsidisation of products with very small market shares).

<sup>6</sup> However it is unclear how quantitative restrictions can be administered in a non-discriminatory manner.

Action under Article XVI or the subsidies Agreement has to follow the established procedure of consultation, conciliation and dispute settlement. In this way, unauthorised retaliation is not allowed. By contrast unilateral action that does not require prior Gatt approval is provided by Article VI on antidumping and countervailing duties.

Gatt also affords remedies to exports that are disadvantaged by another country's domestic subsidies. For example, entry into a foreign market may be made more difficult when local producers receive public assistance. Remedies to such obstacles are provided by Article XXIII on nullification or impairment (see below). It would appear, therefore, that Gatt has all the means necessary to deal with all kinds of trade-distorting subsidies. As explained later on, actual experience suggests otherwise.

*Article XVII: State-trading enterprises.* Article XVII requires that state-owned enterprises or private enterprises with special or exclusive rights do not act contrary to the general principle of non-discrimination. If they have exclusive importation rights they must not discriminate between different sources of imports. Monopolies with exclusive rights to internal distribution must not discriminate between imported and domestic products (i.e. they must extend national treatment). But import monopolies do not in general have the obligation to provide national treatment to imports. Article XVII does not apply to private enterprises with no special or exclusive rights.

By comparison Article 46 of the abandoned Havana Charter was more extensive. It required members to prevent private or public commercial enterprises from engaging in trade-affecting practices that restrained competition, limited access to markets or fostered monopolistic control, whenever such practices had harmful effects on the expansion of production or trade. The Article provided an illustrative list of restrictive business practices: price fixing, market allocation, discrimination against particular enterprises, production quotas, prevention of development (of technology), unlawful extension of intellectual property rights.<sup>8</sup>

*Article XXIII: Nullification and impairment.* Most complaints that reach Gatt concern cases of reduced benefits from tariff concessions caused by subsequent introduction of subsidies or other policies by the importing

<sup>7</sup> Gatt has Contracting Parties but the WTO will have Members.

<sup>8</sup> The irony forty years after the US Congress failed to ratify the Havana Charter is that it is the United States that complains most often of the anti-competitive practices in other countries.

country, which could not be reasonably anticipated at the time of tariff negotiations. One interpretation of Article XXIII is that it refers to the protection of "reasonable" expectations. Hence, when trade liberalisation leads a country to expect that its share of a foreign market will increase to a certain level but as a result of the other country's subsidies market share stagnates or contracts the exporting country can ask Gatt to adjudicate.

In summary, Gatt does not necessarily apply when there is a restriction to trade and it generally does not apply when there is a distortion to competition. For Gatt to apply there must be a policy or private practice required by the government. Then it applies when policies or sanctioned private practices generate results that de facto cause:

- discrimination between imports;
- discrimination between imports and national products after the imports enter the national market;
- injury to domestic industries caused by dumping or subsidies;
- quantitative import/export restrictions (export/import cartels would normally be outside the scope of Article XI);
- nullification or impairment of benefits from a negotiated market opening.

The following examines the extent to which the provisions reviewed above foster competition.

### **Weaknesses of Gatt: Narrow Coverage**

Gatt does not guarantee free market access because it does proscribe all trade restrictions and because it does not prohibit in principle distortions to competition caused by internal public policies, private practices and structural economic differences (such as legal monopolies). Gatt's general behavioural principles (as opposed to obligations relating to generated results, e.g. the reduction of tariffs to a certain level, the prohibition of specific subsidies) refer to the treatment of goods (and soon services), the operation of border restrictions and the operation of regulations or administrative procedures that might result in discriminatory treatment of imports (all other obligations depend on the effect they generate; i.e. their illegality is conditional on the nature and magnitude of the effects they produce).

By contrast, as will be argued below, competition policies establish behavioural principles that refer to both goods and services and they apply to the practices of both governments (in the case of the EC) and private firms. These principles impose general obligations on governments and firms to refrain from any action that

would distort competition even indirectly. Competition policies have broader, more comprehensive objectives (e.g. no obstruction of trade) and more extensive disciplines/measures (e.g. certain private practices are also proscribed).

### **Narrow Non-discrimination Obligation**

To judge whether there is discrimination or de facto impairment of competitive opportunity it is necessary to compare the treatment or conditions of competition that affect similar national and foreign goods. But policies that influence the production of national goods in general fall outside the scope of this comparison even when they create an advantage for national goods. The reason is that to perform such a comparison it is necessary to compare conditions of production in different countries. This is outside Gatt's scope because (a) it does not aim to equalise these conditions across countries and (b) it does not in general establish obligations regarding the conditions of production (except for subsidies that affect trade). Again, the obligation not to distort trade or competition imposed by competition policy is much broader than the requirement of non-discrimination in just a narrow area of the activities of firms.

Furthermore, governments do not necessarily have to discriminate in order to obstruct trade or competition. Non-discriminatory regulations, licensing procedures, technical standards and product certification requirements are all examples of measures that may impede market entry even if they are implemented on a supposedly objective and impartial basis. The Uruguay Round has not taken away the right of governments to regulate in a non-discriminatory manner.

### **Limits of Article XXIII**

To use Article XXIII (nullification or impairment) it is necessary to establish what would have reasonably happened had a government not adopted a particular policy. Such a policy must directly refer to the treatment of a good that competes with imports. There are several reasons why it is not easy to use Article XXIII to promote competition.

First, there is the problem that any comparison must be confined to the treatment of goods, which is narrower than the more useful, from a competition perspective, comparison of the conditions of production.

Second, there is the problem of whether the policy in question is purely protectionist or whether it has other legitimate aims. If it has other legitimate aims it may be argued that the complaining country should not

reasonably expect nonintervention by the government of the importing country.

Third, in oligopolistic industries it is difficult to determine whether intervention raises the level of protection. Under certain conditions, absence of government intervention would lead to lower protection than otherwise. In any case, when oligopolists compete across national borders it is again necessary to perform a comparison of foreign and domestic policies, which is outside the scope of Gatt.

Fourth, complaints brought under Article XXIII cannot be directed against private practices, even if they are indeed anti-competitive. They must be directed against policies that support them or against the non-enforcement of policies that prohibit them. But it is possible that certain practices in certain countries fall outside existing national competition law or competition law may be non-existent at all. The inevitable conclusion must be that existing Gatt rules are no substitute for a fully fledged competition policy.

An important recent case that was based on impairment of expected benefits was the oil-seed dispute between the EU and the United States. According to the United States, the access it gained by an agreement at the beginning of 1960s for its oil-seed exports failed to generate the revenue it expected because EU subsidies helped higher-cost European producers retain a greater than otherwise market share. Indeed, Gatt panels found twice in favour of the United States.

Bearing in mind that case, it is easy to understand the limits of Article XXIII. First, in a world where new technologies are continually being developed and competitiveness depends on technological leadership it is not possible to say how potential benefits are impaired by subsidies.

Second, because Gatt does not prohibit domestic subsidies, other than specific subsidies, but instead allows counter or offsetting action there are always interminable debates about the exact size of the advantage afforded by subsidies and the size of the permissible counter measures. In the oil-seed case, the dispute-settlement committee could not agree on the size of the remedies even though Gatt panels twice ruled that there was impairment.

Third, retaliation has to be authorised by Gatt whose dispute-settlement procedures can be blocked by any of the parties to a dispute. Again, in the oil-seed case, the EU blocked authorisation of retaliation. That meant that even though its interests were found to have been truly harmed, technically the United States had no legal right to retaliate

against the EU because it could obtain no authorisation for that kind of action. It is not surprising, therefore, that the large countries prefer instead to resort to Article VI (to counter export-boosting subsidies) and extra-Gatt means of applying pressure on other countries (to counter import-suppressing subsidies). Admittedly, however, this situation will change when the results of the Uruguay Round come into force. The new dispute-settlement procedures make it impossible for any single country to block panel reports and Council decisions. But it remains to be seen whether it will become any easier to reach agreement on the size of compensation.

### Sub-optimum Instruments

Under current rules, anti-competitive practices such as dumping or export subsidisation emanating from foreign markets may be countervailed by duties imposed at the border of the importing country. This, however, is not the most efficient way of intervening to correct distortions (assuming, of course, that dumping or subsidisation does distort competition). The most efficient means of intervention would be to go as closely as possible to the source of distortion. This means penalising the dumper directly without adversely affecting consumers by the use of border duties.

When the foreign exporter operates a subsidiary in the importing country's market, then it is presumably easy to fine the subsidiary. But in most cases exporters sell to independent importers. If the importing country is not to resort to border measures, it must have access to the foreign country's courts or the foreign government must have an obligation to prevent dumping and export subsidisation. Both of these two options are unavailable under current Gatt rules.

Anti-dumping regulations and policies have recently come under intense scrutiny and criticism. Most critics have focused on the misuse of anti-dumping as safeguards against competitive imports. In an empirical study, Nicolaides and van Wijngaarden<sup>9</sup> have in addition argued that there is little economic justification for the vast majority of anti-dumping cases and that concern with dumping is only legitimate when it threatens to harm competition.

The fundamental problem with existing anti-dumping regulations is that they establish arbitrary benchmarks for assessing what is fair or unfair competition. These are divorced from economic reality and are far removed from benchmarks in competition policies, which aim to prevent predatory practices and other means of monopolising

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<sup>9</sup> P. Nicolaides, R. van Wijngaarden, *op. cit.*

a market or abusing market power. Prevailing anti-dumping policies protect competitors, not competition. Although the Uruguay Round has tightened the definitions of normal price, dumping margin and injury it still has not introduced criteria to distinguish between predatory and other, possibly harmless, forms of dumping (the exception is de minimis dumping).

#### No Independent "Guardian" of the System

It is often argued that one of the reasons for the rise of extra-legal trade arrangements or grey-area measures such as voluntary export restraints, orderly marketing agreements and voluntary import expansion is that they are opaque and therefore not subject to the normal political scrutiny and accountability that exist in most democratic countries. Moreover, targeted countries do not complain because the alternatives facing them are even worse. The end result is that countries "collude" to break Gatt's rules. Had there been an independent authority to control infringements it would have prevented countries from agreeing to subvert competition. It remains to be seen whether the Uruguay Round's prohibition of grey-area measures will be effective in the absence of a supervising agency.

There is another important reason why for the purpose of promoting competition it is essential that there is an independent authority. As argued below, there are only a few "simple" rules in competition policies. Most practices and policies are judged according to their effects on competition, which may vary from case to case. A simple rule in this context is something that prescribes what may and what may not be done. But when a case is judged on its

merits, competition authorities examine its impact on competition. That is, they look at its outcome or result. Rules that regulate policies or behaviour according to the kind of desired or undesired results that should or should not be produced are exceedingly difficult to define unambiguously. This is the reason why an independent authority is needed to interpret and apply the rules accordingly.

In conclusion, Gatt cannot adequately cope with anti-competitive practices and policies because it does not require complete removal of all significant trade impediments, it does not apply to firms and it does not aim to discipline all trade-affecting public policies.

Of the above gaps, the most serious deficiency is that Gatt rules do not really cover the actions of private firms. By contrast, competition policy aims primarily to control private anti-competitive behaviour.

There are holes in Gatt rules which allow anti-competitive practices and policies to pass through unchallenged. However, before any multilateral rules are established, one may legitimately ask, why can national competition policies not fill Gatt's holes? As will be argued below, not only do national competition policies ignore many trade-related problems, but even if they did not, national rules may also be interpreted in ways that cause further friction in commercial transactions between countries.

The references to EU and US policies in the following are very selective. They necessarily ignore the institutional structure and enforcement side of competition policy. Moreover, only passing reference is made to the regulation of mergers and takeovers. The reason for being

Wolfgang Graf Vitzthum (Hrsg.)

### Europäische und Internationale Wirtschaftsordnung aus der Sicht der Bundesrepublik Deutschland

About half of the essays in this collected volume are assigned to European integration, the other half dealing with the international economic order. Part I, now especially relevant since the coming into force of the Maastricht Treaty on 1st November 1993, begins with an analysis of the ambivalency of the rather lack-lustre economic policy debates in the European Parliament; it continues with a treatment of the two directives on biotechnology law; the label "Fortress Europe" is also considered – in the case of capital markets law somewhat hard to sustain. Part I concludes with an analysis of the, if one may put it, Colbertian nature and the regulatory and potentially dysfunctional consequences of EC industrial policy. Though generally in favour of the strengthening of European integration as well as taking cognizance of the heightened factual interdependency between member states, this first part of the volume voices doubts as well as hopes about the manner in which Europe moves towards further integration. Part II, which is devoted to the international economic order, deals with the suggestion that the GATT structure should be strengthened.

The book is published in German and contains French and English articles.

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selective is to focus only on those aspects of competition policy that have a direct effect on trade because ultimately we want to know the extent to which trade policy should be complemented or substituted by competition policy. Even if competition policies in different countries have basically the same objectives, they may differ substantially in the means they use to achieve these objectives. In a world without other barriers to trade, such differences can be a significant source of commercial friction. Ultimately, therefore, if we want to strengthen international competition (i.e. competition between markets) and remove all obstacles to trade, we will have to streamline national competition policies as well.

### US and EU Competition Policies

Assuming that the anti-trust law of the United States and the competition policy of the European Union are the main models of national competition policy<sup>10</sup> a comparison of the two models reveals that they have many similarities. One may infer from this comparison that competition policy typically has three basic objectives:

- to prevent firms from colluding to fix prices, output, market share, etc.;
- to prevent large firms with market power from monopolising a market or abusing their power in that market;
- to prevent the establishment, through mergers or acquisitions, of large firms that might have a negative effect on competition in the market they operate.

Moreover, both models have rules that apply to anything that might have even an indirect restraining effect on trade. They both prohibit outright certain practices (e.g. "per se" prohibitions of agreements such as those that fix prices) while they examine other practices on their merits (e.g. use of the "rule of reason" to judge the costs and benefits from distribution agreements). Also in both models planned mergers that are likely to raise market concentration are required to be notified to the authorities for clearance.

Despite these similarities, the American and European policies also have significant differences which are quite important for the subject matter of this paper. The principles and enforcement of competition rules in the EU and the United States differ in at least three respects. First, EU rules give more scope to efficiency considerations. Unlike US anti-trust, Article 85 of the Treaty of Rome permits the Commission to issue "block exemptions" which allow firms to cooperate on certain specified activities in certain specified areas. Second, EU rules also refer to distortions that arise from differences in national

economic systems (Article 90 on public undertakings; Articles 92-94 on state aids). Third, the Commission is empowered to carry out investigations and impose fines, whereas in the United States anti-trust cases are decided by courts.<sup>11</sup>

The explicit attention given to economic efficiency and the various exemptions that have been granted over the years are both the strength and weakness of the EU policy in relation to its American counterpart. Avoiding per se rules and taking into account the economic impact of a certain business practice inject more economic rationality into competition proceedings (even if decisions are not always predictable). On the other hand, some exemptions have been a clear political compromise with distorting consequences for competition (e.g. the exception of exclusive car dealerships).

But in all cases, competition authorities in both jurisdictions have to rely extensively on the rule of reason to assess whether competition is adversely affected. For example, at minimum they need to define the relevant market and to examine whether trade is impeded and whether the effect on competition is appreciable. Given that there are no precise rules on how these tasks have to be carried out, it is inevitable that the decisions of different authorities vary.

### Can Competition Policy Step In?

Gatt cannot adequately cope with competition problems because its rules do not cover all those policies and practices that cause distortions to competition. To repeat, the main reasons for its inadequacy are that: (a) it does not require complete elimination of all trade restrictions (which means that oligopolies may find it easier to defend their positions and that legal import cartels are possible); (b) it does not cover private practices; (c) its rules may cause secondary anti-competitive effects (e.g. anti-dumping); and (d) Article XXIII is not a flexible or effective instrument for dealing with nullification of expected benefits from trade liberalisation.

Does unilateral application of national competition rules fill these holes in Gatt rules (i.e. without new

<sup>10</sup> For a fuller analysis of competition policy see R. Boner, R. Krueger: *The Basics of Antitrust Policy: A Review of Ten Nations and the European Community*, World Bank, Technical Paper 160, Washington, D.C. 1991; M. Mendes: *Antitrust in a World of Inter-related Economies*, Brussels 1991; OECD: *Competition Policies in OECD Countries*, Paris 1988,1992; D. Raybould, A. Firth: *Law of Monopolies: Competition Law and Practice in the USA, EEC, Germany and the UK*, London 1991.

<sup>11</sup> There are also important differences, not examined in this paper, in the amount of damages that can be claimed, the amount of fines that can be imposed and in the nature of charges (e.g. criminal).



multilateral disciplines)? The answer must be negative for the following reasons.

First, national competition policies are rather inward looking. Although they do take into account the effects of competition from imports, on the whole they do not try to adjust the rules to neutralise the potential damaging effects on national firms from anti-competitive practices that originate abroad. So competition policy on its own cannot solve the problem of anti-competitive practices which are tolerated or encouraged in other countries. The competition policies of certain countries, however, do have what may be interpreted to be industrial policy criteria (e.g. the UK's "public interest" criteria). Hence, whenever relaxation of the rules occurs it is more likely that it aims to preserve strategic national firms rather than to attack foreign anti-competitive practices.

Second, even when industrial-policy criteria do not creep into competition policy, there is always the possibility that the same case can be interpreted in contradictory ways by different competition authorities. Judicious exercise of discretion is fundamental to the administration of an effective competition policy. But what looks judicious to native eyes may look suspiciously biased in foreign eyes. It would be difficult to reconcile different conceptions of competition in the absence of international rules or guidelines. A case in point is the vetting of mergers between large firms. Not only definitions of the "relevant market" may vary substantially, but more importantly industrial-policy concerns and national interests could become decisive. In this context, Jacquemin correctly argues that there should be more cooperation and exchange of information between national competition authorities.<sup>12</sup>

Third, the use of competition policy to "attack" foreign anti-competitive practices is really an option which is available only to the EU and the United States because only these two countries have the might to attack unilaterally foreign barriers. Yet the EU does not have any legal basis for attacking foreign barriers to EU exports. Even if that could be remedied, the unilateral assumption of the roles of both prosecutor and judge does not foster cordial commercial relations. And, of course, there is no guarantee that when governments act with self-righteousness they will not attempt to skew the rules or the outcomes in their favour. Extraterritorial application of national law will heighten rather than lessen tension.

Fourth, national competition laws allow all sorts of exceptions which other countries would naturally regard as distortions to both trade and competition. Export, import or distribution cartels are a clear-cut case of exceptions which should not be allowed within a system that purports to promote undistorted trade and

competition. It is not so easy, however, to state a priori what should be done with the myriad of regulations that control entry into markets such as those of transport, telecoms and financial services. Nor are there any fast and ready rules on how to control possible anti-competitive behaviour of state-owned companies. The EU's continuing interpretation of Article 90 is a case in point. To catch anti-competitive behaviour in regulated industries or in industries dominated by state-owned firms it is necessary to have an independent authority to monitor them and decide whether they act reasonably or not.

Therefore, increased reliance on national competition instruments as a means of facilitating trade must be accompanied, firstly, by a commitment by partner countries to reform anti-competitive policies and to curtail the anti-competitive practices of their firms (that affect both their own and foreign markets). Secondly, there would have to be a certain degree of harmonisation of competition provisions (note, for example, that only the EU has rules on the behaviour of governments and state-owned firms). And, thirdly, countries will need to accept independent surveillance of their policies or, at minimum, a much improved consultation and conciliation procedure.

### Conclusion

This article has argued that existing Gatt rules allow a number of anti-competitive practices and policies unchecked. As a consequence, member countries which are adversely affected by those policies and practices have to resort either to their competition policies or trade policies. The problem is that, in the absence of multilateral rules, these two options cannot really remove all distortions to international transactions and eliminate friction in commercial relations. Since national competition policies cannot completely replace the inefficient, from a global point of view, use of trade policy, it is necessary to establish multilateral rules on competition.

Admittedly, it will be difficult for Gatt members to agree on the need, let alone on the specific nature, of such rules. Probably the issue that will arouse the strongest opposition is that of disciplines on domestic policies (e.g. relations between governments and state-owned firms, market regulation, state aids). For this reason it is politically expedient to start the process of building multilateral disciplines with controls on private anti-competitive practices (e.g. collusion, predation) and policies that have a direct impact on trade (e.g. legal export or import cartels).

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<sup>12</sup> A. Jacquemin: *The International Dimension of European Competition Policy*, in: *Journal of Common Market Studies*, Vol. 31 (1), 1993, pp. 91-101.