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CONSISTENCIES AND INCONSISTENCIES BETWEEN TRADE AND COMPETITION POLICIES

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CONSISTENCIES AND INCONSISTENCIES BETWEEN TRADE AND COMPETITION POLICIES

I. Introduction

1. This note addresses the subject of the consistencies and inconsistencies as between the goals and objectives and the means of implementation of trade and competition policies. It builds on prior work of: the Working Party of the Trade Committee and Working Party No. 1 of the Committee on Competition Law and Policy [e.g. Interrelationship between Competition and Trade Policies and Joint Report on Trade and Competition Policies OCDE/GD(93)101], the consultant's paper "Trade and Competition Policies: Comparing Objectives and Methods", published as No. 4 in the *Trade Policy Issues* series, OECD, 1994; the Joint Report of the Trade and Competition Committees, *Strengthening the Coherence Between Trade and Competition Polices*, [OCDE/GD(96)90]; and the ongoing work of the Joint Group on Trade and Competition Policy.

2. The second section of this note examines at a more general level the broad setting in which both policy domains operate. The third section looks at the objectives of both policies including where there are differences. The fourth section outlines certain key features relating to the means of application of both policies. The fifth section focuses on certain areas where questions of tangible inconsistency are sometimes claimed to arise. The sixth section concludes.

II. Scope

a) "Border/non border"

3. Competition policies and trade liberalisation policies are, in general, mutually reinforcing. Historically, trade negotiations have focused on the liberalisation of "at the border" governmental measures that can or do distort trade flows. In particular, Articles I, II and XXVIII of the General Agreement on Tariffs and Trade (GATT) have, since 1947, provided a framework within which it has proved possible for governments to ratchet down trade barriers through bound reciprocal concessions applied on a most-favoured nation basis. Further, practices most likely to deter trade flows such as quantitative restrictions were subjected to disciplines (such as Article XI) prohibiting them or permitting them subject to a few well-defined exceptions. These at the border issues reflect the traditional "market access" concerns of trade negotiators. Under the GATT, and subsequently the World Trade Organization (WTO), there has also been attention to certain "behind the border" measures that distort or impede trade. The scope of coverage of such measures has steadily expanded over time, most notably in the context of the Tokyo Round and Uruguay Round (see below).

4. Competition policy has historically focused on assuring competitive conditions "behind the border" because competition laws typically provide jurisdiction to proceed only against anti-competitive effects within the national market. Until relatively recently, competition policies tended to focus on promoting consumer welfare by protecting competition between and among domestic firms, although there are a number of examples, some going back decades, of antitrust enforcement focused on international cartel activity, on domestic conduct which excluded foreign firms and on international mergers. In some cases, extraterritorial assertions of jurisdiction have been controversial. More recently, co-operative enforcement of domestic competition laws has also entered the picture. But, in all cases, the focus is necessarily on the competitive effects behind the border, not at the border, given the jurisdiction of antitrust authorities.

5. Having made a distinction between the "at the border" emphasis in trade policy and the "behind the border" nature of competition policy, this should not be overdrawn. From the inception of the GATT in 1947, the principle of national treatment embodied in Article III has obliged governments to maintain the conditions of competition between "domestic" and "foreign" goods by proscribing discriminatory application of governmental measures such as internal taxes and certain other national laws and regulations.

6. Similarly, while "domestic" subsidies that could affect competition behind the border (or in third markets for that matter) were not prohibited outright within the GATT system, they have been subjected to disciplines that aim at curbing their trade distortive effects, e.g. via countervailing measures at the border or by resort to multilateral dispute settlement. This framework has been further refined with the creation of the WTO in 1994 and the adoption of the Agreement on Subsidies and Countervailing Measures.

7. It may be noted that some (but not all) competition policy regimes are also concerned with the competitive effects of state aids and other forms of subsidies. The addition of WTO disciplines on Services, Trade Related Investment Measures (TRIMs), and Trade Related Aspects of Intellectual Property Rights (TRIPs) also evidences the increasing attention being paid by trade negotiators to behind the border measures. With respect to competition policy, globalisation has contributed to a heightened awareness about the effect of residual border measures such as tariffs and other forms of duties that might distort conditions of domestic competition.

b) Public/private

8. A perhaps more fundamental distinction to be conscious of when examining the two policy domains relates to public versus private conduct. The GATT of 1947 focused predominantly on governmental measures - either at the border in the form of quantitative restrictions and tariffs or behind the border in the form of discriminatory laws and regulations. Furthermore, with respect to state trading enterprises, the GATT/WTO framework has always dealt with the actions of such enterprises when engaged in "market" functions. Trade distortions from such actions - whether through public procurement or other market behaviour - have been subjected to discipline. Certain private conduct (such as "injurious sales below normal value") was dealt with directly under, e.g. anti-dumping disciplines.

9. With the creation of the WTO, the trade regime has broadened the scope of its application to certain private conduct relating to, e.g. safeguards (with respect to voluntary restraint agreements), services and intellectual property. While national competition policies are not uniform in this regard, it is arguable that, historically, competition policy has tended to be applied more broadly to private conduct rather than governmental conduct (as a function of the sovereign immunity and act of state legal

doctrines). More recently, competition policies are reaching into governmental conduct in the area of regulations covering essential facilities and professional services, in addition to public utilities and state or regulated monopolies either through the direct application of positive law or through competition advocacy.

10. In many respects the GATS Agreement on Basic Telecommunication Services is the best example of the mutually reinforcing objectives of competition and trade policies. That agreement addresses both governmental measures and private conduct (albeit in an indirect manner) and addresses both at the border and behind the border concerns using both trade and competition policy instruments and concepts.

III. Objectives

11. From the above, it can be seen that competition and trade policies share a broadly compatible underlying rationale: the elimination or reduction of barriers to, and distortions of, markets. The importance of having such a mutually reinforcing nature of policies is perhaps best revealed when it is not present. The absence of a national competition policy can deter or prevent access to foreign goods at lowest cost. Similarly, the absence of trade and investment liberalisation deters or prevents access to pro-competitive foreign goods or producers. Both policies are based, at least in part, on the recognition that a market without distortions maximises efficiency and allocation of resources within the economy. That being said, it is worth (a) discussing the concept of "efficiency" more fully, and (b) noting the presence of policy considerations that temper that perspective.

a) Efficiency objectives

12. The economics of competition policy and trade liberalisation are often quite similar. Competition policy is concerned first and foremost with economic efficiency, composed of allocative, productive and dynamic efficiency. Allocative efficiency is concerned with ensuring that economic resources are distributed to those who put the greatest value on them. This is efficiency in exchange. Productive efficiency is concerned with assuring that a given level of output is achieved at the lowest cost. In competitive markets, both allocative and productive efficiency are achieved at the same point. While allocative and productive efficiencies are static concepts, dynamic efficiency is concerned with the process of discovering the best technologies, processes and products for meeting changing consumer tastes and incorporating them efficiently into the economic system.

13. Trade liberalisation policy similarly may be oriented towards all three of these objectives. Removing tariff, non-tariff and internally based barriers to trade through negotiated concessions are the principal means of achieving the allocative and productive efficiency objectives.

14. Competition policy is also concerned with distortions of competitive market conditions caused by predatory practices of dominant firms that may lead to the exclusion or foreclosure of smaller firms from the market and harm competition. Similarly, trade policy is concerned, on the one hand, with practices of firms that impede access for exports to the market concerned. On the other hand, it also provides for certain counter measures in response to sales below normal value determined to be injurious to a domestic industry.

b) Broader context

15. Notwithstanding this broad convergence, it is a simple matter of fact that both policy domains operate in a broader context where other public policy objectives need to be co-ordinated and prioritised by sovereign governments.

16. In the case of trade policy this is reflected in a number of areas, such as (for instance) provisions that permit departures from "liberalisation" approaches in order to implement measures necessary to protect human, animal or plant life or health, conservation of exhaustible natural resources or measures considered necessary to protect essential security interests. Clearly, to the extent of liberalisation in some cases reflects the outcome of a balancing of public policy objectives relating, e.g. to sustainable development, environment and employment. In areas such as trade in agriculture where trade restrictions have been historically high, this has reflected *inter alia* complex national, social and environment policy objectives. Nor is this fundamentally different in the case of competition law and policy. For instance, in the case of certain sectoral exclusions (and agriculture would be one of these) this reflects a public policy response to broader policy implications as is the case with trade policy.

c) Different emphasis

17. The two policies can also have somewhat differing perspectives. The underlying rationale of multilaterally-based trade liberalisation is generally to set terms and conditions at the international level which will be compatible with global consumer welfare and achieving global productive efficiency. It requires, of course, agreement of sovereign governments to get closer to that objective and, as a consequence, it is a "work in progress". That is one reason why the MFN principle has been such a vital component of the GATT-WTO system. Competition analysis has, by comparison, been more particularly focused on consumer welfare in relation to a class of consumers in a defined market.

18. At the risk of some over-simplification, it can still be said that, while both policies are concerned with micro economic issues, competition policy emphasises a fact specific, case by case approach, and is usually applied *ex post* (although merger review is an exception), while trade policy often involves more of a sectoral or economy-wide approach and is usually applied *ex ante* (although trade remedies are an exception). Similarly, competition policy often emphasises issues of actual competition in particular markets, while trade policy often focuses on issues of potential competition in the sense of safeguarding competitive opportunities. This may lead, for instance, to a broader definition of markets in trade policy terms than in competition policy analysis. It may also mean that competition policy sometimes appears to have a concern for short-term effects while trade policy has more of a concern for long-term market effects. These differences may have implications for the means and mechanisms employed by both policies as discussed below.

IV. Means/Mechanisms

a) Key practices

19. When competition policy is pursuing its allocative and productive efficiency objectives, it is often concerned with concerted efforts to raise prices artificially above competitive levels. This is the reason for the emphasis on proscribing horizontal agreements to fix prices among competitors, or a number of other practices that have the same effect such as bid rigging, market allocation, etc. With

regard to certain other forms of horizontal co-operation, all types of efficiency considerations -- productive, allocative and dynamic -- apply. These may support acceptance of such types of horizontal co-operation, including various types of joint ventures and other consortia. The concern for efficiency also gives rise to the review of mergers between or among competitors that might lead to increased price or less innovation, and hence a reduction in consumer welfare.

20. In competition policy, the efficiency objective increasingly provides the framework for assessing vertical relationships[1]. Such relationships can include contractual provisions such as exclusive dealing, exclusive territories, tie-ins, and so forth. Here, a complex analysis is needed which may involve examining a reduction in intrabrand competition in conjunction with positive and negative effects on interbrand competition, some of which may arise only over time. Likewise, efficiency concerns motivate control of conduct by dominant firms, particularly conduct which excludes or forecloses competitors from a market by means other than vigorous competition. Such conduct could include the kinds of vertical restraints cited above and also extends to unilateral conduct such as predatory pricing or refusing to deal. The important point for this note is that all jurisdictions provide in some way for sanctioning such abusive conduct through administrative or civil procedures. In some jurisdictions, competition policy is empowered to address this abusive conduct whether performed by private or governmental entities.

21. In terms of trade policy, removing tariff and principal non-tariff barriers to trade whether autonomously or through negotiated concessions is the means of fostering the allocative and productive efficiency objectives. This approach can either be focused on particular products or sectors, or can be pursued through broad general measures. For instance, a tariff negotiation that results in a lowered bound tariff rate for a particular product might lower the price to consumers as well as the cost of production to other producers for whom the product is an important input. Similarly, trade negotiations that open particular service sectors to foreign suppliers might reduce prices to consumers and costs accordingly.

22. In the case of goods, trade policy also works through rules-based disciplines such as national treatment (GATT Article III), most-favoured nation (MFN -- GATT Article I), and general elimination of quantitative restrictions (GATT Article XI). These obligations have the effect of ensuring that reductions in protection (via the MFN principle) expose the market concerned to (global) least-cost sources. National treatment may serve both objectives by assuring that foreign goods or (as the case may be) service providers receive no less favourable regulatory treatment than domestic goods or service providers.

23. Trade policy manifests a concern for market exclusion and foreclosure in a number of ways. For instance, exclusion might be addressed by negotiated rights of market access obtained in the form of reciprocal trade concessions. The February 1997 GATS Agreement on Basic Telecoms might provide a good example of this. Exclusion might also be dealt with by the application of national treatment principles to governmental measures that would otherwise have the effect of restricting market access. It is important to stress, however, that where trade policy addresses these issues, it frequently does so in a negotiated and progressive manner, as opposed to the case by case approach of domestic competition policy enforcement.

b) Structural resemblance

24. It also may be worth noting certain “structural” similarities across the policy domains. For instance, both competition and trade policies recognise a limited class of conduct that is impermissible or per se illegal. In the trade policy world, the prohibition on the use of quantitative restrictions in GATT Article XI is a fairly broad prohibition. Furthermore, the Uruguay Round Multilateral Agreement on

Safeguards provides for the elimination of voluntary export restraints (VERs), orderly marketing arrangements or any other similar measures on the export or import side (including compulsory import cartels and discretionary export and import licensing schemes any of which afford protection). In many jurisdictions, abstracting from associated definitional problems, competition policy would recognise a class of "hard core" cartels without any redeeming efficiency justification to be per se illegal. For conduct that does not fall within the limited class of per se illegal acts, both competition and trade policy rely to a large extent on detailed factual analysis that may be conducted in administrative or judicial settings. We will discuss below how these settings may differ in respect of certain practices and procedures.

c) Institutional arrangements

25. The institutional mechanisms for enforcing competition policy reflect the particularities and heritage of each jurisdiction's administrative and judicial systems. Accordingly, in some jurisdictions, enforcement remains subject to a political override. In others, enforcement is administered to varying degrees by independent authorities. Elsewhere, enforcement is a mixture of the two. In some jurisdictions, enforcement is before administrative agencies and only secondarily by courts, while in others the courts and the administrative agencies can provide primary avenues for redress. In the latter case, private rights of action are available to enable private parties to bring their claims. In some jurisdictions, the remedies are of an administrative nature and involve only fines or fines combined with findings of nullity, while in others remedies can involve civil or criminal fines, prison terms, and injunctions. In an increasing number of jurisdictions, administrative guidance, enforcement guidelines and advisory opinions are used in enforcement policy.

26. Trade policy is likewise implemented by a range of institutions. Liberalisation is often unilateral, being the product of a co-ordinated inter-agency process under ministerial authority. In some cases, it is undertaken as part of a regional liberalisation arrangement involving intergovernmental negotiation. At other times, it can be the outcome of a multilateral negotiation. In all cases, it is an essentially political process entered into by governments. However, its status in domestic law/regulation, etc. is complex. Depending on the country concerned, there will be a combination of administrative agencies, political institutions, and courts involved. Unlike the case with competition policy, trade commitments are also increasingly subject to binding negotiated multilateral rules. Any breach of such intergovernmental agreements may entitle affected state parties to have recourse to counter-measures pursuant to the relevant (e.g. WTO) international agreements.

27. Given the wide variance in institutions in both domains, it is difficult to comment usefully about where these particular differences between the trade and competition institutions give rise to what might be described as "inconsistencies".

V. What counts as an "inconsistency"?

28. In the above sections of the note an attempt has been made to make a first, albeit non-exhaustive, overview diagnosis of a number of the possible areas where there appear to be manifest similarities, complementarities, divergences or differences in the policy domains.

29. But these, in and of themselves, do not necessarily mean that there are "inconsistencies" in the sense that one policy domain impedes or conflicts with the operation of the other. The latter consideration is presumably the more important issue to focus on inasmuch as it has a practical bearing.

30. It must be said in this context that many of the issues highlighted in the text above may not give rise to practical inconsistencies. The differences relate to differences of objectives or policy domains which mean that effective implementation of one policy has no particularly damaging implication for the other. Of course, the reality of integrating markets has meant that the question of whether there are consistencies or inconsistencies is all the more important - not just from a viewpoint which is concerned to avoid conflict but also from a perspective which is concerned to maximise policy coherence.

31. With that in mind, the following issues are a first attempt to focus in on some areas where some have held that there may be more practical consistency questions at issue:

- As noted above, trade liberalisation involves opening particular markets through reductions in tariff and non-tariff barriers. In certain cases, this liberalisation is consolidated in the form of binding commitments at the multilateral level. How significant a problem is it that certain exclusions from the application of domestic competition policies exist? If it is considered to be a problem as far as consistency is concerned, is this a matter to be seen as principally (a) an area where there is a prospect for new and improved market access as a result of changes to application of competition law; and/or (b) an area where existing commitments are in fact being undermined and legitimate expectations frustrated?

- Many jurisdictions continue to except export cartels from anti-trust laws. Is there a shared view that such cartels generally increase prices to foreign consumers or otherwise facilitate anti-competitive practices to the detriment of foreign consumers?[2] If so, does this raise issues of consistency as between trade and competition policies? Is there any possibility that measures to deal with such practices by either trade and/or competition policies could lead to conflicting outcomes?

- In the area of governmental monopolies or entities granted exclusive or special privileges, is there any reason to believe that the respective discipline of international trade rules and competition laws could lead to conflict? Alternatively, is there scope for making these policies work in a more coherent fashion to meet objectives shared by both policy communities?

- Is there any reason to believe that the pursuit of bilateral co-operation or positive comity agreements raises any problem of consistency as far as international trade obligations are concerned? Is there satisfaction that such arrangements are compatible with the national treatment and MFN obligations under the WTO?

- What are the residual border trade measures that create inconsistencies for national competition policies? Are there salient sectors where application of governmental measures at the border materially interferes with the attainment of competition law implementation?

- Is it considered that there is an inconsistency in the way in which trade remedies are applied under trade law and the way in which competition law and policy deals with predation and low cost pricing? If so, are there relevant differences in the policy objectives in each domain that account for this?

- Is there any reason to believe that competition policy, when applied in practice to, e.g. vertical restraints, can adopt a perspective based on net efficiency gains to the domestic economy that is inconsistent with a trade perspective that seeks to account for efficiency effects on the “foreign” or global market? If so, is this an inconsistency that is more

theoretical than real? Is it also an inconsistency that relates specifically to the maintenance of negotiated multilateral trade commitments?

– Is there any reason to believe that the manner in which competition law applies to standards setting bodies or professional licensing associations can create inconsistencies with rights and obligations under international trade agreements and vice versa?

VI. Conclusions

32. This note has sought to provide an overview of various possible consistencies and inconsistencies between the trade and competition policy domains. For the most part, we found that both policies are broadly compatible or at least mutually supportive. However, they also have their differences. In some cases this reflects the distinct matters dealt with by each policy. In others, it reflects the fact that either (or both) have to play their part in - and be co-ordinated with - other policy objectives that are the sovereign responsibility of governments. This may lead to differences of perspective or approach. We also noted that there are resemblances in the policy instruments and institutions employed in the discharge of their functions, although the wide variance made it difficult to draw firm conclusions here.

33. It appears important to stress that even where differences in application of the two policies arise, it is not yet altogether clear as to how much these differences actually impede the operation of one or the other policy.

34. It is suggested that a practical orientation might, in the future, focus more narrowly on defining where such potential inconsistencies may or may not arise. The questions outlined above are a first attempt to identify possible candidates. The aim of such an approach would be to avoid any temptation to pursue an unduly academic or abstract discussion. Rather, the object would be to see whether there is some tangible and substantive problem that needs to be dealt with. This, it is suggested, may be the most appropriate next step to take by way of elaboration.

ADDENDUM:
ELABORATION OF CERTAIN ELEMENTS OF PARAGRAPH 31

At the 6th Joint Group meeting held 6 February 1998, the Secretariat was asked to elaborate certain elements of paragraph 31, and it was agreed that delegations would submit further written suggestions for additional elements of paragraph 31 to be elaborated, and to identify for discussion actual cases which were subject to both trade and competition analysis. One written submission requested elaboration of bullets 6 (dealing with trade remedy issues), 7 (dealing with vertical restraints) and 8 (dealing with intellectual property) of paragraph 31.

This addendum addresses directly two of those issues: trade remedies and intellectual property. The discussion of efficiency objectives has been achieved to some extent by the modification of the main text, and more specifically in this addendum in relation to intellectual property. With respect to the issue of vertical restraints, Delegations are referred to COM/DAFFE/CLP/TD98(47)FINAL.

Trade remedies

To simplify the analysis here, this section considers only two trade remedies. In particular, it considers safeguard measures and antidumping, and compares aspects of them with two types of prohibition found in competition laws - the prohibition against price discrimination and the prohibition against predatory pricing. It begins with a discussion of the various objectives of trade remedy laws, followed by a discussion of market definition; a discussion of the way in which price discrimination is addressed under trade and competition law; a comparison of the ways in which issues of price predation are addressed under trade and competition law; a comparison of how "injury" is determined in trade law with proof of anti-competitive effect in competition policy; and finally, a discussion of procedures and remedies.

Objectives of trade remedy laws

There are three principal forms of trade remedy laws: antidumping; subsidies and countervailing duties; and safeguards. In this Section we focus on two of these - antidumping and safeguards.

The WTO Agreement on Safeguards permits Members to apply such measures where a product is being imported into its territory in such increased quantities under conditions that cause or threaten to cause "serious injury" to a domestic industry. These measures are subject to strict disciplines and time-limits, and may only be applied to the extent necessary to prevent or remedy the serious injury. For the purposes of this paper, perhaps the most significant aspect of the WTO Agreement on Safeguards is the complementarity between trade and competition policy with respect to certain prohibited measures. Article 11 provides that Members shall not seek, take or maintain any voluntary export restraint, orderly marketing arrangements or any other similar measures on the export or import side. Footnote 4 to the Agreement further provides that examples of similar measures include: export moderation; export-price

or import-price monitoring systems; export or import surveillance; compulsory import cartels and discretionary export or import licensing schemes, any of which affords protection.

It is useful to keep in mind that, in the evolution of GATT/WTO practice and various national trade laws, there has tended to be a link between evolution of policies with respect to antidumping and those that address issues of safeguards. On this "realpolitic" view, the antidumping laws represent a continuing belief by governments that the task of trade and investment liberalisation and market integration is still incomplete. Accordingly, governments retain a rules-based way to protect their domestic industries from unfair or injurious trade practices that arise from the incomplete nature of trade and investment liberalisation to date despite the substantial progress made over the last fifty years. Viewed in this way, antidumping laws are not primarily concerned with issues of anti-competitive price discrimination, predation or exclusion and their consequent effects on consumer welfare in the short-term. Rather, antidumping laws are a disciplined way, subject to binding multilateral agreement, to ensure that the competitive conditions between and among domestic and foreign goods and firms are safeguarded in such a way that the political consensus for trade and investment liberalisation with its consequent positive effects on consumer welfare in the longer term can be maintained.

Market definition

Competition law focuses on effects on competition, and on particular buyers**,** rather than effects on particular firms. Effects on competition of particular practices are assessed within a "relevant" product market, which is defined based on buyers' demonstrated ability and willingness to substitute between or among a range of similar products and their suppliers. In that sense, market definition is a crucial and technical exercise for the application of competition law.

Trade policy is not necessarily concerned with effects on a "competitive" range of products. This reflects the fact that negotiated tariff concessions are the outcome of a politically negotiated process in which governments "trade" reductions in certain products for reciprocal tariff reductions in certain classes of foreign products. There is no in built requirement that the MFN or national treatment principles apply across a range of "competitive" products *per se.* It can be a question of whether there has been a commitment by a government to grant particular treatment to a partner's product listed in the tariff schedule. Even if the tariff concession related to a product falling into the same line of the Harmonised Tariff Schedule, it is not necessarily the case that all competing products within that HS classification would receive similar treatment. The government concerned may have chosen to grant different tariff treatment to a specific sub-category. However, there are situations where certain conditions of competition, including demand substitution issues, enter into consideration (see for instance, recent WTO cases relating to Article III). In antidumping and countervailing duty investigations, to some degree demand substitutability is factored into determinations of the "like product" for antidumping and countervailing duty determinations and "domestic injury" for material injury determinations.

The reciprocal negotiated concessions have depended very heavily for their effectiveness on consistency and predictability of treatment. It would be difficult to operationalise the *ex post* market definition of competition policy for the ex ante negotiating purposes of trade policy.

Antidumping and price discrimination

At this point it is worth noting that the potential for dumping can be facilitated by market segmentation caused e.g. by tariff barriers or as a result of other obstacles such as norms, standards testing procedures, closed distribution systems or insufficient operation of anti-trust legislation in the exporting country. Without such restrictions or distortions, price differences with other markets should be narrowed because of import competition. Where active import competition takes place in a market, exporting from that market at dumped prices does not normally make sense, as at least part of the low priced goods would be re-exported to the country of origin with the consequence of price arbitrage which would negatively affect the exporter's domestic business. For this reason, the parties to some free trade agreements have agreed to curtail or abolish the antidumping trade remedy. Market segmentation, by contrast, gives exporters scope to maintain higher prices on their home market and thus to compensate lower export prices. [3]

Antidumping laws are primarily directed at international price discrimination. In such cases, there appears to be at least broad resemblance between injury under antidumping laws and "primary line"[4] injury under competition laws concerning price discrimination. However, price discrimination claims in a domestic context in some (but not all) jurisdictions must be shown to harm competition (a topic discussed in more detail below), not merely to harm particular competitors. Furthermore, in some jurisdictions a complaint of price discrimination is subject to defences such as "meeting the competition", i.e. when a competitor lowers his price in one area in order to compete with the lower prevailing price in that area. There is no similar defence available in dumping cases.

Antidumping and predatory pricing

In some countries' views, antidumping laws are essentially concerned with issues of predation, leading to a comparison of the standards of proof under trade and competition laws.[5] However, in some other countries' views, antidumping laws are not concerned with issues of predation. Be that as it may, in most jurisdictions, competition authorities use some proxy for marginal costs such as average variable cost in determining whether predatory pricing is involved. On this view, the notion of predation is less strict. Predation in the antidumping context is not directly linked to any cost standard, except where constructed costs are involved in which case some proxy for average total cost is used. Indeed, dumping laws are primarily directed at international price discrimination, not price predation *per se*. It is worth noting that neither Article VI of GATT 1994 nor the WTO Antidumping Agreement make any reference to predation.

In addition, as discussed below, there are significant differences between antidumping and predatory pricing in terms of the requirements of injury and anti-competitive effects.

Determination of injury and anti-competitive effects

A key component of antidumping analysis is an assessment of material injury to the domestic industry. With respect to price discrimination and predation, competition law in most countries involves a consideration of the competitive effects of the practice under investigation.

That being said, the question of price predation under competition law is generally not reached unless some type of market power screen has been passed. That is, unless market structure and entry

conditions create a real risk of successful predation, i.e., an anti-competitive effect that reduces consumer welfare, there is no need to enter into complex cost calculations.

On the other hand, antidumping laws are concerned with the impact of "dumped" imports on the domestic industry. In making that determination, the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires a consideration of "all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments." Under the WTO rules, the determination of injury is a separate inquiry from the determination of dumping margins. When injury cannot be proven, the analysis ends regardless of whether the existence of a dumping margin has been proven. Furthermore, the WTO rules provide that there "shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis* [less than 2% of the export price], or that the volume of dumped imports [generally less than 3% for any one country], actual or potential, or the injury, is negligible."

Apart from the limited class of cases that various jurisdictions proscribe as per se illegal in their domestic competition policy, competition enforcement usually requires some proof of injury before a remedy is imposed. In the trade context, the GATT-WTO framework requires that authorities examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and injuries caused by these factors must not be attributed to dumped imports. It is worth noting that both the EU and Canada have legislative provisions that provide for public interest concerns to be factored into the decision whether to apply an antidumping or countervailing duty. The "Community interest rule" means that before taking a decision on antidumping measures an overall estimation shall be made of all the interests pro and against such measures so that account shall be taken not only of the interests of the EU producers but also of the interests of the user industry (and the consumers within the EU if the product under investigation is a final consumer item).[6]

Procedures and remedies

In jurisdictions where fines for competition violations are limited to offsetting rather than punitive damages, it would appear to be difficult to distinguish between the two approaches to injury determination, except that, as indicated above, in competition cases there must generally be proof of injury to competition as well as proof of injury to particular firms.[7] In both cases, however, it would be important to assess actual practice before making any sweeping comparisons.

The interrelationship between trade and competition policy remedies is complex in that the use of one policy remedy might have an effect on the necessity of the other remedy. For instance, a number of otherwise anti-competitive mergers may be approved conditional on the lifting of existing trade remedies such that price competition to the merged firm might be provided by increased import competition. Also, it is possible that where price undertakings are used as an antidumping remedy there might be an inconsistency where competition policy might otherwise view such arrangements as hard core cartels. Voluntary export restraints might also be subjected to a similar analysis, but these have been phased out under the WTO Agreements on Safeguards discussed above.

It is also worth noting that the standing requirements for initiating a dumping investigation, pursuant to the GATT-WTO framework may be viewed as more demanding for a complainant than is the case in competition proceedings. For a dumping case to proceed, there must be evidence that the

complaint is made by domestic producers constituting more than 50% of the domestic production of the like product. This high standing requirement may act as a bar to frivolous or anti-competitive litigation. It might be worth considering whether, and under what circumstances, this standing requirement might facilitate collusive behaviour by competitors. Standing requirements under competition laws are not so stringent. However, in order to be allowed to petition competition authorities or to sue in courts, the parties need usually to demonstrate, in one way or the other, that they are potentially harmed by the alleged anti-competitive practices.

Similarly, antidumping and countervailing duty investigationss are now subject to strict negotiated time limits codified in WTO Agreements. On the other hand, there is no such multilateral agreement and few domestic law requirements that limits the decision-making time in competition cases.

In some countries' views, the differences discussed above may not necessarily reflect inconsistencies between trade and competition policies which are (as is noted in Complementarities Between Trade And Competition Policies COM/TD/DAFFE/CLP(98)98/REV1 para 2 notes) "in general complementary and mutually reinforcing." Rather, one needs to take into account the particular aims and specific legal, economic and institutional settings in which the two policies are applied. That being said, in some other countries'views, the differences discussed above show inconsistencies between trade and competition policies.

Intellectual property

Intellectual property provides a very interesting example of the relationship between competition and trade policies. In part, the reason for this is rooted in the discussion of the efficiency objectives of both policies discussed in paragraph 13 of this paper, which discussed the relationship among productive, allocative and dynamic efficiency.

If government intervention hinders the development of new technologies, processes or products, over time the cumulative consequences for welfare will outweigh even large one-off changes in static allocative or productive efficiency. In addition to the effects on efficiency, innovation is an important source of new competition, both in adding new features and qualities to existing products and services and in the creation of completely new products and services which can supplant existing suppliers. For these reasons, competition authorities now place great value on innovation. There is, however, still a considerable debate about the best way to facilitate innovation which is at the heart of both trade and competition concerns with regard to intellectual property. Some commentators argue that protection of intellectual property rights spur innovation by ensuring compensation for an investor's investment, while allowing the diffusion of ideas that facilitates further innovation. This diffusion occurs in part from the fact that patent applications must be filed before there is protection. While intellectual property rights should thus promote the creation and diffusion of primary innovation, some argue that it may slow or deter secondary innovation. However, others argue that overly-broad intellectual property rights can actually slow or deter innovation by reducing the rate of diffusion of ideas or by reducing the incentives for an innovator to continue to develop new ideas due to the lack of active competition acting as an incentive for his or her behaviour.[8] These problems are counter-balanced by the following factors: (1) a patent must disclose inventions clearly enough to allow others to practice it; (2) most countries have research exceptions to patent rights; and (3) a profitable investment may induce others to "invent around" the patent, potentially leading to more competition.

Thus, while competition authorities apply the same standards and analytical methods to intellectual property as to other forms of property, the importance of preserving or encouraging dynamic

efficiency may affect the result in particular cases. For this reason when competition policy is concerned with dynamic efficiency, as is often the case with intellectual property protectionist, it is careful to weigh as accurately as possible those efficiencies against possible anti-competitive effects. The 1995 US Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property and the 1996 EU Technology Transfer Block Exemption set forth certain helpful principles for analysing how competition policy applies to intellectual property.

The WTO addressed intellectual property concerns in its Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"). Like competition law, the TRIPs Agreement generally respects intellectual property rights subject to the rules and practices set forth in previous international agreements and conventions relating to intellectual property, and sets forth the minimum standards of enforcement to be applied in domestic law. Like competition law, the TRIPs Agreement is also concerned with the control of anti-competitive practices in contractual licenses. For example, Article 8 provides for each country to take appropriate measures in order to prevent the abuse of intellectual property rights. Articles 31 and 32 also address the abuse of intellectual property rights by providing rules for the application of competition law (measures taken by a competition authority and a judicial judgement). Article 40(2) provides that nothing in the TRIPs Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. Moreover, a Member may adopt appropriate measures to prevent or control such practices, which may include, for example, exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member. In this regard, it is at least arguable that the TRIPs Agreement functions, at least in part, by allowing for the enforcement of domestic competition policy. In this way, trade and competition policy are mutually reinforcing.

Article 6 of the TRIPs Agreement provides that nothing in the agreement shall be used to address the issue of the exhaustion of intellectual property rights. The issue of exhaustion is concerned with whether parallel imports should be prohibited or not. That being said, it may also be the case that trade law may permit trade in copyrighted or trademarked gray market goods in the name of both allocative and productive efficiency, while competition policy and intellectual property law (working from a dynamic efficiency objective) might not do so in all jurisdictions.[9]

Trade and competition policies may also share similar objectives with respect to standard setting. It may be the case that innovation or adoption of a particular technology is dependent on some general understanding or industry consensus about standards; e.g. access or interconnection. In these cases, both policies are also concerned with the potential for abuse. The WTO Agreement on Technical Barriers to Trade seeks to address this concern through a broad ex ante approach that puts the onus on governments to ensure that "national treatment" is applied by both governmental and non-governmental bodies. On the other hand, competition law tends to police the abuse of professional standard setting through *ad hoc* case by case enforcement. That being said, to the extent that individual prosecutions and sanctions alter the incentives for parties to engage in discriminatory standard setting practices, then competition policy might also have an *ex ante* effect. Thus while the two approaches may use different means to achieve their similar objectives, those differences need not give rise to any inconsistency of application, and in fact, might reinforce each other.

NOTES AND REFERENCES

1. Concern for productive efficiency gains in competition policy might lead in some circumstances in some jurisdictions to mergers that reduce costs to competitors being approved notwithstanding the short term reduction in consumer welfare arising from price increases.

2. It may be that "hard core" export cartels are more likely to be to the detriment of foreign consumers than some other forms of export co-operation agreements that simply enable small exporters to compete effectively in a foreign market thus providing important price competition in the foreign market.

3. When exporting countries have trade barriers that block re-importation of exported goods, antidumping laws may be seen as sharing similar objectives with competition laws that deal with price discrimination. In such cases, it may be possible to address the market segmentation concern by dealing with the trade barrier directly, rather than with price discrimination laws.

4. In some countries, e.g. the United States, competition law distinguishes between "primary line", "secondary line" and "tertiary line" injury. Primary line injury concerns injury to competitors of the firm while secondary line injury concerns injury to downstream firms disadvantaged vis-a-vis other downstream firms. Tertiary line injury concerns injury to customers of the disfavoured buyers.

5. However, it may be observed that there is no requirement or element of predation explicitly or implicitly in the GATT/WTO Agreements, nor does there appear to be a predatory pricing requirement in the implementing legislation of Members' trade remedy laws.

6. Some jurisdictions such as the EU and Canada have gone further, and adopted a "lesser duty rule". The EU has included in its antidumping legislation a rule which provides that the EU applies the lower of the price in the country of export minus the price of the exported good in the Community and the price in the country of export minus the "constructed value" of the exported good in the Community. Canada has recently proposed amendments to its antidumping law that would permit the Canadian International Trade Tribunal (the body which makes the determination of material injury to a domestic industry) to recommend to the Minister of Finance a reduced duty which would still be adequate to eliminate injury or the threat of injury as well as hinder the establishment or growth of an industry.

7. But it is worth noting that not all trade remedies are "offsetting". Some are indirectly offsetting and others are more akin to injunctive relief.

8. United States Federal Trade Commission, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace, Volume I,* Chapter 6 (May 1996).

9. See Joan Biskupic, "Court Lets Discounters Keep Selling US-Made Goods They Buy Overseas" *Washington Post A7* (March 10, 1998).