ROBERT Z. LAWRENCE

Editor's Summary

Although the World Trade Organization (WTO) has made considerable progress in eliminating governmental barriers to trade, it still has far to go in establishing global rules for competition. At present, it deals with unfair private practices through the rules on antidumping. That is why most countries today treat competition under two distinct sets of rules. One consists of antidumping regulations that apply only to foreign producers, the other of antitrust or competition policy rules that focus primarily on domestic competition. The issues arising from this state of affairs are the subject of this volume. The contributors ask: Do antitrust and antidumping both seek to prevent similar harms? Under what conditions might dumping be socially harmful, and what indicators could help determine whether these conditions will be met in practice? Have actual antidumping cases met these conditions? What contribution can economic analysis make in assessing current views on dumping? Are international agreements on competition policy desirable at the bilateral, regional, and multilateral levels? What explains the U.S. approach to such agreements?

Delving into the origins of antitrust and antidumping rules, Alan Sykes finds that the justification for both sets of laws at the outset was to protect the competitive process and the consumer from monopoly power. Over time, however, these justifications diverged. Antitrust law began putting emphasis on protecting small business and then on pursuing economic efficiency as its foremost goal, whereas antidumping law concentrated on protecting domestic producers.

In Sykes's opinion, the experience with antitrust and antidumping policies has been vastly different because the laws were in reality

designed to pursue fundamentally different ends. Whereas antitrust law was intended primarily to address the problems of concentrated economic power, antidumping law was designed to provide a politically popular form of contingent protection, with little connection to preventing monopoly.

The legislative history of antitrust, Sykes notes, shows that the proponents of the Sherman Act of 1890 were greatly concerned with anticompetitive practices and the ability of trusts to increase consumer prices. This concern remained the driving force in the Clayton Antitrust Act of 1914, which prohibited practices that tended to produce monopoly, such as price discrimination geared toward injuring competitors. By contrast, the Robinson-Patman Act focused on protecting small wholesalers and retailers. The Clayton Act amendments of 1950 showed a continuing concern with local control and the protection of small business, as well as with increasing economic concentration.

Judicial statements about the purpose of antitrust laws have changed as well. The predominant concern in early cases was the adverse effects of monopoly. With the passage of the Robinson-Patman Act, the courts included the protection of small business as a goal of antitrust. Today the courts impose constraints on anticompetitive behavior as a means of promoting economically efficient markets. Sykes considers Robert Bork and the "Chicago school" to have been the main proponents of this economic construction of the law, the main goal of which is to eliminate business practices that create deadweight loss in the economy. This change has come about primarily as an exercise in common law. That is to say, the courts have used legislative history and advances in economic theory to develop antitrust law.

Antidumping law has followed an altogether different course, states Sykes. Although the first antidumping law, passed in Canada in 1904, was surrounded by antipredation rhetoric, the real impetus was Canadian manufacturing's concern about low import prices. In the United States, the 1916 Antidumping Act was narrowly aimed at predatory pricing by foreign exporters but was quickly superseded by the 1921 Antidumping Act, which closely resembled Canada's antidumping law. Its supporters, Sykes notes, presented their antidumping rules as antimonopoly legislation to combat predatory pricing, but

they were well aware that most dumping is not predatory in design or outcome.

Although the General Agreement on Tariffs and Trade (GATT) has sought to limit the use of antidumping through Article VI and the Antidumping Code, signatories have at no point revisited the underlying rationale for antidumping law. With the lowering of tariffs under GATT, antidumping has increased around the world. In 1980 Congress transferred antidumping authority from the Department of the Treasury to the Department of Commerce to encourage more responsiveness to dumping complaints. Sykes finds the few comments from European and U.S. authorities on the justification for antidumping vague and unconvincing. The language of current dumping rules requiring authorities to impose antidumping duties in a wide range of cases beyond the few economically justifiable scenarios is clear evidence, he believes, of the true intent of antidumping law.

Sykes also offers a few observations about the economic commentary on antidumping, beginning with Jacob Viner's view that some antidumping measures may be justified. Since Viner's analysis, however, most economic commentary has been highly critical of antidumping. Nonetheless, antidumping policy is being used by a growing number of countries. This persistence, Sykes concedes, could reflect the fact that these rules have an economically useful function, but, he continues, their popularity more likely reflects the help they may provide to the profits of domestic firms.

Dumping

THE NEXT SIX papers in this volume deal with dumping. The first of these, by Robert Willig, provides the theoretical framework for the empirical discussions that follow. As a first step, Willig distinguishes forms of dumping that in theory could be socially harmful from those that might not have such an effect. He also suggests ways to identify these forms in practice.

Monopoly power is what makes dumping socially harmful, says Willig. Dumping that does not necessarily entail efforts to achieve monopoly can have quite different effects. Willig would place the following forms of dumping in this category: "market-expansion

dumping," which consists of exporting at a lower price than in the home market for the purpose of expanding export sales and which may be profitable if the demand conditions in the home and foreign markets differ; "cyclical dumping," or exporting at unusually low prices in periods of weak demand and excess production capacity; and "state-trading dumping," which refers to exporting at low prices by state-owned enterprises, particularly when hard currency is needed. These dumping practices, observes Willig, are perfectly consistent with robustly competitive conditions in the importing market and can all be socially beneficial, despite their adverse effects on domestic producers of competing goods. The important fact is that domestic consumers will benefit from the low prices, and if the importing market is perfectly competitive, the benefits to consumers will outweigh the losses of domestic producers. However, dumping of this kind is not always socially benign. If local producers earn profits or rents, dumping may (but need not) cause net national reductions in welfare by shifting these rents to foreigners.

Willig names two kinds of dumping that may involve efforts to achieve or exploit monopoly power: "strategic dumping" and "predatory dumping." Strategic dumping combines low export prices with a protected home market to give exporters an advantage in industries with static or dynamic economies of scale. With access to both home and foreign markets, foreign firms gain a cost advantage over domestic firms that are unable to compete abroad. This advantage, which is obviously contingent on the home market being sufficiently large, eventually gives the exporting firms market power. Strategic dumping, Willig points out, is likely to damage the importing country by limiting the export opportunities of domestic suppliers through home market protection and by reducing the ability of domestic firms to take full advantage of scale economies. If domestic firms and third-country exporters are unable to compete effectively, over time domestic consumers may be injured by the exercise of market power by importing firms.

On the global level, the negative effects of strategic dumping are likely to outweigh the benefits to the exporting country. Thus if antidumping policy deters strategic dumping (including home market protection), the global economy will benefit. Strategic dumping is only likely to take place, however, under four conditions: if the home market is protected, there are static or dynamic economies of scale,

the home market is sufficiently large, and exclusion from the home market puts domestic and other rival firms at a serious disadvantage. In the absence of any of these factors, strategic dumping is unlikely.

Predatory dumping, which Willig defines as exporting at low prices to drive rivals out of business and obtain monopoly power, could destroy home market competition, harm domestic producers by driving them out of business, and injure consumers through monopoly pricing. This strategy can only succeed in the presence of reentry barriers, which are required to make monopolization feasible.

In principle, preventing predation is a potentially important and beneficial role for antidumping policy. But predatory behavior is not the prime target of antidumping policies. As Willig notes, the use of antidumping measures is not contingent on market characteristics connected with predatory or strategic dumping, nor are injury tests limited to instances in which predation may prove successful. Moreover, antidumping investigations do not distinguish between behavior that is consistent and inconsistent with normal competition. From these observations, it is clear that the design of antidumping is imprecise and may sometimes protect domestic suppliers when this is unnecessary in order to protect competition. In such a case, antidumping policy itself reduces competition.

THE DISCUSSIONS NOW turn to the application of antidumping policies in various countries to determine whether socially harmful behavior was actually present when protection was granted. The consensus here appears to be that such behavior may not have been present in an overwhelming number of antidumping cases. Hyun Ja Shin demonstrates the point in the United States with the aid of four criteria, which, she argues, must be met if predatory dumping is to be a likely explanation: the domestic industry should be concentrated, so that the elimination of just a few firms would enable foreign firms to enjoy a monopoly; the number of foreign sellers should be small, so that they can exercise monopoly power in the future; import penetration should be high, to indicate that domestic firms are being driven out of business; and there should be barriers to entry, so that once domestic firms are driven out of business, foreign firms can raise prices. Cases that fail to meet any of these criteria probably do not involve predatory dumping.

Applying these criteria to dumping investigations in the United States during the 1980s, Shin finds that they were met in only 27 of 282 cases with nonnegative outcomes. For one thing, unconcentrated industries initiated more than 50 percent of all dumping cases; at most, only one-third were initiated by highly concentrated industries. Although more than three-quarters of the foreign industries targeted by antidumping actions were highly concentrated, in many cases several foreign countries exported the same product, and that reduced the likelihood of successful predation. Another significant factor was that import penetration in the period preceding a dumping investigation showed large increases of the kind expected with predatory behavior in only a few cases.

By this point, Shin was left with 39 possible cases of predation, which were reduced to 27 when she measured sunk costs to establish which industries had higher-than-average barriers to entry. To determine whether these 27 cases constituted predation would require either detailed price-marginal cost tests or searches for alternative behavior that would have resulted in higher profits than the alleged predatory behavior, but both exercises are beyond the scope of her discussion.

On the basis of the available data, Shin concludes that few dumping cases in the United States during the 1980s actually investigated anticompetitive acts by foreign firms. She therefore recommends that U.S. antidumping laws be revised to introduce stricter criteria for determining predation. In addition, the injury standard for antidumping cases should be brought closer to the antitrust standard, which takes into account the behavior's effect on the competitive structure of the industry as a whole, rather than the material injury it causes to domestic firms.

IN CANADA, says Mark Dutz, antidumping law is tilted toward finding evidence of dumping and providing remedies that are generous to the complainants. The law defines the "margin of dumping" as the difference between normal value and the export price. But foreign sales below costs must be excluded from the calculation. This requirement inflates the dumping margin and thereby leads to higher estimates of normal values. Estimates of foreign costs also tend to be overstated, particularly in capital-intensive industries, because a minimum profit

margin must be used in calculating constructed values. Another problem is that investigations of material injury tend to adopt narrow definitions of "like goods," which create a bias toward finding injury. In addition, the full estimated dumping margin is applied as a remedy, rather than the margin required simply to prevent injury.

By contrast, Dutz points out, competition law aims to promote efficiency and adaptability in the Canadian economy through competition. The law clearly recognizes the role of foreign firms in providing competition where it may otherwise be lacking at home. Both price discrimination and predatory pricing laws require an "effect-on-competition" test to show "monopolizing design" or "a visible lessening of competition." The frequency of sales and the length of time goods are sold at questionable prices are also considered, and this practice ensures that alleged predation or price discrimination is not just a short-term reaction to changes in the economic environment.

In further contrast to antidumping law, predatory pricing standards do not insist that any price below cost is unreasonable. In general, prices that cover variable costs but not full costs are not considered "unreasonably low." In practically all cases, therefore, the enforced pricing standard is lower than the full current production and financial costs used in the antidumping assessment of normal values. Whereas Canadian competition law subjects pricing practices to an effect-on-competition test, antidumping proceedings need not consider the relative efficiency of the domestic industry, only injury to domestic firms.

Of the 155 investigations initiated in Canada between 1980 and 1991, roughly 3 out of 5 resulted in effective protection, either through a price undertaking by foreign exporters or by findings of positive dumping and material injury by government authorities. Cyclical dumping appears important here, since changes in the macroeconomic environment are strongly correlated with the demand for antidumping actions. However, contends Dutz, it is highly implausible that challenged exporters could have been acting with predatory intent. First, no exporting country has a sustainable dominant share of the Canadian market. And second, there are numerous international suppliers of most products subject to antidumping measures.

Evidence from tribunal review procedures suggests that antidumping actions have given protected industries limited price and profit

benefits in the short run. Even so, they have opened competition in domestic industry to some negative repercussions. For one thing, antidumping procedures may provide domestic producers with a forum for collusion, while longer-term efficiency could be sacrificed if investments to reallocate resources are postponed. For another, domestic complainants and foreign importers spend resources lobbying and litigating antidumping cases. Dutz also points out that since antidumping measures in Canada appear concentrated on primary inputs, higher prices will have a wider ripple effect throughout the economy. The inability of downstream users to have access to the lowest-cost international inputs magnifies the impact of antidumping measures on the economy.

ANTIDUMPING RULES in the European Community, their enforcement, and the degree to which they might actually have countered predatory behavior are examined by Jacques Bourgeois and Patrick Messerlin. As they point out, the Community's decisionmaking rules make it easier to take antidumping action than to refrain from doing so. In particular, only a simple majority in the European Council is required for a positive antidumping action rather than the usual qualified majority, and the Council can override a decision to terminate a proceeding with only a qualified majority rather than the unanimous decision normally required to overturn the European Commission in other matters. Furthermore, deadlines in antidumping investigations are treated differently from deadlines in other EC proceedings.

At the same time, EC industry has no legally enforceable right to antidumping protection if such protection is contrary to the Community interest. The clause spelling this out, note Bourgeois and Messerlin, was clearly designed to take the interests of consumers and downstream producers into account in antidumping proceedings. Currently, however, the rule interprets the Community's interest as residing in eliminating the trade-distorting effects of harmful dumping and thus has little impact. At the same time, the European Commission is becoming more pro-active in investigating the impact of antidumping measures on importers, users, and consumers.

Next, Bourgeois and Messerlin discuss the reasons behind EC antidumping cases and whether they coincide with any of the categories identified by Willig. They find no correlation between the initia-

tion of cases and the business cycle and thus reject cyclical dumping as an important rationale. They then assess predatory behavior as a motive on the basis of the following four criteria: the ability of foreign firms to expand to meet demand, actual findings of dumping and injury, the ability of foreign firms to collude and engage in joint predation, and the number of EC firms and their market shares. Only 12 of 461 cases appeared to meet all four, but this is uncertain because information was limited in several cases and none of the 12 involved sophisticated products with high entry barriers.

The authors conclude that antidumping enforcement in the Community over the past eighteen years has not dealt with predatory behavior. They caution, however, that the results of their analysis must be considered conservative since they considered only the ability to acquire a large market share and did not evaluate the capacity to keep and exercise market power once it is obtained.

LOOKING AT THE electronics industry, Patrick Messerlin and Yoshiyuki Noguchi ask whether antidumping cases in two important products, color television sets (CTVs) and compact disk players (CDPs), reflect a reaction to strategic or predatory dumping by exporters. To assess the plausibility of predatory pricing, they check for preconditions for such behavior, particularly protection in the exporter's home market, substantial size of the home market, and the importance of static or dynamic economies of scale in the supply of the product.

As an example of CTV proceedings explicitly concerned with predatory pricing, the authors cite *Zenith* v. *Matsushita,* an antitrust case of the 1970s. Zenith had alleged that Japanese producers were engaged in domestic price-fixing to support predatory dumping in the U.S. market, but the U.S. Supreme Court ruled against the claimants. As Messerlin and Noguchi point out, Japanese CTVs had only a low share of the U.S. market at the time, with the result that any predatory scheme would have been unlikely.

Strategic dumping was also implausible, the authors add, in view of the declining tariffs on CTVs between 1965 and 1974 and the lack of other private barriers, which meant that Japan's home market was not closed. In any case, during the relevant time frame, the Japanese CTV market was only about 5 percent of the size of the U.S. market, so that Japanese producers could not have benefited significantly from a

protected home market. Another significant factor mentioned by Messerlin and Noguchi is that the U.S. and Japanese CTV industries were distinctly different. Whereas Japanese producers specialized in making small sets at the low end of the market with labor-intensive technologies, U.S. producers were more technologically advanced and concentrated on the more profitable high end. The authors reject the view that Japanese firms derived decisive cost advantages from economies of scale in assembly plant size.

After 1970 Japan's CTV market grew in relation to the U.S. market, and Japanese CTV producers were subject to numerous U.S. trade measures. Yet, the authors contend, the growth of a potentially closed Japanese market did not disadvantage U.S. producers because Japanese producers were still excluded from EC markets, and CTV markets were expanding worldwide. What did help the Japanese become dominant in the CTV market, Messerlin and Noguchi argue, was their research and development, which produced new products and new technology, but this was after the initiation of U.S. trade measures.

In their search for predatory or strategic dumping in the market for compact disc players, Messerlin and Noguchi examine EC antidumping actions against Korean and Japanese producers in the period 1984–89, before trade measures were introduced. The Korean market was clearly closed during these years, but the Japanese market was not subject to any tariff or import barriers.

Assuming that world CDP markets were equally open or closed to both Japanese and EC producers, Messerlin and Noguchi argue that the relative size of the Japanese and EC markets could not have been a disadvantage to EC producers, particularly because the largest European firm, Philips, owned a Japanese subsidiary that gave it a direct presence in the Japanese market. And although the Korean market was closed to EC producers, it was too small in comparison with world CDP markets to provide Korean producers a significant advantage.

As Messerlin and Noguchi point out, R&D, production plants, and key parts are possible sources of scale economies in CDP production. The basic CD technology was developed as an open standard by Philips, the major EC producer, in collaboration with Sony. Hence the technology could not constitute a high entry barrier. Nor do the authors find any advantage in Japan's production capacity (since it varied greatly in the second half of the 1980s), or in scale economy in

key parts. In their view, different business strategies and consumer behavior have caused the Japanese and EC markets to evolve at a very different pace. As in the case of CTVs, they see no compelling evidence to indicate that the preconditions for either predatory or strategic dumping were present during the period in which dumping was found.

IN THE mid-1980s, dumping complaints against Japanese firms by U.S. semiconductor firms led not to the imposition of antidumping duties, but to a controversial agreement that set lower bounds on Japanese export prices. Douglas Irwin uses the semiconductor case to investigate the general relationship between antidumping and competition policy, particularly in high-technology industries. The primary lesson of this experience, says Irwin, is that even the threat of antidumping action can seriously reduce foreign competition and induce cooperative producer behavior.

The trade dispute in question was centered on memory chips, which are essentially standardized products with distinct and relatively short product cycles. The industry is characterized by high fixed costs, very low marginal costs, and dynamic economies of scale in the form of bounded learning by doing, all of which combine to promote robust competition among producers. The industry's cost structure and economies of scale provide incentives for both business cycle and product cycle pricing below (current) average cost.

Unlike the U.S. semiconductor industry, which consists mainly of independent producers of modest size, the industry in Japan is made up of large, vertically integrated conglomerates. In the 1970s Japanese producers benefited from a protected and rapidly growing home market and programs of the Ministry of International Trade and Industry (MITI). By 1985 U.S. and Japanese memory chip producers each held about 45 percent of the world market, after which Japan took the lead.

Irwin notes that demand for memory chips is cyclical, and demand fluctuations are highly correlated with dumping complaints. An industry recession in 1985 pushed many U.S. manufacturers out of the memory chip market. Though imports were not the direct cause of the recession, the U.S. International Trade Commission (ITC) determined that increasing import penetration had contributed to the domestic industry's problems and thus warranted an injury finding. Once the

administrative process was under way, Irwin argues, all sides were motivated to seek a negotiated settlement. To determine whether antidumping measures were necessary to preserve competition against unfair trade practices, Irwin looks for evidence of strategic, market-expansion, and cyclical dumping.

Irwin begins by exploring the interaction of scale economies and home market protection for signs of strategic dumping. Despite the formal liberalization of the Japanese market in 1975, he notes, U.S. producers had difficulty penetrating it. After seeing their share hover around 10 percent for a decade, they blamed unfair trade practices, which they said violated U.S.-Japanese trade agreements. As Irwin points out, however, the low trade shares could have been due to other factors, and there is no direct evidence that Japanese firms were able to use home market advantages to charge lower prices in foreign markets.

Irwin also sees no evidence of market-expansion dumping. Firms in industries with scale economies from learning by doing may engage in pricing below cost early in a product cycle to expand output and reduce future costs. Such market-expansion dumping can be expected shortly after the introduction of a new product. However, he is not persuaded that this type of dumping is worrisome from an antitrust standpoint. Firms price below cost when their market power is at its peak. As long as such forward pricing does not deter entry by competitors (as is consistent with the evidence), it does not constitute anticompetitive behavior. A fall in microcomputer output in 1985 provided a demand shock that was the proximate cause of dumping complaints. Irwin sees little evidence of collusion among Japanese firms to make strategic use of the circumstances to engage in predatory or market expansion dumping.

In the wake of U.S. antidumping complaints, the United States and Japan entered into a semiconductor trade arrangement, signed in 1986, under which Japan agreed to end dumping in the United States and to provide data for monitoring U.S. and third-market export prices. The Department of Commerce used this information to determine company-specific price floors, which it provided to the Japanese firms themselves. To halt dumping, MITI needed to cut semiconductor production, in effect, to enforce a government-led cartel. Irwin contends that U.S. tariff retaliation for noncompliance with the agree-

ment in 1987 encouraged Japanese firms to follow MITI's directives. EC objections caused Japan to desist from monitoring third-country sales. Japanese producers, notes Irwin, benefited from the implicit voluntary export restraint, with production cutbacks substituting for cooperative industry behavior to raise prices and profits. Irwin argues that Japanese producers may have begun cooperating in a de facto market-sharing cartel in the U.S. market. If such coordination existed, however, it could not have arisen without the government's trade actions. Because most U.S. producers had exited the memory chip market by the late 1980s, Japanese producers may have enjoyed substantial market power as demand accelerated.

The agreement brought U.S. producers limited rewards. Only two U.S. firms continued to produce memory chips, and no firms reentered the market. Furthermore, U.S. semiconductor users faced higher prices and even complained that Japanese firms were denying them adequate supplies of semiconductors. In 1991 the Department of Commerce stopped collecting cost or price data and stopped issuing foreign market values for memory chips.

In Irwin's view, the 1985 semiconductor dumping case is a textbook example of cyclical dumping that clearly illustrates the tension between antidumping and competition policy. U.S. dumping complaints failed to preserve competition by keeping U.S. producers in the market, while reducing competition among Japanese producers and even facilitating Japanese collusion. Although memory chips were thought to be a strategic driver for the semiconductor industry, U.S. industry has flourished in the 1990s by focusing on a more profitable product: microprocessors.

Sunset Reviews

BEFORE THE END of 1998, the U.S. Department of Commerce and International Trade Commission will begin reviewing more than 400 antidumping and countervailing duty orders that have been in effect for more than five years. The Uruguay Round Agreement requires such Sunset Reviews of all contingent protection actions every five years to determine whether these measures are still necessary and justified. Sunset Reviews therefore offer an opportunity to alleviate

the administrative and consumer burdens of antidumping measures that may no longer be warranted. As Richard Boltuck and Seth Kaplan point out, the reviews also offer the ITC an ideal opportunity to use rigorous economic analysis in their decisions.

Despite the skepticism of some economists, the authors believe that economic methods would bring transparency and analytical rigor to the process and would limit the potential abuse of discretion in favor of politically powerful interests. Nonetheless, economic methods have not been used to facilitate and inform the application of the antidumping injury test.

The Statement of Administrative Action that accompanies the legislation establishing the Sunset Review requires the ITC to construct a counterfactual scenario to determine whether the removal of the antidumping or countervailing duty would cause material injury to the domestic industry. This test assesses the vulnerability of an industry, which, the authors contend, presents a potential trap in the implementation of the law. However, answering injury and vulnerability questions in the Sunset Review does not lend itself to the "trends analysis" often used to determine injury in dumping cases. Consequently, the ITC will need to develop new methods of analysis.

Boltuck and Kaplan review several analytic approaches that may be appropriate for evaluating whether the expiration of an antidumping or countervailing duty order would materially harm U.S. industry. The first critical step, they emphasize, is to decide how to interpret ambiguities in the legislation concerning the basis for continuing an antidumping or countervailing duty. In their view, the ITC must find a probable causal relationship between the termination of the measure and certain consequences that make the domestic industry materially worse off. Thus the baseline for measuring injury is the state of the industry at the time of the review. The authors interpret "continuation or recurrence of material injury" to mean following the revocation of an order in the sense of picking up the existence of material injury where it left off when interrupted by the order.

Next, the ITC must consider whether the market conditions that existed before the antidumping duty are likely to recur if the order is revoked. To address this question, the ITC must first determine whether any improvement in the condition of the industry is related to the existence of the order, and, second, if there has been an im-

provement, whether removal of the order would harm the industry. Boltuck and Kaplan identify several factors other than the antidumping measure that could account for changes in the condition of the industry, including technological change, entry or exit of domestic firms, substitute products, the position in the business cycle, changes in product mix, and changes in product demand.

Unlike present injury investigations, in which the ITC is obligated to consider the dumping margin, the Sunset Review investigation permits it to consider the magnitude of the margin that the Department of Commerce finds "likely to prevail if the order is revoked." The authors recommend that the ITC consider obtaining direct evidence, possibly from third countries without antidumping orders in effect, to augment the speculative margin projected by the Department of Commerce.

Boltuck and Kaplan maintain that, because of the inherent counterfactual nature of the required analysis, methodologies based on comparative static modeling would be a boon to the investigation in that they would provide estimates of the import price if the order was revoked, the decrease in demand for U.S. like products from the removal of protection, and the supply response of U.S. producers to a decrease in demand. The approach has some drawbacks, however: it is difficult to estimate behavioral elasticities, and a linear approximation error or specification selection error may occur if exact functional forms are used in place of linear approximations.

This kind of review, the authors emphasize, requires a degree of economic expertise. Unless the ITC brings on more staff with economic qualifications, it will have great difficulty performing reviews to a standard acceptable to reviewing courts and panels of the North American Free Trade Agreement and the WTO. Boltuck and Kaplan urge the ITC to take action to rectify this deficiency.

International Competition Policy

THIS SECTION opens with Merit Janow's review of U.S. experience with bilateral trade policies. For most of the postwar period, says Janow, the United States has pursued trade liberalization through multilateral negotiations, relying on bilateral initiatives only to ad-

dress weaknesses or obtain remedies for problems not covered by multilateral rules. Janow distinguishes bilateral approaches that are cooperative from those that are confrontational in character. Cooperative or consultative bilateralism seeks to foster consultation, regularize contacts between officials, and provide forums for discussing trade issues. Examples are bilateral treaties that deal with subjects such as investment rules, taxation, and customs. By contrast, "bilateralism with leverage," is typified by section 301 of the U.S. trade law, which can lead to sanctions.

Janow credits section 301 with placing constructive pressure on the GATT system. First, it put forth a structured time line that ensured trade disputes would be addressed in a more timely fashion. Second, 301 helped shift the GATT procedures for settling disputes from a largely consultative function toward a more adjudicatory role. Third, the desire to reduce the threat of unilateral U.S. action through multilateral rules encouraged more countries to join the GATT system. And fourth, U.S. bilateralism helped introduce GATT disciplines into new areas, such as services, investment, and intellectual property. Domestically, however, the expansion of 301 and similar instruments narrowed the power of the executive branch over U.S. trade relations.

Section 301 was expanded to provide a trade remedy for foreign government actions that encourage or tolerate anticompetitive acts in foreign markets. This played a role in U.S.-Japan trade negotiations involving competition issues, particularly those connected with photographic film. Negotiations between the two countries have achieved some notable results: they have enhanced the visibility of the Japan Fair Trade Commission, achieved some modifications to Japan's Anti-Monopoly Act, and perhaps have increased the importance of competition laws in Japan. At the same time, bilateral accords have failed to establish a durable or predictable mechanism for addressing disputes over market access, and they have not produced a consensus on the nature of the market access problem in Japan or on ways to address the problem.

In its antitrust policies, the United States departs from the multilateral approach of its trade dealings, opting instead for unilateral and bilateral solutions to issues in this sphere. As Janow points out, foreign anticompetitive behavior that affects imports into the United States is subject to an "intended effects" test to determine whether the

behavior infringes on U.S. competition laws. Similar tests are applied by other industrialized countries. The jurisdiction of U.S. law with respect to foreign conduct that harms U.S. exports ("market access" cases) is a less settled question. Such cases are rare because of several practical barriers to applying U.S. competition laws to foreign practices. In particular, foreign legislatures have implemented laws that obstruct extraterritorial application of U.S. antitrust laws or have given their courts discretionary power over whether or not to enforce foreign antitrust judgments. In addition, the difficulties in obtaining evidence, the absence of assets in the United States to which a remedy may be applied, and legal defenses that can immunize foreign defendants from U.S. prosecution all pose challenges to the unilateral application of U.S. competition law.

Improved bilateral cooperation among competition authorities could make it easier for them to obtain evidence outside their jurisdiction and to pool resources on concurrent investigations. It would also enable them to have some influence on the actions of other authorities. In practice such agreements have led to a substantial increase in regular communication between U.S. and foreign competition authorities, which in turn has generated meaningful assistance in actual cases. Nonetheless, bilateral cooperation has not provided much of a framework for addressing conflicts when comity fails or for harmonizing laws and policies across jurisdictions.

Janow also evaluates the relative strengths and weaknesses of unilateral, bilateral, and multilateral approaches to cooperation. In theory, they could all promote the establishment of competition policy norms and effective domestic institutions. Bilateral agreements could provide technical assistance to countries with few competition laws and could serve as building blocks toward greater cooperation. International organizations and regional agreements could also foster the development of competition policy regimes and facilitate consultation on competition policy matters. Indeed, the Organization for Economic Cooperation and Development has already proved to be an important forum for expanding cooperation among nations with established competition policy regimes. Interestingly, Janow does not see the WTO playing an important role in this regard, mainly because it has not traditionally been used to develop national institutional capabilities nor has it focused on private practices. She therefore cautions against

expecting the WTO to evolve into a forum for the negotiation of comprehensive rules and the binding settlement of disputes, particularly in view of the present diversity of national competition laws.

Bilateral agreements on competition policy could also prove useful for dealing with domestic practices that have anticompetitive effects abroad, since these are less likely to involve market access constraints or trade disputes. However, cases with alleged market foreclosure effects are more likely to involve trade disputes and therefore would require greater consensus on competition policy issues before they could be integrated into trade policy mechanisms. As Janow also points out, trade disputes involving issues such as regulatory bias, national industrial policies, state-owned enterprises, and government-authorized monopolies cannot be resolved through traditional antitrust remedies, and only trade negotiations would provide incentives for their removal.

Janow expects competition law and its enforcement to remain domestic in character. In the case of the United States, she sees bilateral agreements playing a greater role, as a complement to unilateral action. As for multilateral action, Janow suggests that developing national laws and institutions are an essential first step toward expanding competition policy agreements.

SEVERAL PREFERENTIAL trading agreements have already incorporated some elements of competition policy, Bernard Hoekman points out. From his investigation of the steps taken thus far, he concludes that international competition policy agreements are indeed feasible and that they can take a wide variety of forms.

Hoekman starts with the most important agreement to date: that between the states of the European Community. The Community is unique in the scope and reach of its regulatory policies, which have established common disciplines on state aids, monopolies, government procurement, and antitrust. All of these disciplines supersede national law and are enforced by supranational bodies, as well as national courts. At the same time, no effort has been made to harmonize national antitrust regimes, which differ considerably from one state to another. The EC treaty also explicitly states that instruments of contingent protection such as antidumping measures do not have a place in a common market.

Another agreement the European Community has signed is with the countries of the European Free Trade Association to form the European Economic Area (EEA). This agreement has abolished antidumping rules and adopted common competition policy rules for activities affecting intra-area trade. In addition, the Community has entered into agreements with the Central and Eastern European (CEE) countries that pledged to adopt many EC rules on competition policy and national competition legislation consistent with EC rules. Unlike the EEA agreements, however, the CEE initiatives contain no provisions for eliminating antidumping. In the view of the Community, instruments of contingent protection must remain applicable to trade flows until the CEE countries have completed the transition to a market economy. The European Community has insisted that all single-market directives be applied before contingent protection is removed. For similar reasons, contingent protection is not eliminated in the less far-reaching EC agreements with Mediterranean countries, although these also contain some competition policy provisions.

As Hoekman also points out, competition policy was easily added to the Australia–New Zealand Free Trade Agreement (ANZCERTA) of 1983 because in 1986 New Zealand adopted competition legislation similar to that of Australia. In 1988 the agreement was amended to eliminate antidumping measures. Thus elimination of antidumping was (implicitly) linked to the transition path for the realization of free trade. In contrast to the EC agreement, ANZCERTA makes antitrust enforcement strictly a national responsibility, though courts and authorities are empowered to sit and enforce rulings in the other country. In addition, ANZCERTA goes beyond simply adopting common antitrust legislation in that it unifies the labor markets of the two countries and liberalizes trade in services.

Internal trade among MERCOSUR countries is still subject to antidumping rules, notes Hoekman. However, MERCOSUR members have begun taking steps to harmonize national competition laws, after which they will consider whether to eliminate antidumping. The MERCOSUR approach to competition rules resembles that of ANZCERTA, in that the reach of common competition policy is contingent on a trade effects test and enforcement is in the hands of national authorities.

The Asia Pacific Economic Cooperation initiative is exploring competition policy as an issue area for possible collective action. Most of this work has focused on information gathering and technical assistance, with little effort to link antidumping or other forms of contingent protection to competition policy. Hoekman conjectures that the end result may be the development of nonbinding principles on competition policy and law in the final agreement. The working group established by the Free Trade Area of the Americas has followed a similar process.

Hoekman draws four major conclusions from his review of these various initiatives. First, national diversity does not preclude international agreement. The regional experience offers examples of agreements between high-income countries (the members of the European Community and the parties to ANZCERTA), between developed and developing or transition economies (the EC-CEE and Mediterranean countries, Canada and Chile), and the possibility of agreement between developing countries (the members of MERCOSUR). Although differences need not prevent an agreement, Hoekman adds, this does not necessarily mean that an agreement is feasible. There are several examples of trade agreements between states with similar competition policies that have not included these issues.

Second, supranational enforcement is not required. The European Community is the only trade area that relies on supranational enforcement of competition policies. Hoekman argues that this may reflect differences in national antitrust regimes before the formation of the Community. Supranational enforcement allowed it to avoid a process of national harmonization. But other regional agreements suggest that international competition policy could be enforced by national authorities.

Third, agreement on antitrust issues does not necessarily require more general competition policy agreements. And fourth, it is possible to substitute competition policy for antidumping rules. However, agreement on antitrust disciplines is neither necessary nor sufficient for the abolition of antidumping.

IN THE NEXT DISCUSSION, David Richardson provides further insight into competition policies and their international dimensions. He also offers a set of proposals to promote international cooperation on

competition policy issues. In general, Richardson observes, competition policies aim at improving both efficiency and fairness. Their underlying assumption is that it is essential to discipline the market power of firms through competition because both the price-setting and attribute-selection power of firms can lead to socially inefficient outcomes. Markets are made more contestable (hence more efficient) if potential entrants have low setup and exit costs and can enter and exit freely. In highly contestable markets, prices and attributes come close to the social ideal, even when there are only a few firms in the market.

Richardson emphasizes the close relationship between trade and competition policies. Liberalization of global trade and investment promotes market contestability. It increases the number of market participants and makes potential foreign entry more likely. It lowers setup costs (foreign firms no longer face the additional costs that are not imposed on local firms). And it lowers exit costs, in that exporters can withdraw from a market without having to consider the political implications of such action (for labor, taxes), as is the case when a local enterprise is shut down. The globalization of markets can also affect natural monopoly. An expanded international market could be large enough to support multiple firms, or, in the case of a global natural monopoly, the corresponding competition policy regime would necessarily be global. Furthermore, by reducing the market power of large firms, cross-country trade and investment penetration of national markets reduce the potential for above-normal profits and thus reduce the temptation to engage in strategic trade policies.

Competition policy, says Richardson, is basically concerned with industry behavior. Although some forms of interaction between firms consist of collusion, which is anticompetitive, interfirm cooperation can also have at least four benefits: relief, research dissemination, quality control, and information. With barriers to foreign competition and investment reduced, efficient cooperation is encouraged and collusive competition discouraged. In addition, governments may allow domestic firms to collude (or may view mergers more favorably) if others will bear more cost than domestic constituents. Market opening and multilateral institutions can remove incentives or the ability to engage in beggar-thy-neighbor practices and can reduce conflict in international economic relations.

Competition policy—especially as it relates to the exit and downsizing of firms, bankruptcy and public bailout, intellectual property and takeovers, and corporate control—is also concerned with firm and industry behavior in the long run, notably with extinction, succession, innovation, and change of ownership. Each of these competition policy concerns involves central aspects of existing WTO conventions, particularly safeguards, trade-related intellectual property agreements, and trade-related investment measures.

Richardson has a strategy for achieving international cooperation on competition policy. It would consist of three broad phases, each of which might initially involve only a subset of all WTO members but eventually would consist of multilateral measures. Each phase would depend on the progress and success of the previous one.

In the first phase—procedural cooperation—competition policy authorities would agree to investigate anticompetitive behavior in their jurisdiction that spills across borders. This cooperation would culminate in a commitment to informational mediation but would not involve dispute settlement procedures. Richardson recommends that this phase be implemented in three steps. First nations would agree to "positive comity." That is, nations with a grievance pertaining to another nation's competition policy would be allowed to appeal to the authorities of that nation to investigate and take any appropriate action under its own competition laws. Second, WTO consultation procedures would be extended to the domain of competition policy. This is a natural extension of positive comity involving a greater presumption of obligation. Third, informational mediation would involve a third party in the dispute. Still, the process would be voluntary and noncoercive, relying on diplomatic moral suasion if mediation fails.

The second phase would be to negotiate a multilateral trade-related antitrust measures (TRAMs) agreement that would set minimum standards for competition policy. These standards would apply to four kinds of behavior: cartelization; other horizontal restraints, especially price-fixing; mergers and acquisitions; and national treatment for foreign direct investors and services. For reasons of infeasibility and the lack of a best-practice consensus, the standards would not cover predation/antidumping and voluntary import expansions, vertical integration, intellectual property issues, and state aids to in-

dustry. Under the TRAMs agreement, if mediation and consultation failed to resolve a dispute about a nation's enforcement of minimum TRAM standards, a WTO panel would review the case. The panel's report could serve as grounds for unilateral fines, withdrawal of concessions, and other competition policy actions by a plaintiff nation, or for a suit brought by the WTO in the defendant nation's courts. The panel report might also allow the defendant's domestic competition authorities the cover to take politically unpopular action.

In the final phase, the TRAM agreement would be augmented with a safeguard mechanism. Current antidumping and subsidization schemes often carry high efficiency costs and are sometimes capriciously administered. The rationalization and downsizing measures of Japanese and European competition policy might allow for more efficient and orderly adjustment in declining industries if they were implemented on a national basis.

ONE OF THE FIRST nations to bring new issues into the multilateral trade arena is usually the United States. Yet it has been somewhat less forthcoming in its support for competition policy negotiations. I. M. Destler explores why. He searches for an answer in the politics of early U.S. antitrust and antidumping policy.

The first critical event, says Destler, was the disappearance of antitrust as a prominent political issue. This allowed the policy focus in this area to shift from preventing business concentration and supporting small business to advancing economic efficiency and promoting consumer welfare. Because of its low political salience, this policy evolution has taken place mainly in the executive branch, under the guidance of the courts and without congressional involvement. Unlike their counterparts in the sphere of trade policy, therefore, antitrust practitioners have been substantially influenced by prevailing economic doctrine.

The history of the antidumping laws reflects much greater political influence, says Destler. These laws have their origins in the protectionist era preceding the Reciprocal Trade Agreements Act of 1934. Though the post–World War II trend has been toward freer trade, the claim that antidumping counters "unfair" trading practices has immunized it from attack. Few political actors, public or private, have been willing to face the charge of "weakening unfair trade laws."

According to Destler, the logic of multilateral trade negotiations is that by trading reciprocal concessions, policymakers can engage export interests to counterbalance the protectionist interests of some domestic producers. Antidumping policy has been included in each of the last three major multilateral trade negotiations. Even though antidumping rules are inherently protectionist, since they treat foreign and domestic firms differently, neither U.S. negotiators nor Congress sought to use the policy discussions on antidumping to legitimize reductions in trade protection. In fact, their efforts have been in the opposite direction. Rather than treat antidumping law as a trade barrier to be bargained down like other import barriers, U.S. policymakers have used it as a political offset, making antidumping relief more accessible as other protection has receded.

The push for expanded access to antidumping laws, Destler argues, has come from Congress, which since 1974 has regularly used trade negotiations as an opportunity to revise or rewrite antidumping laws. New additions to antidumping law laid down timetables for action on antidumping petitions, imposed tighter penalties, and transferred antidumping administration from the Department of the Treasury to the Department of Commerce. The result has been a dramatic increase in the use of antidumping laws. One could view the expansion of antidumping laws as a congressional effort to promote balance or as an escape valve for protectionist pressures.

As Destler points out, U.S. antidumping policy, which has been driven by political interests, differs markedly from antitrust policy, which has been shaped by economic arguments on behalf of market efficiency and competition. Destler argues that these contrasts result from the political need to compensate industries hurt by the liberalization trend. In addition, capture of the normative dialog, the inherent political disadvantages of foreign defendants, and limited domestic political opposition have allowed protection-seekers to maintain and expand their advantages.

U.S. exporters have become increasingly concerned about competitive practices that limit foreign market access. As Destler notes, many of these concerns have been pursued under section 301 of U.S. trade law. Japan is by far the most frequent target. Destler argues that the recent WTO decision against the United States in the Kodak-Fuji case will make attacking restrictive foreign business practices more diffi-

cult. The Uruguay Round agreements compel the United States to pursue cases within the WTO framework, but the Kodak-Fuji decision sets a difficult precedent. Destler suggests that these circumstances indicate the need to include competition policy in multilateral trade negotiations. But it will not be easy.

Destler believes that multilateral negotiations could be encouraged to link changes in U.S. antidumping laws to changes in foreign competition policies and to press for a reduction of anticompetitive practices in foreign markets. Doing so would apply the logic of trade negotiations by mobilizing U.S. exporters to balance the political power of antidumping users. Such a bargain would greatly satisfy free-traders who as yet have been unable to build a domestic coalition to reform antidumping laws. Restrictive foreign markets offer the best substantive justification of antidumping laws, namely that the ability to sell at high prices at home enables foreign firms to sell below cost in the U.S. market. The superior policy solution to this situation is to increase competition in the exporter's home market. Thus, Destler argues, there is substantive logic to trading antidumping for antitrust.

However, the most frequent users of antidumping laws would not be likely to gain from improved foreign market access. Political support for negotiations would have to come from export-oriented U.S. industries, as well as U.S. producers hurt by higher input prices resulting from antidumping actions. Would such support be forthcoming? Probably not, says Destler. Though a committed group of trade policy leaders might succeed in building a coalition, the political risks would be substantial. Furthermore, U.S. antitrust law might be dulled by international negotiations or captured by private interests for a use similar to that promoted in current antidumping law.

Current U.S. policy separates international competition policy negotiations from antidumping. Given the strength of U.S. antitrust policy, why has the United States not pushed international negotiations to improve the contestability of foreign markets? Destler provides several potential explanations. First, jurisdiction over the issue is divided between the Department of Justice and the U.S. Trade Representative (USTR). Although Justice has concluded several cooperative agreements with foreign antitrust authorities, it remains unsure that the WTO is the proper venue for competition policy negotiations and fearful that the USTR's us-versus-them approach

would bring mercantilism to antitrust policy. For its part, the USTR has been aggressive in specific cases, says Destler, but it has not pursued wider negotiations because its business constituency is cautious (it could be vulnerable) and because other nations have expressed interest in using WTO competition policy talks to attack U.S. antidumping laws. Uncertainty about the outcome of potential negotiations has kept most U.S. industry groups from supporting negotiations. In addition, business is generally more willing to mobilize against the loss of a current market than for a potential future benefit, but the gains to individual firms from improved foreign antitrust laws are distant and uncertain. Destler concludes that movement on international competition policy will not occur until the U.S. government overcomes these obstacles.