Competition Policy and International Trade Distortions

Alden F. Abbott and Shanker Singham

Introduction

Competition law and international trade law ("trade law") traditionally have "sailed under different flags." Competition laws sanction business conduct that is deemed to harm the competitive process—in particular, collusive or exclusionary agreements among competitors, anticompetitive mergers, and abuses of monopoly power. Trade laws, by contrast, generally impose specific limitations (tariffs and non-tariff barriers) on business transactions that cross national boundaries. Furthermore, national trade laws, unlike competition laws, increasingly have been constrained by international agreements, and litigation generated by those laws has been reviewed by international tribunals.

However, notwithstanding their distinct legal traditions, international trade policy and competition policy, properly applied, are mutually reinforcing methods for promoting welfare. Changes to trade laws and regulations that reduce or eliminate national barriers to trade and investment (such as high tariffs, quotas, and investor nationality restrictions) promote welfare-enhancing contractual relations that expand trade and, more generally, raise aggregate welfare in the

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A.F. Abbott (✉)
Director for Global Patent Law and Competition Strategy, Research in Motion,
1611 Westmoreland Street, McLean, VA 22101-5166, USA
e-mail: alden.abbott@gmail.com

S. Singham
Partner, Squire Sanders, 1200 19th St., N.W., Suite 300, Washington, DC 20036, USA
e-mail: Shanker.singham@squiresanders.com

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liberalising nations.[1] The benefits of trade liberalisation are magnified by competition law rules that lower the incidence of consumer welfare-reducing restrictions on the competitive process.[2]

Multilateral welfare-enhancing initiatives characterise modern trade policy. In the post-World War II era, the General Agreement on Tariffs and Trade (GATT) negotiating framework, and its successor, the World Trade Organization (WTO), have substantially reduced tariffs and non-tariff trade barriers, promoting global trade liberalisation import competition and thus economic growth.[3] Also, regional and bilateral trade liberalisation compacts, such as the European Union (originally a "customs union" that was transformed into a vehicle for large scale European economic integration), the North American Free Trade Agreement ("NAFTA," covering the United States, Canada, and Mexico), and the US-Korea Free Trade

[1] The beneficial effects of trade liberalisation are summarised at OECD, Benefits of Trade Liberalisation, available at: http://www.oecd.org/about/0,3347,en_2649_36442957_1_1_1_1_1,00.html. Technical questions regarding the welfare effects of specific trade liberalisation policies (such as whether the welfare benefits due to "trade creation" associated with bilateral or regional "free trade" outweigh the welfare losses due to "trade diversion" that reduces trade with non-liberalising jurisdictions) are beyond the scope of this article. A classic work that explores trade diversion and trade creation is Viner, *The Customs Union Issue*, 1950. For a more recent review of the literature on trade creation versus trade diversion, see, e.g., Eicher/Henn/Papageorgiou, Trade Creation and Trade Diversion Revisited: Accounting for Model Uncertainty and Natural Trading Partner Effects, Journal of Applied Econometrics 27 (2010) 2, available at: http://faculty.washington.edu/te/papers/EHP.pdf.

[2] We use the term "consumer welfare" as including the sum of consumers' and producers' surplus. This is consistent with the approach recommended by the legal scholar Robert H. Bork, see Bork, *The Antitrust Paradox*, (Revised ed.) 1993, pp. 90–106 (deeming the maximisation of allocative and productive efficiency (that are associated with consumers' surplus and producers' surplus, respectively) to be the appropriate goal of US antitrust enforcement). Consumer welfare-reducing restrictions could be either private (such as, for example, "naked" price fixing, division of markets among competitors, and other anticompetitive contracts) or public (such as, for example, onerous licensing requirements, other restrictions on entry into businesses or professions, and prohibitions on truthful advertising). Public restraints tend to be the most pernicious, because the normal market forces that tend to undermine private restraints (for instance, entry by new competitors) cannot undermine such restraints, which are backed by the force of law. Only changes to the law, which will be lobbied against by the beneficiaries of the anticompetitive status quo, can undo restraints imposed by government. For an overview of the growing international consensus regarding the harmful nature of government restraints on competition, see Cooper/Kovacic, US Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition, Boston University Law Review 90 (2010) 4, p. 1555, available at: http://www.ftc.gov/speeches/kovacic/2010convergencecomment.pdf.

[3] The WTO has also established a binding trade dispute resolution framework for assessing complaints regarding the alleged illegal application of anti-dumping and countervailing standards, among other rules. This framework, albeit imperfect, has provided a means for somewhat constraining international "trade wars" and constraining the application of protectionist policies. The WTO has been characterised as a multinational structure that, by reducing the power of protectionist interest groups found in individual countries, can simultaneously promote welfare-enhancing trade and accountable government. See McGinnis/Movsesian, The World Trade Constitution, Harvard Law Review 114 (2000) 2, p. 511 (558).

Agreement (one of several such agreements entered into by the United States), have been a force for increasing welfare by extending the geographic extent and scope of trading and investment opportunities.[4]

However, as the WTO-led trade law system has expanded, it has not wisely brought national competition laws within its purview.[5] Currently, national competition laws embody a host of different assumptions about the role of economics; the proper scope and nature of competition law prohibitions, rules, and remedies; procedural issues; and the influence non-competition policy concerns should have on competition law enforcement decisions. Any effort at reaching a consensus on these questions that could inform decision-making under a WTO competition code would be doomed to failure if it related to private behaviour. There is a role for international competition law policy in an increasingly globalised economy through voluntary efforts at building understanding across jurisdictions and thereby gradually converging towards best (or "better") practices. The role of the International Competition Network (ICN) in furthering this aim is touched upon later in this article. In addition, in the area of public sector restraints on trade there may be scope for an international agreement (initially among countries whose consumer welfare enhancing policy goals are more closely aligned) as we also discuss later.

In any event, as the number of ACMDs rises, the WTO system is being forced to deal with a number of regulatory restrictions that reduce welfare by harming the competitive process and have a trade effect. Specifically, the WTO has embraced disciplines on anti-competitive private sector restraints (GATS Article IX), and specific anti-competitive restraints on a sectoral basis (Basic Telecom Agreement and Reference Paper on Competition safeguards). These initiatives extend beyond GATT 1947 provisions that are drawn from the competition lexicon. They include Article III 2 of GATT 1947, which prohibits discriminatory taxation interpreted by the cases to require "equality of competitive opportunity," and GATT Article XVII, which limits the range of activities of State-Trading Enterprises (STEs). Under Article XVII, STEs are subject to commercial considerations when operating in commercial markets and "fair and equitable" standards when buying for themselves. Both of those standards are really competition standards. Indeed, in *Canada*

[4] As explained in the references in note 1, such agreements diminish welfare, however, to the extent that they divert more trade away from the rest of the world than they create within the liberalised trade bloc.

[5] For a good description of the European Union's proposal for inclusion of competition within the WTO framework, and, the failure of this initiative in light of opposition from the United States and developing countries, see generally Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 2010, pp. 211–245. As explained therein, the United States was particularly concerned about the lack of experience of many developing countries with competition law and policy, and the risk that application of the WTO dispute resolution system would risk politicising the application of competition rules (due to the second-guessing of discretionary prosecutorial decisions based on complex evidentiary evaluations). The European proposal dealt with competition laws and policies as they related to private restraints, as opposed to limiting the WTO's jurisdiction over the Anti-Competitive Market Distortions we discuss in this article, and therefore prompted many of these concerns.

Wheat Board,[6] the leading case on Article XVII, the US agreed that "commercial considerations" meant profit-maximising behaviour (in other words, any behaviour that was not profit-maximising was not "commercial").

Nevertheless, the WTO and other trade agreements simply do not reach a variety of anticompetitive welfare-reducing government measures that create de facto trade barriers by favouring domestic interests over foreign competitors. Moreover, many of these restraints are not in place to discriminate against foreign entities, but rather exist to promote certain favoured firms. We dub these restrictions "anticompetitive market distortions" or "ACMDs," in that they involve government actions that empower certain private interests to obtain or retain artificial competitive advantages over their rivals, be they foreign or domestic.

This article assesses the nature of ACMDs, and the limited efforts of government and international institutions in dealing with them. It briefly demonstrates that the WTO has not been able (and in the near term almost certainly will not be able) to cope adequately with these restraints. However, it then strikes a more hopeful note by suggesting that the multilateral International Competition Network ("ICN")—and, in particular, the ICN's Advocacy Working Group—may be a possible near term vehicle for beginning to confront (or at least beginning to highlight) the harm of ACMDs. With that in mind, this article proposed the development of a metric to estimate the net welfare costs of ACMDs. Such a metric could help strengthen the hand of the ICN—and of reform-minded public officials—in building the case for the dismantling of these restraints, or their replacement by less costly means for benefiting favoured constituencies. Eventually, "soft convergence" under the aegis of the ICN might begin to lead some jurisdictions to chip away at, if not wholly dismantle, harmful ACMDs—or at least to begin to replace ACMDs with less harmful means of benefiting favoured constituencies. The dismantling of ACMDs might also be facilitated by the negotiation of a WTO plurilateral agreement (or some other agreement among like-minded countries) to prohibit the most egregious types of ACMDs. As these reforms gradually are implemented, restrictions on welfare-enhancing international commerce will further diminish and national competition policies may be expected to be deployed more effectively in the consumer (and public) interest.

Nature of ACMDs

ACMDs have up to now largely avoided competition law sanction. For purposes of our discussion, ACMDs include: (1) governmental restraints that distort markets and lessen competition; and (2) anticompetitive private arrangements that are

[6] Report of the Appellate Body, WT/DS276/AB/R, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*. This case is discussed later in this article following note 11.

backed by government actions, have substantial effects on trade outside the jurisdiction that imposes the restrictions, and are not readily susceptible to domestic competition law challenge. Among the most pernicious ACMDs are those that artificially alter the cost-base as between competing firms. Such cost changes will have large and immediate effects on market shares, and therefore on international trade flows.

With the growing internationalisation of commerce, ACMDs not only diminish domestic consumer welfare—they increasingly may have a harmful effect on foreign enterprises that seek to do business in the country imposing the restraint. The home nations of the affected foreign enterprises, moreover, may as a practical matter find it not feasible to apply their competition laws extraterritorially to curb the restraint, given issues of jurisdictional reach and comity (particularly if the restraint flies under the colors of domestic law). Because ACMDs also have not been constrained by international trade liberalisation initiatives, they pose a serious challenge to global welfare enhancement by curtailing potential trade and investment opportunities.

Inspired by our focus on harm to competition, we believe that the most fruitful method for assessing ACMDs is to assess them from the perspective of how they affect market participants. This methodology is drawn from the OECD Competition Assessment Toolkit ("Toolkit"),[7] which seeks to help "governments to eliminate barriers to competition by providing a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive means that still achieve government policy objectives." The Toolkit focuses specifically on rules and regulations that (1) limit the number and range of suppliers, (2) limit the ability of suppliers to compete, (3) reduce the incentives of suppliers to compete, (4) limit the choices and information available to consumers, and (5) apply to state-owned enterprises (SOEs).

Rules That Limit the Number and Range of Suppliers

These include the grant of exclusive rights for a company to supply a service or product; license requirements; limitations on public procurement opportunities; geographic limitations on the ability of firms to supply goods or services, invest capital, or supply labour; and the bestowal of exclusive rights on government to supply a good or perform a service. Within this category, restrictions on entry are the most common source of complaints from foreign and domestic firms. Entry restrictions can take the form of direct bans or indirect restrictions, such as quality standards, certification rules, capital adequacy requirements for banks, and other administrative or bureaucratic barriers. Entry restrictions not only may confer market power and restrict output of favoured firms, they may inhibit the realisation

[7] The OECD Competition Assessment Toolkit is available at: http://www.oecd.org/document/48/0,3746,en_2649_37463_42454576_1_1_1_37463,00.html.

of economies of scale and discourage investment. State or local rules that limit entry at the sub-national level may prove particularly pernicious in this regard, and retard economic growth as they diminish consumer welfare.

Rules That Limit the Ability of Suppliers to Compete

Such rules can take the form of anything that reduced the intensity with which firms compete. For instance, regulations limiting advertising can chill interfirm competition. Some countries impose restrictions on direct to consumer advertising that limit consumer information about products and services and may lock in consumer preferences based on imperfect information. This may particularly affect new foreign market entrants that seek to build a reputation in a new market. Similarly, some regulations can raise the costs of established domestic firms with respect to new entrants from abroad, by setting particularly high product standards that are geared to goods that are produced by a favoured domestic company. Rules on content can also have the effect of limiting variety and choice, thereby damaging consumer welfare.

Rules That Reduce the Incentive of Suppliers to Compete

Some regulatory structures may lead to cartel formation or otherwise dampen or eliminate firms' incentive to compete. This may happen, for example, when a government exempts a certain group of firms (such as state-owned companies) from national competition laws, or imposes restrictions that make it highly costly for consumers to switch from one supplier to another.

Rules That Limit the Choice and Information Available to Consumers

There are many types of rules of this sort. Some of these relate to the advertising restrictions described above. Others relate to systems of self-regulation and co-regulation, where the regulatory burden falls to market participants themselves through voluntary systems of regulation.

Rules That Apply to State-Owned Enterprises

In many jurisdictions, governments provide special subsidies or legal exemptions (for example, exemptions from competition law) to state-owned enterprises. In addition, regulatory systems often are skewed to favour a particular national champion or champion technology. These distortions artificially skew competitive

outcomes and may entrench or create monopoly power in the hands of the favoured enterprises. As described later in this article, the ICN has issued recommendations regarding tools that competition enforcers might use to curb competitive harm created by such rules.

In addition to these particular practices, ACMDs may take the form of tax legislation that confers benefits on preferred companies, as well as regulatory and enforcement actions—for example, environmental agency decisions, decisions by government boards regarding locations of investments or product standards, exemptions from building permits, and preferences in public procurements.

We now turn to the efforts of the trading system thus far to come to grips with these types of restraints.

The WTO and ACMDs

The WTO has only a limited ability to combat ACMDs. Most such restraints either fall outside the strictures found in the various WTO Codes and Agreements, or, even if they do not, the WTO has proven itself largely unable to tackle them or to apply the right metric to analyse them.[8] The three notable examples of efforts to reach ACMDs through WTO enforcement actions deserve brief scrutiny, for they illustrate not only the limitations inherent in the current WTO framework, but also the direction of WTO policy.

Kodak/Fuji Film

Kodak claimed that it was seriously handicapped in its efforts to enter the Japanese film market by a combination of Japanese government and private restraints that, cumulatively, blocked efficient entry into the Japanese film market by foreign firms. Kodak asserted that its market share in Japan had been kept to less than 10 % by anticompetitive actions by the Fuji Photo Film Company and counter-liberalisation measures taken by the Japanese government. In particular, the four largest wholesale distributors of photographic film products in Japan handled Fuji products exclusively.

[8] One of the authors has advocated the creation of a multilateral public sector restraints agreement, building on existing WTO jurisprudence and introducing more centrally concepts of consumer welfare enhancement into the discussions of trade restricting government measures. See Singham, *A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets*, 2007, pp. 542–546. Although the authors strongly support such an approach, political constraints may preclude its adoption (or even serious consideration) in the near future. The more modest short-term approach advocated in this article, which emphasises reliance on non-binding advocacy, is fully consistent with the more ambitious long-term goal of establishing a binding international agreement; the two approaches are complements, not substitutes.

These exclusive relationships allegedly resulted from various Japanese Government actions and regulations designed to offset the opening of Japan's film market to foreign firms and from certain allegedly anticompetitive actions by Fuji. Fuji claimed that it had not engaged in anticompetitive behaviour and asserted that Kodak actually had access to all film retailers in Japan. The fact that Fuji had exclusive ties to the major wholesalers did not keep Kodak from distributing to retailers through its own channels, according to Fuji. Fuji also emphasised that Kodak had taken similar actions in the US market to maintain its high market share there. Citing these concerns, the US Trade Representative initiated WTO dispute resolution proceedings against Japan in 1996. The WTO Appellate Body in 1998 found that the restraint in question—involving practices that included government-supported restrictions on film distribution channels—did not implicate violations of Japan's WTO trade commitments.[9]

Mexican Telecoms[10]

COFETEL, Mexico's telecommunications regulatory agency, conferred on Telmex, the dominant Mexican telecommunications company (initially state-owned and then privatised), the power to fix the rate to be paid to all foreign telecommunications carriers terminating calls in Mexico. COFETEL rules, which mandated that those companies charge no less than the Telmex fee for termination, decreed a market-sharing system in support of the high price. The United States filed a claim with the WTO, arguing that these cartel-like incumbent protection regulatory arrangements violated Mexico's WTO commitments to open up its telecommunications market. In particular, the United States included a competition law charge in its complaint that Mexico had violated its commitments under the General Agreement on Trade in Services (GATS), the GATS Telecommunications Annex, and the accompanying Reference Paper. The panel in large part ruled in favour of the United States, finding that Mexico had failed to ensure interconnection at cost-oriented rates; had failed to prevent anticompetitive practices by a major telecommunications supplier (Telmex); and had failed to ensure reasonable and non-discriminatory access to and use of telecommunications networks. Particularly noteworthy were the panel's holding that the term "anticompetitive practices" (found in section 1 of the Reference Paper) necessarily includes cartels; that the "state action" defence for anticompetitive behaviour shielded by regulation

[9] Report of the Panel, WT/DS44/R, *Japan – Measures Affecting Consumer Photographic Film and Paper*.

[10] See Report of the Panel, WT/DS204/R, *Mexico – Measures Affecting Telecommunications Services*, paras. 7.222-7.224. The discussion of the *Mexican Telecoms* matter is based on Fox/Crane, *Global Issues in Antitrust and Competition Law*, 2010, pp. 413–417, and on Dispute Settlement: Dispute DS-204, *Mexico – Measures Affecting Telecommunications Services*, available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm.

should be disfavoured in the international context (a state should not be allowed to mandate trade-harming anticompetitive behaviour to evade its international commitment to prohibit such conduct); and that the adopted anticompetitive regulations were not "appropriate" measures to promote regulatory sovereignty and to protect Mexican investment in domestic infrastructure.

In 2005, Mexico announced that it had fully complied with the panel's recommendations by promulgating new resale regulations allowing for the commercial resale of long distance and international long distance services originating in Mexico, and the United States expressed satisfaction with these changes. The procompetitive resolution of the *Mexican Telecoms* matter, however, it did not lead to a series of similar WTO cases. This is probably because of the limited coverage of the WTO's General Agreement on Trade and Services ("GATS") and the difficulty of proving the violations of the Basic Telecoms Agreement and Reference Paper. The Telmex case represented a particular trade-distortive and anticompetitive activity that could be shown to have violated very specific WTO commitments partly because of the extreme nature of the behaviour involved. Moreover, the satisfactory settlement of this matter undoubted was also strongly influenced by the fact that the United States was Mexico's major trading partner and was linked (with Canada) to Mexico through a comprehensive free trade accord, the North American Free Trade Agreement (NAFTA). Indeed, at the time the case was brought there was a lively debate about whether it should be brought as a NAFTA or a WTO case, and the WTO was chosen as a forum partly to signal a global precedent.

Canada Wheat Board[11]

WTO jurists also applied competition disciplines to a WTO provision drawn from the competition lexicon in the "Canada Wheat Board" case. The Panel and Appellate Body were asked to interpret Article XVII of GATT 1947. Article XVII, as we noted previously, provided that where an STE was buying or selling in the commercial market, it should be subject to "commercial considerations." The US asserted that "commercial considerations" meant that behaviour had to be profit-maximising, and any revenue-maximising behaviour could not be seen to be "commercial." The case concerned the role of an STE, the Canada Wheat Board (CWB) in the purchase and sale of wheat on international markets. The US challenged the CWB's practices as violating Article XVII. The US contended that Canada and the CWB must afford competing wheat sellers as well as potential wheat buyers an "adequate opportunity … to compete for participation in [the CWB's] sales." The US argued that the CWB had to act like a commercial seller, and that it could not use its special privileges to the disadvantage of other

[11] The following discussion of this case draws upon Singham, *A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets,* 2007, pp. 203–218.

commercial actors. The US charged that because the CWB Act was a mandate to promote sales, rather than profits this necessarily led CWB to take unfair advantage of its privileges. Unfortunately, the Panel took a very simplistic view of "commercial considerations," noting that this merely required STEs not to act like "political actors." The panel rejected the US's thesis that the structure of the CWB necessarily resulted in sales inconsistent with Article XVII. It is noteworthy that the Appellate Body reviewing the case returned to the principle of non-discrimination as axiomatic in WTO cases. Proof of discriminating conduct had to come first, and then (and only then), evidence had to be adduced of conduct that did not satisfy "commercial considerations." The Appellate Body was very specific:

> We see no basis for interpreting that provision as imposing comprehension competition-law-type allegations on STEs as the United States would have us do. [Appellate Body Report 145]

Measuring the Welfare Effects of ACMDs

In order to better assess and compare individual ACMDs—and to build the case for phasing out or dismantling them—a metric might be devised to produce estimates of the welfare effects of particular restrictions. Below we briefly sketch a proposal for developing such a metric. Although any metric is bound to be imprecise in application, it should be possible to produce "rough and ready" estimates of the social costs of ACMDs through this exercise. The metric, which could be refined in light of economic learning and case studies, might help inspire a broader international dialogue on welfare-reducing government measures.

A Metric for Measuring ACMDs

The metric would estimate the impact of the ACMD on domestic markets as well as global markets, to the extent possible. The purpose of the metric would be to quantify the difference between the market equilibrium with the market distorted by the regulation, and the equilibrium where the regulatory distortion was not present.

The question is what is the best metric for measuring ACMDs? Historically, analysis of behind-the-border trade barriers or regulatory protection has focused on the impact of these barriers on trade flows. However, we suggest that this metric does not properly evaluate the true impact of ACMDs. While it clearly measures the impact of the barrier to external trade, it does not properly measure the true impact of the ACMD under scrutiny on the domestic economy in the country where the ACMD exists. A better measure of this is a welfare-based metric based on the

implications of the measure for consumer welfare (as previously defined). The type of analysis would be a standard partial equilibrium analysis[12] where the ACMD itself would act as an external shock and the effect measured would be how far the external shock moves the equilibrium from a consumer welfare enhancing market equilibrium. In other words, one would ask how introduction of a particular ACMD altered cost curves and demand curves in the affected market or markets, and the net effect of such alterations on consumer welfare. The estimate would not need to be exact—it could be stated as a rough estimate, plus or minus a certain percentage (error tolerance). Such an approach could add credibility by recognising imperfections in estimation and limitations on knowledge, while at the same time highlighting the real harm to domestic interests flowing from the ACMD. More generally, by highlighting the aggregate deleterious effects of ACMDs on the domestic public at large, broad adoption of this metric might marginally weaken *ex ante* private and public incentives to adopt new ACMDs in the first place.

The ICN and ACMDs

Although *ACMDs* may not readily be reached by direct antitrust law enforcement (as yet) or formal WTO trade enforcement mechanisms, they nevertheless may be susceptible to being undermined through targeted "competition advocacy" initiatives. Such initiatives involve efforts by competition agencies to ensure that competition considerations are weighed in the formulation of laws, regulations, and public policies. Often competition advocacy may involve critiques of draft rules or laws on the grounds that the proposed formulations would block or distort consumers and thereby reduce consumer welfare.

Historically, competition advocacy has been directed at sister agencies at the national level or at subordinate levels of government. In recent years, in discussions with emerging competition regimes, major competition agencies (such as the US Federal Trade Commission, the US Department of Justice, and the European

[12] A partial equilibrium analysis "analyses the behaviour of a single market, household, or firm, taking the behaviour of all other markets and the rest of the economy as given." See Samuelson/Nordhaus, *Economics*, (14th ed.) 1992, p. 287. We do not consider the possibility, suggested by the "theory of the second best," that the welfare harm in the market primarily affected by the ACMD would be more than offset by welfare gains elsewhere, due to the interaction among markets. Leading antitrust commentators have consistently upheld partial equilibrium approaches as key to the carrying out of competition policy, and have dismissed second best concerns, based on the real world impossibility of analysing all potential interactions among markets and on the high likelihood that market-specific partial equilibrium competition analyses "get it right." See, e.g., Bork, *The Antitrust Paradox*, (Revised ed.) 1993, pp. 113–114; Posner, *Antitrust Law*, (2nd ed.) 2001, p. 13 n. 5.

Commission's Directorate General for Competition) have promoted competition advocacy as a valuable method for consumer welfare enhancement.[13]

Consistent with this recent trend, the international "virtual network" dedicated to competition policy, the ICN, established an Advocacy Working Group ("Advocacy Group") in 2001.[14] The ICN consists of competition agencies, not national governments. This might appear at first blush to be a weakness, since its constituent members lack the ability to bind their jurisdictions internationally and some may lack substantial domestic political influence. Properly understood, however, we believe the nature of ICN membership is actually a strength, in that it may allow agencies to sign on to recommendations that do not necessarily reflect current national government policies. Over time, the agencies may be able to secure home state support for such recommendations, to the extent they become more broadly accepted and are seen as reflecting international "best practices."

The initial efforts of the Advocacy Group centred on the identification of advocacy "best practices" and the provision of information to ICN members in support of their advocacy activities. In 2008, the Advocacy Group redirected its efforts to the carrying out of case-specific "market studies," with the goal of identifying good practices for conducting studies. During 2009-2010, the Group conducted five teleseminars where ICN member agencies described their experiences in advocating competition. The teleseminars focused on building relationships between a competition authority and the private bar; government involvement in markets; the role of international organisations in advocacy; competition in the financial markets; and evaluation of particular agencies' competition advocacy programmes. The Advocacy Group promoted an advocacy best practices handbook and Competition Advocacy "Toolkit" in 2010-2011, with the aim of spreading the "culture" of advocacy studies. It also has established an ICN data bank of advocacy studies ("Market Studies Information Store"). The Advocacy

[13] For a good overview of the importance of competition advocacy as a tool to combat government-sponsored restraints on competition, see Cooper/Kovacic, US Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition, Boston University Law Review 90 (2010) 4, p. 1555, available at: http://www.ftc.gov/speeches/kovacic/2010convergencecomment.pdf.

[14] The ICN was established in 2001 as an international "virtual network" for the promotion of "soft convergence" among competition policy regimes through the exchange of information among competition agencies and expert "non-governmental advisors." The ICN states that it "provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community. The ICN is unique as it is the only international body devoted exclusively to competition law enforcement and its members represent national and multinational competition authorities. Members produce work products through their involvement in flexible project-oriented and results-based working groups. Working group members work together largely by Internet, telephone, teleseminars and webinars." See http://www.internationalcompetitionnetwork.org/about.aspx. Information on the ICN's Advocacy Working Group is available at: http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx. The following main textual discussion is drawn from this web entry.

Group also liaises with the ICN's "Advocacy and Implementation Network" in order to generate advocacy recommendations for new competition regimes ("beneficiary agencies").

The Advocacy Group is ideally suited to promote the study and, hopefully, the gradual elimination of, ACMDs that harm consumer welfare. As part of a consensus-building international body, the Advocacy Group can shed a spotlight on a regime's regulatory practices that reduce consumer welfare, without the coercive aspect associated with litigation or state-to-state negotiations.[15] Interjecting the ICN into critiques of anticompetitive government practices is not without precedent—the ICN already has adopted consensus materials that can be applied to advocate against abuses of state-sponsored market power. In particular, the ICN has adopted a document drafted by the ICN's Unilateral Conduct Working Group entitled "State Created Monopolies Analysis Pursuant to Unilateral Conduct Laws—Recommended Practices" ("RP"). The RP include giving competition authorities "an effective role" for promoting competition in connection with privatisation and market liberalisation efforts. The RP also endorse bestowing on competition authorities "effective competition advocacy instruments," including providing "expert reports" and "recommendations" to government bodies responsible for liberalisation/privatisation; participation in meetings and briefings with key government officials; an ability to bring legislative and administrative actions before the courts; and publication of competition authority opinions in order to spark public debate. Aggressive ICN efforts to advance the role of domestic competition agencies in taking on international hybrid restraints would be very much in keeping with the tradition embodied in the State Created Monopolies RP.[16]

Furthermore, ICN-commissioned studies that illuminate the nature and extent of welfare losses stemming from international hybrid restraints may empower fledgling competition agencies to push for domestic reforms, by invoking the importance of being seen as following the "international consensus." Application of a well-regarded metric for measuring the effects of ACMDs, such as the one proposed above, could heighten the impact of individual studies and strengthen the hands of national competition officials—invoking the imprimatur of the ICN—in arguing for welfare-enhancing reforms.

The Advocacy Group could perhaps further advance competition advocacy efforts by publicising economic techniques that may be used to estimate the magnitude of welfare losses associated with particular restraints. Estimates derived from specific case studies that highlight the extent of foregone welfare due to lack of competition may spur efforts to "phase out" *ACMDs* in favour of less socially costly support for favoured constituencies, such as direct targeted subsidies. Eventually, well-supported empirical welfare loss estimates might build the case for

[15] See http://www.internationalcompetitionnetwork.org/uploads/library/doc318.pdf.

[16] Indeed, we believe that the long-term plan of the Advocacy Working Group is in harmony with our proposed reform. See http://www.internationalcompetitionnetwork.org/uploads/library/doc763.pdf.

avoiding less costly "substitute" policies altogether, and lead to the actual elimination of *ACMDs*. In particular, the Advocacy Working Group might formulate some additional general principles from such studies, which could be included in its Competition Advocacy Toolkit—and publicised by the ICN as a whole. To the extent it succeeded, such an ICN-facilitated attack on *ACMDs* might over time also strengthen the hand of competition officials in arguing for the rescission of the more egregious "state action" restraints that have been put in place specifically to shield favoured commercial actors from competitive forces.

Plurilateral Agreement Concerning ACMDs

ICN efforts to limits ACMDs through competition advocacy hopefully could eventually build support for a plurilateral agreement limiting ACMDs, perhaps under the aegis of the WTO.[17] Like-minded jurisdictions could join such an agreement on a voluntary basis as the domestic harm caused by ACMDs and the benefits to be gleaned from limiting or prohibiting them became apparent. Below we briefly sketch possible features that a plurilateral agreement might embody. This discussion is merely suggestive, meant to stimulate further thinking about possible cooperative actions to constrain ACMDs.

The plurilateral agreement could have proactive measures that discipline ACMDs, as well as defensive measures that enable members to take unilateral actions against them, where clearly warranted. These unilateral actions might be in the form of a proportionate trade retaliatory measure that an affected state could invoke upon showing that there was a market distortion that had an anticompetitive effect that led to specific welfare losses in its domestic markets, either to firms or to consumers (the size of the trade retaliation would be bounded by the magnitude of the welfare loss). Such a retaliatory mechanism would have to pass muster under the rules of the global agreement, and there would be full dispute resolution if a party violated these rules.

A key question would be whether full WTO style dispute resolution procedures should be available to ensure that signatories conformed their policies to disciplines applied to ACMDs under the agreement. While full dispute resolution (in the WTO sense, complete with trade sanctions) might not be immediately available, the dispute resolution process could include a referral back to the competition agency of the country that had failed to act against the specific ACMD. The referral might

[17] For the most part, all WTO agreements apply to all GATT members. However, when the WTO was established in 1995, four "plurilateral" agreements were made applicable only to those WTO members that had agreed to them: the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement (the latter two agreements were scrapped in 1997). See http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm. The WTO framework would allow for the creation of additional plurilateral agreements.

include a series of benchmarks that would have to be met within a time certain. Failure to comply with the benchmarks would be a violation of the agreement, and would be subject to fuller dispute resolution.

Conclusion

Interest group politics and associated rent-seeking by well-organised private actors are endemic to modern economic life, guaranteeing that *ACMDs* (not to mention many other sorts of restrictions that are directly shielded by state action immunity) will not easily be rooted out. Nevertheless, the ICN's Advocacy Working Group may provide a good vehicle to assist competition agencies worldwide in their efforts to highlight the baleful effects of such restraints. While this proposed solution is not the only pathway that must be followed, the Advocacy Working Group may provide the tools that, over time, convince state actors to phase out or eliminate particularly egregious restraints. As the benefits of curbing ACMDs become increasingly apparent, individual member states may wish to consider entering into a plurilateral agreement (perhaps under WTO auspices) by which they agree to curb these anticompetitive measures. To the extent such reforms are implemented, consumer welfare will benefit, and trade and competition policy will prove more effective in promoting a welfare-enhancing economic growth agenda that benefits all nations.

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