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Is it Time for an International Agreement on Uncompetitive Public Sector Practices?

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IS IT TIME FOR AN INTERNATIONAL AGREEMENT ON UNCOMPETITIVE PUBLIC SECTOR PRACTICES?

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I. INTRODUCTION

The nineties heralded the liberalization of many economies in the global market, whether through transition from Communism, in the case of the transition countries, or through transition from import substitution, in the case of the Latin American countries and other emerging economies. This has resulted in greater emphasis on open markets, open trading regimes, and the removal of trade barriers.[1] With the reduction of tariff and non-tariff barriers, the structure of the markets themselves are now the focal points of international trade.[2] Consequently, competition policy assumes a new role in the economic development portfolios of government ministries, especially those of developing nations. Foreign traders and investors, who have now entered these emerging markets,

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1. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 3-4 (2d ed. 2000).

2. *See id.*

are furthering the enactment of meaningful competition policies by putting pressure on domestic government officials.[3] There are still many areas, however, where highly concentrated markets remain, and it is important for these to be properly regulated if international trade is to flourish and deliver the tremendous benefits it is capable of generating for society.

Because the failure of domestic markets can prevent the benefits of economic liberalization from materializing, the relationship between trade and competition policy sits center stage in the international arena.[4] Section II of this Article will address the need for a flexible multilateral competition policy that will result in increased trade and economic development.

At the trade ministerial of the General Agreement on Tariffs and Trade ("GATT"),[5] held in Singapore in 1996, the World Trade Organization ("WTO") created a Working Group on the Interaction Between Trade and Competition Policy ("Working Group") to analyze the interaction between trade and competition policy.[6] In its initial communication, the Working Group established its objectives, recognizing in its preface that the relationship between trade and competition policies cannot be categorized simply as complementary or substitutable.[7] Included in the objectives is the study of the interface between trade and competition policy in order to maximize welfare and the efficient allocation of resources for both developed

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3. *See id.*

4. *See id.*

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

6. World Trade Organization Ministerial Conference, *Singapore Ministerial Declaration,* WT/MIN (96) DEC (Dec. 18, 1996), *available at* http://www.wto.org.

7. Working Group on the Interaction Between Trade and Competition Policy, *Communication from Pakistan*, WT/WGTCP/W/41 (Oct. 1, 1997), *available at* http://www.wto.org [hereinafter *Communication from Pakistan*]. In its communication from Pakistan on October 1, 1997, the WTO recognized the importance of understanding the interface between trade and competition policies and that the two could not be "compartmentalized" nor deemed to be complementary to or substitutes of each other. Therefore, the WTO created the Working Group, which was "expected to make important contributions to a better understanding of this interface." *Id.*

and developing nations.[8] Section III will address the valid concerns of developing countries. In its report to the General Council in 2000, the Working Group discussed and analyzed the contribution of competition policy in achieving the objectives of the WTO, including the promotion of international trade.[9]

Determining the best way to incorporate competition policies into the WTO objectives, the Working Group looked to competition chapters existing in regional trade agreements.[10] For example, the North American Free Trade Agreement ("NAFTA") contains a regional competition policy in its Chapter 15.[11] Like NAFTA, the Free

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8. *Id.* The Working Group paid special attention to two main objectives of developing countries. The first main objective was developing a higher rate of sustained economic growth and development to minimize the gap between them and developed countries. The second objective was to carefully tailor competition policies to their individual structural and institutional features. *Id.*

9. Working Group on the Interaction between Trade and Competition Policy, *Report to the General Council*, WT/WGTCP/4 (Nov. 30, 2000), *available at* http://www.wto.org [hereinafter *Report to the General Council*]. The Working Group determined that in order to better understand the relationship between trade and competition policies, the discussions should focus on:

> (i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favored-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

Id.

10. *Id.*

11. North American Free Trade Agreement, Jan. 1, 1994, art. 1501, 32 I.L.M. 296, 663 (entered into force Jan. 1, 1994) [hereinafter NAFTA]. Chapter 15 of NAFTA states:

> 1. Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct, and shall take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.
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> 2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall

Trade Area of the Americas ("FTAA"), currently being debated and drafted, will also contain a competition chapter.[12] The Treaty Establishing the European Community ("EC Treaty"),[13] and the GATT contain similar provisions.[14]

Despite these existing provisions, practitioners have uncovered gaps in the system of rules that govern the world trade order, where governmental restraints on trade give rise to anti-competitive markets. Attempts to use trade rules to correct what are essentially competition problems have not been particularly successful. Some of the problems associated with these gaps can ultimately be resolved by some form of multilateral public sector re-

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cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and competition laws and policies in the free trade area.

3. No Party may have recourse to dispute settlement under this Agreement for any matter regarding this Article.

Id.

12. *San Jose Ministerial Declaration*, Negotiating Group, *at* http://www.ftaa-alca.org/ngroups/ngcompe.asp (last visited Sept. 8, 2001). The Negotiating Group on Competition Policy [hereinafter Negotiating Group] has stated that its general objective is "to guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices." *Id.* As a more specific objective, the Negotiating Group wants to develop the mechanisms "to facilitate and promote the development of competition policy and guarantee the enforcement of regulations on free competition among and within countries of the hemisphere." *Id.*

13. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, NOV. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

14. The EC Treaty has several articles relating to competition policy. They are divided into articles relating to antitrust provisions and articles relating to state aid provisions. For example, Article 87 of the EC Treaty states: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market." EC TREATY art. 87. The article goes on to list the type of activities that "shall" be and those that "may" be considered compatible with the common market. In addition to prohibiting state aid except under specified circumstances, there are articles that prevent actions that affect trade. For example, Article 81 of the EC Treaty prohibits activities that prevent, restrict or distort trade within the common market, especially price fixing and production control. EC TREATY art. 81.

straints discipline. The author understands that there are many objections to this grounded in the United States' state-action exemption and anti-dumping laws. However, I do not believe these to be insurmountable barriers. Section IV of this Article will lay the groundwork for creating a public sector restraints discipline that takes into account the rights of the states in the United States by analyzing state aid within the framework of the European Union. I will also propose a simple dispute settlement procedure that respects a nation's sovereignty, while encouraging the development of national competition laws and agencies.

II. A FLEXIBLE MULTILATERAL COMPETITION POLICY WOULD INCREASE INTERNATIONAL TRADE AND ECONOMIC DEVELOPMENT

One of the goals of competition advocacy is to induce government officials to consider competition principles when implementing market reforms, deregulation, and privatization.[15] In establishing a multilateral competition policy, the aim is not to create a system of perfect competition, but rather to help *all* countries to effectively handle anti-competitive abuses that stunt economic development, trade, and economic welfare, where they occur.[16] This could best be achieved by a flexible system that incorporates cooperation and technical assistance.[17] Be-

15. *See Communication from Pakistan, supra* note 7. Since more than half of the nations in the WTO do not have a competition policy, the concern of the Working Group is not only to create a global competition policy, but also to encourage nations without a competition policy to enact one. This would facilitate enforcement of the global competition policy provisions and give individual nations an opportunity to have control over the private companies working within their boundaries instead of always having to defer to the WTO Dispute Settlement Unit. *Id.*

16. *See id.* "In a regime of perfect competition, there were always those who had intrinsic advantages and, consequently, would reap a disproportionate share of the benefits. Thus, a policy based on the ideal of perfect competition would imply the faster marginalization of others." *Id.* If a competition policy is not designed to foster perfect competition, "rather than being seen as an element contributing to marginalization, competition policy and the tools to assist developing countries in addressing certain practices that had a direct, negative impact on their welfare." *Id.*

17. *See id.* While some nations have had a long and distinguished history with competition policy, others have had no experience and have in

cause of the diversity of WTO Member Nations,[18] a multilateral system must be flexible because a "one size fits all" approach would fail. Such a system would not only benefit the developed nations, who already have established national competition policies,[19] but would be even more beneficial to the developing nations who may or may not have already created competition policies by enabling them to have the assistance of nations who have already been through the developmental phase they are currently in. A well-developed competition policy helps create certainty to benefit most enterprises, but should focus on those areas where there are the most pressing competition problems.

A. Benefits of a Multilateral Competition Policy

Dealing simultaneously with tariff restrictions and domestic regulatory reform is necessary to establish a climate that is conducive to investment and economic growth.[20] Interventionist tools could be used in the past for short-term economic gain; however with the liberalization and globalization of business, governments that al-

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fact developed with very anti-competitive markets. A global competition policy must try to bridge the gap between these countries with a harmonized competition policy. Encouraging cooperation among these nations and technical assistance to the developing nations would aid in bridging the gap. *Id.*

18. *See Communications from Pakistan, supra* note 7. Approximately half of WTO Member countries do not have a competition policy. The Members of the WTO are a conglomeration of developed and undeveloped countries, island and continental nations, all at different levels of economic development. *Id.*

19. "National competition policy can be defined as the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to abuse of a dominant position." Working Group on the Interaction between Trade and Competition Policy, *Communication from Turkey*, WT/WGTCP/W/76 (June 25, 1998), *available at* http://www.wto.org [hereinafter *Communication from Turkey*].

20. *See* Working Group on the Interaction between Trade and Competition Policy, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, WT/WGTCP/W/80 (Sept. 18, 1998) [hereinafter *Synthesis Paper*]. "Greater reliance on market forces as an engine of development and adjustment and on the creation of a framework aimed at ensuring that such forces operate in the public interest, notably by promoting or maintaining competition in markets," would induce the liberalization of trade and foreign investment regimes and privatization of sector-specific regulatory reforms/deregulation. *Id.*

low, or even encourage, anti-competitive practices cause economic dislocations on an international scale.[21] Consequently, more attention must now be focused on domestic regulatory issues.[22] Additionally, since most international trade reforms rely on market forces as vehicles for economic development and trade furtherance, anti-competitive practices shackle developing economies and trade relationships.[23] Some way of dealing with public sector restraints, on the other hand, promotes the efficient allocation of resources; protects the welfare of consumers; increases an economy's ability to attract and maximize the benefits of foreign investment; and establishes an institutional focal point for the advocacy of pro-competitive policy reforms and a competition culture.[24]

A competition policy that minimizes both public and private sector restraints strengthens a stable economy by promoting the efficient allocation of resources.[25] This promotion of efficiency and stability is accomplished through several means. Competition policy drives prices toward marginal costs and ensures that firms produce at the lowest attainable costs.[26] Additionally, competition policy provides incentives for firms to initiate and expand research and development and to quickly introduce both new products and new production methods into the market.[27] Finally, since competition policy provides remedies for business practices that weaken rivalry and promote inefficient allocation, it strengthens economic stability and efficient allocation.[28] In Switzerland, for example, the government is working on strengthening the preventive

21. *See id.*

22. *See id.* The reduction of tariffs and other trade barriers have made the structure of the market and market forces more influential on the development of trade. The expansion of trade is hindered if a country supports and encourages anti-competitive practices in their domestic market because entrance into that market is blocked by such practices as it would be by tariffs. *Id.*

23. *See id.*

24. *See Synthesis Paper, supra* note 20.

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

effect of its competition policy in order to enhance its resource allocation.[29]

By preventing excessive concentration levels and resulting structural rigidities, competition policies protect the welfare of consumers.[30] Excessive concentration levels result in extensive inefficiencies, structural rigidity and vulnerability to external pressures.[31] In Korea for example, monopolies were promoted by industrial policy,[32] and the country became extremely vulnerable to external shocks; as demonstrated by the economic devastation unleashed by the Asian crisis.[33] Currently, Korea is undergoing market reforms with the goal of reducing its vulnerability to external shocks and establishing a solid basis for sustainable growth.[34] An adequate legislative and policy framework protects consumers from anti-competitive practices that raise prices, reduce output and make the economy vulnerable to external shocks.[35]

Competition policies are beneficial for countries try-

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29. *See* Press Release, WTO Trade Policy Review, Switzerland and Lichtenstein: December 2000 (Dec. 6, 2000), *at* http://www.wto.org. Switzerland and Liechtenstein are adapting their economies to better function in the new international economic environment. Reforms making their markets more competitive have resulted in more efficient allocation of resources, better exploitation of their comparative advantage and better trade performance. *Id.* The report notes, however, that there are areas where the government is more hesitant to institute the necessary competition reforms, namely agriculture. *Id.* The report predicts that liberalization of agriculture will lower domestic prices by enhancing the competitive framework. *Id.*

30. *See* Press Release, WTO Trade Policy Review, Korea: September 2000 (Sept. 18, 2000), *at* http://www.wto.org/english/tratop_e/tpr_e/tp138_e.htm [hereinafter WTO Trade Policy Review].

31. *See id.*

32. *See id.* Korea had monopolies that were promoted by industrial policy and took a heavy toll on the national economic welfare. Although the industrial policy initially generated fast growth, it contributed to a lack of competitive pressure in major sectors of the economy. *Id.*

33. *See id.* Because of the lack of competitive pressure in major sectors of the economy, Korea suffered an economic catastrophe during the Asian economic crisis. *Id.*

34. *See* WTO Trade Policy Review, *supra* note 30. In response to the economic crisis, Korea has not resorted to protectionist measures, but to market-based reforms that would increase competition in its markets. *Id.* These reforms are essential to achieve a stable foundation for sustainable and equitable economic growth. The changes have helped Korea recover from the financial crisis, but more liberalization is needed. *Id.*

35. *See id.*

ing to attain and maximize foreign investment.[36] Mozambique, for example, is attempting to create an attractive environment through the use of competition policy in the hopes of attracting greater investment.[37] In the 1997 World Investment Report, it was noted that although worldwide liberalization policies were beneficial, a culture of competition in the world economy is truly essential for liberalization benefits to manifest themselves.[38] A uniform competition policy also reinforces the benefits of privatization and deregulation initiatives by reducing potential tension resulting from inconsistent policies across countries.[39] This would, in turn, make investment in particular countries more attractive to foreign investors.[40]

Obviously, removing trade barriers and tariff reductions is desirable because these reductions lead to wealth creation. However, if one wants this new wealth to be efficiently allocated, then we must ensure that there is a freely functioning market. There are numerous examples of where external trade barriers have been removed, but remaining problems abound. These include uncompetitive distribution sectors throughout developing countries, as well as telecommunication privatizations throughout the world, where public monopolies with regulation have been converted into private monopolies without regulation.

B. Uncompetitive Distribution

The distribution sector in many developing countries is uncompetitive because of the presence of enormous protections for local distributors of foreign suppli-

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36. *See* Press Release, WTO Trade Policy Review, Mozambique: January 2001 (Jan. 26, 2001), *at* http://www.wto.org/english/tratop_e/tpr_e/tp154_e.htm. Trade liberalization and economic reforms have shown significant signs of success in Mozambique. *Id.*

37. *See id.*

38. U.N. WORLD INVESTMENT REPORT 1997: TRANSACTIONAL CORPORATIONS, MARKET STRUCTURE AND COMPETITION POLICY at 185, U.N. Doc. UNCTAD/ITE/IIT/5, U.N. Sales No. E.97.II.D.10 (1997). The Report suggests that the main direct area of interface between foreign direct investment and competition law will occur in the context of merger review and post-entry competition issues. *Id.*

39. *See id.*

40. *See id.*

ers. Dealer laws are exceedingly common in many developing countries, particularly in Latin America.[41] A dealer is generally defined as any legal person who acts in the promotion, importation or sales of products or services in the country. The dealer law usually provides that a distribution agreement may be terminated only if the supplier has just cause. In theory, "just cause" should include noncompliance by the dealer with any of the essential obligations of the corresponding agreement, or any action or omission that adversely and substantially affects the supplier's interests. Notwithstanding this definition, most courts find that "just cause" only exists if there is egregious misconduct by the distributor. Failure to make sales targets is often found not to be sufficient "just cause." If "just cause" does not exist, the supplier must pay the distributor termination indemnities in order to terminate the agreement. These termination indemnities amount to extra-contractual compensation for the losses or damages the distributor may have suffered.

The rights that accrue to distributors in countries with dealer laws accrue only if the distributor is dealing with a foreign supplier, as these laws ordinarily do not apply to national suppliers. These rules make it very difficult for foreign exporters to access the markets, and on the economy of the country as a whole, in the following ways:

(i) prices charged for products are much higher at the point of sale than in other comparable markets;

(ii) distributors have very high profit margins (almost 100% in some cases), and exclusive distributors maintain profit margins much higher than those maintained by non-exclusive distributors;

(iii) distributors frequently refuse to service certain sectors of the market, and suppliers have no other way of reaching those sectors;[42]

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41. *See, e.g.*, CÓDIGO CIVIL DE LA REPÚBLICA DOMINICANA [C.CIV.] Ley 173 (1966) (Dom. Rep.), *amended by* C.Civ. Ley 263 (1971) (Dom. Rep.), C.Civ. Ley 622 (1973) (Dom. Rep.) *and* C.Civ. Ley 664 (Dom. Rep.).

42. In many cases, this prevents the suppliers from selling to government institutions, or filling a charitable need in the country. This directly affected the availability of charitable relief for the Dominican Republic following Hurricane Georges, as suppliers did not have confidence that their distributors would get their product to market.

(iv) a lack of competition in the distribution sector has meant that weak distributors who cannot be terminated continue to limit the ability of foreign suppliers to get the product to market; and

(v) in many sectors, as a result of this, local producers have grown substantially and outstripped foreign suppliers, as foreign suppliers are unable to be competitive.

The dealer laws are used to protect the local distributor as an industry. Without the protection of the dealer laws, there is no way that local distributors could charge the very high profit margins that they do. Nor could they remain as distributors while continuously failing to achieve sales targets.

The dealer laws mean that every exclusive relationship with a local distributor is deemed to be of indefinite duration, regardless of the provisions of the agreement between the supplier and distributor. The imposition of an indefinite, exclusive distribution agreement seriously affects the distribution market and is a restraint on trade.

A second example of where the elimination of tariffs has not been sufficient to address all trade problems is found in Mexico. Mexico's telecommunications market is considered to be one of the most anti-competitive in Latin America. Since it was privatized, Teléfonos de México S.A. de C.V. ("Telmex") has consistently exploited its dominant market power to control its competitors' ability to provide competitive telecommunications services in Mexico. These problems exist because privatization did not go hand in hand with greater competition, as the government shielded Telmex's monopoly for two years before allowing competition. As a result, the Mexican consumer has had to face poor access to basic telephony and little substantial investment for advanced services.[43]

Competition policies provide an institutional focal point for competition advocacy. This gives greater credibility to agencies enforcing competition (not just competition agencies) and enhances their expertise. As a result, competition is promoted by way of enforcement. The laws are established and there is an enforcement body that is

43. *See* D. Daniel Sokol, *Barriers to Entry in Mexican Telecommunications: Problems and Solutions*, 27 BROOK. J. INT'L L. 1 (2001).

given certain powers to ensure compliance with the laws. Consequently, corporations and individuals are more likely to comply with the competition laws and promote a market conducive to development, liberalization, and sustainable growth.

C. A Flexible System

In its initial communication, the Working Group addressed the special concerns of developing nations.[44] The issues and objectives of developing nations differ from those of developed nations and a multilateral competition policy must reflect these differences. A flexible competition policy that enables the variations among the WTO Member nations to enact competition policies that best suit them would be the most successful.[45] As William Kovacic notes, "[e]stablishing unenforceable or erratically applied laws increases uncertainty and risk for private entrepreneurs operating in what already are precarious and unpredictable business conditions."[46] Therefore, a multilateral competition policy must not only be uniform, but practical for implementation in a variety of countries that are in various stages of economic development. The Working Group established five possible elements of a multilateral competition policy.[47] The five elements are:

(i) core principles to be embodied in Members' laws and policies;

(ii) elements or enabling provisions for cooperation;

(iii) establishing a dispute settlement mechanism connected to or part of the WTO Committee on Competition Law and Policy, including dealing with the failure of domestic antitrust agencies to properly implement their own laws;

(iv) technical cooperation and institution building measures to help developing countries; and

(v) a requirement for all Members to adopt a com-

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44. *Communication from Pakistan*, *supra* note 7.

45. *Report to the General Council*, *supra* note 9.

46. William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK J. INT'L L. 403, 404 (1997).

47. *Report to the General Council*, *supra* note 9.

petition policy or law and/or establish competent administrative authority.[48]

These general elements would be more beneficial to the WTO Members because it would allow each country to tailor its own competition policy to its individual needs. These elements enable flexibility while still requiring government officials to enact and enforce some kind of competition policy.

The core principles suggested by the Working Group include transparency and the non-discriminatory application of competition policy.[49] These are heralded to be essential for the success of international trade. In its trade policy review of Brunei Darussalam, for example, the Secretariat noted that greater transparency would help Brunei's efforts to diversify the economy and accelerate its growth.[50] Concrete requirements that would help satisfy the transparency and non-discriminatory application of competition policy include observance of some form of due process for investigations, protection of confidential information, and sufficient relief measures. Another suggested core principle is a commitment to the prohibition of hardcore cartels, which are detrimental to the advancement of foreign trade. An initial step for many countries that have an established competition policy was the elimination of these cartels. Removal of the cartels enables greater liberalization of the nation's economy and openness of its market.

A flexible form of international cooperation is also essential in addressing anti-competitive practices that emerge in a global economy.[51] Cooperation can be used as an alternative to harmonization of competition policies. The main multilateral forum for cooperation in competition matters is the Organization for Economic Cooperation and Development ("OECD").[52] The OECD has regular consultations between national officials, publishes studies, prepares voluntary guidelines for multilateral enter-

48. *Id.*

49. *Id.*

50. *See* Press Release, WTO Trade Policy Review, Brunei Darussalam: May 2001 (May 30, 2001) *at* http://www.wto.org/english/tratop_e/tpr_e/tp164_e.htm.

51. *Report to the General Council*, *supra* note 9.

52. Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 361 (1997).

prise and formulates recommendations to Member States on how to collectively address anti-competitive practices that affect international trade.[53]

Using the OECD as a model, the Working Group suggested ways to foster cooperation among the several Members.[54] For example, channels of communication between national competition authorities should be established.[55] Facilitating the dissemination of competition policy information should also be encouraged. Most importantly, legal cooperation should be achieved through bilateral, plurilateral and multilateral agreements.[56] Cooperation would enable competition officials to collaborate and establish a marketplace of competition ideas through which they could better combat anti-competitive practices. The cooperation would, of course, be voluntary.[57]

The establishment of a permanent WTO Committee on Competition Law and Policy would be useful for many reasons. It would provide a forum for the exchange of perspectives and experiences of competition officials. It could also provide peer reviews for the benefit of nations implementing competition policies for the first time. If there were some enforcement capabilities associated with it, it would lend credibility to officials who are enforcing competition laws. However, it is essential that this window of opportunity to deal meaningfully with the competitive problems that particularly afflict developing countries not be wasted. It is important to consider public sector restraints at this time. Public sector restraints embodied in laws, regulations, or even regulating structures, which are uncompetitive in nature and minimize the potential benefits of trade liberalization, can prevent the competitive market from efficiently allocating the wealth created by global trade liberalization. There are large regions of the globe where countries are either emerging from dec-

53. *Id.*

54. *Report to the General Council, supra* note 9.

55. *Id.*

56. *Id.*

57. Although many critics question the practicality and effectiveness of a voluntary cooperation system, the Asia-Pacific Economic Cooperation Competition Policy and Deregulation Group indicated that such a voluntary exchange of information between competition nationals could be conducted in a voluntary and non-binding setting. *Id.*

ades of import substitution models or from the Socialist command economies of Central and Eastern Europe and the former Soviet Union. In addition, since many other developing countries do not have competition laws or a culture of competition, one of the most serious obstacles to efficient allocation of created wealth gained through trade liberalization is the lack of competition implementation and enforcement and the lack of a global competition culture. Some form of multilateral discipline on public sector restraints will be of great assistance to developing countries and will ensure that gains made by these countries through tariff reductions and non-tariff barrier elimination can be efficiently allocated. It will also ensure that countries removing trade barriers can ensure equitable market access terms for new entrants to promote internal competition.

Technical cooperation should not be confused with regular cooperation, discussed infra, because it addresses more specific issues and concerns. Technical cooperation is technical assistance provided by the developed nations for the benefit of developing nations. However, this technical assistance must be carefully allocated. Many developing nations fail to establish a successful competition policy because they base their policy on that of developed Western nations, but do not account for the lack of certain institutions and frameworks that are essential to the policy.[58] These institutions and conditions include substantial resources, academic infrastructure, accessible information networks, professional associations, a sound judicial system, legal process safeguards, accessibility and availability of business records, and a political environment conducive to market processes.[59]

The Working Group cited specific needs of developing countries that must be addressed under the technical assistance element of a multilateral competition policy.[60] The needs include:

(i) scholarships for academic/professional training;

(ii) internships at competition authorities to gain experience;

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58. *See* Kovacic, *supra* note 46, at 406.

59. *Id.* at 409-13.

60. *Report to the General Council*, *supra* note 9. The needs are listed with particular reference to smaller, island countries.

(iii) visiting staff from experienced agencies to guide and assist, particularly in procedural matters in the early years of new competition agencies;

(iv) resource persons/financial assistance for training workshops targeted at specific groups, such as lawyers, economists and judges;

(v) assistance in the facilitation of workshops for producers and consumers; and

(vi) guidance in the development of an information database system in new competition agencies.[61]

The requirement that each Member State adopt some form of competition policy is flexible enough to allow individual Members to tailor their competition laws to meet their own needs. There is no specific formula for a competition policy to be successful. In Hong Kong, for example, the competition policy has been promulgated by the establishment of a Competition Policy Statement and a high level inter-departmental body that ensures compliance.[62] There are no concrete competition laws established, only a broad statement and an enforcement body. This could be sufficient to satisfy the requirement set out by any multilateral competition policy. Any form of multilateral policy would have to balance the sovereignty and independence of national competition authorities and the multilateral framework of competition policy.

III. THE RESERVATIONS AND PRACTICAL CONSIDERATIONS OF DEVELOPING COUNTRIES CONCERNING COMPETITION POLICIES MUST BE ADDRESSED

The complementary relationship between trade and competition policy and its fostering of economic development has already been discussed. This Section will address more specific concerns and reservations brought by developing countries. As Kovacic points out, many developing countries have failed to successfully implement competition policies because they have used Western models without incorporating the Western institutions

61. *Id.*
62. *Id.*

that make the competition policy effective.[63] The proposal contained herein is designed to deal with the concerns being voiced as a result of the lack of institutional focus on the trade/competition interface, such that it is difficult to resolve certain market access problems through ordinary WTO remedies.

In the very early stages of economic development, effort should be focused on building a market economy through the introduction of a competition policy that is actively enforced by officials.[64] The special challenges that developing economies face with regard to promoting a free market can be overcome by a well-developed competition policy. Because the failure of a developing nation to include an effective competition policy could result in an economic crisis in future economic development, early focus should be on public sector restraints for developing countries, which are very much the remnants of import substitution economic models.

The main concern raised by developing countries with regard to competition policies is the economic dislocation caused by the transition to the competition-based economy. Some fear that many small and medium-sized companies and industries would not survive the implementation of a competition policy. This would lead to an increase in unemployment, which has a social cost of its own. The problem with this concern is that it wholly ignores the interests of consumers in the countries concerned. Whenever anti-competitive practices are tolerated, there is a negative effect on consumers who are impacted by higher prices and fewer choices. National champions are often created at the expense of consumers. Indeed, history has shown that citizens of countries that allow the creative destruction of the marketplace to shape their entrepreneurial sectors do much better in both the short and long run than citizens of countries that do not.

IV. PUBLIC SECTOR RESTRAINTS DISCIPLINE

What might a public sector restraints discipline look like? Clearly, it would only apply to cases where gov-

63. *See* Kovacic, *supra* note 46, at 406.

64. *See Report to the General Council, supra* note 9.

ernments have already made the decision to open the markets to competition.

What then are the barriers to negotiators seeking to agree on such a set of restraints? There are many barriers, but some of the most significant affect U.S. negotiators. Powerful political forces are concerned about any possible erosion of U.S. antidumping laws. U.S. antitrust regulators guard their primacy in matters of antitrust law, and historically have had a much narrower definition of antitrust than their European counterparts. The U.S. maintains a state-action exemption, which creates an antitrust exemption for certain actions by state actors. It is this doctrine that presents a particular challenge for U.S. trade negotiators.

A. The State-Action Exemption Problem

United States antitrust acts are designed to broadly protect commerce and trade from unlawful restraints on trade and attempts to monopolize or gain monopoly power.[65] The goal of United States antitrust policy is to promote "competition" in the economic sense.[66] To achieve this goal, the federal antitrust laws target private and commercial entities and are not designed to cure defects in the government process that can and often do ex-

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65. *See* BLACK'S LAW DICTIONARY 94 (6th ed. 1990). The main federal antitrust acts are: Sherman Act of 1890, 15 U.S.C. § 1 (2000); Clayton Act of 1914, 15 U.S.C. § 18 (2000); Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58 (2000); and Robinson-Patman Act of 1936, 15 U.S.C. §§ 13-13b, 21a (2000).

66. *See* AREEDA & HOVENKAMP, *supra* note 1, at 3-4. There is ambiguity as to what antitrust policy defines as "competition." *Id.* For some, the protection of "competition" entails the preservation of a market that, by its structure, encourages small firms to freely enter and profit. This market structure, however, shackles larger firms making them unable to compete too arduously because the small firms must be able to survive. This could even promulgate a market with many high-cost firms, instead of a market with fewer, larger but more efficient firms. In contrast, the economic definition of "competition" is linked to performance and not the number or size of firms in the market. In an economic sense, optimal competition exists when firms in a market price their output at marginal cost and that marginal cost is reduced by internal efficiency, research and development and attainment of economies of scale. Therefore, the barometer for competition is not the size or number of firms in the market, but their equilibrium output. *Id.*

acerbate many of the problems the laws are designed to prevent.[67] The paramount objective of antitrust policy is to protect and enhance consumer welfare by requiring firms to behave "competitively."[68] The focus, therefore, is on the behavior of private firms, not on the behavior of local and state governments.

This focus on private firms can be attributed to the genesis of U.S. competition policy in the state courts.[69] During its formative years, competition policy was derived not from the common law of contracts in restraint of trade,[70] but from various provisions of state business corporation acts that pertained to firm structure.[71] With the

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67. *See id.* at 7.

68. *See id.* at 4. Behaving competitively is best quantified if it is noted that firms are also encouraged to "take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products." *Id.*

69. In the years following Reconstruction, there was an increase in the number of large interstate firms, or trusts, and in response, American competition policy developed initially in the state courts. *See* Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75 (1990); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989); and James May, *Antitrust Practice & Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

70. In *Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64 (1873), the Supreme Court stated the law regarding contracts in restraint on trade:

> There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. . . A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced.

Id. at 68. In an earlier decision, *Alger v. Thacher*, 36 Mass. (19 Pick.) 51, 54 (1837), the court condemned these contracts because they prevent competition and increase prices.

71. *See* AREEDA & HOVENKAMP, *supra* note 1, at 11. *See also*, McCutcheon v. Merz Capsule Co., 71 F. 787, 792 (6th Cir. 1896); People v. N. River Sugar Ref. Co., 121 N.Y. 582, 626 (1889).

enactment of the Sherman Act in 1890, however, the focus was changed to the contracts and not just the firm structure.[72] Although antitrust arguments are now couched more in public policy and economics, the laws still target the activities of private firms rather than the activities of local and state governments.

B. State-Action Exemption Defined

Generally, when a state antitrust law is inconsistent[73] with federal antitrust law, the state law is preempted. If the state law, however, falls into the "state-action" exemption[74] implicitly created by antitrust law, then the state law is not preempted.[75] Under the state-

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72. *See* Sherman Act of 1890, 15 U.S.C. § 1 (2000) ("Every *contract*, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." (emphasis added)). At common law, a contract in restraint of trade was defined as one that wholly or partially restricts the freedom of the contractor to carry on business. *See* N. Sec. Co. v. United States, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting). Therefore, the restraint on trade was not concerned with competition, but with restraint on the freedom to act. *Id.* Under the Sherman Act, however, the restraint on trade referred to the effect the contract had on competition in the market and the activities prohibited were not necessarily prohibited at common law. *See* Sherman Act §§ 1-2.

73. While the term "inconsistent" has been given many definitions and is subject to various interpretations, it usually does not apply when the state law is more aggressive than the federal laws. *See* AREEDA & HOVENKAMP, *supra* note 1, at 300. When the state law, however, attempts to authorize private parties to escape antitrust laws without any supervision, compels private firms to act in a manner forbidden by antitrust laws, or prevents competition clearly mandated by federal law, then there is a preemption problem. *See id.* at 304. The first two problems permit private firms to determine their own conduct and are often nothing more than a state's compliance to a private firm's request. *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

74. There are some areas where the federal deference to state law is expressly stated. For example, in the area of insurance, the states have greater freedom to determine the antitrust regulations that apply. *See* McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-12 (2000).

75. "State-action" in the antitrust context is very different from the civil rights (Fourteenth Amendment) analysis. In the Fourteenth Amendment analysis, "state-action" is broadly defined, including some private actions that are "quasi-public" in character and can include action by state officials. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (holding that a town,

action exemption doctrine, certain actions of state and local government are immune from the federal antitrust laws even though they would not survive a preemption analysis.[76] The state-action exemption was set out by the Supreme Court in *Parker v. Brown*.[77]

In *Parker*, the Supreme Court rejected the contention that the California raisin proration program violated the Sherman Act.[78] The Court found that the prorate program was not created to operate by force of individual agreement or combination, but rather by the legislative command of the state and did "not intend to operate without that command."[79] Therefore, the Court found that the law did not violate the Sherman Act because the Sherman Act was not created to limit the ability of state officials or legislatures to regulate commerce.[80] The Court buttressed this holding in the sovereignty accorded to state legislatures under the Constitution, which could only be limited by Congress.[81]

The Court did, however, place a limitation on the

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although privately owned, was public enough to bring it within the First Amendment realm). 42 U.S.C. § 1983 condemns acts by public officials who are acting under the color of state law. In contrast, "state-action" in the antitrust context refers only to government policies that are clearly articulated so as to not leave doubt that it is a state sanctioned practice and not just a mistake or act reflecting the discretion of an individual official. *See* AREEDA & HOVENKAMP, *supra* note 1, at 356.

76. *See* AREEDA & HOVENKAMP, *supra* note 1, at 355. Actually, the state-action exemption is part of the preemption analysis. If a statute appears to be preempted by federal law, the second step in the preemption analysis would be to determine if it qualifies as a state-action exemption. If it does, then the statute is saved; if it does not, then the statute is preempted. *Id.*

77. Parker v. Brown, 317 U.S. 341 (1943).

78. *Id.* at 350. Under the proration program, the California Agricultural Committee set production limits in order to maintain the price of raisins. *See id.* at 347.

79. *Id.* at 350.

80. *Id.* "We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* The Sherman Act was enacted to regulate business corporations and prevent business combinations that would restrict competition. *See Parker*, 317 U.S. at 350. "Its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." *Id.*

81. *Id.*

scope of the state-action exemption. The state-action exemption did not grant immunity to people or corporations who violated the Sherman Act under the guise of a state grant of authority.[82] The exemption also does not apply when the state or municipality becomes a party in a private agreement or combination that restricts trade.[83] Since the California statute set production limits but did not authorize private individuals or corporations to do so, the Court found that it was consistent enough with the Sherman Act to avoid preemption under the state-action exemption.[84]

In order to qualify for immunity under the *Parker* standard, "the challenged restraint must be clearly articulated and affirmatively expressed as state policy," and "the policy must be actively supervised."[85] In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, the Court struck down a California statute because, although the price fixing restraint was clearly expressed as state policy, the state neither set the prices nor regulated the reasonableness of the price schedules.[86] Had California's program completely controlled the distribution of liquor within the state, that comprehensive regulation would be exempt from the Sherman Act under the state-action doctrine.[87]

State legislation that appears inconsistent with federal antitrust law can survive preemption if it qualifies

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82. *See id. See also N. Sec. Co.*, 193 U.S. at 332; Rice v. Norman Williams Co., 102 U.S. 654, 662 (1982) (holding that upholding the validity of a state statute does not insulate a firm's invocation of the statute from scrutiny under the Sherman Act).

83. *See Parker*, 317 U.S. at 351-52. *See also* Union Pac. R.R. Co. v. United States, 313 U.S. 450 (1941).

84. *See Parker*, 317 U.S. at 352.

85. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978). *See also* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

86. *See Midcal*, 445 U.S. at 106. The California law required suppliers to set a resale price on liquor and dealers had to charge that price. The price was set by the suppliers, not the state. The Court found this to be a private price-fixing arrangement cloaked in state-action. *Id.*

87. *Id.* at 106 n.9. *See also* New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978); State Board v. Young's Mkt. Co., 299 U.S. 59, 63 (1936).

as a state-action exemption.[88] A restraint unilaterally imposed by a state government does not qualify as a violation of the Sherman Act just because it has a coercive effect upon those who must obey the law.[89] Some restraints imposed by a legislature, however, are not unilateral but a hybrid because they are enforced by private regulatory schemes.[90] If the statute grants private parties a degree of regulatory power, that statute is vulnerable to scrutiny under the Sherman Act.[91] In order for the state-action exemption to apply, there must be an express or strong implication of the intent of the state to remove certain markets from antitrust scrutiny.[92]

Clearly, in the United States, any set of disciplines that purported to apply competition policy to public sector restraints would have to grapple with the state-action exemption. Some precedent already exists for competition provisions in free trade agreements, which might form the building blocks of a multilateral public sector restraints discipline. These may be found in Chapter 15 of NAFTA,[93] in Article VIII of the General Agreement on Trade In Services ("GATS")[94] or in the competition safeguards listed in the WTO Reference Paper on Basic Telecommunications.[95]

Chapter 15 of NAFTA recognizes the importance of maintaining an effective competition policy in the Contracting Parties so as to promote trade and is an example of existing competition provisions that deal with public

88. *See* Fisher v. City of Berkeley, 475 U.S. 260, 265 (1986).

89. *See id.* at 267.

90. *See id.*

91. *See id.*

92. *See* AREEDA & HOVENKAMP *supra* note 1, at 363. For example, a state's intent to eliminate competition in a particular market cannot be simply inferred from state approval of a firm's conduct. If a state approves of certain firm conduct, it makes no direct statement about whether it wants the federal government to make that market or firm immune from antitrust regulation. *Id.*

93. NAFTA, *supra* note 11, ch. 15.

94. General Agreements on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1174, 1175 (1994) [hereinafter GATS].

95. *See* WORLD TRADE ORGANIZATION, WTO REFERENCE PAPER ON BASIC TELECOMMUNICATIONS (1998) *at* http://www.itu.int/newsarchive.press/WTPF98/WTORefpaper.html [hereinafter REFERENCE PAPER].

sector restraints at a regional level. In Article 1501, it states:

> Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct, and shall take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.[96]

NAFTA goes on to encourage cooperation and coordination among the various competition agencies to ensure effective enforcement by providing for mutual legal assistance, notification, consultation and the exchange of information. Despite the state-action exemption, the U.S. was able to successfully negotiate and implement these aspects of NAFTA.

GATS addresses competition issues that face public sector restraints at a global level. Article VIII addresses the issue of monopolies and exclusive service suppliers and specifically provides the following:

> Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
>
> The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.[97]

The WTO Reference Paper on Basic Telecommunications is yet another international agreement that includes competition provisions. This agreement requires Members to maintain measures that prevent major suppliers from engaging or promoting anti-competitive practices.[98] Furthermore, it includes a list of anti-competitive

96. NAFTA, *supra* note 11, art. 1501.
97. GATS, *supra* note 94, at 1174-1175.
98. *See* REFERENCE PAPER, *supra* note 95.

practices that should be particularly regulated. These practices include engaging in anti-competitive cross-subsidization, using data obtained from competitors in an anti-competitive manner, and not making available to other service suppliers technical information about important facilities and commercially relevant information which are needed for them to adequately provide services.[99]

All of these agreements bind, inter alia, the United States, and all have been successfully concluded with extensive U.S. participation. Indeed, U.S. industry has been driving the debate forward as many U.S. companies are adversely affected by public sector restraints in other markets. This is particularly true in the service sector.

C. State Aid Under the European Union Framework

The European Union is itself a trade agreement that has competition provisions that deal with public sector restraints of trade through the state aid provisions. Under the Treaty Establishing the European Community, the European Union established a competition policy that has several prongs, including an antitrust section and a state aid section.[100] Under Article 87, any aid directly given by a Member State, or indirectly given through the use of its resources, which distorts competition by favoring a particular industry or company is considered "incompatible with the common market."[101] Other sections of Articles 81 and 87, however, provide for exceptions to the prohibitions of anti-competitive activities.[102] These excep-

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99. *Id.*

100. *See* EC TREATY, *supra* note 13. The antitrust and State aid provisions overlap in the EC Treaty. Antitrust activities are the subject of Articles 81 through 86 and state aid is the subject of Articles 36, 73 and 86-89. The goal of these competition provisions is to promote the common market. So, for example, Article 81 lists activities that are prohibited because they are "incompatible with the common market" and makes agreements relating to those activities void. *Id.* art. 81.

101. *Id.* art. 87 § 1. "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market." *Id.*

102. *See id.* art. 87 § 2. Article 87 § 2 states:

tions are rooted in the advancement of the public welfare, common market and consumer protection.[103]

Exemptions are available under European competition law for private sector anti-competitive behavior. In order to qualify for exemption under Article 81, Section 3, the activity must satisfy two main requirements.[104] First, the activity must advance production, distribution or economic progress.[105] Second, the activity must pass on to the consumers a fair share of the resulting benefit.[106] For example, the Commission granted an exemption to the P&O Stena Line Cross-Channel ferry service because both of these requirements were satisfied.[107] If the activity meets the criteria for the exemption, the Commission is likely to grant it unless the activity restricts other parties in ways

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> The following shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

Id.

103. The exceptions to the antitrust prohibitions in Article 81 allow activities that contribute "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair of the resulting benefit" to be outside the scope of the antitrust prohibitions. *Id.* art. 81 § 3. The exceptions to the State aid prohibitions in Article 87 allow a state to grant aid that is "compatible with the common market." EC TREATY, *supra* note 13, art. 87. For example, aid is compatible with the common market if it has a "social character" and is granted without discrimination. *Id.* art. 87 § 2. Aid can be compatible if it facilitates "the development of certain economic activities." *Id.* art. 87 § 3.

104. *Id.* art. 81 § 3.

105. *Id.* The activity must "contribute to improving the production or distribution of goods or to promoting technical or economic progress." *Id.*

106. EC TREATY, *supra* note 13, art. 81 § 3. The activity must "allow consumers a fair share of the resulting benefit." *Id.*

107. *See* Commission Notice Pursuant to Article 12(2) of Council Regulation 4056/86 (EEC) Concerning Case COMP/02/37.939-P&O Stena Line 2, 2001 O.J. (C 76) 2. The Commission examined the market conditions and determined that there were no new conditions present in the market to not grant the extension. Since the consumers benefit from better service and lower prices, the Commission determined that the conditions for exemption under Article 81(3) were satisfied. *Id.*

that are not essential to achieve the required objectives or eliminates competition in a substantial part of the market.[108] For example, the Commission took action against Editions Nathan because their exclusivity contracts contained restrictions that were not indispensable to the improvement of production or distribution of educational material.[109]

Under Article 87, Member States are prohibited from directly or indirectly granting aid that would distort or threaten to distort competition by favoring specific undertakings.[110] There are two classes of exceptions to this prohibition against state aid: automatic and discretionary.[111] The types of aid that are automatically considered "compatible with the market" are those that: (i) have a social character in that they are granted to individual consumers without discrimination; (ii) are designed to help after a natural disaster or exceptional occurrence; or (iii) are designed to help areas of Germany that were economically disadvantaged by the post-World War II division of the nation.[112] The types of aid that "may be considered to be compatible with the common market" are those that: (i) promote economic development where the standard of living is unusually low or the unemployment rate is unusually high; (ii) promote an important project of common European interest or remedy a serious problem

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108. *See* EC TREATY, *supra* note 13, art. 81 § 3. The activity can be exempt if it "does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." *Id.*

109. *Id.* art. 86 §§ 1-2. Article 86 § 1 states: "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89." *Id.*

110. *See id.* art. 87 § 1. While the section does not specifically prohibit State aid, it does state that such aid is "incompatible with the market" but such acts are prohibited under various sections of the Treaty. "State aid" under this article refers only to the transfer of financial resources not advantages conferred by the State. *See* Appeal brought on 26 February 2001 by La Poste against the judgment delivered on 14 December 2000 by the Fourth Chamber of the Court of First Instance of the European Communities, 2001 O.J. (C 134) 7.

111. *See* EC TREATY, *supra* note 13, art. 87 §§ 2-3.

112. *See id.* § 2.

affecting a State's economy; (iii) facilitate the development of economic activities or areas, if it does not affect trade; (iv) promote culture and heritage conservation if it does not affect trade; or (v) are other types of aid that the Council may qualify.[113]

While some state aid programs are authorized without any objections from the Commission,[114] there are other cases in which the Commission has to analyze the purpose of the aid and how it is carried out. For example, when Austria granted state aid to Lenzing Lyocell GmbH & Co. KG, the Commission analyzed the aid measures, the purpose of the aid and the nature of the market to determine if it qualified as one of the exemptions.[115] The Commission determined that the aid granted by Austria was compatible with the common market and authorized it as an exemption.[116] These decisions, as well as the listed exceptions in the EC Treaty, could offer some guidance in crafting a set of disciplines at a multilateral level to deal with public sector restraints of trade, which nonetheless do not impinge on the rights of states to grant aid or impinge too severely on the state-action exemption.

D. A Harmonizing Framework

It is possible to craft a set of public sector restraints disciplines based on the existing ones discussed above, together with the draft FTAA competition chapter. Such disciplines could be successfully negotiated by U.S. trade negotiators without damaging the state-action exemption

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113. *See id.* § 3.

114. *See, e.g.*, Authorization of State Aid Pursuant to Articles 87 and 88 of the EC Treaty — Cases where the Commission Raises No Objections, 2001 O.J. (C 211) 47.

115. *See* Commission Decision of 19 July 2000 on State Aid Granted by Austria to Lenzing Lyocell GmbH & Co. KG, 2001 O.J. (L 38) 33. The aid took the form of state guarantees for grants and loans, low prices for hectares of land, fixed prices over thirty years, ad hoc investment aid, and environmental aid. *Id.*

116. *See id.* The Commission determined that the guarantees for grants and loans, the low prices for land and the fixed prices did not constitute state aid under Article 87 of the EC Treaty. The environmental aid did qualify as state aid but satisfied the environmental aid guidelines approved under number N 93/148. *Id.*

by continuing to apply a variant of the *Parker* doctrine to these restraints. The reasons given in the European cases that have dealt with state aids could also be applied so that the following principles could be set out:

(i) nothing in the public sector restraints agreement would prevent Members from designating monopolies;

(ii) where monopolies have been designated, it will be necessary to ensure that they are regulated in such a way as to avoid discrimination against foreign enterprises, and that they operate in as pro-competitive a fashion as possible; and

(iii) where public sector laws, regulations or practices restrict trade, or have an anti-competitive effect, a violation could be found, unless the laws or regulations satisfied the requirement that:

(a) they articulated a valid public policy objective of the Member; and

(b) that the law was the least restrictive way of achieving the public policy goal.

Valid public policy objectives might be drawn from European state aids jurisprudence, for example, where the aid is designed to promote the standard of living in particularly poor regions or to facilitate economic activity. As with the European case law, consumer benefits should be clearly ascertainable from the law, in order for it to constitute a valid objective.

E. Dispute Settlement

One concern of those not convinced of the value of a series of public sector restraints disciplines is how disputes would be resolved. They argue that the dispute settlement mechanism of the WTO is not a valid forum for solving these kinds of disputes. I propose a relatively straightforward dispute settlement that draws on, but is not wholly governed by, the WTO dispute settlement mechanism.

In essence, for countries that maintain competition laws and have competition agencies, complaints would be made to the WTO Committee on Competition and Trade ("Committee"). The Committee could refer the matter to the national agency with guidelines and instructions. If the national agency acted *ultra vires* as to these instruc-

tions, then appeal could be made to the Dispute Settlement Body ("DSB"), which would assess whether or not the national agency acted outside the scope of its power its express instructions. In cases where the country has no competition law or agency, or in cases where the public sector restraint issue supplements another WTO violation, such as national treatment violation or a Non-Violation Nullification and Impairment claim, the complaint could be made by a WTO Member and heard by the DSB on its merits.

V. CONCLUSION

For too long, the focus of the economic benefits of trade liberalization has been on tariff and non-tariff barriers and has ignored domestic regulatory reform. However, as I have made clear, the benefits of trade liberalization will not properly flow to consumers in countries unless there is regulatory reform, particularly to ensure competitive markets. It is clear that without some form of multilateral discipline on the many public sector restraints that render markets uncompetitive, national antitrust agencies (especially in their early days) will be unable to fully resist powerful vested interest groups in countries that have benefited from both the lack of liberalization and the lack of competition. If the powerful benefits of trade liberalization are to be continued, and the forces opposed to trade liberalization resisted, it is critical that competition policy take its proper place at the trade table.