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**US-EU Cooperation in Competition
Policy in Asia: Trade Policy
at the Newest Frontier**

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The rules-based world trading system of the WTO rests on an assumption that is nowhere written into its charter—that WTO members possess functioning markets. For what does market access mean, gained through tariff reduction and elimination, through the removal of quotas, and through the series of rules preventing discrimination against foreign products or services, if there is no functioning internal market for the sale of those products and services? Of course, it is recognized that there may be segments of the market, even whole sectors, where competition is limited or even non-existent—such as the government monopolies that sell transportation services or a highly regulated product—in the past alcohol or tobacco. This phenomenon could not be ignored in the telecom services agreement, which recognizes that there is a direct relationship between the presence of state monopolization of telecommunications services and the possibility of market access. But for trade in the almost all products, the implicit and strongly held unspoken assumption (which unfortunately has no consistent basis in real experience), is that market forces will be allowed to determine competitive outcomes.

There is a growing but still vague uneasiness—an as yet not officially documented concern—that this great underlying but tacit principle of the world trading system, that competition be allowed to determine the sale of goods across borders, is not in fact being given universal effect. The notion is gradually taking hold in trade ministries that competition policy is relevant to trade commitments, at the same time that competition authorities are becoming aware that actions beyond the borders of their traditional jurisdiction effect the operation of the markets for which they have responsibility. In short, private restraints of trade can deprive a nation's trade negotiators of the benefit of the bargains they strike every bit as much as another government's trade restrictive measures. And in a global market, foreclosure of export markets has a direct effect on the competitive equation at home.

Why is there so much tentativeness about dealing with what would seem painfully obvious problems found in the facts revealed piecemeal over the last few decades, namely that private restrictions have shaped trade flows in major sectors—in semiconductors, steel, paper, glass, soda ash, heavy electrical generating equipment, and a host of other products?¹ There are a variety of causes for this seeing denseness or at least inattention by policy makers:

First, the focus of the GATT lay elsewhere, and the task that it had undertaken was itself monumental. What was achieved over the course of 50 years was a slow, but irreversible progression toward removal of government-imposed barriers to trade, particularly at the border.

Second, there had been an attempt at addressing restrictive business practices at the outset, and this nearly proved fatal to the fledgling international trade liberalization

¹ See *The Limits of the GATT: Private Practices in Restraint of Trade* (Coalition for Open Trade 1992); *Dealing With Japan* (Coalition for Open Trade 1994).

effort. It was a central cause of the single largest misstep in the construction of the post World War II economic system—the failure to adopt the Havana Charter for an International Trade Organization in the late 1940s. The point at which national sovereignty would not yield was an attempt to introduce international regulation of private conduct in restraint of trade.²

Third, trade negotiators are generally simply ignorant of most foreign private restrictive business practices. There has been no systematic attempt to do research, public or private, into private anti-competitive behavior. Government trade officials take official notice, by their mandate, only of official acts (with the sole exception of dumping).

Lastly, there is a bureaucratic barrier. Just as trade ministers are allowed to concern themselves with tariffs (however small) but are barred from examining the appropriateness of international currency relationships, which are defined to be strictly the preserve of finance ministers, so too trade ministers are not allowed to think about enforcement of competition policy, although they are allowed to deal with some of the effects of cartel activity, such as through antidumping measures.

The time for examination of anti-competitive practices has now arrived, however. Just as modern medicine has been able to move into treatment of heart disease and cancer because influenza, typhus and small pox have been defeated, so too will trade negotiators—having succeeded largely in wiping out border measures—turn inexorably to addressing internal market trade barriers, whether based on environmental measures (e.g. the U.S. CAFE standards), public health measures (e.g. EU beef hormones), or a failure of competition. This is the new frontier of trade policy.

In the following sections of this paper, we examine in turn, the degree to which Asia presents special challenges to international competition and trade policy, the relevant history of U.S.-European cooperation in these fields, and a comparison of American and European approaches to competition policy. We then propose an initiative that European and American trade and competition policy makers could endorse, given their common interests and divergent approaches

² The U.S. business community generally opposed adoption of the Havana Charter. One reason was the fact that the Charter left much of the responsibility for enforcement of the ban on restrictive private practices to the discretion of national governments, fostering "the suspicion that an active Anti-Trust Division in the United States would be diligent in the prosecution of cases, while in Western Europe and elsewhere general tolerance of cartels and industrial agreements would result in the acceptance of quite a different standard of business behavior. William Diebold, Jr., *The End of the ITO* (Princeton: Princeton Essays in International Finance No. 16, 1952), p. 18.

Issues for Consideration in Building Greater Transatlantic Cooperation

Speaker of the House Newt Gingrich was asked earlier this year at a press conference in Tokyo³ whether he was concerned about access to the Japanese market. He replied, amiably enough, that clearly Japan had perfected very sophisticated forms of protectionism, a fact that it had taken Americans thirty years to understand. He stated unequivocally that this would not deter the United States from continuing to press resolutely for market access.

The Japanese protection system has been the subject of much bilateral palaver, in Reagan era MOSS (market oriented sector selective) talks,⁴ the Bush era SII (structural impediments initiative),⁵ and the Framework talks⁶ of the Clinton Administration. There is an increasing awareness of—although no easy prescription for—dealing with Japan's organization of its market to protect against imports. Japan's use of "liberalization countermeasures"—its own term (*see note 9 infra, generally for a description of the uses of the Japanese actions known as "taisaku"; for a description of their effects, also see Dan Fenno Henderson, Foreign Enterprise in Japan, Laws and Policies, Chapel Hill: University of North Carolina Press, 1973), 254.*)—to bring about an illiberal market structure, including the re-arrangement of businesses to diminish competition, is unique in the world trading system.

The vertical *keiretsu*-nization which blocks market access has only recently become the focus of American trade negotiators. This has occurred most prominently in the Japan photographic film and paper market access case, brought to the U.S. government by the Eastman Kodak Company. (*see Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photography Paper*, Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974, as amended, filed with USTR in May 1995, available at www.dbtrade.com). This was not the first time that the U.S. government had learned of cartel activity affecting imports into Japan. There had been American efforts to liberalize other Japanese sectors afflicted with private restraints of trade—most notably in semiconductors, soda ash, paper, and automobile parts. But in none of these cases had the research been done to understand and demonstrate in so much detail how a market can be closed informally and indirectly by concerted government actions which adjust private behavior.

The portion of the Japan film case dealing with government measures (as opposed

³ Joseph Coleman, "Gingrich urges Japan to reform; China responds to his comments on Taiwan," *The Associated Press*, (Apr. 1, 1997).

⁴ The United States General Accounting Office U.S. - Japan trade evaluation of the Market-Oriented Sector Selective talks: report to the Honorable Lloyd M. Bentsen, U.S. Senate (1988)

⁵ Structural Impediments Initiative (SII) review: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance, 102nd Cong. (1992).

⁶ United States Trade Representative, 1994 National Trade Estimate Report on FOREIGN TRADE BARRIERS 141 (1994)

to private restraints) has now been brought before a WTO panel under that organization's dispute settlement provisions.⁷ The private practices, equally egregious and effective in terms of blocking market access for foreign photographic film and paper, were to be made the subject of a procedure which has been in the GATT system since 1960, but never invoked.⁸ This is an intergovernmental consultative mechanism designed to review complaints about private restraints of trade, and implicitly, the failure of a government to enforce its competition laws for the benefit of competition from abroad. In domestic U.S. legal terms, this part of the complaint would fall most naturally under the heading of a foreign government's "toleration of anti-competitive practices." These consultations, although requested by the United States, never took place due to the refusal of the Government of Japan to meet under the terms of the 1960 GATT Contracting Parties' decision.

A third initiative in the area of private restraints is the direction issued by the U.S. Trade Representative to Eastman Kodak to bring anti-competitive private conduct formally to the attention of the appropriate Japanese authorities—in this matter primarily the Japan Fair Trade Commission. This action was taken pursuant to the direction of the USTR contained in that officials decision of June 13, 1996, covering all of the actions described above.

It is instructive that these measures—the WTO case, the resort to the Japan Fair Trade Commission (JFTC), and the invocation of the 1960 GATT consultative mechanism—were being taken a full fifty years after the adoption by Japan of its Antimonopoly Law. Antitrust law in Japan, dismissed by Western observers as well-meaning but weak, it began to be apparent to U.S. trade negotiators, did have effects, and these were, to their surprise, acutely pernicious. The Antimonopoly Law has in fact often been used, not as the principal guarantor of competition, but as a tool for protecting and promoting domestic producers.⁹ With the full realization of the failure of competition policy in Japan to promote the objectives of the world trading system, competition policy may have finally and belatedly become an important element of U.S. trade policy toward Japan.

But if Japan is an old story, however poorly understood, there is much of Asia that is very much a new story and a new challenge. With the high yen (*endaka*), an aging population, and an industrial policy apparatus that appears far less relevant to Japan's newer challenges, Japan's policy makers turned from sparring with the United States to bringing Japan's state developmental approach to the industrializing economies of Southeast and Northern Asia. Kozo Yamamura and Walter Hatch describe this process and its effects very

⁷ Japan -- *Measures Affecting Consumer Photographic Film and Paper*, WTO (1997).

⁸ GATT, Decision of 18 November 1960.

⁹ See Japan -- *Measures Affecting Consumer Photographic Film and Paper*, *op. cit.*, United States Government First Submission (Feb. 20, 1997), pp. 43-47, 94-145; Japan -- *Measures Affecting Consumer Photographic Film and Paper*, *op. cit.*, United States Government Second Submission (May 20, 1997), pp. 30-32, 116-20.

well in a February 1997 National Bureau of Asian Research monograph heralding "A Looming Entry Barrier: Japan's Production Networks in Asia."¹⁰ The authors review the progress Japan is making in what has been called Japan's new "regional industrial policy." Indeed, Tokyo foresees vertical *keiretsu*-nization of whole sectors of the economies of Japan's neighbors—Indonesia, Thailand, and Malaysia, among others. In sum, Yamamura and Hatch conclude that Japanese production networks represent an Asia-wide threat to free and open trade because they pressure their suppliers and distributors to do business only with them and shun contacts with firms not belonging to these networks.¹¹

Of course, there is more to the issue of private restraints of trade in Asia than Japanese industrial policy, the exportation of that policy, or its emulation by Japan's Asian neighbors. In Asia, more than in the West, relationships matter. (Yamamura and Hatch distinguish the vertical production networks of the Japanese from the Chinese diaspora—they do not see the overseas Chinese as concentrating their energies on manufacturing.) Relationships can go beyond anything that can be dismissed as a "cultural difference," and can take particularly offensive forms, such as large-scale corruption (while not unknown in Western history, it does not seem to be a problem of similar dimensions in Western OECD countries today). Where personal relationships are more important to competitive outcomes than market factors, anyone who believes in an open international trading system must of necessity be seriously concerned.

In addition to the problem of purely private anti-competitive behavior, there is a hybrid form of potentially non market-driven commercial activity which also requires attention. There is a class of actors, particularly but not exclusively located in Asia, which hew more closely to government policy than would be expected of private firms. This category consists of entities that are currently government-owned and commercial organizations which were until recently government-owned. The largest and newest examples that cannot help but be problematic is that of state-ownership in the People's Republic of China. If Korea can launch an import substitution program through the government's jawboning of its major companies, a matter of serious concern to its trading partners, how much more likely is it that the Government of China would be able to control the purchasing decisions of companies which it owns? WTO membership discussions have not dealt with this issue. But it must be a central issue for WTO accession for this nonmarket economy.

A variant on the question of non-commercial behavior by major actors in Asian economies is the case of the recently privatized government monopoly. Does NTT or Korea Telecom, major national institutions until recently, on becoming a private entity, begin basing its conduct in the marketplace solely on market factors? How quickly will real privatization occur?

¹⁰ Kozo Yamamura, Walter Hatch, "A Looming Entry Barrier: Japan's Production Networks in Asia," 8 The National Bureau of Asian Research No. 1 (Feb. 1997).

¹¹ Ibid; See also Kozo Yamamura, Walter Hatch, "Asia in Japan's Embrace, Building a Regional Production Alliance," (Cambridge University Press, 1996).

Add to this picture of an environment characterized by strong developmental priorities on the part of governments and recently privatized or still government-owned entities, the absence of a tradition of vigorous competition policy enforcement. In short, consider circumstances in which government policy is more likely to give primacy to promotion of producers rather than consumer welfare, and it must be concluded that a major set of problems for trade and competition policy have been created. As might be expected, the systematic documentation and data which are available with respect to most formal government barriers is absent in this realm of shadowy "private" barriers. The first challenge that must be overcome in dealing with the trade-related problems of private restraints of trade is a singular lack of information.

U.S. - European Cooperation: The Recent Historical Record

The triumphs of multilateral economic liberalization of the last fifty years are the product of a unique partnership between Europe and the United States. There is not a major round of trade negotiations in memory, including the construction of the World Trade Organization, which has not been the product of this collaboration. That the issue of competition policy has come to the fore is not, however, a result of a coordinated transatlantic approach. Both central figures of international trading system concluded independently that the time had come for exploration of the subject of anti-competitive conduct in light of appropriate rules governing international trade. On the European side, this began as a singularly personal initiative of Sir Leon Brittan, Vice President of the European Union for External Relations. On the U.S. side, senior U.S. trade officials recognized that this was the next logical field to be examined for possible trade liberalization.

A few saw the trade and competition policy nexus years ago. The importance of competition policy was first informally noted bilaterally in a conversation in February 1975 by Deputy U.S. Special Trade Representative Harold Malmgren with European Community Director General for External Relations Sir Roy Denman. The issue, however, was still too undeveloped, and the tasks then at hand too large (e.g. reform of the Common Agricultural Policy) and too absorbing of available energies, to have done more at the time than to note that this was a future issue. After all, the GATT preparatory work for reaching a code on industrial product standards had been begun seven years earlier in 1968, and negotiations were concluded five years later in April 1979. The negotiators were not ready to add to their common agenda for the Tokyo Round competition policy, with its great unknowns and surpassing complexities. In fact, there was so little understanding of the subject, that it was again not added to the Uruguay Round work program launched in 1986 and concluded in December 1993.

While the multilateral trade negotiations excluded the subject of private restraints of trade, this area was often the central focus of bilateral negotiations. These occurred most frequently and most prominently with the emergence of Japan as a major force in

international trade. The European Community and the United States pursued separate approaches to Japan's illiberal trading regime. The EC's highest profile initiative was its aborted GATT Article XXIII case in 1983, an attack planned by Sir Roy Denman. The United States played the same role in this matter as it did in the Franco-British invasion of Suez in 1956: lack of American support scuttled the enterprise. After that, the United States continued on a bilateral track, punctuated by occasional section 301 cases, with attempts to deal with practices generically in various fora and negotiating "baskets." The European approach was to hector the United States for its unilateralism and exclusive bilateralism, while attempting to obtain largely through diplomacy, as opposed to high-profile threats, trade benefits for itself – sometimes in the form of Japanese export restraints (as on autos) instead of market access. The U.S. viewed the European approach as being tantamount to "holding America's coat while we got bloodied in battle", a cry heard most recently from Mickey Kantor, first Clinton Administration USTR. The European view was that it simply made good sense to profit from America's combativeness, and that it might obtain more through its softer approach.

Separately, both the U.S. and the EU have supported Japan's leaders' calls for deregulation of the Japanese economy, as being in the best interests not only of Japan but of her trading partners. U.S. and EU messages on this point have become consistently complementary recently. The presence of the WTO has provided a greater level of comfort, with the U.S. backing the EU in its claims against Japan for discriminatory taxation of alcoholic beverages, and the EU backing the U.S. claim against Japan to open its market for photographic film and paper products. EU officials have become somewhat more understanding of the resort by the United States of bilateral negotiations with Japan on issues that fall outside the scope of WTO obligations, as long as those matters which are covered by the WTO are submitted to it. Correspondingly, the United States has become more sensitive to including the EU as an equal participant in talks with Japan where Europe has had a parallel interest. In response to domestic pressures, and to a lesser degree (so far) to foreign pressure, Japanese officials increasingly talk encouragingly of plans for deregulation of the Japanese economy. Although the size and timing of significant progress is not predictable, there is some Japanese movement, at least, rhetorically, in the right direction—particularly in the area of financial services.

With the exception of two WTO cases (Japan alcoholic beverages and Japan photographic film and paper), U.S.-EU agreement has come less on operational questions than on a philosophical plane. The United States and Europe are cooperating on several fronts at the nexus of competition and trade policies. They are somewhat allied in their interest in pursuing the issue in the OECD and in the WTO Committee on Trade and Competition policy. If this statement is qualified, it is because both wish to pursue the issue of making rules in this area but neither has a clear idea of what the rules might be, nor is there even a consensus at this stage as to whether rule-making is the appropriate objective. The Europeans have groped a bit further ahead than the Americans, and would appear to favor exploring an international set of minimum standards. Americans have not yet reached that conclusion.

The muddle as to what should be done has led to an agreement by the WTO Committee participants on a very curious "first step": The WTO Secretariat was to catalogue which of the WTO/GATT articles have a relationship to competition. Regrettably, this is tantamount to peering through the wrong end of the telescope. What is needed is a study of how failures of competition policy affect world trade, not how GATT rules which attempt to deal with trade problems might affect competition.

Competition policy enthusiasts will wonder why nothing in this section, which is about U.S.-EU cooperation in trade and competition policy, has addressed the progress made toward utilization of "positive comity"—the ability of competition authorities of one of the parties to request an investigation by their sister authorities in the other signatory. There is in fact a September 23, 1991 Agreement between the Government of the United States of America and the European Communities Regarding the Application of Their Competition Laws ("1991 Agreement"), and a draft 1997 pact updating the 1991 Agreement. The Agreement is not by its terms aimed at pursuing market opening initiatives, and has not in fact been used for this purpose.¹² Moreover, there is nothing in the 1991 Agreement or the 1997 update regarding cooperation vis-a-vis access to the markets of third countries, in this instance in Asia. It is about coordination, cooperation and avoidance of conflicts in competition law enforcement within the traditional sphere of activities of the U.S. and EU antitrust/competition enforcement authorities.

European and American Approaches to Antitrust Policy: Barriers to Cooperation

The differences in the competition regimes of the European Union and the United States are fairly substantial. The U.S. competition agencies, reflecting their common law tradition, enforce the antitrust laws through adjudicatory showdowns that are expected to resolve a problem conclusively with the application of remedies such as fines, jail terms, divestiture or consent decrees. As Judge Bork once put it, antitrust is administered "in the good old American tradition of the sheriff of a frontier town.... [who] walked the main street and every so often pistol-whipped a few people."¹³ U.S. antitrust doctrine exalts competition as an end in itself, heavily basing its current legal analysis on the economic thinking of the "Chicago School" which emphasizes maximizing consumer welfare, largely defined in terms of price.

European enforcement may also result in judgements and fines, but is characterized by a closer ongoing administrative supervision of problematic firms and sectors by the Commission. EU competition policy objectives are far more sweeping, and seek not only to enhance consumer welfare, but to foster European integration, promote economic growth, encourage the "harmonious development of economic activities," and create and

¹² Some would argue that the Pilkington Glass case was in part about market access, but it was more about consumer benefits and licensing rules in Europe than access for foreign producers to the European market.

¹³ Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself* (New York and Toronto: The Free Press, 1978), p. 6.

preserve a common market. Community competition law countenances some forms of anticompetitive behavior that would be considered illegal *per se* (e.g., illegal regardless of the justification offered) in the U.S. The EU will sanction such conduct where it is seen to advance other objectives, such as promoting inter-firm linkages between Member States or the need to counter a severe recession. Conversely, within the industrialized world, Community law is uniquely hostile to vertical restraints, which are perceived as a threat to the common market.¹⁴ There are substantial differences in U.S. and EU policies with respect to abuse of a dominant position, merger analysis, and the criminalization of anticompetitive acts.

The most serious potential obstacles to U.S.-EU cooperation are not found in the differences in enforcement practice or substantive law, but in the legacy of the past and differing systems of underlying values, of which the two legal regimes are merely reflections.

American society has always been uniquely suspicious of large concentrations of economic power, which have been viewed as a threat to democratic institutions and individual liberty. After the Civil War, the rapid rise of big business trusts was viewed with considerable alarm, and gave rise to a vast popular "Anti-Trust" movement, mounted with the same revivalist style found in the temperance, universal suffrage, grange and other popular movements of the time:

[C]orporations were big men who were almost as ruthless as criminals... Thus in those days anyone who attacked the "Trusts" could achieve the same public worship as a minister of the gospel who had the energy to attack vice.¹⁵

Beginning in 1890, intense public agitation led to the enactment of a series of "Anti-Trust" laws. While enforcement of these laws was erratic for a generation, public antipathy to "big business" eventually caused the government to establish a large and effective antitrust

¹⁴ In 1997 the EU released a Green Paper on vertical restraints in which "the Commission recognizes that its policy of consistent hostility towards all forms of vertical restraint, while justified in terms of seeking to create a single market, does not reflect current economic thinking and is out of step with the approach of most Member States and third countries." *Common Market Reporter* (Feb. 13, 1997), p. 5.

¹⁵ Thurman W. Arnold, *The Folklore of Capitalism*, (New Haven: Yale University Press, 1937), pp.210-211. One contemporary observer who attended the 1892 national convention of the Populist Party in Omaha and listened to the furious attacks on industrial combinations made this observation: "No intelligent man could listen to the wild and frenzied assaults upon the existing order of things, without a feeling of great alarm at the extent and intensity of the social lunacy here displayed...When that furious and hysterical arraignment of the present timers, that intolerant intermingling of Jeremiah and Bellamy, the platform was adopted, the cheers and yells which rose like a tornado from four thousand throats and raged without cessation for the thirty-four minutes, during which women shrieked and wept, men embraced and kissed their neighbors, locked arms, marched back and forth, and leaped upon tables and chairs in ecstasy of their delirium--this dramatic and historical scene must have told every quiet, thoughtful witness that there was something at the back of all this turmoil more than the failure of crops or the scarcity of ready cash." Cited by Joseph Dorfman in *Thorsten Veblen and His America*, pp. 88-89.

enforcement regime. The messianic currents which infused the American Anti-Trust movement were still running strong when American trust-busters arrived in Occupied Europe in 1946 to attack the German industrial combinations that were seen as a major contributing cause of the war.

Europe offered seemingly poor soil for antitrust. It had always been ambivalent toward American crusades, and antitrust proved no exception. Big industrial concentrations were not regarded with the same distrust as in America, and Germany had given rise to a "combination" movement, roughly contemporaneous with the American antitrust movement, that appeared to be its direct antithesis:

*Cartels were generally recognized as a necessity, their advantages welcomed and unfair practices only were considered as object for legislation.*¹⁶

Cartels and *konzerne* (large bank-led industrial groups) were viewed as institutions capable of softening the brutal extremes of modern capitalism, fostering the development and adoption of modern technologies; cartels actually published magazines and maintained museums to preserve their lore and traditions.¹⁷ Agreements in restraint of trade were not only permitted, but legally enforceable in some European court systems until 1945. Indeed, German industrialists' use of cartel arrangements to recover from the economic dislocations that had followed the Versailles Treaty was the subject of widespread admiration and emulation.¹⁸

In global terms, until World War II, the European model of industrial organization, featuring a considerable degree of "self-regulation" by industry, was more nearly the norm than the American system with its antitrust rules.¹⁹ National cartels existed in every major European country, and these linked to form regional and global cartels. By 1940 over two-thirds of the goods moving in world trade were regulated by international syndicates.

¹⁶ Rudolph K. Michels, *Cartels, Combines and Trusts in Post-war Germany*, (New York: AMS Press, 1928), p.23.

¹⁷ *Kartell-Rundschau*.

¹⁸ Robert A. Brady, *The Rationalization Movement in German Industry: A Study on the Evolution of Economic Planning*, (Berkeley: University of California Press, 1933).

¹⁹ Early in the Twentieth Century there was a tendency to regard cartels as a phenomenon unique to Germany and Austria, while in fact such practices were common elsewhere in Europe. A British Government Committee commented in 1919 that "there is at the present time in every important branch of industry in the United Kingdom an increasing tendency to the formation of Trade Associations and Combinations, having for their purpose the restricting of competition and the control of prices." Ministry of Reconstruction, Standing Committee on Trusts, *Report of the Committee on Trusts*, Cmd. 9236 (1919), p. 2. In March 1939, at a meeting in Düsseldorf between representatives of British and German industry, agreement was reached on a comprehensive joint plan which would, in effect, promote the cartelization of the world economy. The outbreak of the Second World War a few months later frustrated this grand design. Agreement between the Federation of British Industries and Reichsgruppe Industrie, reproduced in George W. Stocking and Myron W. Watkins, *Cartels or Competition? The Economics of International Controls by Business Government* (New York: The Twentieth Century Fund, 1948), pp. 61-63.

Cartels were widely seen as a way to mitigate international conflict and promote European integration.²⁰ Significantly for the future, the Japanese Government, after studying the German industrial system with approval, enacted legislation to encourage its industries to form cartels on the German model, and the *zaibatsu*, large financial combines, grew to dominate the nation's key industries.²¹ A British steel executive speaking at an industry conference in 1927 on the subject of Europe's movement towards cartelization "found it extraordinary that public opinion in the United States, 'still lagged behind the view held in Europe'" to the effect that cartels were beneficial.²² Yet even in the United States, European cartel-based organization proved very influential, and elements of it were incorporated into Franklin Roosevelt's short-lived National Recovery Act program.²³

World War II broke out at the moment when advocates of a vigorous antitrust policy had gained the upper hand in the Roosevelt administration, a success which led to the vast expansion of the Department of Justice Antitrust Division under Thurman Arnold and a systematic legal assault on business concentrations.²⁴ As it happened, when war came, the apparent close nexus between large German and Japanese industrial combines and the enemy regimes in those countries served to reinforce the antitrusters' argument that such syndicates were inherently evil.²⁵ In occupied Germany, the de-cartelization effort was led by James S. Martin, a veteran of Thurman Arnold Antitrust Division, who advocated a "U.S.-directed campaign aimed at rooting out German-style organized capitalism and replacing it with the idealized version of the American free-market system envisaged by

²⁰ See Ervin Hexner, *The International Steel Cartel* (Chapel Hill: University of North Carolina, 1943), pp. 217-35.

²¹ In 1931 a Japanese bureaucrat, Nobosuke Kishi (later Prime Minister) reported back on a study mission to Germany on the industrial "rationalization" movement under way in that country. The German emphasis on government-sponsored cartels was incorporated in Japan's *Important Industries Control Law* of 1931. This law provided for industries to establish their own rules with respect to prices, levels of production, limits on new entrants and marketing controls. These principles were incorporated in many subsequent Japanese laws and policies both before and after World War II. See generally Chalmers Johnson, *MITI and the Japanese Miracle: the Growth of Industrial Policy, 1925-75* (Stanford: Stanford University Press, 1982), pp. 104-115.

²² Sir William Larke, cited in Ervin Hexner, *The International Steel Cartel* (Chapel Hill: University of North Carolina, 1943), p. 58.

²³ See Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (Princeton: Princeton University Press, 1969).

²⁴ Arnold took over the Antitrust Division in March 1938. The Division's enforcement effort had long been limited to "peanut cases" by a lack of resources and clearly defined goals. Arnold secured additional funds, nearly doubled the Division's staff, developed a broad range of new legal strategies, and launched a series of new cases against large business combinations. His approach, as he explained, was to "hit hard, hit everywhere and hit them all at once." Between 1939 and 1941 the Antitrust Division filed 180 cases, and by the time he left the Division in 1943, nearly half of all the proceedings initiated under Sherman Act since its inception had occurred under his tenure. Hawley, op. cit. (1966), pp. 420-40.

²⁵ Arnold rallied considerable public support for the view that antitrust should be used to prevent "economic sabotage of defense industries by foreign powers," e.g., manipulations of German combines like I.G. Farben and Krupp. Hawley, op. cit. (1966) p. 441.

Thomas Jefferson.²⁶ Martin had spent the war years investigating international cartels, and concluded that

*the "real enemy" was something "much bigger than the popular picture of hobnailed Nazis with guns and tanks and, more terrifying yet, something almost supernaturally "could survive defeat because it did not need or use military weapons." ... "The real enemy" was a web of secret international agreements spun by monopolists of all countries, and Germany was its source.*²⁷

The Antitrust Division launched a series of extraterritorial actions against combinations outside the U.S. which had anti-competitive effects in the U.S. market.

Perhaps not surprisingly, these mid-century encounters between zealous U.S. trust-busters and a Europe with vastly different traditions did not result in the wholesale European absorption of American values. German businessmen were appalled at Occupation policies that "dismantled hundreds of viable plants, disrupted supply networks, and broke many of the links between the agricultural and industrial sectors."²⁸ The shattered and destitute condition of European industry, and the threat posed by communism, made the wisdom of a sustained crusade to destroy industrial combinations that might provide the basis for European recovery seem dubious. Martin's ambitious program to break up the cartels was thwarted not only by British opposition but by growing American concern over the need to rehabilitate German industry as rapidly as possible. Similarly, the extraterritorial application of U.S. antitrust law ran into a wall of opposition.²⁹

Yet American ideas left their mark. Jean Monnet and other architects of the postwar European order sought to introduce U.S. antitrust concepts into the effort to create an integrated Europe. This was partly due to a belief in the value of competition but also because of the perceived geopolitical need for institutional checks on the "monolithic structure of the Ruhr," the industrial colossus associated in European minds with German expansionism. The European economic institutions which eventually emerged from the Occupation were something of a hybrid, borrowing from American antitrust thinking but

²⁶ John Gillingham, *Coal, Steel and the Rebirth of Europe, 1945-55* (Cambridge: Cambridge University Press, 1991), p. 109.

²⁷ *Ibid.* at 111.

²⁸ Christopher S. Allen, "The Underdevelopment of Keynesianism in the Federal Republic of Germany," in Peter Hull, *The Political Power of Economic Ideas: Keynesianism Across Nations* (Princeton: Princeton University Press, 1989), p. 266; see also Gerard Brauntal, *The Federation of German Business in Politics* (Cornell: Ithaca, 1965).

²⁹ "To many nations, U.S. extraterritorial enforcement efforts appeared less like legitimate exports than like a military assault. Their response was the antithesis of co-operation, with numerous countries enacting blocking statutes that prevented their nationals from co-operating in American antitrust investigations, and clawback statutes that allowed foreign nationals to recoup the treble damages that they were compelled to pay in private actions in U.S. courts." Roscoe B. Starek, "International Aspects of Antitrust Enforcement," in *19 World Competition* 29, 30 (March 1996).

maintaining elements of the cartel-based systems of the prewar era.

The Schuman Plan, which established the European Coal and Steel Community, contained prohibitions on anticompetitive agreements and other provisions, reflecting a desire to promote a more laissez-faire commercial environment, balanced by other sections giving the High Authority of the ECSC powers to establish and administer cartels in times of recession. The Plan did not seek to extirpate cartels under all circumstances, but to ensure that when they were found necessary, they would be subordinated to a European bureaucracy. These same institutional tensions—between competition and cartelization and between public and private administration of such cartels as were found necessary—were carried forward in both the Treaty of Rome (which established the EEC) and the legal system of the young Federal Republic of Germany.³⁰

These dichotomies animate European competition policy today. A liberal competition Commissioner, Sir Leon Brittan, heavily stressed the procompetitive provisions of the Treaty of Rome, while his successor, Karel Van Miert, has taken care to ensure that the noncompetition or "dirigiste" elements of the Treaty's competition provision are given greater emphasis than was the case under his predecessor.³¹ Similarly, when the Community's steel industry was engulfed in a deep recession in 1976-77, the Commission's principal concern was not to suppress the cartel that was being formed under the leadership of the German mills, but to ensure that the cartel was administered by the Brussels authorities rather than industrialists of the Ruhr.³²

³⁰ See, generally, Peter J. Katzenstein, *Policy and Politics in West Germany: The Growth of a Semisovereign State* (Philadelphia: Temple University Press, 1987); David B. Audretsch, "Legalized Cartels in West Germany," *The Antitrust Bulletin* (Fall 1989); "Cartel Germany: Competition in our Ranks is Being Curbed," *Der Spiegel* (Aug. 26, 1991).

³¹ In 1993, Van Miert commented with respect to the depressed European steel market, "[Y]ou cannot just say I will continue to apply the [competition] rules as strictly as before... [We] are looking for another solution that could be more successful in driving prices back to their normal [e.g. higher] level." Interview in *De Morgen* (Brussels, Feb. 13, 1993). As Van Miert articulated the European perspective on competition policy, "The aims of the European Community's competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States closer together, etc. To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power. If competition policy is to reach these various goals, decisions must be made in a pragmatic fashion, bearing in mind the context in which they are to be made: the realization of the internal market, the globalization of markets, economic crisis, technological development, the ratification of the Maastricht Treaty, etc." "Frontier Free Europe," (May 5, 1993), reproduced in Per Jepsen and Robert Stevens, "Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union," in 64 *Antitrust Law Journal* 443, 450 (1995-96).

³² In the depths of a deep recession in the mid-1970s, the German mills joined with affiliates in Luxembourg and the Netherlands to form an "international steel union" -- Denelux -- to "defend its members' interests both within the EC and on a world scale." This incipient "pan-German cartel" so alarmed the Commission and several Member States that they quickly assented to the formation of a strong Community wide association of major producers, Eurofer. One of the architects of Denelux, H.C. Kohler, later commented that the real purpose of its formation was to induce the Commission and Germany's neighbors to "reorganize

While the American approach to antitrust may seem rigid and simplistic to Europeans, its ground rules are fairly clear and understood by the U.S. business community. The European system is frequently characterized as "pragmatic", but its multiple and sometimes conflicting objectives sometimes make it appear merely rudderless. Consolidations of enterprises and horizontal arrangements with obvious anticompetitive implications have been condoned because of their positive effects on Community integration and/or industrial efficiency. Cartels have been tolerated, tacitly encouraged, and in some cases formally imposed by European authorities, only to be broken up when a shift occurs in policy emphasis or the transfer of a portfolio to a new Commissioner. The contradictions inherent in a "pragmatic" approach to competition policy were highlighted, somewhat comically, when one arm of the Commission reaches out to discipline a cartel only to find that it has managed to grasp not only an industrial syndicate, but another arm of the Commission itself, dutifully working with the cartel to advance some other element of Community policy.³³

Probably inevitably, the cartelization of some European industrial sectors as well as the Community's schizoid approach to competition policy has spread to Europe's trade with the Far East, and has seen the same blurring of lines between official trade policy and private restraints of trade. When Member State governments were dissatisfied with Community trade policy toward Asia, they not only entered into their own bilateral agreements, but helped to arrange "industry-to-industry" understandings, generally involving agreed restraints on shipments between the Community and Asian markets. Similar arrangements, sometimes involving parallel government-to-government and industry-to-industry agreements, were also negotiated at the Community level.³⁴ While today most of the government-to-government arrangements have lapsed or been eliminated, some private anticompetitive arrangements live on and continue to regulate EU-Asia trade.³⁵ The nature and full extent of these arrangements is of course difficult to assess, but

the steel industries Club.* In this it was successful; Eurofer and the Commission thereafter worked closely to administer the first effective pan-European steel cartel since the 1930s, featuring, among other things price stabilization measures and joint restraints on output and delivery. See generally *Der Spiegel* (Dec. 6, 1976); *Metal Bulletin* (Feb. 6, 1976 and April 1977); European Parliament *Working Documents*, Doc. 198/77 (July 4, 1977); H.C. Kohler, *Schriftenreihe der Wirtschaftsvereinigung Eisen und Stahlindustrie zur Wirtschafts Industriepolitik* (1977), p. 8.

³³ See Commission Decision of 18 July 1990, *Official Journal* L. 220/28 (August 15, 1990). In this case, the Competition Directorate took action against the so-called "Sendzimir Club," a cartel of European stainless steel sheet producers that involved price-fixing, market allocation, and joint restraints on deliveries. Part of the cartel members' defense was that the Commission itself had urged them to limit output and raise prices in order to combat recessionary conditions in the industry, and that the Club had duly informed Commission officials of their activities to limit competition. The Commission rejected this defense but imposed only nominal fines. See *Official Journal* L. 220/36-37 (Aug. 15, 1990).

³⁴ For a survey of cartel arrangements (some promoted by governments) between European and Japanese firms in the 1960s and 1970s with respect to steel wheels, steel tubes, and major carbon steel products, see United Nations, *Restrictive Business Practices: Studies on the United Kingdom of Great Britain and Northern Ireland, the United States of America and Japan* (New York: United Nations, 1973), pp. 13-15.

³⁵ For examples see Marco C.E.J. Bronckers, "A Legal Analysis of Protectionist Measures Affecting Japanese Imports into the European Community -- Revisited," in E.L.M. Völker (ed.) *Protection and the*

their existence—and the deep involvement of major European firms—represents a potential obstacle to close EU-U.S. cooperation with respect to anticompetitive practices in Asia. It is not altogether implausible to imagine a scenario in which a joint initiative stumbles into a web of longstanding Japan-EU "gentlemen's agreements" and U.S. policymakers recoil, aghast, from their partner.

Historical American attitudes and approaches to problem-solving with respect to competition policy do not portend particularly well for close cooperation with an entity as nuanced as the EU. The periodic assaults launched by the U.S. on anticompetitive practices outside its borders have moralistic overtones that other countries find obnoxious as well as threatening. Moreover, U.S. actions seem driven more by ideology than by comprehension of what actually occurs in foreign markets. A generation ago U.S. antitrust ideology reflected the belief that bigness, in and of itself, was a "curse;" today the prevailing ideology is defined by the economic doctrines of the Chicago School. While these belief systems differ radically from each other in many respects, they share a characteristic American parochialism toward foreign economic systems, which are poorly understood and viewed through a theoretical lens. Sir Leon Brittan, one of the most vigorous proponents of an activist European competition policy, has commented that

the 'Chicago School' approach currently in favor in the USA is not directly relevant to EC Competition Policy. Chicago does not need to worry about creating a single market. Rather, it presupposes the existence of an integrated market.³⁶

If the Europeans regard Chicago School analysis as useless with respect to their own market, it is difficult to envision them supporting its application with respect to markets in Japan or China, whose systems depart even more dramatically from the assumptions of American economists.³⁷ Differing historical legacies and value systems thus pose hazards for any joint U.S./EU endeavor in Asia. The Europeans will no doubt fear that in any cooperative endeavor with the United States, the Americans will attack a problem in the wrong way, that is, confrontationally and judgmentally, and for the wrong reasons, based on whatever economic ideology is currently ascendant at the moment. Americans may see the Europeans as, at best, compromised by the contradictions inherent in their system, and, at

European Community (Deucater: Kluwer Law and Taxation Publishers, 1987). A Japanese trading company received a fax from its agent in Europe in April 1996 explaining why an offer to sell heavy carbon steel plate for shipment to Japan was in danger of being withdrawn. "Concerning your enquiries we will receive the offer from the mill today or tomorrow and we will send it to you. However the mill has informed us that they have an agreement with the Japanese mills for not competing in their respective domestic markets. In this sense the mill is studying the risk of selling this material." The sale failed to materialize because of the "no-ship" agreement between the Japanese and EU mills. (Industry source, fax in possession of the authors.)

³⁶ Sir Leon Brittan, *European Competition Policy: Keeping the Playing-Field Level* (London: Brassey's, 1992), p. 3.

³⁷ On this point see Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton: Princeton University Press, 1990).

worst, as collaborators with the anticompetitive Asian systems that are the subject of the initiative.

Issues Presented in Building Greater Transatlantic Cooperation

a. Deregulation and privatization movements

There is clearly something in the air that is promoting liberalization in a manner very different from that which characterized periods during prior rounds of GATT trade negotiations. Governments on all continents see privatization, deregulation, and a lessening of state direction within their economies as enhancing their firms' competitiveness in world markets. At least in selected sectors – information technologies, telecommunications, financial services—they are not requiring full payment in current reciprocal trade concessions for liberalization of their markets, whether the changes were brought about internally or resulted from commitments made internationally. This is new, and unprecedented. The progress is far from uniform, but nevertheless, sure and remarkable progress is being made. Are these aberrations? Opinions can differ and only time will tell.

This trend will continue as long as global economic growth remains uninterrupted. There is scope in international negotiations, both multilateral and bilateral, for both enhancing and locking in of this form of liberalization. International negotiations are not driving the process of liberalization so much as quickening the pace. Economic realities are the motivation. In sectors characterized by rapid change driven by technological progress, protection, insulation from market forces, appear to be factors which deprive a nation's firms of the ability to be internationally competitive. Cross-border production, which increasingly characterizes these information industries, is defeated by protection. (This subject is treated in a forthcoming paper by Steven Cohen and Michael Borrus of the Berkeley Roundtable on the International Economy).

It is fair to ask whether these information technology sectors (and perhaps financial services share some of the attributes of these industries) are aberrations. But they are so important to 21st century economies that these exceptions may well shape much of the world trading system. Not insignificant will be sectors whose producers do not demand liberalization, and may well lag in liberalization. These include all consumer goods (including automobiles), basic industries (such as steel, paper and chemicals), pharmaceuticals, agriculture, government-influenced procurement and a whole range of goods and services (such as distribution and retailing). Thus, autonomous movement toward liberalization cannot be relied upon to bring about the full international contestability of markets for all sectors in all major countries nor the degree of change that is needed within any acceptable time frame.

Then what is to be done by trade and competition authorities to promote greater contestability of markets for international commerce?

b. Positive comity

It is natural that the joint subject of trade and competition policy be addressed first by those with the longest history with the more specialized of the two disciplines. Thus, just as environmentalists were the earliest to consider the handling of the problems of trade and the environment, it has been competition policy specialists, officials and academics, who have first waded into the trade and competition policy preparatory work and thinking.

One product of this effort has been a 1997 draft "Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws." The stated objective is to "enhance the effectiveness of international antitrust disciplines" according to the U.S. Acting Assistant Attorney General for Antitrust, Joel Klein. Key to this draft Agreement is its first purpose, to:

Help ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the parties are not impeded by anti-competitive activities for which the competition laws of one or both Parties can provide a remedy....³⁸

The proposal is procedural, and can fairly be characterized as "negative comity" rather than "positive comity." In other words, the agreement provides first for *inaction*—that deference will be given to the action of the competition authority in the importing or host country:

... the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anti-competitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.³⁹

What is heartening in this text is the recognition by competition authorities that private restraints of trade can adversely affect international trade and investment and that there ought to be a remedy to restore the market to openness to the products or investment of the other party.

However, positive comity does not provide a likely to relief from market closures due to private restraints of trade. There are several problems with this approach.

First, governments are not known to act in the interests of foreign producers at the

³⁸ Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, Jan. 24, 1997, E.U.-U.S., art. I.

³⁹ *Ibid.*

expense of their own. In fact, in the trade area, governments have not acted to assist foreign producers even where there would be no adverse affect on domestic producers from doing so, or where there are no domestic producers. Thus, Article 12 of the 1979 Antidumping Code⁴⁰ which allows one Contracting Party to call on another to remedy dumping in the latter's market where this activity is detrimental to the exports of the requesting party, has been a dead letter.

Competition authorities could argue that their body of law differs in that their primary, if not exclusive, function is to promote competition for the benefit of their consumers, so they would have their own independent reasons for acting to benefit foreign exports destined for their own market. Theoretically, this new bilateral mechanism could work. From a trade perspective, there does not appear, at first blush, to be any downside to positive comity—unless it were to prevent through pre-emption efforts at the negotiation of more effective remedies. Certainly some further answer is needed than unilateral action. However, despite the announcement by the Justice Department of the availability of vigorous action under the antitrust laws on behalf of U.S. exporters, none has occurred in the six years since the original announcement was made.⁴¹

A second roadblock to positive comity being a trade solution is the presence of other policy objectives which may override competition policy objectives. Thus, industrial policy has often intruded in the steel sector in the case of the European Community, where known cartel activities have been threatened with prosecution by DG IV unless production cut-backs (which were solely for the benefit of producers, and certainly not for consumers) were implemented. Open and notorious cartel activities in the field of heavy electrical generating equipment also did not receive effective prosecutorial attention from Brussels. The recent actions of EU officials regarding the proposed merger of Boeing and McDonnell Douglas raise significant questions about the prospects for U.S.-EU antitrust cooperation. U.S. authorities reviewed the transaction, it appears, under standard principles of merger review relating to the potential to create undue concentration or market power. EU authorities are reviewed the merger, as was their right, to examine its possible effects within the EU and could, arguable have grounds for concern given the high degree of concentration in this industry. In public statements, however, EU officials introduced into their review trade policy issues that had no obvious relationship to traditional merger analysis. In particular, they sought to use competition proceedings as a lever to reopen a U.S.-EU trade agreement, with which they were dissatisfied, regarding aircraft subsidies. Subsidies *per se*, whether historical or prospective, are not normally a factor in merger review. In reviewing proposed mergers of EU-based companies, DG-IV in the past does not appear to have developed a

⁴⁰ Now found at Article 14 of the Uruguay Round Antidumping Code.

⁴¹ In 1991 Bush Administration antitrust officials publicized prominently their repeal of the footnote 159 of the then-current *Antitrust Guidelines for International Operations*. Footnote 159 had been added by Reagan Administration officials and stated that the U.S. Government would decline, as a matter of policy, to bring extraterritorial antitrust enforcement actions where the only injury caused by the offending conduct was suffered by U.S. exporters and not U.S. consumers. The repudiation of footnote 159 has been applauded and reaffirmed by the Clinton Administration.

theory under which subsidies to the acquiring firm count against a merger or make it more likely that a competitively unacceptable situation will result. Rather, the doctrine applied by the EU in this case—that alleged subsidies to Boeing somehow made its merger with McDonnell Douglas more alarming—appears to be newly-minted and an attempt to pursue trade and industrial policy goals at the expense of international comity in antitrust enforcement.

A third barrier to the successful employment of positive comity is the application very high evidentiary standards and substantial obstacles to attempts to gather evidence across international borders. The Justice Department will not work independently to investigate an offense which takes place largely in another jurisdiction without asking for the cooperation of the relevant authorities in that jurisdiction. This cooperative approach may not be well-suited to instances where the foreign competition authority is not able to exercise independence in the particular sector or case.

Even if the U.S. and the EU could work out their differences in approach and policy priorities to effectively open their markets to each other's goods and services through the use of competition policy, there is no reason to suppose that this achievement would be transferable to opening Asian markets. Japan at best cannot be said to have an effective competition regime, and at worst can be said to have employed its competition laws to aid in protection of its domestic producers in violation of its international trade obligations.⁴² China, for its part, is in the pre-competition law phase of economic development. Other Asian countries lie somewhere in between these two largest economies of East Asia on the competition law and policy spectrum.

Despite the limitations cited above, U.S. and European producers worked out a positive comity clause in a draft agreement, the proposed Multilateral Specialty Steel agreement ("MSSA"), governing trade in specialty steel products. The idea is that signatories, theoretically including Japan, which trade in specialty (alloy tool and stainless) steels, would bind themselves to maintain competition laws on their books, to investigate anti-competitive conduct which another signatory alleged was harming its trade interests, and to report back the results of its investigation.

The United States government rejected this concept in negotiations over the Multilateral Steel Agreement (MSA) dealing with the much larger category of trade in carbon steel products. The reason for its rejection was the fact that European and Japanese firms currently engage in global market allocation, that these cartel activities are well known, and that enforcement actions have not been initiated (much less remedies implemented). The American integrated steel producers proposed in place of the MSSA mechanism (consisting as it did of nothing likely to be effective) an enforceable prohibition against anti-competitive practices in restraint of international trade. This proposal would

⁴² See Japan -- Measures Affecting Consumer Photographic Film and Paper, United States Government Submissions to the WTO (1997).

have made a cause for a complaint with foreign governments, the fact of market closure through private restraints of trade rather than relying on a request for action of competition authorities followed by a reporting process. Japan—which has questioned the need or basis for sectoral agreements like the MSSA in any case—stated that it would not even discuss a provision of this nature. Given the fact that production shares of Japanese producers have been unchanged for decades, even by a single percentage point, it is understandable why Japan would not entertain a positive obligation to prohibit anti-competitive practices in steel trade.⁴³

While there may be no direct harm to agreeing to positive comity, the question of its effectiveness is worth raising. If Japan, the EU and the U.S. all have sound competition laws on their statute books now, what is the necessity of agreeing to positive comity? Has any of the three competition authorities approached one of its sister agencies and been refused an investigation of private restraints of trade which block market access to the products of the requesting country? If there has been no request, does this mean that there is no known problem. If so, why negotiate an agreement on positive comity? Or is it believed that a request would be given short shrift absent an agreement? If rejection of the request would occur, either this is a sad commentary on the current relationships between these agencies or it calls into question whether they indeed have shared objectives with respect to opening markets to international trade and investment.

⁴³ The proposed MSSA, as reported in the press, collapsed over a separate issue -- rules for non-actionable subsidies.

c. China WTO accession

It is possible that the most difficult problem in the trade and competition policy arena will be presented first in the context of Chinese accession to the World Trade Organization. As noted earlier, China is an interesting admixture of extremes—state ownership, state trading, and vigorous entrepreneurial activity. What is largely missing is the rule of law. Among the body of laws not developed and applied in China is antitrust law. This should not be surprising, given the history of China in the 20th Century. After all, why should excesses of capitalism need to be curbed in a vast region devoid of capitalist activity?

But China is evolving very rapidly. It is one of the world's major trading nations, and America's trade deficit with China rivals America's deficit with Japan. In these circumstances, very substantial improvements in the functioning of the Chinese market will be necessary if American policymakers are not to be under enormous pressure to place strict limits on access to the U.S. market for Chinese goods.

What is required? China will have to agree that state-owned enterprises will act in the market place in the same way that privately held firms act. But this is not enough, some form of antitrust regulation will be needed, subject to international review and enforcement within China, to assure that market forces are determining competitive outcomes.

d. An effective work program

Any international negotiation, to be successful, must have three ingredients: the right objectives, sufficient knowledge of the subject at hand on the part of those negotiating to enable them to seek the right objectives, and sufficient leverage.

(1) The information base

The place to start is with preparations at home. The information base with respect to private restraints of trade that burden and restrict U.S. commerce is slim. This does not mean that it could not be systematically garnered and organized. But this process has not even been begun, nor is there a plan to do so. This is at odds with preparations for past trade negotiations. Commissions were formed in the 1960s and 1970s to study nontariff barriers (NTB's). The Department of Commerce and the International Trade Commission engaged in intensive studies prior to the Tokyo Round multilateral trade negotiations. In contrast, there is literally no information at hand on private restraints of trade (outside of a few select filings for the annual National Trade Estimates (NTE) Report and work in connection with a few cases). Even the services negotiations benefited from more than a decade of study and preparation, before the General Agreement on Trade in Services (GATS) was concluded in December 1993.

Thus, a first necessary step to deal effectively with the issues posed by trade and

competition policy must be data collection and analysis. Kozo Yamamura and Walter Hatch suggest that U.S. embassies have ombudsmen who would be available to take complaints. (See notes 10 and 11). This is a useful suggestion, although the word "ombudsman" suggests an actor who can provide remedies, rather than a mere recipient of information. Nevertheless the embassies and the foreign commercial service can serve a useful role in keeping a watching brief for anti-competitive practices which limit U.S. exports, and to be field investigators. These, however, are only the government's sensory mechanisms. More organized data collection and analysis needs to occur in Washington and within academia. In addition, an interagency task force on private restraints of trade should be constituted under USTR's leadership, with fact-gathering assignments given to the International Trade Commission and the Department of Commerce, with public hearings held, and provision made for the submission of confidential data. The objective should be to have a major study completed within two years on the nature of the problem, estimates on the incidence on trade by product and service sector, and suggested solutions. This would take the United States a significant distance down the road toward understanding what its objectives should be in any negotiation on private restraints of trade and having sufficient information to understand what impact negotiations might have on actual commercial interests.

(2) leverage

Where is the leverage to be found that is needed to obtain the agreements that will ultimately provide market access? There are a variety of answers to this question. First, as noted above, at least in a limited number of sectors, it should not be dismissed out of hand that other parties to the negotiation would wish to join in an accord because they judge it to be in their commercial and economic interests to do so. This is what drove the Information Technology Agreement to a successful conclusion as well as the basic telecom negotiation. It was clear that failing to liberalize would condemn a country to becoming or remaining noncompetitive. Trade liberalization, like virtue, was its own reward.

However, more aggressive use of competition policy is not likely to be embraced with like enthusiasm, or if embraced as an international commitment, it is not likely to be often enforced. Some, like Hong Kong and Japan will look at the negotiation as largely an opportunity to seek to curtail or eliminate antidumping regimes in the U.S. and the EU. They will argue that, in the perfectly competitive world to be brought about through improvements in competition rule enforcement, dumping would begin to disappear, and antidumping would become unnecessary.⁴⁴ Others will regard a negotiation on competition policy as providing cover for protectionist reactions to competition from major players—the major U.S., Japanese and EU global corporations.

⁴⁴ Never mind that if this is the case, it is a self-executing bargain: as antitrust enforcement became more vigorous, in a world with no other barriers and trade distortions, dumping should diminish very substantially. Where there is no dumping, there is perforce no antidumping, and were any antidumping mechanisms to continue to function in the absence of dumping, there are already remedies in the Antidumping Code to respond to abuses.

With widely differing perceptions of self-interest in the area of competition policy, leverage will be a substantial problem. There are several traditional answers to this dilemma. One is for the United States to begin to press unilaterally for the opening of markets, through use of existing U.S. laws or new statutory authorities. Another is, within the context of a new round of talks, to offer inducements in unrelated areas of an overall negotiated package. The latter approach has worked in the past—getting countries to sign up to the Agreement on Trade-Related Intellectual Property Rights and Trade Related-Investment Measures. But perhaps even here, signatories realized that it might well be in their own self-interest to sign for the value living up to the commitments made in those instruments.

The Problem of U.S. Domestic Support

A very large **caveat** is in order before rushing off to conclude a multilateral code on trade-related competition rules, even when it becomes clearer what problems are to be solved and what conduct is to be regulated. A important lesson is contained in the stillbirth of the International Trade Organization. By the end of 1950 the President withdrew the Havana Charter, negotiated in 1948, from any further consideration by the Congress. It was never to be re-submitted. One of the major reasons for its death was American business' concerns with the restrictive business practices provisions. These concerns ranged from worries that valid business arrangements would be proscribed, to a feeling that the Code would be applied with varying intensity by national competition authorities, with the most vigorous stick being wielded by the U.S. government against its own corporate citizens.⁴⁵

Few Americans in business or elsewhere remember even reading that there was a proposed ITO or that it failed in part over its attempt to regulate restrictive business practices. Nevertheless, a deep amber cautionary light should definitely be given heed when it comes to contemplating international trade and competition rules. Major American business groups have expressed the view that international discussions are wholly premature and that the U.S. Government's objectives are as yet unspecified. Unions are also very skeptical of the value of the project. Concerns among a number of domestic industries are being further ratcheted up on the grounds that some foreign governments are using this subject as a pretext to advance their own longstanding agenda to effectively repeal the antidumping laws. Furthermore, competition authorities are wary of introducing "their subject" into a trade forum, for fear of loss of control, politicization of enforcement activities, and dilution of national standards. Indeed, one of the approaches urged by some academics is the adoption of international minimum standards. This is an idea which is chilling to a number of enforcement authorities who are not looking for complication of their lives and compromise of their policy objectives which some form of harmonization might bring about.

Indeed, even an American Executive Branch, provided with renewed Fast Track

⁴⁵ See William Diebold, "The End of the ITO," Council on Foreign Relations (Monograph).

legislative approval procedures, and thus freed from earlier concerns which led to the death of the ITO, namely Congressional inaction, must have some political support for its international deals. In this case, however, there is no known domestic political support for negotiations on trade and competition policy. It is a notion whose attractiveness appears to be confined academics and commentators (including the authors of this chapter). As noted, American business regards itself as more likely the target than the beneficiary of new international rules in trade and competition policy.

A few chilling examples suffice. What if one told Boeing that DG IV's challenge to its merger with McDonnell Douglas would now be sanctioned by an international agreement, which would be a logical European Union objective in any talks? Or take the opposite case, what if the European Commission's case against Boeing were reviewable by an international panel, and Commission action subject to reversal or authorized offsetting measures? This might be hard for the European Union to accept.

In this new world, what will be subject to review? Failure to prosecute anti-competitive behavior? What if there were overriding national reasons for not doing so, or just inadequate resources, or inadequate evidence? How much of competition authorities' decision-making is to be reviewable by trade panels? Will international sanction be given to local authorities to require compulsory licensing or other government-imposed restraints on competition from Intel, Microsoft, IBM, Pfizer, or Glaxo, on competition policy grounds? These companies and others, and their governments, have valid grounds for concern.

Overcoming Barriers to Cooperation: A possible U.S.-EU initiative

The discussion above indicates that there are deep historical reasons and more pragmatic contemporary reasons that deep cooperation between the United States and the European Union to achieve anything like a comprehensive multilateral agreement on competition policy will be very difficult to achieve. Indeed, there is very little appetite for it outside of the rarified musings of academe, and the natural cravings of negotiators to bargain for solutions to even the most poorly understood problems.

This is not a reason to conclude either that there are not very real trade problems that result from failures of competition policy, or to abandon the quest for solutions which both the U.S. and the EU could endorse. Two observations lead us to be optimistic that it is possible to achieve an international agreement on private restraints of trade. The first, explored immediately below, is that there distinctly is a basis for U.S.-EU cooperation on this subject. The second is that the direction in which solutions have been sought have been needlessly complicated. As much simpler approach, well known in the trade field for the last five decades is readily at hand.

a. The prospects for transatlantic collaboration

First, the prospects for U.S.- EU cooperation are not as remote as might be concluded from reviewing the narrative contained in the middle portion of this paper. Differences in enforcement style and substantive policy do not, by themselves, constitute a bar to close cooperation between the U.S. and the EU on market access issues in Asia. Areas of convergence are far more pronounced. Both the U.S. and the EU share an antipathy to a broad range of anti-competitive conduct, and a commitment to open markets and a liberal trading order.

The U.S. and EU positions on the most pernicious forms of anti-competitive acts, particularly horizontal practices, are largely coextensive—"cartels, market sharing, boycott of foreign firms, price fixing, bid-rigging, coercive exclusive dealing, etc." are condemned by both parties.⁴⁶ The current EU Competition Commissioner, Karel van Miert, views "cartels as the most serious restriction to free trade,"⁴⁷ and has made comments on Asian market access issues that could as easily have been uttered by the U.S. Trade Representative:

*The Japanese economy would be more open if they had a competition authority like we and the United States have. Countries that have a competition policy or authority are ipso facto opening their markets.*⁴⁸

The United States and the EU have two of the closest views of any major parties in the World trading system as to what each considers appropriate trade and competition policy, even if the degree of closeness may easily be overestimated.

b. Next steps for forging a U.S.-EU Consensus

First, Europe and the United States should each develop an internal consensus on trade and competition policy objectives.

Second, the EU and the U.S. should share information from their respective foreign market barrier databases. This will assist them in agreeing on common definitions of the trade barriers to be eliminated and developing a consensus between themselves on the nature of the problems caused for international trade by private anti-competitive practices.

Third, the United States and the EU should seek to agree on a common approach to providing solutions. A common negotiating approach will sometimes take shape as a result of direct negotiations with the government whose market is dysfunctional. These

⁴⁶ "Commission Wants EU Rules to be More International," *European Report* No. 2141 (June 19, 1996).

⁴⁷ "'Kiss and Tell' Plan to Crack Down on Illegal Cartels," *European Report* No. 2148 (July 13, 1996).

⁴⁸ "Van Miert Says Plan for Independent Cartel Agency Will be Short Lived," *European Report* No. 2160 (Sept. 25, 1996).

resolutions will be sector and country specific—as in the case of market access in Japan for photographic film and paper, on which the U.S. and the EU are currently collaborating.

Of even greater potential importance, will be evolving a common approach toward generic solutions to be sought through multilateral negotiations in the WTO.

Fourth, once a common approach to multilateral solutions has been agreed between the U.S. and the EU, they should propose a WTO work program. A procedure for notification and response could be engaged in by the Working Group on Trade and Competition. Members could notify private practices which they felt were anti-competitive, and the country which was the locus of the anti-competitive activity could provide information and its views regarding the activity in question.

c. Redefining the objective of the WTO trade and competition exercise

The WTO is best suited solely to regulating impediments to trade. It is not there to provide a means of reaching and influencing internal policy spheres, whether environment or competition policy. It is easy enough to see what ought not to be done in the WTO. There should not be international harmonization of domestic laws given widely varying standards and local contexts. There should not be minimum standards. There should not be any tolerance of the exercise being hijacked by those who wish to find another forum in which to attack the antidumping remedy. Nor should there be an international examination of how the WTO might be adversely affecting competition – a concept inimical to the functioning of an a global trading system.

These somewhat random lurches toward various objectives are the direct result of the WTO Working Group on Trade and Competition having been established before there was the slightest international (or national) consensus on the definition of the problem that it was being created to address. The exploration of these dead ends should be abandoned in favor of more traditional WTO (GATT) inquiries as outlined above. What has been lost sight of is that the WTO exists not to dictate the shape of domestic regulation but to remove barriers to trade. In the field of competition, or contestability of markets, what trade negotiators should care about is not whether a country has a competition policy, or whether it is enforcing it, but whether or not a market is open to the goods and services of other signatories.

The WTO is about nothing more or less than the maintenance of a balance of concessions—the enforcement of reciprocal commitments to grant market access to foreign goods and services. In the context of the WTO, it matters less why a concession ceases to have value (other than if this occurs from natural market-related causes) than that it has lost value. This could occur, for example, either because the government of the country making the concession had a change of heart and impaired the concession with its own measures, or that certain of its nationals conspired to deprive the trade concession of its value by

preventing market forces from operating. The current WTO distinguishes between these two circumstances. If a government violates its word through promulgating measures that impair promised market access, a remedy is provided. If it fails to provide a functioning market, and private restraints of trade block access to that market, the WTO provides only that governments should consult, but there is no remedy. This is a deficiency in the WTO accord.

An appropriate solution would be the creation of a clear cause of action under Article XXIII:1b. Nullification and impairment of WTO obligations would be found wherever market access, bargained for under Article XXVIII (governing the negotiation of tariff concessions) was denied, whether the cause was government measures or private behavior. The fundamental distinction would be eliminated between, on the one hand, the case where a government actually arranges for private restraints of trade (see EU GATT Case regarding Japan Semiconductors), and cases where a government proved unequal to the task of providing a functioning market. It would not matter whether the government in question knew of the existence of the private restraints of trade or whether it had good information and good intentions but inadequate prosecutorial resources with which to act. In fact, it should not matter to the WTO whether the importing country's government even had competition laws at all. Points would not be given for trying to deliver a contestable market, but on delivering one.

If a WTO member is the beneficiary of a concession, and trade restraints deny it the value of that concession, it should be owed compensation, whatever the cause. Each WTO member must become the guarantor of its bargains, and strictly liable for nullification or impairment of their value.

Would this approach solve the problems of competition policy in Asia? It arguably holds much more promise than seeking to reform entire economic systems as the starting point for crafting solutions. Harmonization of competition policies is neither possible, nor necessarily desirable. International oversight of national decisions over prosecution for infractions of domestic laws will not be acceptable to any WTO member in the foreseeable future, and certainly not to the United States.

Clearly, there is scope for a common U.S.-EU approach to problems of competition policy which involve barriers to access to Asian markets, although only limited instances of past cooperation exist. The United States and Europe have followed independent approaches without substantial lasting or widespread success to date. With the integration of China and the further development of other Asian economies, it is imperative that the U.S. and EU cooperate more closely to address the issues raised.