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# ANTITRUST IN THE GLOBAL MARKET: RETHINKING “REASONABLE EXPECTATIONS”

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## INTRODUCTION

The international dimensions of antitrust policy are vividly illustrated by the recent battle between the two giants of the photographic film industry, Eastman Kodak and Fuji Photo Film. During the post-war period, Fuji was able to solidify its dominant position in the Japanese film market, assisted by Japan's high tariffs on imports of photographic film and paper. However, Japan began to reduce these tariffs in 1967, and eventually eliminated them in 1994.<sup>1</sup> During this period, Kodak undertook numerous promotional efforts in Japan, including a \$44 million campaign sponsoring the Winter Olympics in Nagano.<sup>2</sup> Despite these efforts, however, Kodak's share of the Japanese market remained virtually unchanged. Kodak blamed its lack of success in Japan on Fuji, which it accused of using its dominant position in the Japanese market to prevent distributors from dealing with foreign competitors. Moreover, Kodak charged that the Japanese government itself had both tolerated and actively encouraged Fuji's anticompetitive practices. In short, Kodak accused the Japanese government of conspiring with Fuji to keep it out of the Japanese film market.<sup>3</sup>

As the Kodak-Fuji dispute illustrates, competition policies in one country can produce significant concerns in other countries. This reality has produced an increasing number of international conflicts.<sup>4</sup> Some conflicts have revolved around fear that companies are abusing their market power with respect to products they *export* to other markets. In other cases, such as the Kodak-Fuji dispute, concerns have focused on the use of market power to discourage *imports* from other countries. As

1. In 1967, Japan lowered its tariffs on black and white film and paper from 20-25% to 12.5-15%, but retained a 40% tariff on color film and paper. See *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R ¶ 2.2 (Mar. 31, 1998) available in 1998 WL 268878 [hereinafter *Photographic Film*]. Tariffs on both kinds of film and paper were reduced to 4-7.2% in 1979, and completely eliminated in 1994. See *id.*

2. See Claudia Deutsch, *Fuji and Kodak Turn to Madison Avenue in the Latest Round of Their Battle Over the Photo Market*, N.Y. TIMES, Apr. 16, 1998, at D6; Laura Johannes & Norihiko Shirouzu, *A Film War Breaks Out in Nagano*, WALL ST. J., Feb. 3, 1998, at B1.

3. For further discussion of Kodak's allegations, see *infra* Part II.A.

4. See, e.g., *The Borders of Competition*, THE ECONOMIST, July 4, 1998, at 69 [hereinafter *Borders*] (discussing increasing number of international clashes over competition policy). For a discussion of the history of international conflicts in the area of competition policy, see *infra* Part I.

discussed in Part II, however, the international legal community has not yet developed any binding international rules for resolving these conflicts.

The Kodak-Fuji dispute is significant because it raises the intriguing possibility of a new international legal approach for resolving international antitrust disputes. In the past, these disputes had often provoked significant international friction and even threats of trade war.<sup>5</sup> In the Kodak case, however, the United States chose instead to submit the controversy to dispute settlement in the new World Trade Organization (WTO).<sup>6</sup> The case marks the first time that international antitrust issues have been referred to a WTO tribunal.

A number of commentators have argued that the WTO should stay out of international antitrust disputes, because none of the agreements subject to WTO dispute settlement expressly addresses antitrust issues.<sup>7</sup> These commentators have expressed fear that such fact-specific and politically sensitive disputes will overwhelm the WTO's new dispute settlement mechanism. To borrow a phrase from Judge Taft's opinion for the Sixth Circuit in *United States v. Addyston Pipe & Steel Co.*,<sup>8</sup> assessment of the reasonableness of different competition policies would require tribunals to "set sail on a sea of doubt," concerning "how much restraint of competition is in the public interest, and how much is not."<sup>9</sup>

Despite these criticisms, the WTO panel did not find that competition policy issues were outside the scope of WTO dispute settlement. The panel agreed that Japan had not violated any express provision of the WTO agreements. However, it ruled that the United States could nevertheless challenge governmental policies that had a disproportionate impact on the competitive opportunities available for imported film, if it could show that these policies violated "reasonable expectations" created by Japan's specific commitment to lower its tariff on imported film.<sup>10</sup> If Japan did

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5. See *Borders*, *supra* note 4. See also *infra* Part I.D.

6. The WTO was established in 1994, and currently has over 130 members. See Agreement Establishing the World Trade Organization, *opened for signature* Apr. 14, 1995, *reprinted in* 33 I.L.M. 1144 (1994) [hereinafter WTO Charter]. WTO rules and dispute settlement procedures are discussed *infra* Part I.E.

7. See *infra* Part III.A.

8. 85 F. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

9. *Id.* (warning against adoption of a contentless standard of reasonableness in antitrust law). See generally ROBERT H. BORK, THE ANTITRUST PARADOX 26-30 (1978) (concerning the "sea of doubt" that continues to influence antitrust theory); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 266, 292, 296, 328-53 (1986) (discussing influence of these concerns on development of U.S. antitrust law).

10. See *Photographic Film*, *supra* note 1, ¶ 10.70.

violate such expectations, it must negotiate an appropriate adjustment with the United States.

While accepting the possibility of a valid challenge to Japanese competition policy, the panel went on to find that the United States had failed to establish that Japanese policies had significantly contributed to Kodak's problems in Japan. In reaching this conclusion, the panel created significant barriers to any future claims involving antitrust concerns. First, it suggested that it would be almost impossible to challenge facially-neutral marketing and distribution policies, even when these policies create substantial uncertainty about what is permissible and what is not. In addition, the panel suggested that governments may safely encourage private practices that systematically harm foreign competition so long as these practices could have taken place without governmental intervention.<sup>11</sup>

This Article makes two principal arguments. First, it argues that WTO tribunals can and should step into the legal gap concerning competition policy in order to safeguard the international trading system. The WTO agreements expressly provide for the settlement of "non-violation" disputes. A rule requiring governments to negotiate an adjustment for policies that have a disproportionate impact on imports is consistent with the text and purpose of these provisions, as well as with prior GATT practice and general principles of international law.<sup>12</sup> However, this rule should apply to policies that tolerate or encourage disproportionately harmful business practices, as well as those that directly produce such practices. Without such a rule, countries will face increasing pressures to resort to the very sort of unilateral measures that WTO rules were intended to prevent.

In addition, the Article proposes a new approach for defining reasonable expectations in the area of competition policy designed to help trade tribunals avoid the much-feared "sea of doubt." Under this approach,

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11. See *infra* Part II.B.

12. The WTO Appellate Body has ruled that WTO tribunals should apply the rules of interpretation set forth in the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 155 U.N.T.S. 331 [hereinafter Vienna Convention], which require examination of the ordinary meaning of the words of the treaty, taking into account the context and the treaty's objective and purpose, as well as subsequent practice and interpretation and general principles of international law. See United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WTO Doc. WT/DS58/AB/R, para. 114, *reprinted in* 38 I.L.M. 118, 150 (1999) [hereinafter Shrimp]. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, art. 3.2, 33 I.L.M. 112, 115 (1994) [hereinafter DSU] (WTO tribunals should apply "customary rules . . . of public international law," and should not "add to or diminish the rights and obligations provided in the covered agreements."); SIR I.M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed. 1984).

the WTO would recognize that its members can reasonably expect other members to take into account the impact of their competition policies on foreign exporters. In addition, WTO members could reasonably expect other members to articulate transparent (that is, clear and understandable) legal standards for private competition, and provide meaningful procedures for foreign interests to assert that these standards have been violated. Finally, WTO members could reasonably be expected to give due consideration to emerging international norms in antitrust law. As shown in Part III, adoption of these guidelines would facilitate the process of international negotiation of antitrust conflicts, enhance the credibility of the WTO system, and curb pressures for resort to unilateral self-help.

Part I of the Article discusses the current lack of international trade rules concerning competition policy, and the impact that this legal gap has had on the WTO. Part II discusses the history of the concept of reasonable expectations in international trade law, and the problems encountered in applying this concept to the Kodak-Fuji dispute. Finally, Part III discusses the importance of developing a new approach for future antitrust-related claims, and proposes a new test for determining whether government competition policies have indeed violated reasonable expectations.

## I. THE FAILURE TO ACHIEVE BINDING INTERNATIONAL ANTITRUST RULES

### A. THE LEGAL GAP IN INTERNATIONAL TRADE LAW

Early in this century, few countries outside the United States saw the need to pursue active antitrust policies, and there was relatively little effort to develop international antitrust rules.<sup>13</sup>

The post-war period brought a new recognition of the need for increased international economic cooperation. Concerns about the contribution of cartels to the German war effort led to the imposition of U.S.-style antitrust laws in Japan and Germany.<sup>14</sup> The United States also prepared a draft charter for a new International Trade Organization (ITO),

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13. See CORWIN D. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES: AN INTERNATIONAL COMPARISON 3-6, 227-28 (1967) (describing efforts in the League of Nations and positive view of cartels during the Depression era); Diane Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 298-99 (1992) (observing that even after World War II, most of the world had not yet "gotten religion" on antitrust enforcement).

14. See Michiko Ariga, *Japan*, in 6 COMPETITION LAWS OF THE PACIFIC RIM COUNTRIES § 1.01 (Julian O. von Kalinowski ed., 1987); Kurt Stockmann & Volkmar Strauch, *Federal Republic of Germany*, in B5 WORLD LAW OF COMPETITION § 1.03(1)-(2) (Julian O. von Kalinowski ed., 1987).

which included detailed rules on antitrust and other areas of importance to international trade.<sup>15</sup> Ironically, however, plans for an ITO collapsed when the United States itself refused to ratify the Charter, based in part on concerns that the ITO would unduly restrict the United States' ability to enforce its own antitrust laws.<sup>16</sup>

Instead, the United States and a group of other countries entered the 1947 General Agreement on Tariffs and Trade (GATT).<sup>17</sup> This agreement establishes a general framework in which governments could agree to lower the tariffs they charge on imports in exchange for reciprocal commitments from other countries.<sup>18</sup> Although the agreement contains several general prohibitions on non-tariff restrictions on international trade,<sup>19</sup> it does not directly address antitrust issues.<sup>20</sup> However, Article

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15. See Havana Charter for an International Trade Organization, Mar. 24, 1948, art. 46, U.N. Doc. E/Conf.2/78 (1948). See generally F.M. SHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 38 (1994); George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089, 1116 (1949); Dale B. Furnish, *A Transnational Approach to Restrictive Business Practices*, 4 INT'L LAW. 317, 322-26 (1970); John E. Lockwood, *Proposed International Legislation with Respect to Business Practices*, 41 AM. J. INT'L L. 616, 616-21 (1947). For a discussion of unsuccessful efforts to establish international antitrust rules prior to the ITO, see GABRIELLE MARCEAU, ANTI-DUMPING AND ANTI-TRUST ISSUES IN FREE-TRADE AREAS 60 (1994) (describing efforts of the International Labour Organization); Furnish, *supra*, at 318-22 (efforts of the League of Nations).

16. For a discussion of the demise of the ITO, see generally WILLIAM A. BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE (1950); RICHARD N. GARDNER, STERLING DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE (1980); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969); CLAIR WILCOX, A CHARTER FOR WORLD TRADE (1949). See also Earl W. Kintner, Mark R. Joelson & Peter J. Vaghi, *Groping for a Truly International Antitrust Law*, 14 VA. J. INT'L L. 75, 86-89 (1973) (describing controversy over antitrust provisions of Havana Charter).

17. 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].

18. See *id.* art. II.

19. For example, the agreement prohibits governments from enacting non-tariff measures that discriminate against imports, act as "quantitative restrictions" on international trade, or treat imports from one country more favorably than imports from other countries. See *id.* arts. I, II, XI.

20. See generally JACKSON, *supra* note 16, at 522-57 (discussing absence of competition rules in GATT). GATT rules do address competition problems *indirectly*, by authorizing governments to impose "antidumping" duties on products imported below the selling price in the country of origin, or below actual cost. See GATT, *supra* note 17, art. VI (authorizing imposition of anti-dumping duties); Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 168 (1994) [hereinafter WTO Agreement]. Theoretically, antidumping duties prevent foreign monopolies from subsidizing exports with monopoly profits from their home market. See, e.g., Richard H. Clarida, *Dumping: In Theory, in Policy, and in Practice*, in 1 FAIR TRADE AND HARMONIZATION 357 (Jagdish Bhagwati & Robert Hudec eds., 1996). See also European Community Commission, Eleventh Annual Report on the Community's Anti-Dumping and Anti-Subsidy Activities ¶¶ 2.2-2.3 (1993), reprinted in JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 678-81 (3d ed. 1995). As numerous critics have noted, however, this remedy is both underprotective (because it fails to remedy anticompetitive effects in the exporting nation) and

XXIII of the GATT expressly authorizes the “Contracting Parties” to resolve disputes concerning allegations that any benefit accruing to another party “directly or indirectly” under the GATT is being “nullified or impaired,” or that a treaty objective is being “impeded.”<sup>21</sup> This provision applies whenever nullification or impairment results from a party’s violation of an express treaty commitment. However, it also applies to impairment that results from measures that do *not* conflict with any provision of the agreement, and indeed to impairment that results from “any other situation.”<sup>22</sup>

Subsequent efforts to produce binding international antitrust rules also proved unsuccessful. In 1953, the United Nations Economic and Social Council (ECOSOC) released a new set of draft articles on restrictive business practices.<sup>23</sup> However, this effort met the same fate as the ITO. The United States opposed the agreement, arguing that no “satisfactory [ ] or effective” agreement could be achieved until nations achieved a “greater degree of comparability” in their national antitrust policies and practices.<sup>24</sup> In 1960, a GATT group of experts reached a similar conclusion concerning the feasibility of an international antitrust agreement.<sup>25</sup> Instead, GATT

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overbroad (because it can be applied even if there is no anticompetitive effect in the importing nation). See, e.g., Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT’L L. & ECON. 1 (1996); Wesley Cann, Jr., *Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Antidumping/Antitrust Dichotomy Through WTO-Consistent Global Welfare Theory*, 17 U. PA. J. INT’L ECON. L. 69, 90 (1996); William J. Davey, *Antidumping Laws: A Time for Restriction*, 1988 FORDHAM CORP. L. INST. 8-1 to 8-17; Allan V. Deardorff, *Economic Perspectives on Antidumping Law*, in THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE ch. 6 (Robert M. Stern ed., 1993).

21. GATT, *supra* note 17, art. XXIII, ¶ 1. Article XXIII authorizes the GATT Contracting Parties to conduct investigations, make appropriate recommendations, give rulings, and in sufficiently serious circumstances, to authorize the imposition of trade sanctions. See *id.* ¶ 2. For a general discussion of GATT dispute settlement procedures, see ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT SYSTEM (1993).

22. GATT, *supra* note 17, art. XXIII, ¶ 1. For a general discussion of the concept of nullification and impairment, see Ernst-Ulrich Petersmann, *Violation Complaints and Non-Violation Complaints in Public International Trade Law*, 34 F.R.G. Y.B. INT’L L. 175 (1991).

23. See *Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council*, U.N. ESCOR, 16th Sess., Supp. No. 11, U.N. Doc. E/2380, E/AC.37/3 (Mar. 30, 1953), reprinted in 1 ANTITRUST AND RESTRICTIVE BUSINESS PRACTICES: INTERNATIONAL, REGIONAL & NATIONAL REGULATION § 5.D.2 at 29 (Julius J. Marke & Najeeb Samie eds., 1982).

24. *Restrictive Business Practices, Comments of Governments*, U.N. ESCOR, 16th Sess., Supp. No. 11, Add. 2, at 4-5, U.N. Doc. E/2612 (1955), quoted in Wood, *supra* note 13, at 285.

25. See Report of the Group of Experts on Restrictive Business Practices: Arrangements for Consultations, June 2, 1960, GATT B.I.S.D. (9th Supp.) at 170-71 (1961).

members adopted a decision recommending that members should consult with each other concerning allegedly restrictive business practices.<sup>26</sup>

#### B. EXTRA-TERRITORIAL APPLICATION OF NATIONAL RULES

Initially, U.S. courts ruled that U.S. antitrust laws applied only to conduct that occurred within U.S. borders.<sup>27</sup> However, U.S. courts soon began to expand the reach of U.S. antitrust rules to extra-territorial conduct that produced an intentional effect on U.S. markets.<sup>28</sup> The United States government began to pursue an aggressive policy of extra-territorial enforcement of U.S. antitrust law,<sup>29</sup> producing strenuous objections from U.S. trading partners.<sup>30</sup>

Recently, however, the United States and Europe have moved closer on the issue of extra-territorial application of national antitrust law. In 1982, the United States amended its antitrust laws to restrict extra-territorial jurisdiction in non-import cases to instances where a "direct, substantial, and reasonably foreseeable" effect could be found.<sup>31</sup> Extra-territoriality also began to find increasing acceptance in the European Court

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26. See Decision on Restrictive Business Practices: Arrangements for Consultations, Nov. 18, 1960, GATT B.I.S.D. (9th Supp.) at 28 (1960).

27. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

28. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). For a discussion of cases involving the extra-territorial application of U.S. antitrust law, see JAMES R. ATWOOD & KINGMAN BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* §§ 6.02-6.08, at 142-56 (1982); Wood, *supra* note 13, at 297-98.

29. See generally ATWOOD & BREWSTER, *supra* note 28, § 6, at 142-81, §§ 2.23-24, at 43-47; WILBUR L. FUGATE, 2 FOREIGN COMMERCE AND THE ANTITRUST LAWS § 15.2 (1982).

30. See generally 1 JAMES R. ATWOOD, KINGMAN BREWSTER & SPENCER WEBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* ch. 4 (1997); Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505 (1998).

31. Foreign Trade Antitrust Improvement Act of 1982 § 7, 15 U.S.C. § 6(a)(1) (1994). In addition, a number of U.S. courts developed a comity-based balancing test, which permitted dismissal of cases in which the U.S. is deemed to have an insufficient interest. See, e.g., *Timberlane Lumber Co. v. Bank of Am.*, 749 F.2d 1378 (9th Cir. 1984). However, the Supreme Court recently ruled that principles of international comity should be used only where there is a "true conflict" between American and foreign law, that is, when a party cannot simultaneously comply with the laws of both countries. *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993). For commentaries on *Hartford Fire*, see Benjamin B. Ferencz, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AMER. J. INT'L L. 750 (1995); Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AMER. J. INT'L L. 42 (1995); John A. Trenor, Comment, *Jurisdiction and the Extraterritorial Application of Antitrust Laws After Hartford Fire*, 62 U. CHI. L. REV. 1583 (1995); Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53 (1995); Russell Weintraub, *Case Two: Extra-territorial Application of U.S. Law Against U.S. and Alien Defendants (Sherman Act)*, 29 NEW ENG. L. REV. 616 (1995).

of Justice (ECJ). In the 1988 *Wood Pulp* decision,<sup>32</sup> for example, the ECJ found that members of a foreign-based export cartel were subject to EC law on the basis of sales the cartel had made within the EC.<sup>33</sup> As Judge Wood has explained, except in rare cases, the reach of European law is “now almost coexistent” with its U.S. counterpart.<sup>34</sup>

Nevertheless, extra-territoriality has proved to be an inadequate solution for international antitrust concerns. Antitrust authorities have encountered significant practical problems in applying their own rules to extra-territorial conduct. It has often proved quite difficult for national authorities to obtain evidence about activities that occur outside their territory.<sup>35</sup> In addition, the assertion of overlapping jurisdictional claims by separate antitrust authorities has produced increasing friction and inefficiency, especially in the area of merger law.<sup>36</sup>

Moreover, although there is increased agreement with regard to applying national rules to extra-territorial conduct that harms *consumers* within *national* markets, there is no such consensus concerning the application of national antitrust rules to extra-territorial conduct that harms the access of *exporters* to *foreign* markets. In 1988, the Department of Justice (DOJ) issued guidelines indicating that it would not apply U.S. antitrust rules to overseas conduct that restrains U.S. exports, unless the conduct also harmed U.S. consumers.<sup>37</sup> Although the DOJ appeared to

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32. Joined Cases 89, 104, 114, 116, 117 & 125-29,85, *Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, 5242-44.

33. *See id.* *See also* Case T-102/96, *Gencor v. Commission* (Ct. First Instance 1999), available at <<http://www.curia.eu.int>>, ¶¶ 90-111 (international law permits extra-territorial jurisdiction over conduct that has foreseeable, immediate and substantial effect in the EC, subject to principles of non-interference and proportionality). Japan has also begun to apply its antitrust laws extra-territorially. *See* Toshio Aritake, *U.S., Canadian Companies Involved in Cases Launched Under Japan's Anti-Monopoly Law*, 15 Int'l Trade Rep. (BNA) No. 26, at 1131 (July 1, 1998) (discussing Japan's first cases involving the extra-territorial application of Japanese antitrust law).

34. *Wood*, *supra* note 13, at 301. For example, Judge Wood points out that the ECJ's approach would not result in application of EC antitrust law to cases in which foreigners had refused to deal with EC customers, while the United States' "effects" doctrine might. *See id.*

35. *See* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 376-77 (1997) (discussing procedural obstacles involved in transnational antitrust cases, and the problems caused in the United States' recent attempts to indict General Electric and various foreign entities, including a European subsidiary of De Beers, for conspiring to fix the price of industrial diamonds).

36. *See* *Wood*, *supra* note 13, at 301 (noting that the assertion of extra-territorial jurisdiction has “multiplied several times over the number of different jurisdictions in which regulatory claims must be satisfied”). *See also* *Borders*, *supra* note 4 (discussing U.S.-E.U. conflict over the proposed merger of Boeing and McDonnell Douglas).

37. *See* U.S. DEP'T OF JUST., ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 4.1 n.159 (1988).

reverse its position in 1992,<sup>38</sup> it has rarely sought to apply U.S. antitrust laws to extra-territorial conduct that harms U.S. exports.<sup>39</sup>

### C. THE EMERGENCE OF NEW INTERNATIONAL NORMS

Efforts to expand the reach of national antitrust rules were accompanied by the development of new regional antitrust rules. In the European Union, nations have agreed to a set of new supranational competition rules that in many ways resembles those of the United States.<sup>40</sup> More recently, New Zealand and Australia substantially harmonized their antitrust rules and established a system of trans-Tasman antitrust enforcement.<sup>41</sup>

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38. See *DOJ Policy Regarding Anticompetitive Conduct That Restricts U.S. Exports*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 483 (Apr. 9, 1992). The new policy was codified in the Department's new 1995 guidelines. See U.S. DEP'T OF JUST., ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.122 (1995), reprinted in 68 Antitrust & Trade Reg. Rep. (BNA) No. 1707 (Special Supp. Apr. 6, 1995). For commentaries on this policy, see Yoshio Ohara, *The New U.S. Policy on the Extraterritorial Application of Antitrust Laws, and Japan's Response*, 17 WORLD COMP. 49 (1994). See also Jay M. Vogelson, Michael H. Byowitz & Mark R. Sandstrom, *ABA Section of International Law and Practice Report to the House of Delegates*, 29 INT'L LAW. 945 (1995) (concluding that antitrust law did not offer best way for U.S. businesses to gain access to foreign markets); Symposium, *U.S. Antitrust Laws and the Global Market: National and Extra-Territorial Enforcement*, 9 LOY. CONSUMER L. REP. 169 (1997) [hereinafter *U.S. Antitrust Laws*].

39. See *U.S. Antitrust Laws*, *supra* note 38, at 173-85 (discussing limited results under new policy); Joel Davidow, *The Sherman Act and Outward Bound Commerce*, 6 GEO. MASON L. REV. 447 (1998).

40. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, arts. 85-86, 298 U.N.T.S. 11 [hereinafter EEC TREATY], amended by TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]. See generally Eleanor M. Fox, *US and EU Competition Law: A Comparison*, in GLOBAL COMPETITION POLICY 339 (Edward M. Graham & J. David Richardson eds., 1997); David J. Gerber, *The Transformation of EC Competition Law?*, 35 HARV. INT'L L.J. 97, 99-103 (1994); Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55 (1992). The three countries of the European Free Trade Association (EFTA) that are also part of the European Economic Area (EEA) also agreed to adopt large portions of the EC's economic law, including its competition laws. See Agreement on the European Economic Area, 1994 O.J. (L 1) 3. See generally Carl Baudenbacher, *Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area*, 3 COLUM. J. EUR. L. 169 (1997).

41. See Closer Economic Relations-Trade Agreement, Mar. 28, 1983, N.Z.-Austl., 22 I.L.M. 945. See generally Rex J. Ahdar, *The Role of Antitrust Policy in the Development of Australian-New Zealand Free Trade*, 12 NW. J. INT'L L. & BUS. 317 (1991); Tony Dellow & John Feil, *Competition Law and Trans-Tasman Trade*, in COMPETITION LAW & POLICY IN NEW ZEALAND 24 (Rex J. Ahdar ed., 1991); Ravi P. Kewalram, *The Australia-New Zealand Closer Economic Relations Trade Agreement*, 27 J. WORLD TRADE 111 (1993); Graeme Thomson, *Australia and New Zealand*, in GLOBAL COMPETITION POLICY 385, *supra* note 40. The North American Free Trade Agreement also contains provisions on competition policy. See *infra* note 51.

In addition, the international legal community began to develop a set of “soft” international instruments that either disclaim any intent to create enforceable rights and obligations, or lack the normative content necessary to create such rights and obligations.<sup>42</sup> As discussed above, a 1960 GATT Decision recommended that GATT members should consult with each other concerning allegedly restrictive business practices.<sup>43</sup> In addition, a number of bilateral treaties of “friendship, commerce and navigation” require the signatories to take such measures as they “deem appropriate” to prevent restrictive business practices that might have harmful effects on bilateral trade.<sup>44</sup> The Organization for Economic Cooperation and Development (OECD) has adopted a set of guidelines that recommend that multinational enterprises should refrain from participating in cartels and other restrictive business practices, but expressly state that observance is “voluntary and not legally enforceable.”<sup>45</sup> Finally, the United Nations General Assembly has adopted a Code on Restrictive Business Practices that condemns collusive anticompetitive actions and individual firm abuses of dominant positions, but also consists of non-binding recommendations.<sup>46</sup>

As a number of scholars have pointed out, these “soft” instruments do not, in themselves, create any affirmative legal duty for governments to

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42. For commentaries on the nature and legal effects of “soft” law, see, for example, Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT’L & COMP. L.Q. 787 (1986) (describing the diplomatic practice of creating informal agreements); *A Hard Look at Soft Law*, 82 AM. SOC’Y INT’L L. PROC. 371 (1988) [hereinafter *A Hard Look*] (panel discussion by Gunther Handl, W. Michael Reisman, Bruno Simma, Pierre Marie Dupuy & Christine Chinkin); R.R. Baxter, *International Law in “Her Infinite Variety,”* 29 INT’L & COMP. L.Q. 549 (1980) (discussing variety of ways in which legal norms reflect different intensities of agreement); C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850 (1989) (focusing on the impact of soft instruments in international economic law); Francesco Francioni, *International “Soft Law”: A Contemporary Assessment*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 167 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (focusing on the use of soft law by the International Court of Justice). For a critical view of soft law, see Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413 (1983).

43. See *supra* note 26 and accompanying text.

44. See, e.g., Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. XVIII, para. 1, 4 U.S.T. 2063, 2076-77 [hereinafter U.S.-Japan FCN Agreement].

45. *Annex to the OECD Declaration on International Investment and Multinational Enterprises*, OECD Doc. 21 (76) 04/1 (1976), reprinted in 75 DEP’T ST. BULL. 83, 84 (July 19, 1976) [hereinafter OECD Guidelines]. See generally Barry E. Hawk, *The OECD Guidelines for Multinational Enterprises: Competition*, 46 FORDHAM L. REV. 241 (1977) (discussing how OECD Guidelines affect concerns about restrictive business practices internationally).

46. See *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF/10 (1980), reprinted in 19 I.L.M. 813 (1980) [hereinafter UNCTAD Code]. The code, which was negotiated under the auspices of the United Nations Conference on Trade and Development (“UNCTAD”), also contains a number of hortatory provisions calling for special attention to the problems of developing countries. See, e.g., *id.* at § A Objective 4, § C Equitable Principle 1.

regulate anticompetitive activities.<sup>47</sup> However, they may acquire binding force as customary international law if they become widely accepted and are generally considered to be required by international law (*opinio juris*).<sup>48</sup>

In recent years, certain general principles concerning regulation of anticompetitive practices have now gained widespread acceptance. More than seventy countries, comprising 98% of world output and 99% of world trade, have now adopted some form of antitrust policy.<sup>49</sup> Moreover, there is a growing consensus on the prohibition of certain hard-core cartel practices and abusive practices by a dominant firm that have the overwhelming effect of blocking market entry and raising prices.<sup>50</sup>

In addition, an increasing number of “soft” legal instruments now impose a legal obligation to “consult” or “cooperate” on international antitrust issues. Several bilateral and regional agreements include a commitment to consult on antitrust matters and/or to cooperate in antitrust enforcement activities.<sup>51</sup> The OECD guidelines contain an undertaking on

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47. See, e.g., Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 22 GERMAN Y.B. INT'L L. 11 (1979); Joel Davidow & Lisa Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247 (1978).

48. See, e.g., Baade, *supra* note 47, at 22-23. But see Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 204-08 (1995) (*opinio juris* need not be shown if there is sufficient state practice).

49. See Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105, 110 (1998). See also Abbott B. Lipsky, Jr., *Control Transactions: Competition Rules Outside the United States*, 987 PLI/CORP. 403 (May 1997) (describing recent “explosion” in international antitrust enforcement). But see *Antitrust: Hong Kong Government Rules Out Antitrust and Competition Measures*, 14 Int'l Trade Rep. (BNA) No. 45, at 1966 (Nov. 12, 1997).

50. For a discussion of the notion of “consensus wrongs” in antitrust, see Douglas Rosenthal, *Equipping the Multilateral Trading System with a Style and Principles to Increase Market Access*, 6 GEO. MASON L. REV. 543, 557-63 (1998); Wolfgang Fikentscher, *The Draft International Antitrust Code (“DIAC”) in the Context of International Technological Integration*, 72 CHI.-KENT L. REV. 533, 542-43 (1996). See also Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 23 (1997) (arguing for general consensus principles).

51. See, e.g., U.S.-Japan FCN Agreement, *supra* note 44; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956; Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 34 U.S.T. 389 (1982); Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 1-Aug. 3, 1995, Can.-U.S., 35 I.L.M. 309 [hereinafter Can.-U.S. Agreement]. See also North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1501, reprinted in 32 I.L.M. 605, 662 [hereinafter NAFTA]. Competition provisions are currently being discussed as part of negotiations for a new Free Trade Agreement of the Americas (FTAA), and in the Asia Pacific Economic Cooperation (APEC) forum. See, e.g., *Competition Policy FTAA Group to Look at Trends in Competition Policy*, 13 Int'l Trade Rep. (BNA) No. 35, at 1369 (Sept. 4, 1996); *APEC Plans Pledge Liberalization*, 13 Int'l Trade Rep. (BNA) No. 47, at 1839 (Nov. 27, 1996); *JFTC Offers Training Sessions for APEC Antitrust Administrators*, 13 Int'l Trade Rep. (BNA), No. 36, at 1420-21 (Sept. 11,

the part of OECD members to establish “appropriate review and consultation procedures” concerning restrictive business practices, and to “cooperate in good faith with a view to resolving” disputes involving conflicting national requirements.<sup>52</sup> As Professor Baade has argued, the fact that this provision is included in a voluntary code does not prevent it from being deemed legally binding on OECD members.<sup>53</sup> And the OECD has in fact helped to facilitate a significant amount of voluntary international cooperation.<sup>54</sup>

In 1991, the United States and the European Communities took cooperation a step further. The 1991 EC-U.S. cooperation agreement sets out a detailed framework for coordinated investigations and recognized the principle known as “positive comity.” Under this principle, either party may formally request that the other party take action to stop anticompetitive activity that the requesting party believes may adversely affect its “important interests.”<sup>55</sup> The recipient of the request must consider the initiation of an investigation, and advise the requesting party of its decision.<sup>56</sup> Finally, the parties agree to observe a detailed set of “negative comity” factors. Under this provision, the parties may not initiate an enforcement action that may adversely affect important interests of the other party without first considering the relative significance of the effects and conduct in the other party; the presence of an intent to harm interests in the other party; the extent to which its activities would conflict with the other party’s laws, economic policies, or ongoing enforcement activities; and the impact of the activity on reasonable expectations.<sup>57</sup>

In 1998, the United States and the European Communities entered a supplementary agreement clarifying that positive comity also applies to anticompetitive activities that adversely affect the ability of firms in one

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1996). See generally Waller, *supra* note 35 (criticizing use of national antitrust law enforcement as an alternative to international antitrust enforcement).

52. OECD Guidelines, *supra* note 45, § 11.

53. See Baade, *supra* note 47, at 29-30.

54. See Wood, *supra* note 13, at 289 & n.45.

55. Agreement Regarding the Application of their Competition Laws, Sept. 23, 1991, U.S.-E.C., art. V, 30 I.L.M. 1491 (1991) [hereinafter U.S.-E.C. Agreement]. For a general discussion of the U.S.-E.C. agreement, see Robert D. Shank, Note, *The Justice Department’s Recent Antitrust Enforcement Policy: Toward a “Positive Comity” Solution to International Competition Problems?*, 29 VAND. J. TRANSNAT’L L. 155 (1996). Other instruments also include positive comity provisions. See Can.-U.S. Agreement, *supra* note 51, art. V. See also OECD, Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, July 27-28, 1995, 35 I.L.M. 1313, 1314-16 (1996).

56. See U.S.-E.C. Agreement, *supra* note 55, art. V.

57. See *id.* art. VI.

party's territory to "export to, invest in, or otherwise compete in" the territory of the other party."<sup>58</sup> The agreement also clarifies that the requesting party will "normally" defer or suspend its own enforcement actions if the anticompetitive activities at issue either: (1) do not have a direct, substantial and reasonably foreseeable effect on its consumers, or (2) are principally located in and directed toward the other party's territory.<sup>59</sup> However, the agreement does not apply to mergers, because the parties' strict deadlines for merger review do not allow for deferral or suspension.<sup>60</sup>

These legal developments have narrowed, but not eliminated, the legal gap in international antitrust law. A large and rapidly growing number of countries have now adopted some form of competition policy. Many of these countries have entered agreements that provide for ongoing cooperation in antitrust enforcement activities. However, many other countries have not engaged in either activity. Moreover, there is no binding international rule requiring them to do so. Finally, even under existing antitrust cooperation agreements, there is no legal mechanism to ensure that a party will take adequate action to restrain anticompetitive activities that produce significant extra-territorial harm.

#### D. THE THREAT OF AGGRESSIVE UNILATERALISM

During the 1980s, the U.S. Congress became increasingly frustrated with perceived gaps in a number of areas of international trade law. As a result, the United States initiated a policy known as "aggressive unilateralism"—the aggressive use of economic threats to pressure foreign governments to negotiate solutions to international economic disputes.<sup>61</sup>

The policy arose under Section 301 of the 1974 Trade Act, which authorizes the U.S. Trade Representative to initiate negotiations with other countries concerning any "act, policy or practice" by a foreign government that the Trade Representative determines to be "unreasonable or

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58. Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, Mar. 6-Apr. 6, 1998, E.C.-U.S., art. II, 37 I.L.M. 1070.

59. *See id.* art. IV.

60. *See id.* art. II.4(a).

61. *See generally* Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter *AGGRESSIVE UNILATERALISM*]. *See also* Jagdish Bhagwati, *The Diminished Giant Syndrome*, *FOREIGN AFF.*, Spring 1993, at 22.

discriminatory” and that “burdens or restricts United States commerce.”<sup>62</sup> The statute defines a practice as unreasonable if it does not violate any international legal rule, but is “otherwise unfair and inequitable.”<sup>63</sup> Any practice that “denies fair and equitable . . . market opportunities” is deemed unreasonable, including government “toleration” of “systematic anticompetitive activities” by private enterprises in its territory.<sup>64</sup> If the offending nation fails to negotiate a mutually satisfactory agreement with the United States, the Trade Representative may impose economic sanctions against it.<sup>65</sup>

In 1986, the United States initiated a Section 301 investigation concerning allegedly anticompetitive practices in the Japanese semiconductor industry.<sup>66</sup> In its negotiations with Japan, the United States insisted that Japan should ensure that semiconductor producers did not lower their prices below cost. In addition, Japan “secretly” agreed to double the U.S. semiconductor industry’s share of the Japanese market to twenty percent.<sup>67</sup> When U.S. exports to Japan failed to meet this target, the United States imposed retaliatory duties on \$165 million in imports from

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62. 19 U.S.C. § 2411(b)(1) (1994). In addition, the statute requires that the Trade Representative take action when a foreign practice is found to violate, or be inconsistent with, a U.S. trade agreement or other “international legal rights.” *Id.* §§ 2411(a), 2411(d)(4).

63. *Id.* § 2411(d)(3).

64. *Id.* § 2411(d)(3)(B)(i). The provision applies only if the anticompetitive activities have “the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market.” *Id.*

65. *See id.* § 2411(c). For a discussion of U.S. policy under Section 301, see generally THOMAS O. BAYARD & KIMBERLY ELLIOTT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* (1994); Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL’Y INT’L BUS. 263 (1992); C. O’Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT’L L. 209 (1997). For a discussion of similar provisions in other countries, see Lei Wang, *Are Trade Disputes Fairly Settled?*, J. WORLD TRADE, Feb. 1997, at 60; Daniel Partan, *Retaliation in the United States and European Community Trade Law*, 8 B.U. INT’L L.J. 333 (1990). *See also* Case 70/87, *ECC Seed Crushers’ and Oil Processors’ Fed’n (FEIDOL) v. Commission*, 1989 E.C.R. 1781, 2 C.M.L.R. 489 (1991) (reviewing Commission determination under European equivalent to Section 301).

66. Among other things, the United States complained that Japanese firms purchased semiconductors only from other firms that belonged to the same *keiretsu*, even if imports were more competitively priced. *See generally* Charles S. Kaufman, Note, *The U.S.-Japan Semiconductor Agreement: Chipping Away at Free Trade*, 12 UCLA PAC. BASIN L.J. 329 (1994). For an assessment of the competitive impact of *keiretsu*, see Paul Sheard, *Keiretsu, Competition, and Market Access*, in GLOBAL COMPETITION POLICY 501, *supra* note 40.

67. *See U.S., Japan Reach Five-Year Deal on Chips, Administration Dropping Dumping, Section 301 Cases*, 3 Int’l Trade Rep. (BNA) No. 32, at 994 (Aug. 6, 1986) (noting that numerical targets were kept out of agreement because of antitrust concerns).

Japan.<sup>68</sup> The sanctions remained in place until 1991, when Japan entered into a new five-year agreement that expressly incorporated the twenty percent target.<sup>69</sup>

The semiconductor agreement led to the first antitrust dispute under GATT rules. The EEC brought a GATT complaint alleging that the price floor provision in the U.S.-Japan agreement violated the GATT prohibition against quantitative restrictions on international trade.<sup>70</sup> The panel found that the Japanese government had violated the prohibition, even though it had not actually required businesses to implement the price floor. The panel noted that the government had created incentives for semiconductor producers to create the price floor, and that these producers could not have enforced the price floor without government information and assistance.<sup>71</sup> Ironically, the European government then proceeded to negotiate its own price floor for Japanese semiconductor exports.

The semiconductor dispute also contributed to the establishment of a bilateral task force, known as the Structural Impediments Initiative (SII), to study antitrust issues and other “structural” impediments to trade. The joint SII report resulted in significant reforms in Japanese antitrust enforcement.<sup>72</sup> Specifically, Japan agreed: (1) to increase its administrative and criminal fines for antitrust violations; (2) to issue a new set of guidelines on distribution practices; (3) to increase the number of antitrust investigators; (4) to reform the approval process for construction of new large stores; and (5) to establish a special office to receive complaints from

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68. See *Retaliation Measures Over Semiconductor Dispute Announced by Administration*, 4 Int'l Trade Rep. (BNA) No. 13, at 428 (Apr. 1, 1987).

69. See *US and Japan Sign Semiconductor Pact Targeting 20 Percent Share, Design-Ins*, 8 Int'l Trade Rep. (BNA) No. 23, at 845 (June 5, 1991).

70. See *Japan—Trade in Semi-Conductors*, May 4, 1988, GATT B.I.S.D. (35th Supp) at 116 (1989) [hereinafter *Semi-Conductors*]. The EEC was unable to challenge the alleged “secret” agreement to increase exports to specified levels, because the panel accepted the United States’ representations that no such understanding existed. See *id.* ¶ 25.

71. See *id.* ¶ 109. The Japanese government had “requested” Japanese producers to keep export prices above cost, collected cost data from each producer, monitored cost and price data, and asked producers to keep production to forecasted levels. See *id.* ¶ 99.

72. See, e.g., BAYARD & ELLIOTT, *supra* note 65, at 40-41. See generally Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L.J. 137, 163-73 (1995); Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436 (1991); Gary R. Saxonhouse, *Japan, SII and the International Harmonization of Domestic Economic Practices*, 12 MICH. J. INT'L L. 450 (1991); Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396 (1996). The United States had previously raised the issue of anticompetitive business practices with Japan in 1985, as part of the Market-Oriented Sector-Specific (MOSS) talks. However, those talks “amounted to little more than a Japanese promise to provide further information on the Japanese auto market.” BAYARD & ELLIOTT, *supra* note 65, at 106.

foreign businesses.<sup>73</sup> Following these reforms, administrative fines hit record levels, plaintiffs won their first private antitrust damage action, and the number of retailers seeking to open large stores tripled from approximately 500 to more than 1,500.<sup>74</sup>

The United States' aggressive unilateralism provoked intense international controversy. Proponents of the U.S. approach argued that nations could properly use economic measures to promote the general objectives of international trade rules.<sup>75</sup> Critics responded that the United States cannot legitimately establish itself as the sole "judge, jury and executioner" of foreign practices.<sup>76</sup> Moreover, the United States' insistence on numerical results was itself anticompetitive, because it essentially required foreign businesses to favor U.S. products without regard to commercial considerations.<sup>77</sup> Finally, critics argued that unilateralism created a hostile and confrontational atmosphere that could ultimately place the entire international trading system at risk.<sup>78</sup>

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73. See Mitsuo Matsushita, *The Antimonopoly Law of Japan*, in GLOBAL COMPETITION POLICY 151, *supra* note 40, at 155-56. See generally *Joint Comments on the Japan Fair Trade Commission Antimonopoly Act Enforcement Guidelines*, 60 ANTITRUST L.J. 291, 327 (1991); Abbott B. Lipsky, Jr., *Current Developments in Japanese Competition Law: Antimonopoly Act Enforcement Guidelines Resulting from the Structural Impediments Initiative*, 60 ANTITRUST L.J. 279 (1991); James F. Rill, *Competition Policy: A Force for Open Markets*, 61 ANTITRUST L.J. 637 (1993).

74. See Matsushita, *supra* note 73, at 166-68. See also Kotaro Suzumura, *Formal and Informal Measures for Controlling Competition in Japan: Institutional Overview and Theoretical Evaluation*, in GLOBAL COMPETITION POLICY 439, *supra* note 40, at 453-60.

75. See, e.g., Thomas Schoenbaum, *The Theory of Contestable Markets in International Trade—A Rationale for "Justifiable" Unilateralism to Combat Restrictive Business Practices?*, J. WORLD TRADE, June 1996, at 161 (arguing that the United States should use unilateral sanctions to ensure contestable markets). See also Robert Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM 113, *supra* note 61, at 113-59 (noting that although unilateral trade sanctions violate GATT rules, they may nevertheless be "justified" in order to promote the agreements' "general objectives"). For general discussions of the arguments in favor of unilateral retaliation, see BAYARD & ELLIOTT, *supra* note 65; CLYDE PRESTOWITZ, *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD* (1988); LAURA D'ANDREA TYSON, *WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES* (1992); Amelia Porges, *U.S.-Japan Trade Negotiations: Paradigms Lost*, in *TRADE WITH JAPAN: HAS THE DOOR OPENED WIDER?* 305 (Paul Krugman ed., 1991); Sykes, *supra* note 65.

76. BAYARD & ELLIOTT, *supra* note 65, at 330; Hudec, *supra* note 75; Helen Milner, *The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision*, in AGGRESSIVE UNILATERALISM, *supra* note 61, at 163.

77. For a critique of arguments for "managed trade" and "aggressive unilateralism," see JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 23-57 (1991).

78. See *id.* at 56. See also JIM POWELL, *WHY TRADE RETALIATION CLOSES MARKETS AND IMPOVERISHES PEOPLE* (CATO Policy Analysis No. 143, 1990).

## E. THE EMERGENCE OF THE WTO

Concerns about aggressive unilateralism played an important role in the negotiations that eventually led to the creation of a new World Trade Organization in 1995. The new WTO agreements include a new agreement, known as "GATT 1994,"<sup>79</sup> which incorporates the old GATT rules.<sup>80</sup> The agreements also address a number of areas, such as intellectual property rights and trade in services, that were not previously addressed by GATT rules but had been subject to unilateral action under Section 301.<sup>81</sup> Finally, the new rules addressed U.S. concerns about ineffective enforcement of GATT rules by authorizing WTO tribunals to make legally binding decisions concerning alleged violations of the WTO agreements.<sup>82</sup>

The newly expanded powers of the WTO were accompanied by an express prohibition on the use of unilateral trade sanctions to enforce WTO rules. Under the WTO Dispute Settlement Understanding, WTO members may not "make a determination to the effect that a violation has occurred . . . except through recourse to" WTO dispute settlement procedures.<sup>83</sup>

No similar progress was achieved in the area of competition policy.<sup>84</sup> Although a group of antitrust experts submitted a proposed antitrust code to

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79. General Agreement on Tariffs and Trade 1994, Dec. 15, 1993, *reprinted in* 33 I.L.M. 28 (1994) [hereinafter GATT 1994].

80. *See id.*

81. *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPS]; Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 (1994) [hereinafter GATS].

82. Under the old GATT rules, the GATT Contracting Parties could only adopt a panel decision if all parties—including the losing party in the dispute—agreed. *See* JACKSON ET AL., *supra* note 20, at 342-43. In contrast, the decisions of WTO panels are automatically adopted by the WTO unless there is a consensus to the contrary. *See* DSU, *supra* note 12, art. 16. Moreover, the prevailing party is automatically authorized to impose economic sanctions if the losing party fails to comply with an adopted decision, unless there is consensus to the contrary. *See id.* arts. 22.2 & 22.6. For a general discussion of the legal effect of the WTO agreements, see John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1994). The United States' implementing legislation for the new agreements is set forth in the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). *See generally* BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* (1995); Patricia Isela Hansen, *The Impact of the WTO and NAFTA on U.S. Law*, 46 J. LEGAL EDUC. 569 (1996).

83. DSU, *supra* note 12, art. 23.2(a). For a discussion of the deterrent effect of the new WTO on unilateral action, see A. Lynne Puckett and William L. Reynolds, *Rules, Sanctions and Enforcement Under Section 301: At Odds With the WTO?*, 90 AM. J. INT'L L. 675 (1996).

84. The principal exception to this generalization involves the GATS, which requires governments to give "full and sympathetic consideration" to foreign government requests concerning allegedly anticompetitive practices by its service providers, and to "cooperate through the supply of

GATT members in 1993, this code was never adopted.<sup>85</sup> A number of nations, including the United States, have expressly opposed efforts to negotiate new antitrust rules in the WTO.<sup>86</sup> Instead, the WTO has established a working group to examine and identify competition policy issues.<sup>87</sup>

However, the WTO agreements retain the old GATT provisions permitting settlement of disputes concerning non-violations that result in impairment of a benefit accruing under the WTO agreements. The agreements do not require WTO members to withdraw non-violating measures that impair a treaty benefit.<sup>88</sup> However, members must negotiate a “mutually acceptable compensation” if a non-violating measure is found to impair a treaty benefit.<sup>89</sup>

Moreover, the new agreements expressly prohibit the use of unilateral trade sanctions to resolve disputes concerning non-violation impairment. Under the WTO Dispute Settlement Understanding, members may not “make a determination that . . . benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded” except through recourse to WTO dispute settlement procedures.<sup>90</sup>

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publicly available non-confidential information” relevant to such practices. GATS, *supra* note 81, art. IX. See also Agreement on Telecommunications Services, Feb. 15, 1997, art. 1.1, 36 I.L.M. 354, 367 (1997) (requiring governments to maintain “appropriate measures” to prevent “major” suppliers from engaging in “anti-competitive practices”).

85. See *International Antitrust Code Will Be Studied by GATT Members*, 10 Int'l Trade Rep. (BNA) No. 35, at 1470 (Sept. 1, 1993). See generally Daniel Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1 (1997).

86. See *U.S. Opposes Plan to Negotiate Agreement in WTO, Officials Say*, 14 Int'l Trade Rep. (BNA) No. 47, at 2034 (Nov. 26, 1997); *Caution Necessary Concerning WTO Agenda on Competition Rules, Justice Official Warns*, 13 Int'l Trade Rep. (BNA) No. 13, at 1856 (Dec. 4, 1996). See also *Report of the Special Committee on International Antitrust Chapter 11*, 1991 A.B.A. SEC. ANTITRUST L. (advocating harmonization of antitrust law in “key” areas, but opposing creation of an international enforcement procedure). For a discussion of the European position in support of new international antitrust rules, see generally EUROPEAN COMM'N, COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING INTERNATIONAL COOPERATION AND RULES (1995).

87. See *WTO Working Group Begins Examination of Competition Rules*, 14 Int'l Trade Rep. (BNA) No. 48, at 2072 (Dec 3, 1997). See also Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/2 (Dec. 8, 1998), available at <<http://www.wto.org>>.

88. See DSU, *supra* note 12, art. 22. There is a five-year moratorium on the application of non-violation provisions to the WTO's intellectual property rules. See TRIPS, *supra* note 81, art. 64(2). See also India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Appellate Body Report WT/D550/AB/R (Dec. 19, 1997) [hereinafter India].

89. DSU, *supra* note 12, art. 22.2.

90. *Id.* art. 23.2(a).

Despite this clear prohibition, the United States has stated that it reserves the right to impose unilateral sanctions in areas that are not covered by WTO rules, including antitrust policy.<sup>91</sup> However, the WTO has clearly had a deterrent effect on U.S. use of unilateral sanctions. While the WTO agreements were being negotiated, the United States initiated a Section 301 proceeding concerning allegedly anticompetitive practices in the Japanese automotive industry.<sup>92</sup> As in the semiconductor case, the United States insisted that Japan establish a numerical target for U.S. exports. When the Japanese government refused, the United States announced that it would impose retaliatory duties on imports of Japanese luxury cars in the amount of \$5.9 billion. This time, however, the U.S. threat failed. After Japan challenged the U.S. threat in the new WTO, the two countries reached an eleventh-hour agreement that permitted the United States to drop its threat of economic sanctions, but made no mention of numerical targets, or of any significant change in Japanese competition policy.<sup>93</sup>

## II. INTERNATIONAL ANTITRUST AND “REASONABLE EXPECTATIONS”

### A. THE KODAK-FUJI BATTLE

#### 1. *The Antitrust Dispute*

Japan's Fuji Film Company has long held a dominant position in the Japanese film market.<sup>94</sup> Prior to 1967, this dominant position was

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91. See STATEMENT OF ADMINISTRATIVE ACTION WITH RESPECT TO THE URUGUAY ROUND TRADE AGREEMENTS, H.R. DOC. NO. 103-316, at 1018, 1033, 1035 (1994) [hereinafter STATEMENT OF ADMINISTRATIVE ACTION]. For a discussion of possible arguments supporting the U.S. position, see Jared Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233 (1996).

92. See Peter Passell, *Sanction of Japan: The Implications*, N.Y. TIMES, May 17, 1995, at A1; David Sanger, *Sanction of Japan: The Overview*, N.Y. TIMES, May 17, 1995, at A1. See also David Sanger, *US Finds Itself Virtually Alone on Japan Trade*, N.Y. TIMES, May 29, 1995, at A1 (discussing global reaction to U.S. threat).

93. See Michiyo Nakamoto, *Tokyo Files Complaint with WTO*, FIN. TIMES (London), May 18, 1995, at 6. Instead, the U.S. accepted a non-binding pledge from Japanese car makers to increase North American production and increase purchases of foreign auto parts. See *U.S., Japan Strike Deal on Autos Address Parts, Dealerships, Repairs*, 12 INT'L TRADE REP. (BNA) No. 27, at 1132 (July 5, 1995). The United States has continued to express concerns about allegedly anticompetitive practices in the Japanese automotive sector. See *United States Calls on Japan to Make Auto Market Reforms*, 15 INT'L TRADE REP. (BNA) No. 32, at 1380 (Aug. 12, 1998).

94. Fuji currently accounts for 68% of the Japanese film market, followed by Konica (19%), Kodak (10%), and Agfa (3%). See *Photographic Film*, *supra* note 1, ¶¶ 5.15-5.16.

buttressed by a system of extremely high tariffs, quotas, and restrictions on foreign investment.<sup>95</sup> In 1967, however, the Japanese government began gradually eliminating its formal restrictions on foreign imports and investment. Finally, in 1994, the Japanese government agreed to eliminate all formal barriers to photographic film and paper imports.<sup>96</sup>

Although Kodak's exports to Japan increased substantially when Japan first began reducing its tariffs and quotas, its market share soon declined back to pre-1967 levels.<sup>97</sup> Kodak traced its problems in Japan to Fuji's establishment of exclusive relationships with Japan's four largest wholesale photographic film distributors (*tokuyakuten*), which supply seventy percent of Japan's retail market for photographic film.<sup>98</sup> Kodak claimed that these exclusive arrangements violated Japanese antitrust law.<sup>99</sup> Similar to U.S. antitrust law, Japanese antitrust rules impose a "rule of reason" on exclusive dealing between manufacturers and distributors.<sup>100</sup> Under this rule, a "powerful enterprise" may legally prohibit its distributors from dealing in competing products, but only if competitors find it difficult to establish alternative distribution channels.<sup>101</sup>

Even in the United States, there is considerable controversy over when, if ever, exclusive dealing arrangements should be deemed

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95. For a general discussion of Japan's international trade relations, see C. FRED BERGSTEN & MARCUS NOLAND, RECONCILABLE DIFFERENCES? UNITED STATES-JAPAN ECONOMIC CONFLICT (1993); BILL EMMOTT, JAPANOPHOBIA: THE MYTH OF THE INVINCIBLE JAPANESE (1993); JAMES FALLOWS, LOOKING AT THE SUN (1994); MITSUO MATSUSHITA & THOMAS J. SCHOENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT (1989); PRESTOWITZ, *supra* note 75; Alex Seita, *Discussing Japan Rationally*, 25 L. & POL'Y INT'L BUS. 193 (1994).

96. *See supra* note 1.

97. *See* United States Submission in the *Photographic Film* case, Feb. 20, 1997, available in 1997 WL 108726 [hereinafter U.S. Submission], Figure 1. A chart of Kodak's market share in Japan since 1967 is also available in *Privatizing Protection* (visited Sept. 1, 1999) <[http://www.dbtrade.com/film\\_in\\_japan/priv\\_protection/1.htm](http://www.dbtrade.com/film_in_japan/priv_protection/1.htm)>.

98. The term *tokuyakuten* is used to refer to primary wholesalers or special contract agents. *See Photographic Film*, *supra* note 1, ¶¶ 5.121, 5.142. The term is closely related to the more widely used *keiretsu*, which refers to a broad variety of interfirm relationships and sets of related firms. For a discussion of the competitive impact of *keiretsu*, see Sheard, *supra* note 66.

99. Kodak also argued that Fuji had unlawfully pressured retailers to maintain "stable" prices for its film. Resale price maintenance is generally illegal under both Japanese and U.S. antitrust law. *See* STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 230-34 (1993); Matsushita, *supra* note 73, at 185.

100. *See* Matsushita, *supra* note 73, at 187. For a comparison of U.S. and European law concerning exclusive dealing, see Fox, *supra* note 40, at 339, 345-47. For further discussion of Japanese antitrust law, see MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW (1990); Ariga, *supra* note 14.

101. *See* Matsushita, *supra* note 73, at 188-89. A firm with a market share above 10% is generally considered to be a "powerful enterprise" under Japanese law. *Id.*

unreasonable.<sup>102</sup> As a number of scholars have argued, exclusive dealing often produces important efficiency benefits, such as improved service and lower prices.<sup>103</sup> These efficiency benefits may often be sufficient to justify any adverse effect on competition. Indeed, Kodak itself has entered into a number of exclusive dealing arrangements in the United States and elsewhere.<sup>104</sup>

Kodak argued that Fuji's actions were unreasonable in Japan because of the unique importance of the *tokuyakuten* in the Japanese film market. In other markets, it is comparatively easy for manufacturers to establish alternative distribution channels to compete with those of their competitors. In Japan, however, the retail market for photographic film consists of over 280,000 outlets, most of which are small photo-specialty shops.<sup>105</sup> Access to so many unaffiliated stores requires an extensive and costly distribution network. In addition, Kodak alleged that Japanese law severely restricted its ability to use discount pricing and promotional campaigns to attract new retail customers.

Kodak's accusations drew a prompt response from Fuji Film. Fuji argued that the *tokuyakuten* purchased all of their requirements from Fuji voluntarily, and not as a result of any requirement imposed by Fuji.<sup>106</sup> Moreover, access to the *tokuyakuten* was not "essential" to success in the Japanese film market, since the *tokuyakuten*'s principal customers already either purchased or had access to Kodak film.<sup>107</sup>

More fundamentally, Fuji claimed that Kodak's problems in Japan were "caused by Kodak, and Kodak alone."<sup>108</sup> Kodak made no attempt to

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102. See, e.g., *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 384 (7th Cir. 1984) (exclusive dealing permissible unless its "probable" effect will be "to raise prices above (and therefore reduce output below) the competitive level"). See also Fox, *supra* note 40, at 345-47 (noting that exclusive dealing arrangements are "seldom successfully challenged" in the United States).

103. See, e.g., William B. Lockhart & Howard F. Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 933-40 (1952).

104. See *United States v. Eastman Kodak*, 853 F. Supp. 1454 (W.D.N.Y. 1994), *aff'd*, 63 F.3d 95 (2d Cir. 1995) (setting aside consent decree provisions against exclusive dealing arrangements because these arrangements were purely voluntary and resulted in cost savings for consumers).

105. See *Photographic Film*, *supra* note 1, ¶ 2.6.

106. See FujiFilm Co., *WTO Film Case—Latest Analysis* (visited Sept. 24, 1999) <<http://home.fujifilm.com/info/wto/ana4.html>> [hereinafter *Latest Analysis*]. See also FujiFilm Co., *Kodak Mistakes in Japan* (visited Sept. 24, 1999) <<http://home.fujifilm.com/info/wto/mistake.html>>; FujiFilm, *Rewriting History: Kodak's Revisionist Account of the Japanese Consumer Photographic Market* (visited Sept. 24, 1999) <<http://www.fujifilm.co.jp/eng/special/sp001.html>> [hereinafter *Rewriting History*].

107. See *Latest Analysis*, *supra* note 106, at 4.

108. *Id.* at 4.

invest in existing Japanese distributors until 1976, even though it could have done so much earlier. Moreover, Kodak had not established any direct sales force, sales management, or manufacturing or research facilities in Japan. Finally, Fuji noted that foreign products other than film and paper had managed to succeed in Japan despite the practices complained of by Kodak. In short, Fuji concluded that Kodak “simply was not paying attention” to Japan.<sup>109</sup>

## 2. *The Trade Dispute*

Rather than seek relief under U.S. or Japanese antitrust law, Kodak chose to file a Section 301 petition alleging that the Japanese government had not only tolerated, but actively encouraged, exclusive dealing relationships between Fuji and its distributors.<sup>110</sup> The petition was filed just one week after the United States threatened to impose economic sanctions against Japan in connection with its Section 301 investigation of allegedly anticompetitive practices in Japan’s automotive sector.<sup>111</sup>

As a number of commentators have noted, Kodak’s allegation that the Japanese government had tolerated anticompetitive behavior appears unwarranted, since Kodak had failed to seek any relief from Japanese antitrust authorities before filing the petition.<sup>112</sup>

However, allegations concerning Japan’s active encouragement of anticompetitive practices were more disturbing. Kodak alleged that Japan’s Ministry of International Trade and Industry (MITI) had issued a number of directives that encouraged Fuji to adopt certain practices, such as tight payment terms and high-volume rebates, which made it more difficult for the *tokuyakuten* to make film purchases from new suppliers.<sup>113</sup>

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109. *Id.*

110. Kodak’s Section 301 petition can be found at <<http://www.kodak.com>> (visited Sept. 24, 1999). For the memorandum filed in support of the petition, see *Privatizing Protection*, *supra* note 97.

111. See *supra* notes 92-93 and accompanying text.

112. See, e.g., William H. Barringer & James P. Durling, *Out of Focus: The Use of Section 301 to Address Anticompetitive Practices in Foreign Markets*, 1 UCLA J. INT’L L. & FOREIGN AFF. 99, 110 (1996) (arguing that litigants should exhaust local remedies before seeking an international remedy); Hiroyuki Fujii, *The Kodak-Fuji Dispute: A Spectrum of Divergent Colors and a Blueprint for a New WTO Procedure for Disputes Involving Government Toleration of Anti-Competitive Practices*, 2 UCLA J. INT’L L. & FOREIGN AFF. 317 (1997) (arguing that Kodak should have exhausted its remedies under Japanese law prior to seeking international intervention); Douglas F. Rosenthal, *Equipping the Multilateral Trading System With a Style and Principles to Increase Market Access*, 6 GEO. MASON L. REV. 543, 553 (1998) (resolution of controversy required prior factfinding investigation by the Japanese Fair Trade Commission and, if necessary, by the U.S. Department of Justice).

113. See *Privatizing Protection*, *supra* note 97, ¶¶ 23, 75-78.

In addition, Kodak alleged that MITI had discouraged the establishment of effective distribution alternatives. Japan's 1974 Large Store Law authorizes MITI to restrict the size and operating hours of stores measuring more than 500 square meters, if necessary to avoid harm to small local retailers.<sup>114</sup> Pursuant to this law, MITI issued a directive requiring all applicants seeking to operate large stores to notify and seek the prior approval of unofficial local retail councils, known as the "Prior CACA" and the "Prior Prior CACA."<sup>115</sup> Not surprisingly, large store construction in Japan came to a virtual standstill until 1990, when MITI officially abandoned the prior accommodation requirement.<sup>116</sup> Even after 1990, a number of local governments continued to require prior accommodation with local retailers.<sup>117</sup>

Finally, Kodak claimed that Japan's Fair Trade Commission had reinforced Fuji's market dominance by restricting the use of price discounts and other promotional devices. Pursuant to Japan's Antimonopoly and Premiums Laws, the Commission issued notifications prohibiting the use of discount prices that might unjustly tend to "cause difficulties to the business activities of other businesses," and the use of refunds, prizes and gifts that are not "reasonable in light of normal business practices."<sup>118</sup> The Commission authorized private industry groups, known as fair trade councils, to promulgate and enforce fair competition codes specifying which practices would be permissible in their industry.<sup>119</sup> Kodak claimed that the Premiums Law and fair competition codes were so opaque that it could not figure out which promotion campaigns would be permitted, and which would not.<sup>120</sup> Instead, the Japanese government appeared to give free rein to the fair trade councils, which appeared to be exempted from Japan's Antimonopoly Law.<sup>121</sup> The apparent need to obtain industry approval allegedly had a "significant chilling effect" on the use of even innocuous promotional campaigns.<sup>122</sup>

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114. See *Photographic Film*, *supra* note 1, ¶¶ 5.281-5.327.

115. For a discussion of the large store approval process, see Suzumura, *supra* note 74, at 453-60.

116. See *id.*

117. See *Photographic Film*, *supra* note 1, ¶ 5.327.

118. *Id.* ¶¶ 2.35-2.45.

119. See *Privatizing Protection*, *supra* note 97, ¶¶ 30-31.

120. See *Photographic Film*, *supra* note 1, ¶¶ 5.530, 7.127.

121. See *Privatizing Protection*, *supra* note 97, ¶¶ 224-29.

122. *Photographic Film*, *supra* note 1, ¶¶ 6.617, 10.343, 10.361.

The United States provided Japanese antitrust authorities with information on Kodak's charges, and required Kodak to do the same.<sup>123</sup> In addition, the United States requested international consultations under the 1960 GATT Decision on restrictive business practices.<sup>124</sup> However, Japan refused to consult with the United States unless the discussions also addressed certain complaints about Kodak's business practices in the United States. Instead, Japanese authorities agreed to conduct an informal market survey of the film industry, based on voluntary submissions by Japanese businesses.<sup>125</sup> The resulting report concluded that there was insufficient evidence to warrant a formal investigation of Fuji's practices, but recommended that Fuji review a number of practices that could have an anticompetitive effect.<sup>126</sup>

The United States called the Japanese report a "whitewash," and its results "weak and woefully insufficient."<sup>127</sup> However, rather than threaten unilateral sanctions, the United States sought for the first time to vindicate its complaints about Japanese competition policy in the new WTO.

#### B. DEFINING "REASONABLE EXPECTATIONS"

In its complaint in the WTO, the United States alleged that Japanese policies affecting competition in the photographic film market had nullified or impaired the value of its prior tariff commitment, because they violated reasonable expectations that the commitment would increase the U.S. firms' access to the Japanese film market.<sup>128</sup> Moreover, even if these expectations had not been violated, Japan had violated GATT rules by applying its competition rules in a manner that violated GATT Article III, which prohibits governments from applying their internal laws in a manner that accords "less favorable treatment" to imports, and GATT Article X, which requires governments promptly to publish all measures affecting

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123. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, SECTION 304 DETERMINATIONS: BARRIERS TO ACCESS TO THE JAPANESE MARKET FOR CONSUMER PHOTOGRAPHIC FILM AND PAPER, 61 Fed. Reg. 30,929 (1996).

124. See *supra* note 26 and accompanying text.

125. See *Japan to Conduct Study of Trade Practices in Film Market*, N.Y. TIMES, Feb. 22, 1996, at D6. The FTC has conducted thirteen such studies since 1990, but never imposed any penalty as a result. See Michiyo Nakamoto, *Japan to Probe Competition in Photo Markets*, FIN. TIMES (London), Feb. 22, 1996, at 4.

126. See *Film Ruling Sharpens Differences with U.S.*, NIKKEI WEEKLY, July 28, 1997, at 6; *Japan Film Market Passes JFTC Muster; But U.S. Is Pursuing Its Case at WTO*, 14 Int'l Trade Rep. (BNA) No. 31, at 1319 (July 30, 1997).

127. Bethan Hutton, *US Anger as Japanese Survey Clears Fuji*, FIN. TIMES (London), July 24, 1997, at 5.

128. See, e.g., *Photographic Film*, *supra* note 1, ¶ 6.85.

international trade, and to administer these measures in a “uniform, impartial and reasonable” manner.<sup>129</sup>

The WTO panel agreed that the United States need not establish a violation of WTO rules in order to prevail, provided that it could show that a current Japanese policy had a disproportionate impact on import competition and was inconsistent with the United States’ “reasonable expectations” at the time it negotiated the tariff commitment.<sup>130</sup> If these requirements were met, Japan could be required to negotiate an appropriate adjustment with the United States.

However, the panel found that none of Japan’s current policies had any significant effect on the competitive relationship between domestic and imported film. Accordingly, the United States could not succeed on either its non-violation claim or its claim of unlawful discrimination.<sup>131</sup> Moreover, Japan was not required to publish rulings or policies unless these were shown to have “general application.”<sup>132</sup>

This section examines the basis for the panel’s decision on the United States’ non-violation claim in light of the previous decisions issued by GATT panels concerning this type of claim.<sup>133</sup> These decisions suggest two separate paradigms for defining reasonable expectations. The first paradigm uses *promissory estoppel* principles to ensure that governments respect the promises implied by their own prior conduct or representations, if these promises appear to have induced detrimental reliance during tariff negotiations. The second paradigm recognizes a reasonable expectation that governments will not adopt policies that *systematically offset* their prior tariff commitments. The United States suggested a third paradigm that would have recognized a reasonable expectation that governments will not adopt policies with the *subjective intent* of offsetting a prior trade commitment. As shown below, however, each of these paradigms presents serious difficulties when applied to disputes involving competition policy.

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129. *Id.* ¶¶ 1.2, 4.26.

130. *See id.* ¶¶ 10.70, 10.85.

131. *See id.* ¶¶ 10.115, 10.402-03.

132. *Id.* ¶¶ 10.393, 10.396, 10.401.

133. Although GATT panel reports are not binding on WTO panels, the WTO Appellate Body has recognized that adopted GATT panel reports “create legitimate expectations among WTO members, and should be taken into account” where relevant. Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body, § E, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996). WTO panels may also find useful guidance in the reasoning of unadopted GATT panel reports. *See id.*

### 1. *Promissory Estoppel*

The concept of reasonable expectations was used in a number of cases to require GATT members to abide by express or implied promises that produced detrimental reliance (that is, a tariff concession) by other members during tariff negotiations. For example, in *Treatment by Germany of Import of Sardines*,<sup>134</sup> a GATT panel found that Germany had nullified or impaired the value of its agreement to reduce its tariff on certain Norwegian sardine species by subsequently lowering its tariff on a closely-related Portuguese species even further.<sup>135</sup> Although the new tariff did not violate any express GATT obligation, Germany's practice of applying the same tariff to the different sardine species for the previous twenty-seven years gave rise to a reasonable expectation that it would continue to do so in the future. Germany subsequently agreed to eliminate all but one percent of the tariff differential.<sup>136</sup>

Similarly, in *Australian Subsidy on Ammonium Sulphate*,<sup>137</sup> a GATT working party found that Australia had nullified or impaired the value of its tariff commitments for certain fertilizer by removing a previously-existing subsidy to purchasers of the imported fertilizer, even though this action did not violate any express GATT rule.<sup>138</sup> Previously, Australia had subsidized purchases of both domestically-produced and imported fertilizer. Although GATT rules expressly permitted domestic subsidies, the working party found that Australia's prior practice had given rise to a reasonable expectation of continued equal treatment of the domestic and imported fertilizers. Australia's decision to preserve the subsidy only for domestically-produced fertilizer violated this expectation. The working party recommended that Australia should adjust the subsidy to remove the competitive inequality between domestic and imported fertilizer.<sup>139</sup>

Finally, in *German Import Duties on Starch and Potato Flour*,<sup>140</sup> the disputing parties themselves agreed that Germany must comply with a prior

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134. *Treatment by Germany of Import of Sardines*, Oct. 31, 1952, GATT B.I.S.D. (1st Supp.) at 53 (1953).

135. *See id.* at 58.

136. *See id.* at 58, ¶ 16.

137. Apr. 3, 1950, II GATT B.I.S.D. at 188 (1952) [hereinafter *Australian Subsidy*].

138. The GATT's general prohibition against measures that discriminate against imports does not apply to government subsidies paid directly to domestic producers. *See* GATT, *supra* note 17, Art. III, para. 5. The new WTO agreements now contain a new set of rules restricting the use of such subsidies. *See* Agreement on Subsidies and Countervailing Measures, in Agreement on Trade in Goods, Dec. 15, 1993, 33 I.L.M. 28 (1994).

139. *See Australian Subsidy*, *supra* note 137, at 195, ¶¶ 16-17.

140. Feb. 16, 1955, GATT B.I.S.D. (3d Supp.) at 77 (1955).

representation that it would lower its duty on certain starch products to a specified level “as soon as possible,” even though this promise was set forth in a letter (delivered to the Benelux delegation) that was never included in any formal agreement or notified to the GATT Secretariat.<sup>141</sup> The disputing parties agreed that the promise in the letter formed part of the balance established by their subsequent tariff concessions, and that Germany should lower the specified tariff without requiring any further concessions from Benelux.<sup>142</sup>

The United States did not seek to rely on the promissory estoppel paradigm in the *Photographic Film* case. Indeed, this paradigm will rarely be useful in international antitrust disputes. As discussed above, no international legal instruments concerning antitrust issues existed until relatively recently, and those that have developed do not impose any binding obligations apart from a general obligation to consult.<sup>143</sup> Thus, although Japan has had a friendship, commerce, and navigation treaty with the United States since 1954,<sup>144</sup> and has accepted the OECD Guidelines on restrictive business practices, neither of these instruments provides a sufficient basis for evaluating Japan’s subsequent competition policies in the photographic film sector.

A country’s prior competition policies will also rarely afford a basis for promissory estoppel, because most countries did not actually begin to pursue active antitrust policies until relatively recently. For example, although Japan has had a U.S.-style Antimonopoly Law since 1947 (when it was imposed by U.S. occupation forces), it largely ignored the law until relatively recently.<sup>145</sup> And although Japan has now begun to pursue a more active antitrust policy, its Fair Trade Commission has rarely imposed any significant penalties for antitrust violations, and has never initiated a formal investigation under the new distribution guidelines introduced as a result of the 1989 Structural Impediments Initiative.<sup>146</sup>

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141. See *id.* at 78, ¶ 2.

142. See *id.* at 78, ¶ 3.

143. See *supra* Part I.C.

144. See *supra* note 44.

145. See Matsushita, *supra* note 73, at 152 (noting that the Antimonopoly Law was “too ambitious” for Japan’s post-war economy and enjoyed “no popular support”). See also Douglas Rosenthal & Mitsuo Matsushita, *Competition in Japan and the West: Can the Approaches Be Reconciled?*, in GLOBAL COMPETITION POLICY 313, *supra* note 40, at 313-14 (discussing Japanese view of “competition” as something “dangerous and unstable”); First, *supra* note 72, at 138 (1995) (discussing differences between Japanese and American views of antitrust policy). See generally MATSUSHITA, *supra* note 100; Ariga, *supra* note 14.

146. See, e.g., First, *supra* note 72. For further discussion of the Structural Impediments Initiative (SII), see *supra* notes 72-73 and accompanying text.

## 2. “Systematic” Trade Barriers

As noted earlier, GATT rules expressly permitted government subsidies to domestic producers. In 1955, however, the GATT Contracting Parties adopted a decision recognizing that governments could reasonably be expected to refrain from introducing or increasing domestic subsidies that would impair the value of their prior tariff concessions.<sup>147</sup> This rule was first applied in *EEC—Production Aids Granted on Canned Fruits and Dried Grapes*,<sup>148</sup> where a GATT panel found that the EEC had impaired the value of certain fruit product tariffs by adopting a subsidy designed to compensate for the price differential between domestic and imported fruit.<sup>149</sup> This decision had limited legal effect, because it was never adopted by the GATT Contracting Parties.<sup>150</sup> However, in *EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins*,<sup>151</sup> another GATT panel found that the EEC had impaired the value of its tariff concessions concerning oilseed imports when it introduced a subsidy scheme that “systematically” counteracted the price effect of the tariff concessions, “completely” insulated domestic producers from import competition, and prevented tariff concessions from having any impact on import levels.<sup>152</sup> The panel concluded that such subsidies would render tariff commitments meaningless and would discourage governments from negotiating further tariff concessions.<sup>153</sup> This time, the decision was officially adopted.

The United States argued that although Japan had not directly subsidized Fuji or any other domestic film producer, it had achieved the same results by adopting marketing and distribution policies that acted together “systematically” to block foreign film producers’ access to the Japanese photographic film market. The United States claimed that Japan had encouraged the *tokuyakuten* to deal exclusively with Fuji, by encouraging the adoption of certain standard transaction terms that made distributors highly dependent on their existing suppliers (that is, Fuji).<sup>154</sup> In addition, it alleged that Japan had “chilled” the efforts of foreign film

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147. Report adopted Mar. 3, 1955, GATT B.I.S.D. (3d Supp.) at 224 (1962), *reconfirmed* in Panel Report on the Operation of Art. XVI, Nov. 21, 1961, GATT B.I.S.D. (10th Supp.) at 209 ¶ 27 (1961).

148. L/5778 (1985) (unadopted) [hereinafter *Production Aids*].

149. *See id.*

150. *See supra* note 133.

151. Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86, ¶¶ 147-48 (1990) [hereinafter *Oilseeds*].

152. *See id.*

153. *See* Follow-up on the Panel Report, Mar. 31, 1992, *available in* 1992 WL 792951, at \*24, ¶ 81. *See* *Oilseeds*, *supra* note 151, ¶ 144.

154. *See supra* note 113 and accompanying text.

producers to promote their products in Japan by enacting vague legal restrictions on promotional campaigns and authorizing local trade associations to implement these restrictions.<sup>155</sup> Finally, the United States alleged that Japan had severely restricted foreign ability to develop direct relationships with retailers, by restricting the growth of stores large enough to support such relationships.<sup>156</sup> In the United States' view, the combined effect of these policies was to disrupt "severely" the competitive conditions necessary in order for foreign film producers to be able to benefit from Japan's reduced tariffs on imported film.<sup>157</sup>

The WTO panel agreed that Japan's agreement to lower its tariff on imported film gave rise to a reasonable expectation that it would not subsequently adopt *any* policy that had a "disproportionate impact" on film imports.<sup>158</sup> Thus, the rule against systematic trade barriers was not limited to disputes involving direct financial subsidies.

In addition, the panel found that the United States could claim that current policies violated its reasonable expectations at the time of the 1967 tariff negotiations, even though *general* policies aimed at systematizing distribution, restricting large store growth, and limiting promotional campaigns were already in place at that time. The United States could reasonably expect that Japan would not subsequently implement these pre-existing policies in a manner that would create a disproportionate burden on the ability of foreign enterprises to compete in local film markets.<sup>159</sup> Thus, the United States could permissibly challenge any *specific* policy or practice that had not itself been published at the time of its initial tariff negotiations.

By recognizing that competition policies can violate reasonable expectations, the panel opened the door for a powerful new kind of dispute settlement in the WTO. Although governments need not withdraw such measures, they may be required to negotiate an appropriate adjustment (provided the policy is shown to have a "continuing effect").<sup>160</sup>

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155. See *supra* notes 119-22 and accompanying text.

156. See *supra* notes 114-17 and accompanying text.

157. See U.S. Submission, *supra* note 97, ¶¶ 1, 379, 388, 392, 394 (policies "systematically" offset prior tariff commitments); *id.* ¶¶ 244, 404 (policies "severely disrupted" competitive conditions in the Japanese film market).

158. See *Photographic Film*, *supra* note 1, ¶ 10.85.

159. See *id.* ¶ 10.79 (governments may permissibly challenge policies that were not actually published at the time of the tariff negotiations).

160. See *id.* ¶¶ 10.57-10.59.

However, the panel emphasized that the non-violation provision constituted an “exceptional” remedy that should be used with great caution and required “detailed justification.”<sup>161</sup> It found that in this case, the United States failed to provide such a justification.

In reaching this conclusion, the panel first noted that the financial subsidies in *Oilseeds* and *Production Aids* were expressly limited to specific products, and directly linked to imports. In contrast, the marketing and distribution policies challenged by the United States on their face applied to all products, regardless of their origin.<sup>162</sup>

The panel did not dismiss the possibility that a facially neutral measure that is generally applicable to all products, regardless of national origin, might nevertheless nullify or impair a prior tariff commitment. However, in the *Semiconductor* case, a GATT panel had expressly rejected the EEC’s argument that a facially neutral agreement to encourage private purchases of foreign semiconducors would in practice favor U.S. exports, because the commitment was made in response to U.S. pressure.<sup>163</sup> This circumstance did not provide the detailed justification required to demonstrate that the facially neutral policy had impaired Japan’s prior tariff commitment.<sup>164</sup>

The panel was skeptical that facially neutral distribution and marketing restrictions could have a disproportionate impact on imports. It noted that the European Court of Justice (ECJ) had found that Sunday-closing laws and other facially neutral “selling arrangements” cannot be challenged as unlawful trade restrictions.<sup>165</sup> In any event, Japan’s current restrictions on large store growth and promotional campaigns could not be deemed to cause disproportionate harm, because they had permitted the recent modest increase in large store sales, as well as Kodak’s successful marketing campaign during the Nagano Olympics.<sup>166</sup> The panel dismissed the United States’ claim that uncertainty about the role of private trade

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161. *Id.* ¶¶ 10.30, 10.36.

162. *See, e.g., id.* ¶ 10.225.

163. *See* Semi-conductors, *supra* note 70, at 152. As discussed above, the panel accepted the United States’ representation that there was no “secret” agreement to increase U.S. exports to a specified level. *See supra* note 68 and accompanying text.

164. *See id.* ¶ 131.

165. *See Photographic Film, supra* note 1, ¶ 10.227 (citing Case C-145/88, Torfaen Borough Council v. B&Q PLC, 1989 E.C.R. 3851); Joined Cases C-267 & 268/91, Keck & Mithouard, 1993 E.C.R. I-6097; Joined Cases C-69 & 258/93, Punta Casa SpA v. Sindaco del Comune di Capena, 1994 E.C.R. I-2355. *See also* Exxon v. Maryland, 437 U.S. 117 (1978) (holding that state statute prohibiting oil producers and refiners from operating retail service stations in Maryland does not impermissibly burden interstate commerce).

166. *See Photographic Film, supra* note 1, ¶¶ 10.229-10.231, 10.276.

associations in approving promotional campaigns had chilled its marketing efforts as a “very general argument” that was “not supported by sufficient evidence.”<sup>167</sup>

Moreover, even if Fuji’s exclusive relationships with the *tokuyakuten* were deemed to have a disproportionate impact on film imports, there was no evidence that Japan’s current policies had *caused* these relationships to emerge or continue. In *Japanese Semiconductors*, the GATT panel had found that the Japanese government could be deemed to have caused a private price-fixing scheme because: (1) it created incentives for private actors to undertake the scheme; and (2) the scheme would not have been possible in the absence of governmental intervention.<sup>168</sup> In this case, the panel found that Japan’s policies on film distribution did create incentives for exclusive dealing.<sup>169</sup> However, it found that Fuji’s exclusive relationships with the *tokuyakuten* could have emerged even in the absence of governmental intervention. The panel noted that most of the *tokuyakuten* had already become single-brand distributors before the Japanese government initiated the challenged policies. There was also evidence that the remaining *tokuyakuten* discontinued their purchases from Kodak for independent business reasons.<sup>170</sup> Finally, single-brand distribution was the norm in other markets where no such guidance had been issued.<sup>171</sup>

Thus, while recognizing the possibility that anticompetitive policies might be challenged as systematic barriers to trade, the Kodak panel also erected three major obstacles to future claims. First, the panel suggested that it would be extremely difficult to challenge facially neutral marketing restrictions, at least where these measures allow foreign businesses *some*

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167. *Id.* ¶ 10.346. Although the United States had presented evidence of various trade association actions that allegedly caused Kodak to drop proposed promotional campaigns, the panel found no evidence that the Japanese government itself had caused any of these actions. *See id.* ¶¶ 10.276, 10.308.

168. *See supra* notes 70-71 and accompanying text. *See also* EEC—Restrictions on Import of Dessert Apples, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 93 (1989) (finding that the European Community’s specific authorization of certain private actions violated GATT rules); Canada—Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140, 158 ¶ 5.4 (1984) (finding that GATT rules apply to government law permitting private investors to submit “voluntary” undertakings for the purpose of obtaining government approval of proposed investments); EEC—Regulation on Imports of Parts and Components, May 16, 1990, GATT B.I.S.D. (37th Supp.) at 132, 197 ¶ 5.21 (1990) (finding that GATT rules apply to government requirements that a private party “voluntarily accepts in order to obtain an advantage from the government”).

169. *See Photographic Film, supra* note 1, ¶¶ 10.49, 10.57-10.59.

170. There was evidence that the fourth *tokuyakuten*, *Asanuma*, was dissatisfied with Kodak’s refusal to deal with it directly. *See id.* ¶¶ 10.115, 10.163, 10.173, 10.181, 10.195, 10.204, 10.262.

171. *See id.* ¶¶ 10.173, 10.204.

access to important channels of distribution and promotion. Second, the panel found that the creation of uncertainty is not, in itself, sufficient to violate reasonable expectations. Finally, the panel held that policies that encourage private actors to pursue practices that systematically harm foreign competition cannot violate reasonable expectations unless the anticompetitive practices could not have occurred without government assistance.

### 3. *Motive*

In order to avoid the problems involved in showing systematic harm, the United States introduced a third paradigm of reasonable expectations based on the Japanese government's alleged *intent* to protect Fuji from import competition. In short, the United States suggested that Japan's tariff commitment gave rise to a reasonable expectation that it would not thereafter *seek* to harm competition by imports in the Japanese film market.

In support of this theory, the United States pointed to a number of official statements by the Japanese government. For example, the United States pointed to a number of official statements suggesting that the Japanese government had intended to ensure that domestic manufacturers retained control over Japanese distribution. Similarly, MITI's distribution measures were taken pursuant to a 1967 decision by the Japanese Cabinet, which called for the implementation of "counter measures" to "reorganize the industrial system" and to "restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries, by resorting to the strength of their superior power."<sup>172</sup> Subsequently, MITI issued a report expressing concern that if supermarkets continued to expand, their "influence over manufacturers will grow, and the market system controlled by manufacturers will be shaken."<sup>173</sup> MITI later proposed the Large Store Law, in order to "'nurtur[e] and nourish[] the small- and medium-sized companies' resistance so as to provide them with the ability to ambush" foreign capital.<sup>174</sup> Finally, MITI expressly stated that measures taken pursuant to the Premiums Law—including industry codes promulgated by private trade associations—would also be used as "liberalization counter-measures."<sup>175</sup> As one Japanese official noted, Japanese companies "will not be able to successfully compete if large

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172. *Id.* ¶¶ 10.95-10.100 (quoting the Japanese Cabinet Decision on Liberalization of Inward Direct Investment of June 6, 1967).

173. *Id.* ¶ 10.355 (quoting 1969 MITI survey).

174. *Id.* ¶ 5.302 (quoting July 19, 1973, Diet proceeding).

175. U.S. Submission, *supra* note 97, ¶¶ 256, 295, 298, 300.

foreign companies . . . came in and conducted various excessive premium campaigns.”<sup>176</sup>

The WTO panel rejected the United States’ contention that evidence of improper motivation could, in itself, establish a non-violation claim. However, it indicated that evidence of improper motivation could be a potentially important factor in its analysis, since it would be “more inclined” to find that the government had actually caused harm to imports if it had subjectively intended to do so.<sup>177</sup>

The United States, however, was unable to persuade the panel that Japanese policies were subjectively intended to establish single-brand distribution or otherwise impair import competition. The panel found that Japan’s distribution policies were not directed at promoting vertical integration or single-brand distribution.<sup>178</sup> Although the government had expressed concern about import competition, the “main focus” of its policies was to improve the efficiency of domestic distribution.<sup>179</sup> Similarly, “it seem[ed] clear” that the Large Store Law, like similar laws in “many other countries,” was primarily intended to protect small stores.<sup>180</sup> Finally, measures enacted under the Premiums Law were directed at protecting consumers from “excessive” promotional activities.<sup>181</sup>

The panel’s inability to find an improper governmental motive is hardly surprising. Even in private disputes in domestic courts, an individual’s state of mind is difficult to discern.<sup>182</sup> These problems are magnified in cases involving governmental action, because governmental decisions are generally made by a number of different individuals and institutions, and for a number of different reasons.<sup>183</sup> For example,

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176. *Id.* ¶ 256.

177. *See Photographic Film, supra* note 1, ¶ 10.87.

178. *See id.* ¶ 10.204.

179. *See id.* ¶¶ 10.130, 10.171, 10.186, 10.200.

180. *Id.* ¶ 10.225.

181. *See id.* ¶¶ 10.262, 10.319.

182. *See, e.g.,* Mark Snyderman, *What’s So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335, 1354 (1988) (noting that even when purporting to evaluate a party’s “subjective” motivation, courts tend to focus on whether there are “reasonable grounds” for the challenged actions).

183. *See, e.g.,* Miguel Poiars Maduro, *Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights*, 3 EUR. L.J. 55, 68 (1997) (“[I]t is impossible to reconstruct the decision-making process leading to a State’s regulations and thus to uncover the real motivations behind them.”). *See generally* Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of*

although protectionist concerns clearly played a role in the process leading to the adoption of Japan's distribution and marketing policies, the policies were also intended to achieve certain legitimate policy goals. Indeed, if every national regulation that was influenced by protectionist concerns were found to violate reasonable expectations, very few regulations would survive WTO review.

Instead, the panel focused on whether protectionist concerns were the main motivation for the challenged policies. In other words, the panel appeared to be concerned with determining whether the Japanese government would have adopted the policy even in the absence of its protectionist concerns. This type of determination is difficult to make even in national courts, where the parties have access to extensive discovery, live testimony and cross-examination, and fact-finders that are generally familiar with the local political context.<sup>184</sup> Motive-based determinations are even more difficult in the WTO. Unlike the litigants in national courts, the parties to WTO proceedings have no access to discovery or any other independent fact-finding procedures. Moreover, WTO proceedings generally rely on written evidence, rather than on live testimony.<sup>185</sup> Unlike the judges and juries in national courts, WTO panelists generally come from countries that are not involved in the dispute, and are therefore unfamiliar with the political context in which governmental decisions have been made.<sup>186</sup>

In addition, even if the Japanese policies were *initially* intended to counteract import competition, this fact is not enough to establish that those policies are *currently* maintained for this reason. Over time, protectionist restrictions may come to enjoy popular support for reasons entirely independent of their initial intent. For example, although restrictions on the sale of high-alcohol beer were initially introduced in a number of states in the hopes of creating a special niche for local low-alcohol beer, these

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*Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

184. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) (discussing the difficulty of determining the "sole" or "dominant" motivation behind legislative choices). Paul Brest has argued that courts should instead require government to come forward with an "extraordinary justification" whenever an illicit motive has played an "affirmative role" in the decisionmaking process. See Brest, *supra* note 183, at 130-31.

185. See DSU, *supra* note 12, at app. 3 (providing for written submissions and oral arguments in closed sessions open only to the parties to the agreement themselves). *But see id.* art. 13 & app. 4 (providing that panels may seek information or advice from any "relevant source," and may establish an "expert review group").

186. See *id.* art. 8.3. (providing that panelists may not be citizens of countries that are parties to a dispute "unless the parties . . . agree otherwise").

regulations are now widely regarded as valid means of protecting public health and safety.<sup>187</sup> Similarly, even if Japanese policies were initially introduced for protectionist reasons, they may now be popularly viewed as preserving important social values. In short, a motive-based approach offers little realistic prospect for resolving most international antitrust disputes.

### C. THE AFTERMATH

The panel's decision produced mixed reactions. In Japan, the government viewed the decision as affirming that its market was in fact open to imports.<sup>188</sup> In the United States, critics expressed concern about the credibility of WTO commitments.<sup>189</sup> Meanwhile, the European Union urged "intensified discussion" on trade and competition issues in the WTO.<sup>190</sup>

The United States did not appeal the panel's decision. Instead, it announced that it would continue to pursue its concerns about Japanese competition policy outside the WTO framework. The United States established an interagency committee to monitor Japan's compliance with

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187. See United States—Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 ¶ 5.74 (1992).

188. See, e.g., *Fujifilm Statement About WTO Decision* (visited Sept. 24, 1999) <<http://www.fujifilm.co.jp/eng/special/sp032.html>> (decision affirmed that imported film is "widely available and competitively priced in Japan"); *Japan Welcomes WTO Report on Film Dispute*, Japan Economic Newswire Plus, Dec. 6, 1997, available in DIALOG (quoting MITI statement that decision accepted that "there are no barriers for foreign products to get access to the Japanese market").

189. See Keith Bradsher, *Kodak is Loser in Trade Ruling on Fuji Dispute*, N.Y. TIMES, Dec. 6, 1997, at A1 (quoting U.S. Trade Representative's statement that the decision "simply do[es] not address market realities"); Nancy Dunne, Guy de Joniquie'res & Michiyo Nakamoto, *WTO's Film Ruling Angers Washington*, FIN. TIMES (London), Dec. 8, 1997, at 3; Robert S. Greenberger, Laura Johannes & Ross Kerber, *WTO's Kodak Ruling Heightens Trade Tensions*, WALL ST. J., Dec. 8, 1997, at A3; Leon Hadar, *WTO Kodak Ruling Adds Fuel to U.S. Protectionist Fires*, BUS. TIMES (Singapore), Dec. 11, 1997, available in 1997 WL 7774551; Evelyn Iritani, *U.S., Kodak Lose Japan Trade Suit*, L.A. TIMES, Dec. 6, 1997, at D1 (quoting Senator John Ashcroft's concerns about "the credibility" of the WTO); *Trade Injustice*, N.Y. TIMES, Dec. 10, 1997, at A28 (decrying the WTO's "embrace [of] blatantly protectionist behavior by the Japanese Government"); John Maggs, *Kodak Calls WTO Ruling on Film Unacceptable, Seeks Trade Action*, J. COM., Dec. 8, 1997, at 3A; Paul Magnusson, *Why the WTO Needs an Overhaul*, BUS. WEEK, June 29, 1998, at 34 (interpreting decision as indication that "WTO is stumbling—perpetuating subtle trade barriers it was intended to eliminate"); Lorraine Woellert, *Kodak, U.S. Lose Trade Dispute; WTO Edict Called "Unconscionable"*, WASH. TIMES, Dec. 6, 1997, at A1 (quoting Clyde Prestowitz's statement that the ruling would "sap the credibility of the world trade system in the American eyes"); Gary Yerkey, *World Trade Turns 50: Time to Celebrate? or Pull the Plug?*, 15 Int'l Trade Rep. (BNA), No. 19, at 842 (May 13, 1998) (finding that Kodak decision has increased general concerns over WTO dispute settlement).

190. Marc Selinger, *EU Joins U.S. in Pledging to Test Japan's Film Market Claim*, 15 Int'l Trade Rep. (BNA) No. 6, at 232 (Feb. 11, 1998).

certain “commitments” made during the *Photographic Film* proceedings, concerning its policies of “active” antitrust enforcement and improved market access for imported products.<sup>191</sup> If the committee should find that Japan had failed to comply with its “commitments,” the United States would consider the “full range” of options—including economic sanctions against Japan.<sup>192</sup>

The Japanese government refused to cooperate with the U.S. committee, but agreed to discuss antitrust issues in separate negotiations.<sup>193</sup> The two countries recently announced that they had reached a substantive agreement on antitrust cooperation that will include positive comity principles.<sup>194</sup>

### III. RETHINKING “REASONABLE EXPECTATIONS”

#### A. THE NEED FOR A NEW APPROACH

A number of commentators have expressed strong reservations about the use of WTO dispute settlement to resolve international antitrust disputes. Professor Jackson, for example, has argued that the use of WTO tribunals to resolve competition policy disputes may place too great a burden on the dispute settlement process.<sup>195</sup> Others have expressed concerns about the very notion of non-violation claims.<sup>196</sup>

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191. See Nancy Dunne, *US. to Hold Japan to Its Fuji Stance*, FIN. TIMES (London), Feb. 4, 1998, at 8; John Maggs, *US Declines to Appeal WTO's Film Decision*, J. COM., Feb. 4, 1998, at 4A; Selinger, *supra* note 190; U.S. TRADE REPRESENTATIVE, THE PHOTOGRAPHIC FILM AND PAPER MARKET IN JAPAN: REPRESENTATIONS BY THE GOVERNMENT OF JAPAN (1998), reprinted in 15 Int'l Trade Rep. (BNA) No. 5, at 205 (Feb. 4, 1998).

192. See Marc Selinger, *Japan Will Not Cooperate in Film Market Access Test, U.S. Says*, 15 Int'l Trade Rep. (BNA) No. 10, at 434 (Mar. 11, 1998) (quoting statements by Office of the U.S. Trade Representative General Counsel). See also *Japan Must Do More to Open Market for Photo Film Paper, U.S. Report Says*, 16 Int'l Trade Rep. (BNA) No. 24, at 995 (June 16, 1999).

193. See *First Joint Status Report on the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy, Released at G-8 Summit, May 15, 1998*, 15 Int'l Trade Rep. (BNA) No. 20, at 891 (May 20, 1998) (summarizing status of US-Japan discussions begun in June 1997). See also *US Looking at New Areas for Negotiation With Japan*, 15 Int'l Trade Rep. (BNA) No. 29, at 1284 (July 22, 1998) (discussing new U.S. proposals for reform in Japanese antitrust laws); Toshio Aritake, *Japanese Agency Panel Proposes to Create Private Enforcement System to Bypass JFTC*, 15 Int'l Trade Rep. (BNA) No. 22, at 954 (June 3, 1998) (discussing proposals for antitrust reform made within Japan).

194. See *U.S., Japan Reach Agreement on Antitrust Cooperation Accord*, 16 Int'l Trade Rep. (BNA) No. 18, at 757 (May 5, 1999). See also *Japan Fair Trade Commission to Beef Up Enforcement, M & A Harmonization Power*, 15 Int'l Trade Rep. (BNA) No. 41, at 1738 (Oct. 21, 1998).

195. See *Expert Warns of Burden to WTO Dispute Settlement*, 15 Int'l Trade Rep. (BNA) No. 18, at 778 (May 6, 1998) [hereinafter *Expert Warns*] (quoting Professor Jackson's concern that increased use of WTO dispute settlement to “plug gaps” in the WTO agreement “places too much of the problem-solving burden on the dispute settlement process,” and Professor Bhagwati's statement that WTO

However, the majority of scholars have rejected the notion that international tribunals can abstain from resolving disputes on the basis of a *non-liquet*—that is, a ruling that the law is not sufficiently complete to resolve the dispute.<sup>197</sup> *Non-liquet* is viewed as inconsistent with the social need for the settlement of disputes (*ut sit finis litium*).<sup>198</sup> Moreover, the parties' grant of jurisdiction over a dispute necessarily imposes on the tribunal a *duty* to exercise this authority.<sup>199</sup> As Professor Reisman has argued, it is "precisely because of a 'gap' in the applicable law that parties often turn to formal dispute settlement processes."<sup>200</sup>

The rule against *non-liquet* applies equally to WTO tribunals. It is true that the authority of WTO tribunals is expressly limited to disputes arising under covered agreements. Moreover, WTO tribunals are expressly admonished not to "add to or diminish the rights and obligations provided"

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panels cannot determine "what the law should be"). See also Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311 (1998) (use of non-violation provisions in antitrust disputes could provoke "wrong" decisions that undermine the international trading system); Thomas Cottier & Krista Nadakavukaren Schever, *Non-Violation Complaints in WTO/GATT Dispute Settlement, Past, Present and Future*, in INTERNATIONAL TRADE LAW & THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 125, 141 (Ernst-Ulrich Petersmann ed., 1997) [hereinafter INTERNATIONAL TRADE LAW] (there can be no "objectively reasonable" expectation that governments will arrange their existing laws to protect foreign businesses from anticompetitive practices); Claude Barfield & Mark A. Broombridge, *A System America Wanted*, J. COM., Feb. 27, 1998, at 6A (United States "cannot have it both ways": it must either negotiate new antitrust rules, or abandon its complaints against foreign antitrust policy).

196. See, e.g., Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 365-66 (1997) (expressing concern over "potentially limitless scope" of non-violation clause); Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, 27 J. WORLD TRADE 5, 19 (1993) (characterizing non-violation complaints as "legal fantasy"); Friederich Roessler, *The Concept of Nullification and Impairment*, in INTERNATIONAL TRADE LAW 125, *supra* note 195, 141-42 (WTO should maintain a "cautious" approach to the concept of nullification and impairment). Concerns about the concept of non-violation have led governments to suspend application of the concept to certain treaty provisions. See, e.g., TRIPS, *supra* note 81, art. 64(2); NAFTA, *supra* note 51, Annex 2004 & art. 1501.3.

197. See W.M. Reisman, *International Non-Liquet: Recrudescence and Transformation*, 3 INT'L LAW. 770, 771 (1969); Prosper Weil, "The Court Cannot Conclude Definitively . . .": *Non Liquet Revisited*, 36 COLUM. J. TRANSNAT'L L. 109, 110 (1997) (noting the prevailing view that "there is no room for *non liquet* in international adjudication because there are no lacunae in international law"). But see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (refusing to decide merits based in part on absence of a uniformly accepted rule of law); *South West Africa (Second Phase) (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6 (July 18) (refusing to decide a question because the absence of an "objective rule" would have required it to make subjective choices that would have exceeded its judicial mandate); Julius Stone, *Non-Liquet and the Function of Law in the International Community*, 35 BRIT. Y.B. INT'L L. 124, 159 (1959) (noting that international tribunals are neither compelled nor forbidden to declare a non-liquet).

198. See Weil, *supra* note 197, at 114.

199. See *id.* at 115.

200. Reisman, *supra* note 197, at 774.

in these agreements.<sup>201</sup> As discussed above, however, WTO rules also expressly authorize WTO tribunals to protect the benefits arising under most covered agreements in situations where there has been *no* violation of any explicit rule. Moreover, WTO dispute settlement proceedings are expressly designated as the *exclusive* means for resolving such disputes.<sup>202</sup> Thus, the same considerations that support a rule against *non-liquet* in the International Court of Justice are not only applicable in the WTO, but may actually be stronger in light of the WTO's exclusive authority to resolve non-violation disputes.<sup>203</sup>

Of course, the mere fact that international tribunals may fill in legal gaps does not mean that they may not refuse to do so based on concerns about the enforceability or political consequences of their rulings. Professor Reisman has described a number of examples in which such considerations have prompted the issuance of a *non-liquet*.<sup>204</sup> Political considerations also played an important role in several GATT non-violation decisions. For example, in a case involving United States sugar quotas, a GATT panel refused to find that certain import restrictions nullified or impaired prior tariff commitments, because the GATT Contracting Parties had formally waived the rules that would otherwise have prohibited those acts.<sup>205</sup> Similarly, the 1985 *Nicaragua* panel declined to rule on Nicaragua's claim that its reasonable expectations were violated by a U.S. embargo that "virtually eliminated all opportunities for trade" between the two countries, on the grounds that there was no realistic prospect of restoring the balance established by prior tariff commitments.<sup>206</sup> The panel noted that the United States had expressly declared that it would not remove the embargo until its "political problem" with Nicaragua was

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201. DSU, *supra* note 12, art. 3.2.

202. *See supra* note 90 and accompanying text.

203. These arguments also preclude the view that anything that is not expressly prohibited by WTO rules is permitted by these rules. In 1927, the PCIJ announced a similar doctrine. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7) (holding that without prohibitive rules, "every State remains free to adopt the principles which it regards as best and most suitable"). This doctrine raised a "doctrinal storm of the first magnitude," but has reappeared in several subsequent decisions. Weil, *supra* note 197, at 113 (citing *Haya de la Torre (Colom. v. Peru)*, 1951 I.C.J. 71, 80-81 (June 13)).

204. *See* Reisman, *supra* note 197, at 775-86.

205. *See* United States—Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 228 (1991) [hereinafter Waiver Case]. Under GATT rules, countries could obtain waivers if a two-thirds majority of GATT members approved. *See* GATT, *supra* note 17, art. XXV para. 5.

206. *United States—Trade Measures Affecting Nicaragua*, GATT Doc. L/6053, ¶¶ 5.6, 5.11 (Oct. 13, 1986), available in 1986 WL 363154 (GATT).

resolved,<sup>207</sup> and had imposed an export embargo that made it impossible for Nicaragua to retaliate against U.S. exports.

Several commentators have argued that the lack of consensus in international competition suggests a similar political risk in cases involving competition policy issues.<sup>208</sup> However, *failure* to address competition issues in the WTO could also have serious political consequences for the international trading system. As the Kodak case illustrates, private restrictions that block foreign access to major distribution channels can have the same effect as a prohibited tariff. A rule permitting governments toleration and encouragement of restrictive business practices could therefore seriously undermine the credibility of existing tariff commitments.

Unfortunately, local political processes cannot be trusted adequately to regulate practices that restrict foreign competition. As numerous writers have shown, there is a significant risk that local monopoly interests can capture these processes, to the detriment of local consumer interests.<sup>209</sup> Moreover, local political processes have an inherent tendency to undervalue unrepresented foreign interests.<sup>210</sup> Accordingly, national competition policies may often be used as a vehicle to protect local interests from foreign competition, rather than to promote the larger interests of the community as a whole.

The Film panel sought to protect the credibility of tariff commitments by requiring WTO members to negotiate adjustments when their policies directly cause disproportionate harm to import competition. However, such adjustments should also be required when governments encourage or

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207. See *id.* ¶ 5.10. The United States claimed that the embargo was justified under the GATT's "national security" exception, but refused to permit the panel to address this issue.

208. See, e.g., Cho, *supra* note 195, at 313, 339 (citing Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159 (1980); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 67-78 (1987)).

209. For a general discussion of the risks of "capture" by monopoly interests, see John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986). See also DANIEL FARBER & PHILLIP FRICKEY, *LAW AND PUBLIC CHOICE* 12-37 (1991). For a discussion of the reaction of U.S. courts to the concerns raised by "capture" theory, see Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997); Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991).

210. See, e.g., Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 211 (1996) (stating that national authorities are not politically accountable to the membership of the WTO as a whole); Robert E. Hudec, "Circumventing" Democracy: *The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311, 314 (1993) (arguing that unrepresented foreign interests have little influence over domestic political processes).

tolerate private practices that produce such harm. Without some form of international regulation, governments will be able to evade their tariff commitments simply by tolerating or encouraging private actions that block foreign competition. If this is perceived to be true, governments and their constituents will begin to question the value of existing international commitments, and of negotiating further commitments. Instead, governments will face increasing political pressure to redress perceived wrongs through unilateral self-help. As discussed above, this is precisely the sort of outcome that WTO rules were designed to prevent.<sup>211</sup>

The current WTO agreements thus create a dangerous paradox. The absence of specific rules for competition policies poses serious difficulties for international tribunals seeking to resolve disputes over these policies. However, governmental toleration of restrictive business practices could render existing commitments largely meaningless, and encourage the very sort of unilateral action that WTO rules were designed to prevent. In either case, the future of the international trading system is at risk.

#### B. AVOIDING THE “SEA OF DOUBT”

The WTO agreements direct WTO tribunals to clarify the provisions of covered agreements “in accordance with customary rules of interpretation of public international law.”<sup>212</sup> These rules include the Vienna Convention on the Law of Treaties, which permits consideration of “any relevant rules of international law applicable in the relations between the parties.”<sup>213</sup> Since the Statute of the International Court of Justice expressly recognizes “general principles of law” as a source of international law,<sup>214</sup> non-violation disputes may properly be resolved in accordance with such principles.

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211. See *supra* Part I.E.

212. DSU, *supra* note 12, art. 3.2.

213. Vienna Convention, *supra* note 12, art. 31(3)(c). See also DSU, *supra* note 12, art. 7 (panels may address the relevant provisions in any agreements cited by the parties to the dispute). See generally David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT’L L. 398 (1998).

214. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055 (1945), T.S. No. 993. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 3 (1990); BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 18 (2d ed. 1994); ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 17-18 (1994). In some cases, international tribunals have also resolved disputes by resort to equity. See, e.g., *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 344 (Feb. 20).

One such general principle is the principle of good faith.<sup>215</sup> This principle has been used to justify an “anti-inconsistency rule,” which requires states to comply with unilateral declarations that are intended to be binding.<sup>216</sup> It is also embodied in the doctrine known as *abus de droit*, which recognizes that states must exercise their treaty rights in a reasonable manner—that is, in a manner that is “necessary and appropriate” to the intended objective, and does not produce an unfair advantage.<sup>217</sup>

The panel’s decision in the *Photographic Film* case suggests a similar “rule of reason.” As discussed above, the panel ruled that governments could be held accountable for measures that produced a disproportionate impact on import competition for products subject to a prior tariff commitment provided that a direct causal link could be established. In order to close the legal gap, WTO members could agree that this approach should also apply to governmental policies that tolerate or encourage restrictive business practices that erode prior tariff commitments in a manner that is disproportionate to the practices’ purported benefits.<sup>218</sup>

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215. For a discussion of the link between non-violation impairment and the duty of good faith, see Adrian T.L. Chua, *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence*, 32 J. WORLD TRADE 27 (1998). For a general discussion of the duty of “good faith” in the commercial law of a number of different countries, see GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann eds., 1995).

216. See Baade, *supra* note 47, at 29-30. See also *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20). But see Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT’L L. 1 (1977) (criticizing these decisions).

217. See *Shrimp*, *supra* note 12, at 158 (citing BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 125 (1953) (rights should be exercised in manner that is “appropriate and necessary” for the intended purpose)). The *Shrimp* panel found that the principle provided the basis for a GATT provision prohibiting environmental trade measures from being applied in a manner that would constitute “arbitrary or unjustifiable” discrimination. *Id.* But see *India*, *supra* note 88, at paras. 40-48 (limiting use of reasonable expectations under TRIPS, where parties have suspended the application of non-violation provisions).

218. Such a rule would resemble the approach adopted by the European Court of Justice, which has ruled that national rules capable of hindering trade between member states violate the treaty prohibition on measures having an effect equivalent to a “quantitative restriction” on trade, unless the restriction is “proportionate” to the regulatory aim. See *Case 120/78, Cassis de Dijon*, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494 (1979). However, the E.C.J. recently ruled that this test does not apply to facially neutral “selling arrangements,” unless intended to restrict trade. See *Joined Cases C-267 & C-268/91, Keck & Mithouard*, 1993 E.C.R. I-6097, I-6131, [1995] 1 C.M.L.R. 101, 124 (1993). See generally Miguel Poiaras Maduro, *Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom v. Political Rights*, 3 EUR. L.J. 55 (1997); Norbert Reich, *The ‘November Revolution’ of the European Court of Justice: Keck, Meng and Audi Revisited*, 31 COM. MKT. L. REV. 459 (1994); Wolf Sauter, *The Economic Constitution of the European Union*, 4 COL. J. EUR. L. 27 (1998).

As I have argued elsewhere, however, WTO tribunals should adopt a cautious approach to this type of interest balancing. WTO tribunals lack the expertise and fact-finding capacities necessary to make the complex assessments presented by antitrust issues.<sup>219</sup> The absence of international consensus and the admonishment against rulings that “add to or diminish the rights and obligations” of WTO members counsel even greater caution. Accordingly, a government’s toleration or encouragement of restrictive business practices should not be deemed to impair prior tariff commitments unless it imposes a “clearly disproportionate” burden on import competition.<sup>220</sup> In making this determination, WTO tribunals should give greater weight to the importing nation’s own laws, as well as emerging international norms and the requirements of transparency. Finally, general principles of exhaustion of local remedies suggest that WTO tribunals should not address competition issues until they have first been considered by local antitrust authorities, unless there is a showing that local remedies would be futile or would involve unreasonable delay.<sup>221</sup>

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219. See Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT’L L. 1017 (1999). See also Croley & Jackson, *supra* note 210, at 208 (finding that lack of fact-gathering resources makes panels “ill-positioned to second-guess” the factual determinations of national authorities).

220. The United States Supreme Court has applied a similar approach to facially neutral measures that have a discriminatory effect on interstate commerce. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See generally Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Martin Redish & Shane Nugen, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Michael Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986). As discussed above, the ECJ has also adopted a more cautious approach with respect to facially neutral “selling arrangements.” See *supra* note 217.

221. Although WTO panels have not generally required the exhaustion of local remedies in disputes involving alleged violations of WTO rules, the doctrine is particularly applicable to antitrust disputes. Unless the government has expressly rejected an antitrust claim, or somehow indicated that a claim would be futile, there may not be a “measure” for WTO review. WTO panels can review “situation[s]” that impair treaty benefits, but cannot issue binding decisions in such cases. See GATT, *supra* note 17, art. XXIII para. 1; DSU, *supra* note 12, art. 26.2. The increased potential for international friction in these cases, together with the need to consider issues of local law and to balance competing policy considerations, also support the application of exhaustion principles. See J.E.S. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?*, 31 BRIT. Y.B. INT’L L. 452 (1954) (arguing that exhaustion should apply where asserted breach involves local law); David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT’L L. 389, 400-04 (1964). See generally C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW (1990); BROWNLIE, *supra* note 214, at 494-504; A.A. CACADO TRINDADE, THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF INDIVIDUAL RIGHTS (1983).

### 1. *Good Faith*

In *Mediterranean Citrus*, a GATT panel ruled that concerns about the legality of a preferential trade arrangement were sufficient to require the EC to negotiate an adjustment to redress the adverse impact of the arrangement on U.S. citrus exports.<sup>222</sup> Although the panel did not clearly articulate its reasoning, its concerns appear to have arisen from the fact that a special GATT committee had been unable to determine whether the arrangement fell into the GATT exception for regional agreements.<sup>223</sup>

In certain cases, nonbinding norms may raise a similar presumption of unreasonableness. In the *Photographic Film* case, for example, Japanese authorities considered Kodak's allegations, but found insufficient evidence to warrant further investigation. The WTO could have reviewed this determination to ensure that it was neither arbitrary nor unjustifiable under Japan's own antitrust rules. Japanese antitrust laws prohibit enterprises with strong market power from imposing exclusive dealing requirements.<sup>224</sup> Of course, WTO rules do not actually require Japan actively to enforce its national antitrust laws.<sup>225</sup> However, if this sort of exclusive dealing had been shown to exist, Japan could not assert that the benefits of this practice outweighed any adverse impact on import competition.<sup>226</sup>

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222. See EC—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, GATT Doc. L/5776 (Feb. 7, 1985) (unadopted), available in 1985 WL 291425 (GATT). Although the *Citrus* decision was never adopted by the GATT Contracting Parties, WTO panels may take note of the reasoning in unadopted decisions. See Palmetier & Mavroidis, *supra* note 213, at 402. Concerns about possible adverse effects of apparent non-violations also appear to explain the panel's decision in *Uruguayan Recourse to Article XXIII*, Nov. 16, 1963, GATT B.I.S.D. (11th Supp.) at 95 (1962) (recommending that disputing parties negotiate a solution "with a view to minimizing" the possible adverse effects of certain import restrictions on Uruguayan exports).

223. GATT rules generally prohibit members from according preferential treatment to any country, unless such treatment is part of an arrangement that meets the treaty requirements for a regional free trade area or customs union. See GATT, *supra* note 17, arts. I, XXIV.

224. See, e.g., MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 155-56 (1993).

225. A number of recent agreements do recognize an obligation to "effectively enforce" national laws. See TRIPS, *supra* note 81, arts. 41.1-41.2 (requiring WTO members to ensure that enforcement procedures "permit effective action," are "fair and equitable," and are not "unnecessarily complicated or costly"); North American Agreement on Environmental Cooperation, Sept. 1993, Can.-U.S.-Mex., art. 5, 32 I.L.M. 1480 (requiring effective enforcement of national environmental laws); North American Agreement on Labor Cooperation, Sept. 1993, Can.-U.S.-Mex., art. 3, 32 I.L.M. 1499 (similar requirement for national labor laws). See generally Jack Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439 (1995).

226. See Legal Status of Eastern Greenland, 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69 (Apr. 5) (finding that because Norway had previously affirmed that it recognized all of Greenland as Danish,

In addition, WTO tribunals should give due consideration to emerging international norms in the area of competition policy. For example, nearly every nation that has adopted competition laws prohibits dominant firms from imposing exclusive dealing requirements where the overwhelming effect is to block market entry and raise prices.<sup>227</sup> While this emerging consensus does not in itself create an international legal obligation, it can nevertheless give rise to a presumption of unreasonableness sufficient to justify good faith negotiations.<sup>228</sup> Thus, countries that tolerate or encourage this type of exclusive dealing might be required to negotiate an adjustment that accounted for this minimum norm.<sup>229</sup> In order to assess emerging norms, panels can and should consult bodies with expertise in competition policy, such as the OECD.<sup>230</sup>

Finally, WTO tribunals should recognize that WTO members have an affirmative duty to engage in good faith negotiations concerning practices that may adversely affect import competition. It is too late in the day for countries to claim that competition policy lies in the exclusive domain of individual states.<sup>231</sup> Thus, countries that refuse to consider or respond to foreign complaints concerning the impact of restrictive business practices

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“she has debarred herself from contesting Danish sovereignty over the whole of Greenland”); *Atlantic and Hope Ins. Cos. (The Mechanic) Case*, 3 Int. Arb. 3221, 3226 (Ecu.-U.S. Cl. Com. 1862) (finding that because Ecuador had previously recognized a specific legal principle when it produced benefits for Ecuador, it “could not honour and in good faith deny the principle when it imposed an obligation”). See generally CHENG, *supra* note 217, at 144-49 (discussing general principle of estoppel in international law).

227. See *supra* note 50 and accompanying text.

228. WTO tribunals might give similar weight to decisions and recommendations issued by the OECD. See *A Hard Look*, *supra* note 42, at 388 (noting that soft standards can establish a “presumption of illicity” and serve as a “contributing factor” in determining whether a state has complied with international law).

229. See *Case Concerning the Gabčíkovo-Nagymaros Project (Slovk. v. Hung.)*, 1997 I.C.J. 3 paras. 140-43 (Sept. 25) (finding that parties to a treaty establishing a joint project along the Danube River should negotiate an adjustment to address new environmental concerns, giving “proper weight” to the “new norms and standards” set forth in various international environmental legal instruments).

230. WTO panels are permitted to seek information and technical advice from other bodies. See *DSU*, *supra* note 12, art. 13.

231. See Tadeusz Gruchalla-Wesierski, *A Framework for Understanding “Soft Law,”* 30 MCGILL L.J. 37, 58-59 (1984) (arguing that negotiation of soft international instruments in a specific area internationalizes the issue, and indicates that it is no longer within the “exclusive domain” of individual states). See also Baade, *supra* note 47, at 30 (OECD guidelines create a binding obligation on the part of OECD members to consult and cooperate “in good faith” on covered issues); *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 266 (Advisory Opinion of July 8), *reprinted in* 35 I.L.M. 809, 830 (finding that provisions of Treaty on the Non-Proliferation of Nuclear Weapons give rise to an obligation on the part of all nations to pursue good faith negotiations leading to nuclear disarmament).

on international trade may also be required to negotiate an appropriate adjustment.<sup>232</sup>

This cautious approach to competition policy disputes could help restore public faith in the credibility of prior tariff commitments and facilitate the process of international negotiation on competition policy issues. In the *Photographic Film* case, for example, the panel appeared to agree with the Japanese authorities' conclusion that there was insufficient evidence to justify a full investigation of Fuji's practices under Japanese law. However, the process of international review nevertheless produced an important public debate and discussion on competition policy. In defending its policies, the Japanese government made a number of important representations designed to address the United States' most serious concerns. For example, the Japanese government assured the WTO that it was "actively scrutinizing" potentially anti-competitive practices in the film industry, and would eliminate certain "excessive" practices.<sup>233</sup> It also stated that it did not exempt private industry councils from its antitrust laws, and did not permit these groups to regulate foreign marketing campaigns.<sup>234</sup> These representations were clearly intended to address foreign concerns about the reasonableness of Japanese competition policy, and can provide a reasonable basis for evaluating the future conduct of that policy.

## 2. *Transparency*

As discussed above, WTO members must respect the requirement of transparency set forth in GATT Article X, which requires governments to promptly publish all measures affecting international trade, and to administer these measures in a "uniform, impartial and reasonable" manner.<sup>235</sup> The panel rejected the U.S. argument that Japan had violated this requirement by failing to publish clear and understandable rulings or regulations to clarify the standards applied under its Premiums and Large Store Laws. It ruled that the United States had not shown that any of Japan's unpublished rulings or regulations had "general application."<sup>236</sup> The panel also discounted the contention that the absence of clear and

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232. See Schoenbaum, *supra* note 75 (arguing that failure to negotiate in areas where there are no international rules can justify imposition of trade measures under Section 301).

233. Submission of Japan, Apr. 3, 1999, paras. 227-32, 318-23, 365-69, available in 1997 WL 295222 (W.T.O.).

234. See *id.* paras. 476-78.

235. See *supra* note 129 and accompanying text.

236. See *supra* note 132 and accompanying text.

understandable standards could in itself impose a disproportionate burden on foreign import competition.<sup>237</sup>

The Appellate Body's decision in the *Sea Turtles* case suggests a more expansive approach to the transparency requirement.<sup>238</sup> In that case, the United States enacted a statute banning imports of shrimp from countries that failed to adopt regulatory regimes comparable to those of the United States, which bans the use of certain shrimping methods harmful to sea turtles. The Appellate Body found that the U.S. statute itself did not violate any WTO rules, because it was "even-handed" in its treatment of domestic and imported goods, and rationally related to a legitimate regulatory objective.<sup>239</sup> However, the United States had exercised this right in an "arbitrary" manner, because it failed to respect the "fundamental requirements of due process" established in GATT Article X.<sup>240</sup> U.S. officials had not only applied a standard that was quite different from its published standard, but also failed to provide foreign governments with a prior opportunity to be heard, a reasoned written decision, or an opportunity to appeal.<sup>241</sup>

Similar principles can also be applied to competition policy. The GATT transparency requirement applies to all laws and rulings of general application that affect the conditions of competition for imported products.<sup>242</sup> As discussed above, national competition policies can have a significant impact on the ability of imports to compete in national markets. Thus, the panel should have found that Japan impaired the value of its tariff commitment by failing to provide clear and predictable standards under its Premiums and Large Store Laws.<sup>243</sup>

An approach requiring policies that significantly restrict competition to be clearly articulated and actively supervised would closely resemble the approach developed by U.S. courts under the state action doctrine. Under this doctrine, courts have found that private practices are immune from federal antitrust law *if* a state government has clearly articulated an alternative competition policy and actively supervised compliance with this

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237. See *supra* note 167 and accompanying text.

238. See *Shrimp*, *supra* note 12.

239. See *id.* paras. 141, 144.

240. *Id.* para. 182.

241. See *id.* paras. 180-84.

242. See GATT, *supra* note 17, art. X para. 1.

243. For a general discussion of lack of transparency in Japan's administrative processes, see Frank Upham, *The Legal Framework of Japan's Declining Industries Policy: The Problem of Transparency in Administrative Processes*, 27 HARV. INT'L L.J. 425 (1986).

policy.<sup>244</sup> Thus, in *Cantor v. Detroit Edison Co.*,<sup>245</sup> the mere fact that the state utility commission had approved a utility's practice of distributing light bulbs to its customers did not insulate the practice from federal antitrust laws, because the state had not clearly articulated any policy concerning the specific practice.<sup>246</sup> Similarly, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,<sup>247</sup> the Supreme Court found that the mere fact that California required producers and wholesalers to fix the prices that could be charged by wine retailers within the state did not insulate this practice from federal antitrust laws, since California had not actively supervised the actual prices set by producers and wholesalers.<sup>248</sup> As the court states in *FTC v. Ticor Title Insurance Co.*,<sup>249</sup> "[n]either federalism nor political responsibility is well served" unless there is some assurance that state competition policies are in fact intended to serve the public interest.<sup>250</sup>

Of course, the requirement of transparency cannot ensure that local procedures will produce justifiable results. As discussed above, local processes tend to be inherently biased against the interests of both local consumers and foreign competitors. In cases where a particular law appears to have had a significantly large impact on imports, WTO tribunals may properly review the results of transparent processes to determine whether they are consistent with the general principle of good faith. However, the requirement of transparency will help ensure that WTO tribunals have an adequate basis for reviewing national competition policies. In addition, greater transparency can facilitate the public debate and deliberation on competition policy necessary to negotiate successful international solutions to complex problems.

## CONCLUSION

The increasing importance of international economic competition has led a number of governments and scholars to advocate the negotiation of new international antitrust rules. However, the continued lack of

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244. See *FTC v. Ticor Title Ins.*, 504 U.S. 621, 633 (1992). See also *Parker v. Brown*, 317 U.S. 341 (1943). See generally Elhauge, *supra* note 209; David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293 (1994).

245. 428 U.S. 579 (1976).

246. See *id.*

247. 445 U.S. 97 (1980).

248. See *id.*

249. 504 U.S. 621 (1992).

250. *Id.* at 636.

international consensus in many areas of antitrust policy suggests that a great deal more international discussion and deliberation is needed before nations can agree on such rules.

In the meantime, the WTO should help facilitate international negotiations by recognizing that WTO members have a reasonable expectation that other members will engage in good faith negotiations to minimize the adverse effects of their competition policies on foreign interests, especially where these policies conflict with existing national or international norms. In addition, tribunals should require that WTO members establish transparent standards and procedures for implementing their competition policies. In this way, WTO tribunals will not only help prevent the gradual erosion of WTO commitments, but will also facilitate the public debate and deliberation needed for successful negotiation of international antitrust issues.