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INTERNATIONAL MARKET CONTESTABILITY AND THE NEW ISSUES AT THE WORLD TRADE ORGANIZATION

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1. INTRODUCTION

At the first ministerial-level meeting of the World Trade Organization (WTO), held in December 1996 in Singapore, ministers of the member nations authorized the formation of working parties to examine whether rules should be added or changed in the body of multilateral trade law in order to address issues of trade and investment and of trade and competition policy. The move was a response to a growing recognition that, even though successive rounds of multilateral trade negotiations have led to substantial reduction or even elimination of tariffs and other traditional non-tariff trade barriers, many persisting impediments to market access do not fall into the category of traditional trade barriers. Indeed, some analysts would claim that the non-traditional barriers to trade have risen precisely as substitutes for fallen traditional barriers.

The newly identified barriers are mostly found behind the national frontier. They are not the result of measures imposed at the border deliberately to impede imports; instead, they are internal to the domestic economy of a trading nation. They include domestic regulatory policies, which often favour established, incumbent firms by retarding or preventing the entry of new competitors into regulated markets. Such regulations are of concern to trade policy if they impede or block market access by foreign firms via either imports or direct investment. Market access barriers can also be created by industrial policies that grant subsidies and subsidy-like benefits to favoured firms.

In addition to government measures, private business practices can create market entry barriers. These practices include "vertical restraints" such as exclusive dealing relationships between firms, thereby forestalling possible sales by other firms. It is difficult for public policy to deal with these practices because they might be economically justified by the efficiencies they make possible. Nonetheless they may create market access barriers and it is legitimate for policy makers to question whether the anti-competitive effects outweigh any resulting efficiencies.

Private and public measures may come in combinations that reinforce their market-restricting effects. Although the combinations are not specifically border measures, it may be argued that in some cases they have been created with the intent to favour domestically-owned firms over foreign-owned or -controlled ones.[1]

Such barriers can reduce the international contestability of the markets concerned. A market is contestable if barriers to entry are sufficiently low that incumbent firms must behave competitively to forestall entry by rival firms. Among other things, pricing in a contestable market is competitive; in other words, prices are maintained at levels that would prevail if a very large number of sellers participated in the market. If prices are held at competitive levels, consumers will receive the benefits of competition even though there may be few sellers in the market. Firms in contestable markets for technologically advanced products and services must also constantly strive to improve the products or services they offer (and to introduce new products at a satisfactory rate) and/or to reduce their operating costs; otherwise, they will be overtaken by new rivals in the marketplace.

Consequently, in contestable markets allocative efficiency is high because prices are competitive and quantities sold are commensurate with demand at these prices. In such circumstances, sufficient resources are allocated to produce the relevant goods and services, with the result that there is neither undercapacity nor overcapacity. Because their innovation rates are high, contestable markets tend to be dynamically efficient as well.

Not all markets can, however, be fully contestable. A prerequisite for entry into some markets is high fixed costs, allowing only one supplier of the good or service concerned to operate efficiently. For example, the fixed costs of creating a network of cables and switching devices needed to provide basic telecommunications services is very high, and in most regions only one such network is economically feasible. In such cases of so-called "natural monopoly," new entry is effectively blocked by the high fixed costs: a second supplier would not be able to garner enough revenue in competition with the incumbent supplier to amortize these costs.[2] Nonetheless, even for natural monopolies, the goal of policy can be to maintain as much contestability as possible. For example, while the market for basic telecommunications services might have to be non-contestable, that for value-added services sold over the network need not be. Instead, to maintain contestability, public policy might require the basic service provider to allow all sellers of such services access to the network, provided of course that sellers pay fees to the basic provider to cover its costs.[3]

Some analysts argue that the main goal of trade policy should be to increase international market contestability (see, e.g., Feketekuty and Rogowsky, 1996; Graham and Lawrence, 1996; and Zampetti and Sauvé, 1996). However, this goal should surely extend well beyond trade policy *per se*. Indeed, fostering and maintaining an equally high degree of contestability in domestic markets should be a major goal of any government.[4] It is, in fact, the main objective of domestic competition policy. There is thus a natural complementarity between trade policy and competition policy: if a market is internationally contestable (i.e., open to entry by foreign firms), it is likely to be domestically contestable as well.[5]

Similarly, there can be a natural complementarity between the goals of competition policy and those of policy affecting foreign direct investment (FDI). In FDI, a firm based in one nation extends business operations into the market of another nation. The parent firm is the investor and the foreign operation under its control is the investment. FDI differs from long-term portfolio investment: in this case an investor in one country passively holds an investment in another country, without attempting to manage the activities of the investment except perhaps in the capacity of a shareholder. An internationally contestable market is, by definition, open to entry by foreign firms. Those that choose to enter the market do so because they believe that they can offer better products or lower prices than their domestically-owned rivals. The result is that consumers benefit and domestic firms are likely to be pressured to improve their products or increase their efficiency. Thus, open FDI policies – policies that do not discriminate against foreign firms by subjecting them to barriers not placed on domestic firms – are consistent with increased international market contestability. A question that naturally presents itself is whether WTO rules should require nations to maintain open policies toward direct investors.

The complementarities described here form the intellectual basis for the investigations to be carried out by the new WTO working parties. This article explores the possible directions for their studies. We begin by considering why markets are not always contestable.

2. BARRIERS TO MARKET CONTESTABILITY

If market contestability is a desirable goal that encompasses liberal trade, investment and competition policy, it is fair to ask why governments might choose to pursue policies that are inconsistent with this goal. One reason is that there are cases where increased efficiency can be at odds with increased contestability. But while such cases exist, their frequency or significance should not be overstated.

It is especially important to beware of false claims of efficiencies that do not exist. Such claims are often advanced by incumbent sellers wishing to defend policies or practices that shelter them from competition. Worldwide, for example, the leaders of telecommunications monopolies have long claimed that increased competition would lead to decreased efficiency in telecommunications services and hence to reduced consumer welfare. However, serious analysis reveals that the opposite is true: increased competition in the market for telecommunications services results almost invariably in consumer welfare gains, not losses (Petrazzini, 1996). The challenge for public policy officials thus is not to limit competition in the sector but rather to find ways of increasing contestability despite the high degree of natural monopoly characterizing the provision of basic telecommunications services.

Indeed, most political resistance to increased contestability is based not on any trade-off between contestability and efficiency but rather on the fact that contestability tends to reduce rents garnered by incumbent firms and/or to reduce the ability of regulatory officials and other government agents to exercise powers over the relevant economic activities – powers that too often are exercised to the detriment of the general public. Perhaps the strongest resistance to increased contestability comes from industries characterized by "regulatory capture," that is, where government regulators tend to view their job precisely as protecting the interests of incumbent sellers rather than maximizing benefits to the public. The wisdom (or lack thereof) of such regulation is being examined and questioned today around the world.[6] In the United States and the United Kingdom, for example, deregulation began in earnest during the late 1970s, under the administrations of U.S. President Jimmy Carter and British Prime Minister Margaret Thatcher. In these countries, efforts to deregulate economic activity have continued apace into present times. In other nations such as Japan and Taiwan, deregulation to reduce or eliminate regulatory capture has begun only much more recently. Nonetheless, those two nations are clearly heading in the direction of greater deregulation.

3. CONTESTABILITY AND INVESTMENT POLICY IN THE WTO

Boiled down to its essence, the case for including investment policy in the WTO is as follows: First, the increased globalization of markets[7] for many goods and services is a trend that makes these markets increasingly contestable and hence allows the benefits of increased contestability to be realized to an increasing extent. Second, new WTO investment rules should be designed obligating governments not to implement measures (or to continue with existing measures) that can offset the benefits of this trend. In addition, WTO rules should offset (or force governments to take steps to offset) private practices that can reduce contestability.

Globalization and the U.S. Auto Market

To illustrate this argument, let us examine the market for automobiles in the United States. During the four decades going roughly from the Great Depression to the first oil crisis, the number of firms supplying the U.S. auto market fell precipitously. Among the reasons for this decline were higher costs of creating or upgrading dealer networks, and higher costs of introducing new automobile models. In short, the market for automobiles became steadily less contestable during the period because of a rise in the "sunk" costs associated with participation in the market.

One consequence was that surviving firms were increasingly able to appropriate rents from automobile buyers. Much of the rent was in turn appropriated by unionized workers: by the time of the first oil crisis, hourly compensation in the auto industry far exceeded the national average for workers in manufacturing, and the premium paid to auto workers could not be explained by a higher marginal productivity. Further, the design of American-made automobiles began to ossify: chassis-on-frame body design prevailed even though it had become obsolete by the early 1960s; overly heavy autos were powered by fuel-guzzling, environmentally unfriendly V-8 engines that produced remarkably little power for their weight and displacement. Thus the lack of contestability had manifest consequences: prices were higher than they would have been in a competitive market; product improvement was sluggish; and by 1974 most U.S. autos were inappropriate for the changing market, which (even before the 1974 energy crisis) had begun to demand smaller and more fuel-efficient cars.

During the 1970s, and especially during the second half of that decade, the shifting demand was met to a large extent by imports, especially from Japan. Japanese autos offered features that American drivers had begun to demand, plus the quality of the product seemed to be higher in terms of reliability and characteristics such as finish and precision. Shifting demands and the growing ability of Japanese producers to meet these demands reversed the U.S. market's trend toward increasing non-contestability. The benefits to U.S. consumers were unmistakable: in particular, in 1979 there was more product variety than in 1970, especially at the low-price end of the market.

Nevertheless, throughout the 1970s and into the early 1980s pressures mounted to restrict Japanese auto imports. Incumbent U.S. producers and the United Auto Workers union together were adversely affected by the increased contestability of the market, and they worked tirelessly to persuade the U.S. government to implement import-reducing measures. Voluntary export restraints (i.e., de facto quotas) were introduced early in the Reagan administration even though, in its rhetoric, it was more committed than any previous U.S. administration to the principles of free markets and free trade.

Japanese firms responded by upgrading the quality of products that came into the United States under quotas; that is, they brought in higher-priced models, on which they received higher markups, in place of lower-priced, lower-markup models. They also established U.S. production facilities via foreign direct investment. These facilities began to come on line during the mid- to late 1980s.

U.S. car makers found that local production by Japanese auto firms was not so easy to block as imports. By establishing local facilities, the Japanese firms demonstrated that the U.S. market for automobiles had become significantly more contestable within the previous decade. One consequence was that their U.S. rivals – the Detroit "Big Three" – were forced to upgrade their own products and find ways to cut their own costs. These firms had to discard their strategies appropriate to a highly oligopolistic, non-contestable market, and adopt ones appropriate to a contestable market.

The big winner was the U.S. consumer. Compared with 15 or even 10 years ago, U.S. consumers today have a choice of many more automobile models, and the average price of autos has fallen as a percentage of disposable personal income. Automobiles produced by domestic firms are no longer technically obsolete or, in terms of product characteristics, out of touch with market demand.

The change in the U.S. auto market thus illustrates that globalization of an industry can foster contestability in markets for the relevant products; indeed, in this instance globalization reversed what had been a trend toward reduced contestability in the domestic U.S. market. The example provides hard evidence supporting the assertion made earlier: increased globalization of industries makes the markets for the output of these industries increasingly contestable.

New Rules: the TRIMs Agreement and Beyond

But what about the second assertion, that new international rules on foreign direct investment will impede governments from passing laws or adopting policies to offset increased contestability? In the case of the U.S. auto market, no such rules existed and yet the increased contestability did come about. No rules were necessary and, indeed, no rules ever are necessary as long as governments do not discriminate against foreign direct investment.

Even in this case, it was a close call. During the mid-1980s, legislation was introduced in the U.S. Congress that would have put domestic content requirements on cars manufactured domestically. The bill was clearly intended to discriminate against Japanese auto manufacturers. Other, even more discriminatory measures were called for by a number of prominent figures, including members of Congress. The domestic content bill would have violated new world trade rules proposed by the United States, although at the time these were under negotiation in the Uruguay Round and hence not yet in effect. The rules came into force on completion of the Round and adoption of the Agreement on Trade Related Investment Measures (TRIMs); this agreement forbids national or sub-national governments from placing domestic content requirements on foreign investors as a condition of entry, on the grounds that such requirements are inconsistent with General Agreement on Tariffs and Trade (GATT) Article III on national treatment for imports. Fortunately, Congress never passed the bill.

In fact, in member nations of the Organization for Economic Co-operation and Development (OECD), including the United States and Canada, treatment of FDI is already largely consistent with market contestability. In these nations, the main purpose of an international agreement would be to ensure the same approach in future governmental measures and, in particular, to discourage measures that might act against contestability (such as the proposed local content bill). In many non-OECD nations, however, current policy regimes are anything but consistent with contestability. Many of these regimes were established during the 1960s and 1970s, in a period of backlash against the legacy of colonialism and fears of neocolonialism. By and large (and with some major exceptions), policies in the developing nations are moving away from the regimes established in those years since they have been shown to retard economic development. One aspect of this shift is liberalization of policies toward FDI, a trend that began to look more and more like a stampede in the early 1990s (see, e.g., UNCTAD, 1994). For these nations, an international agreement on investment would serve as something of a beacon. It would establish universal norms against which national policies could be calibrated, and it would help guide policy makers as they implement liberalization. Unfortunately, an international agreement is opposed by certain developing nations, including ones that might benefit greatly from it.

As mentioned earlier, the Uruguay Round produced a consensus on a limited WTO agreement on FDI – the TRIMs Agreement – which does in fact prohibit certain government measures that might reduce market contestability. In addition to domestic content requirements, banned measures include export performance requirements and trade-balancing requirements as conditions for entry. However, this list by no means exhausts the arsenal of measures available to governments to discriminate against foreign direct investors. Many policy makers and analysts thus see the need for a much more comprehensive agreement on investment reaching deeper into the arsenal.

The main provisions of such an agreement would include all of the following key items:

- Governments at both national and sub-national levels would be obligated to extend national treatment to investments of foreign investors[8] on both a pre- and post-establishment basis (pre-establishment national treatment is sometimes termed “right of establishment”). Essentially, governments would be obligated to grant the foreign affiliates treatment under law and policy that was no less favourable than the treatment granted to similar business entities under domestic control. The obligation would be a rather natural extension of GATT Article III, which requires that once imported goods have cleared the frontier, they receive treatment under law and policy no less favourable than that accorded to similar products produced domestically.

  Governments would be allowed to register exceptions and “derogations” (temporary exceptions) to national treatment, but these would have to be listed (i.e., they would have to be “transparent”). One objective of negotiations would be for governments to pressure each other to minimize exceptions.

- Governments would be obligated to grant investors (and their investments) from every nation party to the agreement “most favoured nation” treatment, i.e., to subject no investor (or its investment) from one nation to discriminatory treatment as compared with the treatment granted to a similar investor (or investment) from another nation. In other words, all investors (and their investments) would be granted treatment no less favourable than that granted to investors (and their investments) from the “most favoured” nation.

  Again, certain exceptions might be allowed on a transparent basis.

- Nations would be obligated to meet certain standards of protection for foreign investors; for example, no investment of a foreign investor could be expropriated except for a purpose consistent with due process of law, on a non-discriminatory basis, and with prompt and just compensation. Nations would also be obligated to meet standards for normal business transactions (transfer of funds, sojournment of personnel who are not nationals of the country in which the investment is located, etc.).

- Governments would be obligated to curtail, or refrain altogether from applying, to foreign investors or their investments certain measures that have the effect of reducing market contestability. Included would be additional trade-related measures not now covered by the existing TRIMs Agreement (e.g., other performance requirements imposed on foreign investors or their investments as conditions of entry). Further, many of the existing subsidies and subsidy-like measures (“investment incentives”) used by governments to attract foreign direct investment might be curtailed or abolished.[9]

- The agreement would establish procedures for resolution of disputes arising out of differing interpretation of the obligations (including alleged violations by governments bound by the obligations), with "standing" granted to foreign investors as well as governments. (Under current WTO dispute settlement procedures, only member governments have standing to bring disputes before the Organization.) Care would have to be taken, however, to ensure that the procedures did not enable private parties to pursue frivolous cases intended merely to harass competitors. Such an outcome could discourage rather than enforce market contestability.

At present a number of agreements establish limited obligations on some governments along the lines itemized. These include over 900 bilateral investment treaties (BITs) and certain regional agreements such as Chapter 11 of the Treaty to Establish a North American Free Trade Area (NAFTA). This chapter in fact contains almost all of the provisions outlined above; it applies, of course, only to Canada, Mexico and the United States, and their investors and investments. The Asia Pacific Economic Co-operation forum (APEC) has endorsed a set of "Non-binding Investment Principles" (NBIP). These embody most of the provisions, often in rather ambiguous language, but as the name indicates, they are not binding upon nations; rather, they are seen as "principles to which the member nations [of APEC] might aspire." OECD nations are in the process of negotiating a Multilateral Investment Agreement (MAI), which would probably embody most if not all of the provisions outlined above. However, the agreement would include few nations outside the OECD, even though in principle non-OECD members are free to join the MAI. At meetings held in international organizations during 1996-97, numerous non-OECD nations expressed reluctance to join an agreement negotiated without their participation.

The result is something of a crazy quilt of international rules, which are often inconsistent with one another and with provisions of existing WTO agreements.[10] It would seem to make a great deal of sense to strike a single agreement within the WTO, one that would be consistent with other WTO obligations.

Conflicting Views

It remains to be seen whether the WTO will actually implement rules along these lines. The ministerial decision at Singapore to create a working party investigating trade and investment was in fact a compromise. On the one hand were national blocs (led by Canada and Japan, with support from the European Union and a number of developing nations) that wanted some work to proceed in this area; on the other hand were blocs that opposed anything of the sort.

Of the latter, one "bloc" consisted of the United States standing more or less alone. In fact it did not oppose formation of the working party; instead, it was against any effort to begin negotiations until after conclusion of the OECD MAI exercise. The Americans argued that, given the position of many WTO member nations, any agreement that might emerge from WTO negotiations at this time would embody "low" standards, while higher standards could be achieved within the OECD. By higher standards they presumably meant an unqualified statement of the principle of national treatment and relatively short lists of exceptions and derogations.[11]

Another bloc more actively opposed trade and investment rules in the WTO. Consisting of developing nations, the bloc argued that such an agreement would prevent its members from pursuing policies necessary for their economic development free from foreign domination. It is beyond the scope of this paper to discuss in depth the validity of their position. It should, however, be noted that many of the policies this bloc seems eager to preserve are very contrary to the spirit of contestability, e.g., the right to screen proposed investments by foreign interests against national development criteria. Such screening has at best a dubious record in fostering economic development by blocking supposedly bad investment. Nonetheless, certain developing countries continue to impose arbitrary, discriminatory policies on the local activities of foreign firms; that is, they do not grant national treatment or else impose arbitrary exceptions to national treatment.

This bloc was led by India, which (in proportion to its size) has one of the lowest rates of foreign direct investment of any nation (see UNCTAD, 1996, Appendix, Tables 5 and 6), and Malaysia, which has one of the highest rates. Further, the growth record of India has been dismal while that of Malaysia has been remarkable. In fact, in many ways Malaysia serves almost as a textbook example of how a developing nation might use FDI to its benefit. The country already has very open foreign investment policies that are quite far removed from the rhetoric often voiced by certain of its national leaders. Indeed, it is not clear how acceptance of the international obligations listed above would reduce the benefits of FDI to the Malaysian economy (or, as some Malaysians have claimed, impose risks to national autonomy and sovereignty). India, on the other hand, almost surely could benefit from a heavy dose of policy reform to make its markets function better. It is a nation rich in human capital (for example, it has produced more scientists and engineers holding advanced university degrees than all but a handful of other nations) and it surely has the potential for rapid growth on the model of neighbouring countries in East Asia. Greater contestability of markets would be a major goal of Indian reform, and a more open policy toward FDI would be an important means of achieving that goal.

Malaysia's opposition to a WTO agreement on FDI thus seems contrary to the policies that nation is pursuing, even if its opposition fits the position stated by certain of its leaders. For its part, India seems determined to defend policies that have simply frustrated its aspirations to become a major economic entity.

In the end, trade and investment survived as one of the WTO "new issues" but the ultimate outcome remains unclear.

4. THE ROLE OF COMPETITION POLICY IN FOSTERING INTERNATIONAL CONTESTABILITY

While views differ about the proper role of investment policy, still more controversial is the question of the role of competition policy at the multilateral level. Even strong advocates of market contestability differ on the question. They agree that competition policy has a role to play in maintaining market contestability at some level but they disagree over whether competition policy should be implemented at the international or national level.[12]

Even if there were a consensus on the desirability of multilateral competition policy, formidable obstacles block the path to its realization. First, in nations that have adopted competition policies and enforcement mechanisms (including the European Union), standards vary significantly from one jurisdiction to another. The variance is in both substantive and enforcement standards. Concerning enforcement, for example, in the United States certain violations of antitrust law are criminal offences while in Europe all violations are treated as non-criminal civil offences.[13] Concerning substantive matters, certain practices would be regarded as subject to a "rule of reason" in the United States (that is, their legality would depend on specific circumstances) but would be illegal *per se* in Europe. In particular, certain vertical arrangements and practices that are illegal in Europe are subject to "efficiency defences" in the United States (see Note 4). However, European law often grants sectoral exemptions to illegal practices while U.S. law does not.

Other differences concern the roles of competition enforcement agencies. The European Commission's Directorate General IV acts as both an investigatory/prosecutorial agency and, to some extent, a judicial agency. The United States has two such agencies, the Federal Trade Commission and the Antitrust Division of the Department of Justice, with roles limited to investigation and prosecution.[14] The judicial role in the United States is the responsibility of the court system itself. Private parties aggrieved by alleged violations of antitrust law can sue in U.S. courts without going through the enforcement agencies; in fact, private antitrust cases are an important aspect of U.S. competition policy. In Europe, there is no such private right of action. In Japan, private cases are possible but uncommon: more usually, parties with interests adversely affected by alleged violations of anti-monopolies law notify the Japanese Fair Trade Commission.

The differences in substantive and enforcement standards appear simply too great to allow harmonization, ruling this out as a way of internationalizing competition law.

Proposed Agreement on Trade-Related Antitrust Measures

However, while there is little international consensus on the set of practices that fall under the aegis of competition policy, one commentator sees greater consensus on a subset of restrictive business practices that most impede international contestability of markets (Fox, 1997). In other words, there might be a set of such practices on which nations could agree to international standards, even if they could not agree on overall competition standards.

Specifically, Fox proposes negotiation of a new WTO agreement that might be labelled "trade-related antitrust measures" or TRAMs, in the spirit of the existing agreements on Trade Related Investment Measures (TRIMs) and on Trade Related Aspects of Intellectual Property Rights (TRIPs). She sees the agreement as covering the following:

- cartels with boycotts;
- vertical arrangements that tend to exclude "outside" vendors or prevent new entrants from gaining access to established distribution channels; and
- monopolistic discriminations and exclusions.

While agreement on the first of these could be relatively straightforward, Fox herself acknowledges that the second and third are problematic. As noted earlier, vertical arrangements that create elements of exclusivity can also be efficiency-enhancing. This potential benefit provides the key argument used to justify (among other things) the existence of so-called "production *keiretsu*" in Japan. And again, as previously noted, differences exist in U.S. and European substantive policy on vertical arrangements: the United States generally allows efficiency defences for arrangements that might be prohibited in Europe. Other differences concern a firm's right to refuse to deal: the United States allows such refusal by monopolistic firms except under specific circumstances, while European policy holds that "dominant" firms have a duty not to discriminate between customers or refuse to deal.

TRAMs and Existing WTO Rules

How might such an agreement fit into existing WTO trade rules? One possibility would be to create a TRAMs code as an extension of the existing GATT Article XXIII. Concerning "nullification or impairment," Paragraph 1 of that article states:

> If any [member nation] should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> - the failure of another [member nation] to carry out its obligations under this Agreement, or
> - the application by another [member nation] of any measure, whether or not it conflicts with the provisions of this Agreement, or
> - the existence of any other situation,
>
> the [aggrieved member nation] may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other [member nation or nations] which it considers to be concerned. Any [member nation] thus approached shall give sympathetic consideration to the representations or proposals made to it.

Paragraph 2 of Article XXIII indicates that if no satisfactory adjustment is effected between the disputing nations, the issue can be brought before the member nations, that is, referred to the WTO dispute settlement procedures. Indeed, as the language of this article would seem to suggest, impairment of market access by a private business action that itself might be remedied by competition policy is tantamount to nullification or impairment of a benefit by a nation under point *(c)*, "the existence of any other situation" (in this case, the lost benefit would be increased exports resulting from the reduced border measures brought about by the GATT). The article would seem to allow the aggrieved nation (i.e., the nation suffering reduced exports) to make "written representations or proposals" to the putatively offending nation (where the market access barrier exists).

However, there are two flaws in this argument. First, in 1960 a GATT working party recommended against the application of Article XXIII(1)*(c)* as a means to address restrictive private business practices, arguing that application of the GATT was limited to governmental actions. This recommendation was adopted by the GATT contracting parties (in today's language, the WTO member nations) and hence is now considered part of WTO law. Second, WTO dispute settlement panels do not pass judgment on member governments' failure to enforce their own national laws and policies where these are not germane to specific WTO obligations.[15] Should a panel do so in the case of competition policy, it would be setting a new precedent, one that member governments would almost surely reject.

Accordingly, the way forward might be for the WTO member nations to consider revoking the 1960 working party recommendation and negotiating criteria under which Article XXIII(1)*(c)* could be invoked in situations involving private business practices. Adoption of Fox's proposals would be a sensible step in this direction.

Despite the difficulties nations might have with these proposals, it is thus worth trying to create a TRAMs agreement along the lines proposed. True, Fox's approach – concentrating on specific areas of competition policy that pertain most closely to market access problems – would lead negotiators into territory where different nations have different substantive standards. However, the excursion into difficult territory would be strictly limited: negotiators would not have to tackle all of competition law, but rather to harmonize only a portion of it. Further, at least one issue (cartels with boycott) holds the prospect of fairly ready agreement on standards. Indeed, an agreement on this issue alone would be worthwhile. As for the other two issues (vertical arrangements impeding market access, and discrimination and exclusion by monopolistic firms), negotiations would be more thorny. The contentious question would be the scope for allowing exceptions, including a general exception based on an efficiency defence. Agreement on common standards might or might not be achievable but, whatever the outcome, it would certainly be worth a try.

5. CONCLUSION

Among the most contentious issues at the WTO ministerial meeting in Singapore were trade and competition policy, and trade and investment policy. The decision then taken – to form working parties to study these issues and make recommendations to the WTO ministers at a future time – reflected a lack of consensus about what action, if any, is needed. But the same decisions also represented a consensus that the issues are important.

If the ultimate goal of trade policy is to make markets more internationally contestable, action on these issues is necessary. The ideas presented here, however, are not meant to represent the final word on how to act. Instead they are presented to spark a debate that could be very valuable. The 1996 decisions of the WTO ministers ensure that the debate will proceed.

The danger is that the very real need for debate might be used as an excuse for inaction. If this were to happen, it would be truly unfortunate. The completion of the Uruguay Round greatly improved the architecture of the world trading system. However, this very progress has revealed remaining gaps. As important steps toward creating a complete architecture, satisfactory agreements are needed on trade and investment policy and on trade and competition policy. The working parties created by the WTO ministers in Singapore represent opportunities for moving forward on these important issues. They are opportunities that must not be lost.

NOTES

1 For example, in a recent WTO dispute case, the United States claimed that certain Japanese laws and policies on photographic film, although in the form of domestic regulation, effectively discriminate against sales by foreign firms. The European Union has asked to be included as a third-party participant in the case. Legal counsel for the U.S. firm Kodak, whose complaint initiated the case, further maintain that private practices in Japan have restricted Kodak's ability to increase its market share. These practices cannot, however, be the basis for a WTO complaint. In turn, legal counsel for the firm Fuji, the dominant seller of film in Japan, argue that certain practices of Kodak in the United States have prevented Fuji from expanding U.S. sales of its product. For Kodak's account, see Dewey Ballantine, 1996; for Fuji's account, see Willkie, Farr and Gallagher, 1995, Ch. 6.

Restrictive private business practices can be addressed in bilateral consultations under WTO aegis. At the time of writing, the governments of the United States and Japan have not agreed to such consultations. At issue is whether the consultations will be limited to practices of Fuji in the Japanese market or extended to include practices of Kodak in the U.S. market.

2 It is argued that, for this to be strictly true, the costs must be "sunk" (i.e., non-recoverable) if the firm decides to pull out of the market.

3 This, of course, is unlikely if the network is a government-owned monopoly. For example, the U.S. Federal Communications Commission (FCC) believes that publicly owned telecommunications monopolies in a number of countries overcharge callers from abroad for access to local networks. The cost to U.S. callers is estimated at US$3 to US$4 billion dollars a year. See Petrazzini, 1996.

4 It should, however, be noted that competition policy in some nations allows an "efficiency defence" in some cases where market concentration is high or where what are classically termed "restrictive business practices" (RBP) result in some sort of exclusion. To establish an efficiency defence, the firms holding a large market share or practicing the RBP must demonstrate greater producer efficiency than would be the case if the market were less concentrated or the RBP did not exist; they must demonstrate as well that the efficiency results in greater output and lower prices to consumers than would otherwise prevail. In these situations, the efficiency itself can create an entry barrier and hence be at variance with the goal of increasing contestability. In a natural monopoly, as discussed in this text, high seller concentration results in efficiency. One dilemma of competition policy thus is assessing the correct trade-off between efficiency and contestability.

5 The goals of competition policy and trade policy are not identical, however. In some cases, there might be overriding reasons to prevent a market from being internationally contestable (e.g., national security) yet the goal of competition policy might still be to maintain a high degree of domestic contestability. Further, in some cases foreign firms might achieve such high degrees of efficiency as to exclude domestic firms, in which case it might be argued that international contestability of the market is inconsistent with domestic contestability.

6 No claim is made here that regulation is never necessary in any industry. In fact, most government regulation in most countries began with the recognition of some sort of market failure that could be addressed by governmental measures. Such situations persist. For example, it may be argued that markets characterized by a high degree of natural monopoly should be regulated. Further, in some markets regulation is warranted to enforce sanitation, safety or health standards. The challenge for regulators is to avoid over-regulating and, in particular, to be on their guard lest necessary regulations turn into measures that merely protect the interests of incumbent firms over those of potential new entrants without offering any benefit in the form of increased safety or health. In other words, regulators must guard against the suppression of market contestability while maintaining needed health and safety standards.

Changing circumstances can affect whether regulation is needed or desirable. A key point in this regard is that the trend toward increased globalization of many industries, if not impeded, itself leads to greater contestability in these industries. A danger is that a vicious circle might form in such cases; that is, regulation originally designed to correct market failure will in present circumstances reduce the international contestability of the relevant sector and hence, on the surface, will provide a rationale for continued regulation.

7 The term "globalization," when applied to a market or an industry, is somewhat vaguely defined but the essence is that demand in any national market in such an industry can be met by producers based anywhere in the world. Demand can be met by imports, by local production supported by FDI or by some combination of the two. Increasingly, "global" firms combine trade and local production as means of supplying markets all over the world (Graham, 1996).

8 In most cases, the investment would be a local business under the control of a foreign-owned multinational firm.

9 Under the existing WTO Agreement on Subsidies and Countervailing Measures, subsidies to foreign investors used in conjunction with prohibited TRIMs are themselves prohibited. According to legal experts we have consulted, a wide variety of investment incentives might be challengeable under this agreement. However, for one reason or another governments have been unwilling to bring cases before the WTO. A future agreement might therefore serve to clarify the scope of the existing agreement (rather than create an entirely new set of rules) by specifying exactly what types of subsidies or subsidy-like measures granted to foreign investors should be considered as either prohibited or actionable under existing rules.

10 Various aspects of the inconsistencies are discussed in Graham (1996) and Graham and Sauvé (1996). The latter in particular discusses possible inconsistencies with WTO obligations as a result of accession of nations to a future OECD MAI.

11 However, even assuming that higher standards can be agreed upon within the OECD group of nations than within the WTO membership at large, it is not entirely clear why a plurilateral agreement might not be sought at the WTO (one to which only a sub-group of member nations obligated themselves). Plurilateral agreements currently do exist within the WTO, e.g., the Agreement on Government Procurement. Such an agreement might be more readily made consistent with other WTO agreements than one struck outside the WTO umbrella. In particular, a WTO plurilateral agreement might make use of the existing Dispute Settlement Understanding, appropriately modified so as to create a means by which firms would have limited standing to bring disputes before the WTO.

12 For example, advocates of international contestability generally agree that all nations should have adequately enforced competition laws.

13 The non-criminal treatment applies at both national and EU-wide levels. Competition law at the EU-wide level is governed by Treaty of Rome articles 85, 86, 92, 93 and 97, and by the Mergers Regulation. The European Commission's Directorate General IV enforces competition law at this level and has extraordinary powers not possessed by other EU agencies. See Vernon and Nicholaidis, 1997, for an analysis of EU competition policy, and Fox and Pitofsky, 1997, for a comparison of U.S. and EU law and policy.

14 However, the ability of these agencies to conclude "consent decrees" gives them some quasi-judicial powers.

15 A WTO panel would, of course, consider failure of a government to enforce its own law where this law reflected a WTO obligation.

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