RESTRICTIVE TRADE PRACTICES AND EXTRATERRITORIAL APPLICATION OF ANTITRUST LEGISLATION IN JAPANESE-AMERICAN TRADE

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In December 1996 the ministerial meeting of the World Trade Organization (WTO) established a study group to examine whether multilateral trade rules should sanction antitrust. Persistent bilateral confrontations involving market access—especially between Japan and the United States—often had an antitrust or competition policy dimension. Still, antitrust usually operated primarily within a state's territorial borders; its official enforcement regime was, accordingly, more institutionally autonomous than the economic ministries responsible for implementing the WTO's trade law.[1] Even so, competition policy proposals the WTO workgroup was considering rested upon increased bilateral cooperation among antitrust regimes throughout the world. Yet Japanese officials asserted that between

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1. *See* GLOBAL COMPETITION POLICY (Edward M. Graham & J. David Richardson eds., 1997); Merit E. Janow, *U.S. Trade Policy Toward Japan and China: Integrating Bilateral, Multilateral, and Regional Approaches, in* GLOBAL COMPETITION POLICY 175-203 (Edward M. Graham & J. David Richardson eds., 1997); Edward M. Graham, *Contestability, Competition, and Investment in the New World Trade Order, in* GLOBAL COMPETITION POLICY 204-22 (Edward M. Graham & J. David Richardson eds., 1997); Thomas R. Howell, *The Trade Remedies: A U.S. Perspective, in* TRADE STRATEGIES FOR A NEW ERA: ENSURING U.S. LEADERSHIP IN A GLOBAL ECONOMY 299-323 (Geza Feketekuty & Bruce Stokes eds., 1998); *World Trade Fifty Years On*, ECONOMIST, May 16, 1998, at 22-23. *See also* Barry E. Hawk, *Overview, in* ANTITRUST AND MARKET ACCESS: THE SCOPE AND COVERAGE OF COMPETITION LAWS AND IMPLICATIONS FOR TRADE 7-38 (Organization For Economic Co-Operation and Development ed., Paris, 1996); THE ROLE OF THE COMPETITION AGENCY IN REGULATORY REFORM, PROCEEDINGS OF A WORKSHOP BY THE OECD AND FAIR TRADE COMMISSION OF JAPAN (Organization for Economic Co-Operation and Development ed., Paris, 1997). Please note that throughout this article, the terms "antitrust" and "competition policy" are used interchangeably.

their country and America the "era of bilateralism" was over.[2] Also, Japan and other nations condemned efforts by the U.S. and the European Union (EU) to apply their own antitrust law extraterritorially to private anticompetitive business conduct occurring solely within foreign states. Professor Shingo Seryo and Mark A.A. Warner consider the bearing these issues have on the extraterritorial reach of antitrust principles. Although the reasons they give differ somewhat, the two papers agree that a more internationalized approach to antitrust conflict resolution is preferable to one dominated by unilateral state action.[3] Thus Seryo and Warner raise an important question: to what extent are bilateral and multilateral modes of dispute settlement compatible where competition policy is involved?

Especially in Japanese-American trade, the relationship between bilateral and multilateral dispute resolution is complex. Leading trade policy expert, Merit E. Janow, observed that most of the 100 bilateral "understandings" the U.S. and Japan had reached over the post-war period were "negotiated so as to be consistent with multilateral principles."[4] Ironically, specialists agreed, such international agreements sanctioned both the WTO dispute settlement process which brought Japan victory in the Fuji-Kodak case of 1997, where a WTO dispute settlement panel decided that Japan's alleged involvement in the film sector of the nation's distribution system did not constitute a violation of the WTO's charter,[5] and the extraterritorial antitrust principle which Japan so adamantly opposed. In addition, by the 1990s antitrust regimes throughout the world shared a common institutional culture to such an extent that bilateral cooperation increased steadily.[6] But in the

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2. Howell, *supra* note 1, at 311. *See also id.* at 312-13, 317; Edward M. Graham & J. David Richardson, *Issue Overview*, *in* GLOBAL COMPETITION POLICY 3-44 (Edward M. Graham & J. David Richardson eds., 1997); Janow, *supra* note 1, at 175-86; Hawk, *supra* note 1, at 7-38.

3. *See* Shingo Seryo, Restrictive Practice and the Antimonopoly Laws in Japan and Extraterritorial Application of the U.S. Antitrust Laws (Mar. 23-25, 1998) (paper presented to the Japan-U.S. Study Group on Economic Relations after the Uruguay Round, Tokyo, Japan); Mark A.A. Warner, Restrictive Trade Practices and the Extraterritorial Application of U.S. Antitrust and Trade Legislation (Mar. 23-25, 1998) (paper presented to the Japan-U.S. Study Group on Economic Relations after the Uruguay Round, Tokyo, Japan). See also materials cited in Section I of Tony A. Freyer, *Regulatory Distinctiveness and Extraterritorial Competition Policy in Japanese-American Trade*, WORLD COMPETITION L. & ECON. REV. (forthcoming). The author of the present paper commented on both papers on Mar. 24, 1998.

4. Janow, *supra* note 1, at 176.

5. *See* Richard Katz, *Big Loss at the WTO: Kodak's Moment: Not a Pretty Picture*, ORIENTAL ECONOMIST, Jan. 1998, at 7-9.

6. *See* Charles S. Stark, *The International Application of United States Antitrust Laws*, *in* INTERNATIONAL ANTITRUST IN A GLOBAL ECONOMY (International Association of Young Lawyers, New Orleans, Louisiana, Apr. 24-27, 1997); Claudio Cocuzza & Massimilano Montini, *Struggling for an International Antitrust Regime? Different Solutions in a Global Economy*; *in* INTERNATIONAL ANTITRUST IN A GLOBAL ECONOMY (International

U.S., wrote one informed commentator in 1998, "Differences in tradition, intellectual outlook, and operational approach contribute to misunderstanding and even hostility between policymakers on opposite sides of the trade/antitrust divide." When it came to dealing with the private restrictive business practices which were a focus of the WTO's competition policy study group, moreover, the "institutional fissure between trade and antitrust is itself working to undermine the ability of the United States to deal with new forms of protectionism that jeopardize the world trading system, most notably the 'privatization' of market areas abroad." A similar "divide" existed in other nations, including Japan.[7]

Japanese-American trade tensions nonetheless suggested that both modes of dispute resolution could be complementary. A comprehensive approach to

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Association of Young Lawyers, New Orleans, Louisiana, Apr. 24-27, 1997); Michael H. Byowitz, *Unilateral Use of U.S. Antitrust Laws to Achieve Foreign Market Access: A Pragmatic Assessment, in* INTERNATIONAL ANTITRUST IN A GLOBAL ECONOMY (International Association of Young Lawyers, New Orleans, Louisiana, Apr. 24-27, 1997); Jean-Claude Rivalland, *From* Dyestuffs, Zoja *and* Wood Pulp . . . *to Where?: The EU Perspectives, in* INTERNATIONAL ANTITRUST IN A GLOBAL ECONOMY (International Association of Young Lawyers, New Orleans, Louisiana, Apr. 24-27, 1997); Harvey M. Applebaum, *International Harmonization of Antitrust and Trade Laws, in* INTERNATIONAL ANTITRUST IN A GLOBAL ECONOMY (International Association of Young Lawyers, New Orleans, Louisiana, Apr. 24-27, 1997); Mitsui Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO, in* FORDHAM CORPORATE LAW INSTITUTE 24TH ANNUAL CONFERENCE INTERNATIONAL ANTITRUST LAW & POLICY (New York, Oct. 16-17, 1997), at 1-16; Hideaki Kobayashi, *The WTO and Competition Policy, in* FORDHAM CORPORATE LAW INSTITUTE 24TH ANNUAL CONFERENCE INTERNATIONAL ANTITRUST LAW & POLICY (New York, Oct. 16-17, 1997), at 1-8; Akinori Yamada, *Recent Development of Competition Law and Policy in Japan, in* FORDHAM CORPORATE LAW INSTITUTE 24TH ANNUAL CONFERENCE INTERNATIONAL ANTITRUST LAW & POLICY (New York, Oct. 16-17, 1997), at 1-24; Joel I. Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century, in* FORDHAM CORPORATE LAW INSTITUTE 24TH ANNUAL CONFERENCE INTERNATIONAL ANTITRUST LAW & POLICY (New York, Oct. 16-17, 1997), at 1-17; Eleanor M. Fox & Januz A. Ordover, *The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action*, WORLD COMPETITION L. & ECON. REV., Dec. 1995, at 5-34; Eleanor M. Fox, *Competition Law and the Agenda for WTO: Forging the Links of Competition and Trade, in* ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 1-36 (John O. Haley & Hiroshi Iyori eds., Pacific Rim Law & Policy Association, Seattle, Wash., 1995); Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law, in* ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 59-91 (John O. Haley & Hiroshi Iyori eds., Pacific Rim Law & Policy Association, Seattle, Wash., 1995); John O. Haley, *Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?, in* ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 303-26 (John O. Haley & Hiroshi Iyori eds., Pacific Rim Law & Policy Association, Seattle, Wash., 1995).

7. Howell, *supra* note 1, at 313. For other nations, including Japan, see GLOBAL COMPETITION POLICY, *supra* note 1, and Hawk, *supra* note 1.

resolving "market privatization" conflicts was the Structural Impediments Initiative (SII), which sought to open Japan's market sectors by providing incentives for strengthening the nation's own antitrust institutions.[8] At the time SII began operation in 1991, Matsuo Matsushita, Japan's leading antitrust authority, observed that by "fill[ing] a gap created by the lack of political leadership in Japan" the bilateral settlement was an important "supplement to" and "not a substitute for" the General Agreement on Tariffs and Trade (GATT), the post-war multilateral trade system out of which the stronger WTO was subsequently created in 1995.[9] In addition, Janow said, "Progress in achieving expanded market access can be assured only if measures undertaken to open markets have some domestic support in Japan."[10] In SII and other Japanese-American sectoral market negotiations, "it was not U.S. pressure as such but rather public support in Japan for U.S. negotiating objectives that obliged Japanese government officials to go farther than they might otherwise have chosen." A protectionist system rooted in anticompetitive cultural assumptions and institutionalized ideology clearly persisted in Japan. By the 1990s, however, a protracted recession following the end of the post-war period of high growth and the collapse of the "bubble-economy," had fostered within Japan advocates of market-oriented deregulation. Thus, Janow emphasized, if Japanese society faced a perceived "trade off" between increased market efficiency with greater unemployment, on the one hand, and market "inefficiency, lower imports, and fuller employment [on the other], . . . there will be overwhelming pressure to choose the latter approach. This fact alone suggests that international attention to economic deregulation in Japan is important."[11]

The following comments place Seryo's and Warner's informative analysis of extraterritorial antitrust within this wider context. Section I suggests some developments in economic history and theory that helped to explain why antitrust and private anticompetitive conduct became significant international trade issues by the mid-1980s, but not before. Section II examines Professor Seryo's assessment of Japan's antitrust regime and its place within bilateral and multilateral dispute settlement framework.; Section III does the same for Warner's study of the relationship between trade and antitrust policies in the U.S. Section IV draws together the preceding themes to argue that the complimentary character of bilateral and multilateral modes of dispute resolution encourages an emerging international antitrust regime which could contribute, as Seryo and Warner recommend, to remedying privatized market-access frictions like those arising between Japan and the U.S. Section V states a conclusion.

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8. LEONARD J. SCHOPPA, BARGAINING WITH JAPAN: WHAT AMERICAN PRESSURE CAN AND CANNOT DO (1997).

9. Matsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiations*, 12 MICH. J. INT'L L. 436, 448-49 (1991).

10. Janow, *supra* note 1, at 181.

11. *Id.* at 185-86.

I.

Considerations of economic history and theory helped to explain restrictive trade practices and antitrust's extraterritorial application. Until fairly recently, these issues received little attention in international trade disputes. As late as 1983 President Ronald Reagan's Assistant Attorney General of the U.S. Antitrust Division told the National Association of Manufacturers that the cartel practices and "lax antitrust laws" of "our trading partners" neither aided their international competitiveness nor disadvantaged American business.[12] Meanwhile, American business interests complained that U.S. antitrust law hurt their ability to compete successfully in transnational markets. Foreign governments tolerated or even sanctioned the anticompetitive conduct of their own private and public enterprises. Accordingly, the contention was that antitrust's enforcement of competition at home hurt American business competitiveness abroad.[13] This ambivalent assessment reflected an international consensus among many trade experts that such macroeconomic indicators as exchange rates and capital flows were more important than microeconomic factors, including anticompetitive business conduct.[14] Thus, prior to the mid-1980s an ideal world of international trade liberalism maintained within the GATT framework was thought to be working according to macroeconomic theory, despite growing concerns involving microeconomic issues identified with the presence or absence of competition policy among different foreign states.[15]

From the mid-1980s on, however, macroeconomic theory alone no longer credibly described the reality of international trade. The oligopolistic competition which after World War II had characterized the global expansion of multinational corporations (MNCs) entered a new phase. Critics claimed that Japan and other states had designed specific policies to benefit their own local business interests and multinational corporations.[16] Insofar as liberal economic theory was concerned, what was new about these policies was that competition involved nonprice factors, and

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12. AKINORI UESUGI, NEW DIRECTIONS IN JAPANESE ANTITRUST ENFORCEMENT 13 (1994).

13. *See* Gary R. Saxonhouse, *Japan, SII, and the International Harmonization of Domestic Economic Practices*, 12 MICH. J. INT'L L., 450, 465-66 (1991).

14. See generally the masterful interdisciplinary project published in three volumes, 1 THE POLITICAL ECONOMY OF JAPAN, THE DOMESTIC TRANSFORMATION (Kozo Yamamura & Yasukichi Yasuba eds., 1987-1992); 2 THE POLITICAL ECONOMY OF JAPAN, THE CHANGING INTERNATIONAL CONTEXT (Takashi Inoguchi & Daniel I. Okomoto eds., 1987-1992); 3 THE POLITICAL ECONOMY OF JAPAN, CULTURAL AND SOCIAL DYNAMICS (Shumpei Kumon & Henry Rosovsky eds., 1987-1992).

15. *See* 2 THE POLITICAL ECONOMY OF JAPAN, THE CHANGING INTERNATIONAL CONTEXT, *supra* note 14.

16. *See id. See also supra* note 1 and accompanying text.

exchange rate equilibrium seemed to be of declining importance. Thus in those particular sectors in which a foreign government allied itself with the MNCs to enlarge the nation's share of world markets, atomistic competition influencing the price mechanism for both producers and consumers seemed less relevant.[17] Within a decade these tensions became even more pronounced as "crony capitalism" was identified as a cause of the East Asian financial crisis beginning in the fall of 1997.[18] The extensive interpenetration between government authorities and service sectors, including particularly financial institutions, in Indonesia and other "Little Tiger" economies appeared to be an extension of the anticompetetive business-government collaboration which characterized Japan. As a result, during the 1990s international demands for a global competition policy grew.[19]

Institutional constraints shaped the search for a more globalized antitrust regime. Successive GATT rounds lowered macroeconomic trade barriers throughout the world, facilitating the integration of domestic markets into a more global business order.[20] An indication of market globalization was the scale of the MNC's business: in 1995 the world GNP was (US) $25,223 billion, of which 200 MNCs turned over (US) $7,850 billion. Paradoxically, as international market integration progressed, the private anticompetitive conduct of MNCs increased.[21] The MNC's "dual personality"—a collection of corporate units or subsidiaries doing business in a host state's domestic market and abroad—encouraged a range of incentives which included both competitive and anticompetitive market behavior. In addition, the MNC usually maintained a unified operational strategy common to its distinct corporate units, yet each unit was bound by the local laws of the sovereign state in which it did business. These institutional imperatives engendered a mix of market pressures that could foster management's decision to pursue restrictive practices.[22]

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17. *See* 2 POLITICAL ECONOMY OF JAPAN, THE CHANGING INTERNATIONAL CONTEXT, *supra* note 14.

18. *See 1998 More of the Same*, ORIENTAL ECONOMIST, Jan. 1998, at 1-2; Frank Gibney, Jr., *The Last, Best Hope*, TIME, Dec. 22, 1997, at 36-37; Richard Hornik, *The Myth of the Miracle*, TIME, Dec. 8, 1997, at 40: Cameron Barr & Yoshiko Matsushita, *Asia Woes Push Japan to Bold Bailout*, CHRISTIAN SCI. MONITOR, Dec. 18, 1997; James L. Tyson, *US to Lecture Tokyo on Helping Asia*, CHRISTIAN SCI. MONITOR, Jan. 14, 1997. For increased demands for global competition policy see *supra* notes 1, 6, and accompanying text.

19. *See 1998 More of the Same*, *supra* note 18; Gibney, *supra* note 18; Hornik, *supra* note 18; Barr & Matsushita, *supra* note 18; Tyson, *supra* note 18.

20. *See* COMPLETING THE URUGUAY ROUND: A RESULTS ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS (Jeffrey J. Schott ed., Institute For International Economics, Washington, D.C., 1990). *See also supra* notes 1, 6, 14, and accompanying text.

21. *See* Rivalland, *supra* note 6, at 2.

22. *See* EDWARD M. GRAHAM, GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS 35 (1996). *See also id.* at 33-46.

Conflicting global patterns of deregulation could exacerbate institutional pressures influencing a MNC's anticompetitive behavior.[23] Deregulation, of course, did not create a market vacuum altogether empty of formal rules. Instead, this reform effort to bring government's laws more in line with market efficiencies usually substituted one regulatory regime for another. In the U.S., direct bureaucratic or administrative control over a private firm's market conduct declined between the 1970s and 1990s; but the role of civil litigation as a regulatory device grew.[24] Outside America, by contrast, deregulation generally involved the privatization of state-owned or managed enterprises; in many states it also resulted in making illegal as antitrust violations private cartel and monopoly practices which public officials previously had tolerated or expressly sanctioned.[25] Under each mode of deregulation, moreover, governments retained the lawful power to authorize certain forms of anticompetitive conduct in the public interest. Perhaps the most complex and controversial outcome of this process was antidumping laws.[26] Also, as the costs of "croney capitalism" in the East Asian financial crisis suggested, many important domestic markets had experienced little or no meaningful deregulation, while about one half of the signatories to the WTO had no functional antitrust law. With such a diversity of rules and enforcement regimes impinging upon the MNC's unified operational strategy, it was not surprising that restrictive market behavior often resulted.[27]

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23. *See* THE ROLE OF COMPETITION AGENCY IN REGULATORY REFORM, PROCEEDINGS OF A WORKSHOP BY THE OECD AND FAIR TRADE COMMISSION OF JAPAN, *supra* note 1; DEREGULATION OR RE-REGULATION? REGULATORY REFORM IN EUROPE AND THE UNITED STATES (Giandomenico Majone ed., 1990); REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD (Organization for Economic Co-operation and Development ed., Paris, 1994); UNLOCKING THE BUREAUCRAT'S KINGDOM, DEREGULATION AND THE JAPANESE ECONOMY (Frank Gibney ed., 1998); STEVEN K. VOGEL, FREER MARKETS, MORE RULES: REGULATORY REFORM IN ADVANCED INDUSTRIAL COUNTRIES (1996).

24. *See* Pietro S. Nivola, *When It Comes to Regulations, U.S. Shouldn't Cast the First Stone*, WALL ST. J., May 15, 1996, at A15; DEREGULATION OR RE-REGULATION? REGULATORY REFORM IN EUROPE AND THE UNITED STATES, *supra* note 23; VOGEL, *supra* note 23. *See also* THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, AND ALFRED E. KAHN 222-310 (1984).

25. *See* THE ROLE OF COMPETITION AGENCY IN REGULATORY REFORM, PROCEEDINGS OF A WORKSHOP BY THE OECD AND FAIR TRADE COMMISSION OF JAPAN, *supra* note 1; DEREGULATION OR RE-REGULATION? REGULATORY REFORM IN EUROPE AND THE UNITED STATES, *supra* note 23; REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD, *supra* note 23; UNLOCKING THE BUREAUCRAT'S KINGDOM, DEREGULATION AND THE JAPANESE ECONOMY, *supra* note 23; VOGEL, *supra* note 23.

26. *See* Robert A. Lipstein, *Using Antitrust Principles to Reform Antidumping Law*, *in* GLOBAL COMPETITION POLICY (Edward M. Graham & J. David Richardson eds. 1997).

27. *See supra* notes 1, 6, 18, 23, and accompanying text.

This same multiplicity of institutional pressures could, however, encourage MNCs to favor deregulation and stronger antitrust. By the 1990s, in such diverse places as America, Europe, Australia, and Japan some leading big business interests—particularly those identified with MNCs—increasingly advocated deregulation and antitrust; they did so, at least in part, because their global competitive advantage was threatened by the restrictive trade practices employed by less internationalized firms operating in the same market sectors.[28] In Japan throughout the post-war era, not only business but Japanese society as a whole were unsupportive of the nation's antitrust law and its chief enforcer, the Japan Fair Trade Commission (JFTC). As the changing global economy culminated in the prolonged recession of the nineties, however, market data collected by the leading big-business organization, Keidanren, revealed widespread popular dissatisfaction with pervasive high costs identified with officially or informally sanctioned cartels, and related problems, which in turn were seen as the outcome of excessive bureaucratic protectionism.[29] Nevertheless, many Japanese business sectors benefitted from the protectionist policy. Thus the old system was, said Keidanren officials privately, to "some players very comfortable but not to others."[30] Most importantly, many larger, multinational firms competing in the global economy perceived that their profitability was constrained by, in effect, subsidizing those less efficient sectors enjoying greater protection. Reflecting the consumer demands and market efficiencies which were consistent with the MNC's competitive environment, Keidanren publicly disassociated itself from the old order, and despite internal criticism, switched to advocating a deregulation program emphasizing the JFTC's vigorous enforcement of the AML.[31]

Thirty years earlier Corwin Edwards suggested how similar tensions impeded the international development of competition policy.[32] Edwards was an economist whose institutional antitrust theories had significantly influenced American trade policy during the 1940s. He helped to draft the competition provisions of the International Trade Organization (ITO), the failed post-war attempt to establish an international dispute resolution process for trade and antitrust issues. His theories also shaped the Japanese and German adoption of antitrust laws under post-war Allied occupations. Edwards continued making pioneering comparative studies of national competition policies during the 1950s and 1960s, despite the

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28. *See supra* notes 1, 23, 24, and accompanying text.

29. *See* KEIDANREN, BUILDING A DYNAMIC AND CREATIVE SOCIETY (May 1995); KEIDANREN, A MESSAGE FROM THE CHAIRMAN (Sept. 1995).

30. Interview with Keidanren officials (Oct. 6, 1995).

31. *See* Freyer, *supra* note 3; Graham & Richardson, *supra* note 2; Hawk, *supra* note 1.

32. *See* CORWIN D. EDWARDS, TRADE REGULATIONS OVERSEAS: THE NATIONAL LAWS (1966).

prevalence of GATT's macroeconomic trade liberalism.[33] A government's "policy toward restrictive business practices" was, he wrote in 1966, "intimately related to . . . policy toward matters as diverse as foreign trade and investment, industrial growth, patents, . . . *the degree of separation between government and private action, personal and contractual freedom,* and the division of powers within government."[34] For international purposes, then, a state's antitrust regime was "partly a participant in supra-[national] developments and partly a peculiar national entity."[35] A state's competition policy, in turn, reflected its "political, legal, economic, and cultural history; . . . its contemporary, political, economic, and legal institutions; and . . . the whole range of relevant government policies. The ideological barriers to understanding are more formidable than the language barriers."[36]

A generation later, new economic theories resonated with the multidimensional analysis Edwards had advocated. Emphasizing the importance of incentives in the operation of economic markets or political and legal systems, the neo-institutional theories of Douglass C. North recognized that imperfect information, transaction costs, and other factors brought about outcomes which often were neither optimal nor even beneficial to those who purportedly sought such results through manipulation of the rules of the game.[37] Much like Edwards' assessment of the importance of ideology to explaining the diverse international pattern of antitrust regimes, North argued that groups pursued contrary views of self-interest in part because ideological conflicts fostered opposing perceptions of property rights. A mix of economically productive and adverse outcomes resulted. Similarly, Edwards' recognition that cultural factors influenced the international diversity of competition policies, echoed Francis Fukuyama's critique of Chicago School neoclassical economics and related "macroeconomic growth models . . . [which] cannot account for 30% to 40% of the actual observed economic growth that goes on in the world."[38] According to Fukuyama, "it is cultural factors that account for that residual."[39] In addition, his recognition that "[e]verbody is embedded in a whole series of overlapping social groups, including the family, the workplace, the local community, and the state," suggested the multiplicity of causal factors Edwards

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33. See *id.* for Edwards' theory of institutional economics and his contribution to the ITO. *See also* TONY A. FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA 1880-1990, at 225, 229, 260-67, 286, 299, 330 (1992).

34. Edwards, *supra* note 32, at iii-iv (italics added).

35. *Id.*

36. *Id.*

37. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

38. Francis Fukayama, *Culture and the Market Process*, *in* MARKET PROCESS UPDATE: NEWS FROM THE CENTER FOR MARKET PROCESSES AT GEORGE MASON UNIVERSITY 1 (Spring 1997).

39. *Id.*

identified fostering both anticompetitive conduct itself and an antitrust regime's institutionally-distinctive response.[40]

These continuities in economic thought informed the rise of antitrust as a trade issue by the 1990s. A European Commission report urging strengthened transnational cooperation among antitrust regimes around the world noted in 1995, much as had Edwards thirty years before, that a central issue of international competition policy was the need to overcome comparative institutional inconsistency.[41] "As regards competition policy," wrote Karl van Miert, "how can we imagine that this new 'trade order' could produce its full, positive effects when, throughout the world, companies are subject to different rules on competition and, of even more concern, certain national authorities (or regional authorities in the case of the EU) rigorously apply their antitrust legislation while others have a more lax approach?"[42] Similarly, ideological and cultural factors of contemporary economic theories which paralleled Edwards' institutionalism found their way into analysis of comparative competition policymaking. "Competition policy is also altered to serve social goals without regard to sector," observed the editors of *Global Competition Policy* in 1997. "Examples are promotion of small or minority-owned business, maintenance of indigenous culture, assurance of service to peripheral or declining subregions, and the buttressing of government revenue."[43] Thus, an emerging international process of antitrust dispute resolution constituted wide-ranging governmental and private business interests whose legitimacy multiple institutions and policies sanctioned, including differing or even contradictory market outcomes.

II.

The most conspicuous test of developing a global competition policy was, critics claimed, Japan. As a large trade surplus increasingly characterized Japan's place in the international economic order from the mid-1980s on, Americans and Western Europeans argued that the distinctiveness of Japanese society constituted an illiberal, illegitimate barrier to their exports.[44] Distinguishing Western regulatory

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40. *Id. See also* Edwards, *supra* note 32.

41. *See* KARL VAN MIERT, COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING INTERNATIONAL COOPERATION AND RULES, REPORT OF THE GROUP OF EXPERTS (European Commission Directorate-General IV, Brussels, July 1995).

42. *Id.* at 3.

43. Graham & Richardson, *supra* note 1, at 34.

44. For the standard critical view identifed with "Japan, Inc.," see CLYDE V. PRESTOWITZ, TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD (1988); CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975 (1982); Karel van Wolferen, *Will the New World Trade Organization Work? No Chance—East and West Trade Won't Meet*, WASH. POST, June, 26 1994, at C3; SHINTARO

traditions from Eastern conformism and consensual control, the critics maintained that Japan's ideological or cultural distinctiveness encouraged collusive and anticompetitive practices which were sustained by lax antitrust enforcement. Foreign and Japanese proponents of such views agreed with Naohiro Amaya that the "Japanese version of competition takes the form of solidarity within the company (that is the village) and burning enthusiasm for combat in intercompany relationships." For the Japanese, moreover, it was "hard to accept" that competition "produces losers."[45] In America the "losers get on a stagecoach and travel to a new frontier." But the "cold detached attitude that responsibility for oneself, survival of the fittest, and elimination of the weak constitute the ultimate in rationalism" made "Japanese feel a powerful sense of guilt and tragedy."[46] Employing theoretical assumptions like those of Douglass C. North, by contrast, Mark Ramseyer argued that entrenched institutional barriers to private litigation reinforced an ideological "consensual myth" impeding effective antitrust enforcement.[47]

Others contended, however, that the obstacles to Japan implementing a meaningful antitrust regime were not insurmountable. Douglas E. Rosenthal and Mitsuo Matsushita represented a growing opinion among competition policy experts and some political economists that during the 1990s "Japan, the United States, and Europe are at least 'reading from the same page' in discussing broadly shared national and international macroeconomic goals and concepts. . ."[48] Interacting global and domestic market pressures had fostered the "greater acceptance of free market ideas in Japan today than is generally understood in the West."[49] For the first time since the Allied Occupation ended in 1952 the, nation's Antimonopoly Law was "increasingly being enforced in ways comparable to Western antitrust laws."[50] Although there was disagreement on particular deregulation measures, the "idea of

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ISHIHARA, THE JAPAN THAT CAN SAY "NO" (1989); EAMONN FINGLETON, BLINDSIDE: WHY JAPAN IS STILL ON TRACK TO OVERTAKE THE U.S. BY THE YEAR 2000 (1995); PETER HARTCHER, THE MINISTRY: HOW JAPAN'S MOST POWERFUL INSTITUTION ENDANGERS WORLD (1998).

45. Naohiro Amaya, *Harmony and the Antimonopoly Law*, 3 JAPAN ECHO 85, 91 (1981).

46. *Id.* at 92.

47. J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J., 604 (1985); J. MARK RAMSEYER, ODD MARKETS IN JAPANESE HISTORY: LAW AND ECONOMIC GROWTH (James E. Alt & Douglass C. North eds., 1996). For a different institutional analysis but that reaches the same conclusion, see FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987); MARK TILTON, RESTRAINED TRADE CARTELS IN JAPAN'S BASIC MATERIALS INDUSTRIES (1996); R. TAGGART MURPHY, THE WEIGHT OF THE YEN (1997). *See also* North, *supra* note 37.

48. Douglas E. Rosenthal & Mitsuo Matsushita, *Competition in Japan and the West: Can the Approaches Be Reconciled*, *in* GLOBAL COMPETITION POLICY 313, 314 (Edward M. Graham & J. David Richardson eds., 1997).

49. *Id.*

50. *Id.*

deregulation in Japan" was sufficiently "powerful and pervasive" that "[n]either bureaucrats, business leaders, nor politicians dare *openly* oppose . . . [it] even if privately there is foot dragging."[51] Undeniably, protectionist values and institutions from the high growth era remained "entrenched," but there were "institutional reforms already underway . . . which can be promoted to bring change—if Western leaders take them seriously and make it their policy to encourage them."[52] Finally, protectionist policies being advocated in the West represented, fundamentally, as great a threat to more open global markets as Japan's traditional style of protectionism. This common challenge to growing international acceptance of transnational competition policies suggested that limiting protectionism could be "constructively debated between Western and Japanese cultures."[53]

Like Rosenthal and Matsushita, Professor Shingo Seryo[54] suggests that Japan's antitrust regime has entered a new era. While his principal focus is upon the market access controversy which gave rise to the extraterritorial application of U.S. antitrust laws during the 1990s, Seryo's explanatory framework is much broader. He notes that business globalization accompanying the decline of formal trade barriers under GATT made private anticompetitive conduct a leading market-access issue.[55] The Japanese government reinforced this restrictive behavior through various formal and unofficial means. The JFTC, however, increasingly favored stronger competition policies. Japanese and foreign interests converged, moreover, to support institutional innovations and policymaking that were pro-competitive. Accordingly, Seryo's analysis shows, neither collectivist cultural assumptions nor an institutionalized, market-closing ideology necessarily prevented the emergence of a more effective antitrust regime in Japan.

The most significant factor promoting a stronger competition policy was, Seryo acknowledges, the SII.[56] As the dominance of liberal macroeconomic trade theories diminished during the 1980s, the U.S. government became convinced that the real cause of Japan's continuing trade surplus with America was the failure of Japanese regulatory institutions to intervene effectively in oligopolistic industrial sectors which excluded outsiders from transactions through, among other things,

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51. *Id.*

52. *Id.* at 315.

53. *Id.* at 316. *See also* Paul Sheard, *Keiretsu, Competition and Market Access*, *in* GLOBAL COMPETITION POLICY 501-46 (Edward M. Graham & J. David Richardson eds., 1997); John O. Haley, *Japan's Postwar Civil Service: The Legal Framework*, *in* THE JAPANESE CIVIL SERVICE AND ECONOMIC DEVELOPMENT CATALYSTS OF CHANGE 77-101 (Hyung-ki Kim et al. eds., 1995). For a good discussion of the sources influencing protectionism, see WILLIAM A. LOVETT ET AL., U.S. TRADE POLICY: HISTORY, THEORY, AND THE WTO (forthcoming).

54. Unless otherwise noted, the following material is a summary of Seryo, *supra* note 3 and Rosenthal & Matsushita, *supra* note 48.

55. *See* Seryo, *supra* note 3, at 1-2.

56. *See* SCHOPPA, *supra* note 8. *See also* Janow, *supra* note 2, at 175-86.

discriminatory devices in the distribution system, certain exclusionary business practices identified with group enterprise (*keiretsu),* and perceived rigidities in the pricing mechanism.[57] SII went into operation in 1991, and it assigned primary enforcement responsibility to the JFTC.[58] The Ministry of International Trade and Industry (MITI) and other agencies also were given jurisdiction. The U.S. government hoped to bring about stricter enforcement of the Japanese Anti-Monopoly Law (AML) by urging an increase in the JFTC's budget, higher maximum fines imposed upon cartels, and more vigorous criminal prosecution of cartels. It also sought to introduce greater transparency in the compliance process by recommending that the JFTC replace its reliance upon such informal measures as administrative guidance with more formal procedures, including published administrative guidelines and a program to encourage private plaintiffs' actions for damages.[59]

The EU, as well as earlier GATT negotiations and the North American Free Trade Agreement, have to varying degrees harmonized national economic institutions. Like the WTO, by contrast, SII not only attempted to diminish international diversity in formal economic institutions, but also sought to reduce the differences in the business behavior and customs of such firms as the MNCs.[60] By requiring greater transparency in the Japanese regulator's competition policies and methods, a combined bilateral and multilateral dispute resolution approach made it more difficult for Japanese firms—even with the collaboration of protectionist government officials—to maintain private anticompetitive relationships and other exclusionary devices. As such, both approaches rely upon formal sanctions and publicity to enforce compliance with the AML, which in turn is expected to open Japanese firms to increased competition from foreign corporations. Thus SII and the WTO addressed market-access issues at the point where administrative informality and anticompetitive business conduct intersected.[61]

Seryo argues, accordingly, that the JFTC's enforcement of the AML has entered a new phase.[62] Over the two decades following the end of the Allied Occupation, the JFTC survived by protecting politically important small business interests. This constituted the first stage. Then, during the 1970s and 1980s, a 1977 Amendment strengthened the AML's civil penalty provisions and the JFTC won its first important cartel case since 1952.[63] AML enforcement thus incrementally

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57. *See* SCHOPPA, *supra* note 8; Matsushita, *supra* note 9; Saxonhouse, *supra* note 13; THE POLITICAL ECONOMY OF JAPAN, *supra* note 14.

58. *See* SCHOPPA, *supra* note 8; Matsushita, *supra* note 9; Freyer, *supra* note 3; Graham & Richardson, *supra* note 2; Hawk, *supra* note 1.

59. *See id.*

60. *See supra* notes 2, 6, 8-9, 20, 29, and accompanying text.

61. *See id.*

62. *See* Seryo, *supra* note 3, at 3-8.

63. *See id.* at 3-4.

improved even if it remained relatively weak. The emergence of the market access issue and SII as a microeconomic policy remedy promoted the third stage in which, as Rosenthal and Matsushita noted, the JFTC's enforcement record increasingly approached that of its American and European counterparts.[64] Even so, Seryo stresses the importance of 1991 and 1992 AML revisions which improved the JFTC's ability to impose criminal sanctions against the private cartel or monopolization conduct of individual firms and trade associations.[65] In keeping with the paper's central focus, he discusses those areas of the JFTC's enforcement action that relate primarily to the market access issue and SII: price fixing, bid rigging, group boycott and trade associations, vertical restraints, merger acquisition, and administrative guidance. Although particular outcomes in each area have been mixed, the AML's overall impact upon Japanese business behavior is, he concludes, greater than ever.[66] Indeed, the JFTC's effectiveness was sufficiently improved to refute the U.S. argument in the Fuji-Kodak case that Japan's weak AML enforcement constituted "nonviolation" under the WTO.[67] As a result, to resolve market access issues Seryo prefers bilateral and multilateral competition policymaking based on transnational cooperation, rather than a unilateral approach like that which Kodak pursued in its original Section 301 claim.[68] Implicitly he recognizes too that the AML's operation in Japanese society has been more dynamic than proponents of either cultural or ideological causation have suggested.

These considerations shape Seryo's assessment of Japan's AML as a trade remedy. His overall analysis follows that of Richardson and Matsushita, emphasizing the increased compatibility between Western and Japanese antitrust regimes during the 1990s. At the same time, Seryo recognizes that as long as Japan's protectionist heritage impedes this gradual convergence, Japan's AML enforcement can benefit from what Richardson and Matsushita call appropriate Western "encouragement."[69] As a result, Seryo urges the U.S. and Japan to adopt a cooperative antitrust agreement like that which the U.S. has entered into with other nations and the EU.[70] Even so, the anticompetitive sectorial structures associated with long periods of business-government collaboration may be so entrenched that multilateral competition policies facilitating greater international market integration are also required. Thus WTO member states should enter into a multilateral agreement creating a "[d]ispute settlement mechanism for competition law and policy without any executive function. Member states [would] have

64. *See supra* notes 31, 48 and accompanying text.
65. *See* Seryo, *supra* note 3, at 3-4.
66. *See id.* at 3-8.
67. *See id.* at 8-9; Katz, *supra* note 5.
68. For more on Section 301, see *infra* note 75.
69. *See* Rosenthal & Matsushita, *supra* note 48, at 315.
70. *See* Seryo, *supra* note 3, at 9-11.

responsibility to enforce their own competition law."[71] Significantly, such a multilateral dispute settlement process would rest upon the strengthened Japanese antitrust regime emerging from SII.

Seryo does not specifically address whether culture or ideology impedes effective AML enforcement. His assessment of SII, the JFTC's new enforcement priorities, and the WTO's Fuji-Kodak decision suggests, however, that the new international multiplicity of antitrust institutions could erode the anticompetetive behavior rooted in established collusive habits and interests. Accordingly, the more transparent, rule-based dispute resolution process some Japanese officials advocated during the 1990s,[72] in conjunction with foreign pressure, represented an important policy change. Unlike the macroeconomic issues of the post-war GATT, new trade tensions required international harmonization of private business behavior where it intersected with protectionist government action. Along with global market imperatives impinging upon traditional business-government relations, the change created incentives for some Japanese authorities to promote bilaterally and multilaterally enforced competition policies as a remedy for restrictive trade practices, including market-access frictions. Indeed, Richardson and Matsushita indicated, for the first time since the Allied Occupation ended, leading representatives of Japanese ruling institutions had broken with the long-standing collaboration between business and government to support the JFTC and its convergence with an emerging international antitrust regime.[73] Seryo is thus cautiously hopeful that increased international cooperation among antitrust institutions—sanctioned ultimately by a multilateral dispute resolution process—will reconstitute global market conduct enough to disestablish Japan's traditional protectionist order.

III.

Mark Warner[74] argues that American competition policies toward foreign restrictive trade conduct potentially could foster more open markets in Japan. He examines first the historical evolution of the most important principle underpinning the extraterritorial application of U.S. antitrust law: the effects doctrine. An historical analysis reveals that the doctrine's reach has become increasingly

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71. *Id.* at 10.

72. *See supra* note 31 and accompanying text.

73. *See* Rosenthal & Matsushita, *supra* note 48. The general points made in this paragraph are developed more extensively in Freyer, *supra* note 3.

74. Unless otherwise noted, the following material is a summary of Warner, *supra* note 3.

expansive, culminating in the *Nippon Paper*[75] decision of 1997. Section 301, by contrast, ever since its inception in the Trade Act of 1974[76] has always provided private American business interests an official channel by which the U.S. government could act against foreign market behavior unilaterally. The procedural standards governing the application of the effects doctrine are more rigorous than those applied under Section 301. Still, both policies were sanctioned to varying degrees by international agreements, so their potential application by the U.S. remained essentially a matter of discretion.[77] The international legitimacy of such power did not mean, however, that its use was necessarily advisable. Like Seryo, Warner concludes that transnational anticompetitive frictions—including those involving market access issues—are best resolved through less confrontational, multilateral negotiational frameworks.[78] Whether Japan and the U.S. could relinquish their confrontational heritage sufficiently to succeed in a less adversarial process was, nonetheless, for Warner an open question.[79]

Applying antitrust extraterritorially is controversial in part because it clashes with state sovereignty. Fundamentally, the issue is whether a U.S. law should apply outside the nation's territorial boundary to conduct occurring in a foreign state. In the *American Banana*[80] case of 1909 the Supreme Court first considered whether the Sherman Antitrust Act reached beyond U.S. borders to settle a monopolization claim of one American company against another arising from both firms' Costa Rican operations. The Court decided against giving the law an extraterritorial extension.[81] Nearly twenty years later, however, an International Court of Justice opinion suggested that courts possessed more discretion in applying a nation's law extraterritorially than *American Banana* had held.[82] By 1945 the ALCOA decision rejected the 1909 precedent, holding that Sherman Act violations occurring in Canada were within U.S. jurisdiction if there were provable "effects" across America's border.[83] From the 1970s to the 1990s the U.S. Supreme Court[84] expanded

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75. United States v. Nippon Paper Indus., Co., Ltd., 944 F.Supp. 55 (D. Mass. 1996); *rev'd*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

76. *See* Warner, *supra* note 3. For Section 301 and its relation to other competition policy issues see Byowitz, *supra* note 6; Applebaum, *supra* note 6; Cocuzza & Montini, *supra* note 6. *See also* Janow, *supra* note 1, at 175-86; Howell, *supra* note 1, at 299-323; Graham & Richardson, *supra* note 2. For cites to the *Nippon Paper* case see U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

77. *See* Seryo, *supra* note 3.

78. *See id.*

79. *See id.* at 19-21.

80. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

81. *See id.*

82. S.S. Lotus (France v. Turkey), 1927 P.C.I.J., (ser. A) No. 10 (Sept. 27).

83. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

84. *See* Byowitz, *supra* note 6; Cocuzza & Montini, *supra* note 6.

the effects doctrine to include a wide range of antitrust civil actions. Initially, Great Britain and Australia enacted laws "blocking" the extraterritorial enforcement of U.S. antitrust decisions.[85] But gradually these confrontations gave way to greater international cooperation among antitrust officials. Meanwhile, the EU developed its own extraterritorial effects doctrine and the U.S. Justice Department and Federal Trade Commission reaffirmed the U.S. version in the Antitrust Enforcement Guidelines for International Operations (1995).[86]

The *Nippon Paper* case reflected this ambivalence. In 1995, as a result of the Justice Department's action, a federal grand jury indicted Nippon Paper Industries Co. Ltd., a Japanese producer of thermal facsimile paper, for an alleged conspiracy to fix the price of facsimile paper purchased by consumers in the U.S. and Canada. Nippon Paper was principally a domestic Japanese firm which relied upon trading companies to sell its product abroad. The price fixing conspiracy thus occurred within Japan but those affected were foreign consumers. Accordingly, the principal issue before the federal court was whether the criminal provisions of U.S. antitrust law applied to collusive conduct taking place exclusively within Japan. [87] More particularly the doctrinal question was: did the *effects* of the price fixing conspiracy upon American consumers justify giving extraterritorial reach to American antitrust law? Because the precedents governing the expansion of the effects doctrine applied to civil violations rather than criminal conspiracy, the trial court in 1996 decided against the Justice Department's claim of extraterritoriality.[88] But the following year the U.S. Court of Appeals reversed, establishing a new extraterritorial rule in criminal antitrust cases.[89]

Warner's insights concerning *Nippon Paper* are important. In both the U.S. and the EU, winning a case employing the effects doctrine required standards of proof based on evidence that usually was located abroad. Thus in *Nippon Paper* American prosecutors gathered sufficient evidence to initiate the suit at least in part because in a related case they procured necessary evidence through cooperation with Japanese prosecutors who had raided the offices of two Japanese firms. But, then, as the case proceeded on appeal the Japanese government intervened as an amicus curiae on behalf of the same Japanese companies. An initial assessment of the Circuit Court's *Nippon Paper* decision published in the *National Law Journal* stressed the importance of the early intergovernmental cooperation at the evidence-

85. *See* Byowitz, *supra* note 6.

86. *See Aluminum Co. of America*, 148 F.2d at 416; Stark, *supra* note 6, at 11-12.

87. *See* Harvey M. Applebaum & Thomas O. Barnett, *Sherman Act Can Apply to Criminal Antitrust Actions Taken Entirely Outside the Country, if These Actions Have Foreseeable, Substantial Effect on U.S. Commerce*, NAT'L L.J., Apr. 21, 1997, at B4.

88. *Nippon Paper Indus. Co., Ltd.* 944 F.Supp. at 55.

89. United States v. Nippon Paper Industries Co., Ltd. (1st Cir., 1997), *reprinted in* 72 Antitrust & Trade Reg. Rep. (BNA) No. 1083, at 283 (Mar. 30, 1997).

gathering stage.[90] Warner, by contrast, emphasizes the Japanese government's official stance against the extraterritorial principle filed in its appellate amicus brief.[91] It did not question that the facts involved criminal conduct. The "concern" was "instead with the legal issue of the inappropriate reach and extent of United States legislation." The essence of the Japanese Government's position is that the conduct of Japanese legal persons in the Japanese market is for the Japanese authorities to regulate. Extraterritorial application of the Sherman Act is invalid under international law and violates Japanese jurisdiction.[92]

Such statements indicate, Warner concludes, that the Japanese government's support for cooperative antitrust enforcement is equivocal. Reading carefully the *Nippon Paper* record he finds that the Japanese government's brief distinguished the assistance Japanese prosecutors gave American investigators in the earlier suit from the facts in the 1997 appellate case.[93] According to the brief, the Japanese prosecutor's action was appropriate in the "related" litigation because it involved criminal conduct by Japanese citizens which purportedly occurred inside American territory, thus establishing a formal ground for U.S. antitrust jurisdiction.[94] In *Nippon Paper* itself, however, the admittedly criminal acts Japanese citizens committed took place solely within Japan, in which case no direct linkage to U.S. jurisdiction existed, except on the basis of the offensive effects doctrine. Thus Warner recognizes that the Japanese government formally admitted that "international cooperation pursuant to bilateral or multilateral arrangements for mutual cooperation is the appropriate way to handle such conflicts even where criminal action is involved."[95] Nevertheless, his close analysis suggests a scope for international cooperative antitrust endeavors that is quite narrow. Indeed, the potential for successful bilateral or multilateral arrangements between Japan and foreign states appeared to be so limited that continued resort to extraterritoriality by the U.S. or the EU seemed unavoidable.

Warner finds that other competition policy issues concerning the U.S. and Japan exhibited a similar tension. His incisive analysis of Section 301 demonstrates that its unilateral implementation by the U.S. Trade Representative (USTR) is broadly sanctioned by the WTO.[96] The public statements of President Bill Clinton and USTR officials repeatedly affirmed, moreover, that vigorous resort to such unilateral action was entirely a matter of U.S. discretion.[97] Thus, both the WTO's

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90. *See* Applebaum & Barnett, *supra* note 87, at B4.
91. *See* Warner, *supra* note 3, at 5-7.
92. *See id*, at 6.
93. *See id.*
94. *See id.*
95. *Id.*
96. *See* United States v. Nippon Paper Indus., Co., Ltd., 944 F.Supp. 55 (D. Mass. 1996), *rev'd*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).
97. *See* Warner, *supra* note 3, at 13-14.

multilateral dispute resolution process and American policy assertions supported taking an independent stand. In addition, during the 1990s the Justice Department significantly stepped up its cartel prosecutions of MNCs.[98] In the *Nippon Paper* case a domestic Japanese firm pursued a price fixing conspiracy in Japan while selling abroad through a trading company. Reaching this sort of private anticompetitive conduct required extraterritorial application of the effects doctrine. The Justice Department's increasing prosecution of MNCs, however, went after the international cartel practices of corporate divisions or individuals operating in the U.S. A leading case involved the well-known American firm, Archer-Daniels Midland (ADM). In 1996 the Justice Department won decisions for related price-fixing conspiracies against ADM and other corporate or individual defendants from Korea, Japan, Germany, Austria, and Switzerland.[99] For its role in conspiracies to fix the global price of lysine and citric acid, ADM paid $100 million in fines; Haaman & Reimer, a U.S. subsidiary of Bayer AG, paid $50 million.[100]

Bilateral and multilateral dispute resolution is preferable to uneven policies, Warner concludes. Although the U.S. vigorously asserted the freedom to employ unilateral antitrust and trade policy options, as a practical matter their use have been episodic. Thus, amidst conspicuous Japanese-American confrontations involving market access, the extraterritorial application of the effects doctrine was exceptional, despite the *Nippon Paper* decision. Instead, the U.S. Antitrust Division devoted most of its competition policy resources to improving bilateral cooperation among foreign antitrust regimes around the world or to the prosecution of global cartel practices of MNCs operating within American territory. [101] Similarly, despite the unilateral action Section 301 sanctioned, USTR usually relied upon a bilateral or multilateral settlement, like that resulting in the WTO's decision against the U.S. in the Fuji-Kodak case. After all, Japan, notwithstanding its long protectionist heritage, was endorsing a transnational dispute-resolution approach. Along the same line, Warner notes that both the U.S. and Japan had approved in principle the hard-core cartel proposal that the Council of the Organization for Economic Co-Operation and Development (OECD) was considering in 1998. Most importantly, perhaps, the U.S. joined Japan and the EU in support of new multilateral agreements under the WTO involving service sectors, including provisions which internationalized competition policy.[102] An analysis of Japan's brief in the *Nippon Paper* appeal suggested, however, that the grounds supporting such improved international

98. *See id.* at 15-17.

99. *See* Klein, *supra* note 6, at 10-11.

100. *See id.*

101. *See id.*; Stark, *supra* note 6.

102. *See* Geza Feketekuty, *Setting the Agenda for Services 2000: The Next Round of Negotiations on Trade in Services*, Program for the Study of International Organization(s) WTO Series No. 8 (Geneva, 1998) *available at* (visited Feb. 16, 1999) <http://www.miis.edu/ctcd/standard/publica.htm>.

cooperation in the antitrust field were narrow. Accordingly, he is less than confident that the Japanese-American legacy of confrontation would soon end.[103]

Still, Warner shares with Ambassador Charlene Barchevsky, and indeed Corwin Edwards, a faith in internationalizing antitrust institutions. The institutional assumptions underlying the policy goals Edwards sought to achieve through the ITO, though rejected in their time, were consistent with what Barchevsky called in her 1998 keynote address commemorating GATT's Fiftieth Anniversary, the "long-held theory among many countries that sound competition law enforcement is crucial to the health of national economies." And like Edwards' recognition that antitrust regimes had to address the structural incentives fostering the anticompetitive conduct of internationally-operating corporations, Barchevsky observed that "economic globalization has dramatically increased the importance of strong competition policies due to the risk of international cartels and the tremendous growth in transnational mergers."[104] The potential for achieving such policies through the WTO was certainly much improved compared to the ITO. Even so, Barchevsky observed, negotiating an international competition policy agreement in the WTO would be "difficult, given the great disparity between countries on antitrust rules—both in substance and in the vigilance of their enforcement—and the fact that half of the WTO members do not have competition laws of their own."[105] Not unlike Edwards, moreover, Barchevsky emphasized that it was "crucial . . . that we develop an international culture of competition and sound antitrust enforcement built on the base of shared experience, bilateral cooperation and technical assistance.[106] From that base we should focus on those particular practices and industries where the most egregious anticompetitive practices have been concentrated. If we can do that, we will have a solid foundation from which to build a more comprehensive regulatory framework for competition policy."[107]

IV.

The continuities Edwards and Barchevsky shared provided a basis for evaluating the outcomes Seryo and Warner recommended. All four commentators agreed that creating a multilateral framework to support global enforcement of competition policy required a preexisting network of bilateral or otherwise

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103. *See* Warner, *supra* note 3, at 18-21.

104. *Keynote Address: The Global Trading System, A GATT 50th Anniversary Forum*, BROOKINGS INSTITUTION, Mar. 4, 1998, at 6 [hereinafter *Keynote Address*]. Warner quotes approvingly this entire passage at the very end of his paper, *supra* note 3, at 22 n.59. As for Edwards, see *supra* note 32, at iv.

105. *Keynote Address*, *supra* note 104.

106. *See id.*; FREYER, *supra* note 33.

107. *Keynote Address*, *supra* note 104.

cooperative antitrust arrangements. After all, the failure of nations to reach bilateral agreement supporting the implementation of Edwards' international antitrust ideas helped to defeat the ITO.[108] The subsequent dominance of macroeconomic trade liberalism under GATT during the initial post-war decades further limited international acceptance of competition policies like those Edwards favored. By the early 1990s, however, the successful Japanese-American negotiation of SII was representative of increased bilateral cooperation among antitrust regimes around the world.[109] Such cooperative antitrust endeavors of course varied in scope and depth. Yet more than ever before the antitrust authorities of one state supported another state's officials to prosecute private anticompetitive conduct under that state's antitrust laws. According to one informed observer, "a culture and bureaucracy favoring effective antitrust enforcement in purely domestic contexts is increasingly present in various countries. Such a culture and bureaucracy are prerequisites to the possibilities of having the host jurisdiction challenge private restraints that deny market access to non-host country firms."[110]

None of the four commentators discussed the distinctive institutional character of an antitrust regime. But, as Barchevsky and Edwards indicated, the comparative strength or weakness of each regime's institutional culture was a measure of the potential for establishing a global competition policy. Throughout most of the time Edwards was professionally active, an internationally-shared antitrust culture hardly existed, as the United Kingdom's and Australia's "blocking" statutes revealed in the clash over extraterritorial antitrust during the 1970s. By the 1990s, however, the network of cooperative antitrust arrangements was growing. Taken as a whole, these cooperative measures had as their objectives the preservation of unrestricted market competition which fostered consumer welfare. Outside the U.S., especially in many European nations, the EU, and Japan, antitrust objectives also included defending small business from the exploitive conduct of bigger firms.[111] Maintaining a competitive local market and preventing private cartel practices were consistent with these objectives. In addition, more so than trade laws generally, antitrust enforcement was bureaucratically autonomous and limited by due process rules, legal damage systems, the claims of private litigants, and extensive judicial review. By comparison, political and diplomatic contingencies primarily determined how finance and trade ministries enforced international trade laws.[112]

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108. *See* FREYER, *supra* note 33, at 260-67.

109. *See supra* notes 6, 8-9, 13, and accompanying text.

110. Byowitz, *supra* note 6, at 9.

111. *See* Stark, *supra* note 6; Byowitz, *supra* note 6; Applebaum, *supra* note 6; Cocuzza & Montini, *supra* note 6; Janow, *supra* note 1, at 175-86; Howell, *supra* note 1, at 299-323; Graham & Richardson, *supra* note 2, at 3-46; GLOBAL COMPETITION POLICY, *supra* note 1, at 122-23, 192, 208, 236-37, 342, 453-60.

112. *See* Byowitz, *supra* note 6, at 9.

Several institutional factors have strengthened the emerging transnational antitrust culture. The basic purpose of most formal bilateral antitrust agreements is to facilitate the discovery and use of evidence required in civil and criminal prosecutions. The primary problem that authorities must overcome in such cases involves legitimate business concerns about revealing confidential data, particularly, according to Charles Stark of the U.S. Antitrust Division, the "risk of improper use or disclosure of confidential business information that could be given to a foreign authority."[113] A potentially satisfactory resolution of the problem was the International Antitrust Enforcement Act (IAEA) of 1994.[114] The law's sanction of "reciprocal cooperation" included confidentiality safeguards—especially a prohibition against sharing premerger notification—that received bipartisan congressional approval and the support of business groups.[115] Progress toward other nations entering into agreements under the law was slow. It nonetheless coincided with growing international acceptance of the multilateral, evidence-sharing and investigation framework in "hard-core" cartel prosecutions proposed by the OECD. Moreover, formally or informally antitrust regimes increasingly embraced the principle of "positive comity", which, Stark explained, "allows one [state's authority]... to ask the other to enforce its antitrust laws to deal with conduct that adversely affects both parties. This mechanism is likeliest to be useful for conduct that occurs in the requested party's territory and can most effectively be investigated and remedied by . . . that party."[116]

Japan's sanction of the growing international antitrust culture provided useful context for understanding the Japanese government's *Nippon Paper* brief. MITI officials endorsed the strengthened transnational cooperative antitrust framework that was emerging during the 1990s. The *1998 Report on the WTO Consistency of Trade Policies*, published annually by MITI and distributed by its Office of Trade Policy Review, stated that the "best way to prevent unilateral extraterritorial application of foreign competition laws . . . [in controversies which included market access issues] is to strictly enforce Japanese competition laws . . . [especially] the Japanese Anti-Monopoly Act."[117] While on its face the statement was consistent with the rigid stance taken in the *Nippon Paper* brief, the MITI Report actually took a more qualified overall position. "It is worth considering", the Report continued, "signing a bilateral agreement between the U.S. and Japan regarding a

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113. Stark, *supra* note 6, at 11-12.

114. *See id.*

115. *See id.*

116. *Id. See generally* Cocuzza & Montini, *supra* note 6; GLOBAL COMPETITION POLICY, *supra* note 1, at 547-80.

117. *1998 Report on the WTO Consistency of Trade Policies by Major Trading Partners* (Industrial Structure Council, Office of Trade Policy Review, Ministry of International Trade and Industry, Tokyo, 1998), at 258, *available at* (visited Feb. 16, 1999) <http://www.miti.go.jp/report-e/g3menu-e.html> [hereinafter *1998 Report*].

notification system and the exchange of information [like that established in the IAEA of 1994] if it is conditioned on U.S. restraint of unilateral extraterritorial application of its antitrust laws."[118] Similarly, the Report endorsed "a practice of notifying and consulting with the foreign government in consideration of international [positive] comity. In doing so, it would be best to use multilateral forums for notification, exchange of information and consultation as described in the 1995 OECD Council Recommendation [which facilitated the 'hard core' cartel proposal]."[119]

This juxtaposition of the *Nippon Paper* brief and the MITI Report suggested wider policy implications. Regarding the broader meaning of the case itself, the Report's endorsement of the increasingly cooperative character of international antitrust culture was consistent with the *National Law Journal*'s assessment that intergovernmental prosecutorial collaboration involved in the suit represented an important future direction of Japan's competition policy. Indeed, at about the same time the Justice Department won the *Nippon Paper* appeal, the director of the Antitrust Division remarked that Japan was one of the states that had joined with the U.S. to pursue international antitrust enforcement generally.[120] Japan's WTO victory in the Fuji-Kodak decision of 1997 also reinforced greater transnational antitrust convergence. USTR's decision to move from a unilateral Section 301 claim to the WTO's bilateral dispute resolution body was formally sanctioned by the multilateral agreements that were the basis of the WTO itself. In addition, the process both governments followed to argue for and against the private conducts of Fuji and Kodak, required adherence to formal rules and transparency standards like those Japan had committed itself to in SII.[121] Thus it was understandable that the MITI Report supported "conducting multilateral discussions at the OECD and other forums [including the WTO] to consider convergence of competition laws, and the development of multilateral and bilateral cooperation frameworks for investigation and enforcement of competition laws."[122]

Meanwhile, leading members of Japan's traditional power structure changed from opposing to supporting more vigorous antitrust enforcement.[123] During the 1990s LDP and MITI leaders generally embraced the influential big-business organization, Keidanren's deregulation reform proposals, including a new reliance upon the AML. Keidanren's endorsement of the JFTC and more vigorous AML enforcement reversed its preference for protectionist policies that had lasted throughout the post-war era. The Deregulation Promotion Plan Keidanren announced in 1994-95 reflected the interests of globally competitive, big business

118. *Id.* at 261. For *Nippon Paper* see *supra* notes 86-90.
119. *1998 Report*, *supra* note 117, at 260-61.
120. *See* Klein, *supra* note 6, at 10-11.
121. *See* Katz, *supra* note 5; Kobayashi, *supra* note 6, at 1-6; Seryo, *supra* note 3.
122. *1998 Report*, *supra* note 117, at 261.
123. The following four paragraphs summarize my findings in Freyer, *supra* note 3.

sectors and urban consumers concerned about high prices maintained through collusive dealing.[124] MITI's announcement that it was shifting industrial policy to a position more in line with the Keidanren Plan's basic proposals brought to an end decades of rivalry between that more powerful ministry and the JFTC.[125] Prime Minister Ryutaro Hashimoto's new, more favorable attitude toward the commission indicated that prominent LDP leaders shared the views of their counterparts in big business and MITI. This convergence of opinion evidenced a growing factional struggle within Japan's post-1993 ruling government and traditional tripartite power structure over disestablishing the protectionist regime. Similarly, the growing demand for antimonopoly law expertise among commercial and consumer lawyers, along with persistent foreign pressure following SII, suggested that expanding domestic and global market competition threatened the old order.

Within this context of struggle the JFTC pursued its new pattern of enforcement during the 1990s. Undoubtedly, as Seryo said, foreign pressure influenced the commission's shift toward increased criminal and civil prosecution of cartel practices.[126] Both the foreign criticism that the JFTC's enforcement was too weak and the U.S. Justice Department's support for its organizational strengthening clearly facilitated more effective enforcement. Moreover, it was noteworthy that by making cartels a policy objective the JFTC also reflected the concerns about the price-gap and related consumer problems big business interests, MITI, and certain LDP leaders articulated in their admittedly equivocal advocacy of deregulation.[127] Indeed, in their discourse linking deregulation and the JFTC, business, ministerial, and political officials suggested that reform would especially benefit consumers.[128] In the past, the JFTC was an isolated defender of consumer interests. The new cartel prosecutions, by contrast, represented a policy pattern that for the first time aligned some leaders within the tripartite power structure with the competition values of the AML and their enforcement by the JFTC.

These conflicts very much influenced ultimately successful efforts to strengthen the JFTC. Throughout the decades following the end of the Occupation the commission's perceived marginality within Japan's government and society impeded its implementation of the AML. The problem involved not only straightforward structural matters of limited staff and resources resulting from inter-agency competition within the budget process. Less conspicuous but not

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124. *See id.* at Section II. *See also Building a Dynamic and Creative Society*, *supra* note 29; *A Message from the Chairman*, *supra* note 29; Interview with Keidanren officials, *supra* note 30.

125. *See* Freyer, *supra* note 3, at Section III.

126. *See id.* at Section IV; Seryo, *supra* note 3; Katz, *supra* note 5.

127. *See* Freyer, *supra* note 3, at Sections II and IV.

128. *See id.* at Section II. *See also Building a Dynamic and Creative Society*, *supra* note 29; *A Message from the Chairman*, *supra* note 29; Interview with Keidanren officials, *supra* note 30.

unimportant were factors of bureaucratic culture including: personnel recruitment, the scope of informal relational contacts facilitated by such practices as *shukko*,[129] and, most importantly, the custom of allocating commission seats to senior members from MOF, MITI, and other major ministries.[130] The fact that, as MITI's minister Hashimoto made the JFTC's strengthening a consideration in settling the auto-trade talks, which ended in the compromise agreement of June, 1995, seeking approval at the prime minister level, suggested that among the LDP and MITI leadership the commission represented a new priority. The leadership's cooperation with U.S. Department of Justice and other international agents favoring the JFTC reinforced this policy change. To be sure, the LDP's and MITI's endorsement of Keidanren's proposal to repeal the AML's anti-big business holding company ban, while they supported a more vigorous commission, indicated that the support the commission received from its former rivals was not unconditional. Nevertheless, in Spring, 1996 the Diet passed into law the JFTC upgrade measure,[131] even as the attempt to end the holding company ban initially failed, not to be passed until the following year. This sequence of events suggested that the tripartite power structure's support of improved antitrust enforcement was politically meaningful.

This interdependency of interests also indirectly sanctioned private suits. The institutional restructuring the Diet enacted in 1996 not only significantly facilitated improved AML enforcement. It also encouraged a related SII goal—the bringing of private actions.[132] The Japan Federation of Bar Associations' consumer committee supported a new campaign to improve the law code's procedures governing private suits; also, path breaking litigation known as the Saitama case and other suits initiated by an Osaka consumer-advocate group suggested that better opportunities for bringing private actions might be forthcoming.[133] Moreover, by giving the JFTC the power to provide friend-of-the-court evidence in private suits, the Diet mitigated a principle in the administratively-oriented civil code which discouraged such litigation. This new role Japan's antitrust regime played in the nation's market relations facilitated adoption of the multilateral dispute resolution process Seryo and Warner recommend as the best alternative to the extraterritorial application of American competition policy.

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129. An Official budgetary practice instituted by the Japanese Diet to fund short-term inter-agency transfers, *shukko*, has a larger significance within Japan's bureaucratic culture in that it enlarges the relational contacts of individual bureaucrats, and therefore their ministry's or department's influence throughout the civil service.

130. *See* Freyer, *supra* note 3, at Section IV; Seryo, *supra* note 3; Katz, *supra* note 5.

131. *See* Freyer, *supra* note 3, at Section III.

132. *See id.* at Sections II and IV.

133. *See id.*

V.

As the 1990s drew to a close, it was unclear whether Japan's and America's growing participation in the international antitrust culture would overcome the global reach of anticompetitive practices. The ADM litigation, involving as it did MNCs and foreign individuals from six different nations, indicated the global scale of restrictive business behavior. Not since Edwards and the ITO, however, had institutional and market imperatives converged so forcefully to promote bilateral and multilateral policy frameworks which could shape more competitive business conduct inside foreign states. Especially in Japanese-American market access confrontations, the new support the JFTC and AML received within Japan's tripartite power structure fostered establishing international competition policy under the WTO. Culture and ideology made Japan's business-government collaboration so entrenched that reform-minded, Japanese opposition within the nation was essential in order to overcome anticompetitive behavior. Where reformer interests coincided with appropriate foreign support like that occurring in SII, moreover, the possibilities increased that more competitive markets would result. Thus Japan's most successful international firms—as represented by Keidanren's deregulation proposals—were leading advocates of a more effective antitrust regime. Notwithstanding the forceful language of the *Nippon Paper* brief, MITI joined the JFTC in also supporting the increased antitrust comity American and European antitrust authorities favored.[134] These developments undoubtedly influenced the WTO's antitrust study group. Ultimately, bilateral and multilateral dispute resolution in the field of antitrust was, as Seryo and Warner suggest, both complementary and essential.

134. *See supra* notes 99, 111, 117, 122, and accompanying text.