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Harmonizing Antitrust: The Less Effective Way to Promote International Competition

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Efforts to harmonize national competition laws, whether by multilateral code, bilateral agreement, or unilateral national action in response to an emerging international consensus on appropriate standards, are drawing increased interest. In December 1996 a ministerial meeting of the World Trade Organization (WTO) considered the future establishment of multilateral rules to discipline anticompetitive actions by companies. In the fall of 1994, Congress passed the International Antitrust Enforcement Assistance Act, which authorizes the Justice Department and the Federal Trade Commission (FTC) to cooperate with foreign antitrust authorities in multinational antitrust enforcement. One hope for this legislation is that it will increase the effectiveness of antitrust investigations and enforcement actions involving international activities and reduce enforcement conflicts between jurisdictions. In the summer of 1993, a team of experts with a strong German representation published a draft harmonized international competition code. Under the auspices of the prestigious Max Planck Institute, the draft code was proposed as a treaty amendment supplementing the GATT's traditional trade rules. It met with a storm of criticism for being premature and overambitious. The European Union Commission was recently successfully challenged by France before the European Court of Justice for signing, without prior

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approval of European Union (EU) member states, a bilateral Antitrust Cooperation Agreement with the United States. As a result, the Commission had to go back to the EU Council for formal approval. Antitrust harmonization is under serious study by the Competition Committee of the Organization for Economic Cooperation and Development (OECD), although progress is slow.

North American antitrust officials and experts are exploring ways to achieve greater harmonization of Canadian and US competition laws—both legislated more than 100 years ago—while helping Mexico implement a competition law after their example. The new Mexican competition law went into effect in June 1993. This harmonization effort was a predicate to Mexico's entry into the North American Free Trade Agreement (NAFTA), which includes a largely hortatory chapter inviting the strengthening and harmonization of the national antitrust laws of the three signatories. A recent American Bar Association Task Force Report optimistically hails the NAFTA as a landmark on the path to North American economic integration. Similar developments, although not as ambitious, are taking place in Latin America as well. The Rio Group, comprising the largest countries in Latin America, is currently considering the adoption of common competition rules.

More advanced efforts at integration are taking place on the European continent. The European Economic Area Agreement (EEAA) between the European Union and all member states of the European Free Trade Association except Switzerland, which took effect in January 1994, and all of the EU's Association Agreements with other European countries contain competition provisions that virtually duplicate Articles 85, 86, and 92 of the Treaty of Rome. The EEAA also provides for a common enforcement authority, while the Association Agreements provide for consultation and conciliation procedures. Numerous additional examples could also be identified.

The significant academic support for antitrust harmonization contrasts with the broad, although not always outspoken, opposition from many government officials and practitioners. We do not oppose the effort, however, and cite with approval the chapter by Fox and Pitofsky in this book, comparing US and EU competition law, as a positive step in this direction. We believe that a different and more important form of harmonization exists that requires more immediate attention: putting the objectives of antitrust in accord with those of other economic laws and policies by making their conflicts more transparent and open to policy debate.

The role of laws and policies governing competition, at least within each of the major states of the world trading system, needs strengthening and increased visibility. By comparison, harmonizing national antitrust laws with each other is a less urgent concern. Competition law and policy in the United States, Europe, Japan, and Canada are relatively weak vis-à-vis five sets of national laws and economic policies that most directly restrict national and global competition: (1) protectionist trade measures, (2) measures intended to attract or exclude categories of foreign investors, (3) nonborder regulations that confer a competitive advantage on local products or firms, (4) industrial policies intended to promote national champions and save jobs, and (5) overly broad protection of intellectual property rights in some nations, which has had the effect of discouraging innovation and competition not involving industrial pirates. Making different antitrust laws more consistent will not address the sometimes profoundly anticompetitive provisions of these five nonantitrust law and policy sectors. Because competition policy is often weak nationally, it is necessarily weak in multilateral forums.

The theme of this chapter is that differences in antitrust enforcement between nations do not significantly impede the functioning of open markets. Rather, low-visibility resistance to competition outside the scope of antitrust law and policy, particularly expressed in the five sectors enumerated above, often is an impediment. If advocates of free trade are serious about promoting open global markets and reducing regulatory inefficiencies, a constituency of efficient producers and consumers who welcome a global marketplace needs to mobilize around antitrust policy. Furthermore, this constituency needs to be encouraged to play a larger and more effective role in making national as well as international economic policy. Leadership should come from the industrialized states if stronger competition policy is to be adopted by the industrializing nations, which likely will be among the major traders of the next century.

Before intersectoral harmonization can advance, and before significant multilateral progress can be made in international deregulatory agreements relating to protected sectors, national commitments to competition must be strengthened. While antitrust enforcement in the United States, Europe, Canada, and Japan may be somewhat stronger and more aggressive than it was 10 years ago (see the relevant chapters in this book), it still plays a very modest part in determining the trade, investment, intellectual property, regulatory, and industrial policies and laws of these respective governments—or of any government today.

There are too many exceptions to, and exemptions from, national competition laws in the service of these other national governmental policies. Even US and European competition laws, which are among the most actively enforced, are riddled with the five sectors of preemption enunciated above. Until these five sets of laws and policies are themselves more transparent and open to debate on the costs and benefits of their anticompetitive purposes and effects, antitrust harmonization will be of marginal significance. Where antitrust is not preempted, political and budgetary pressures limit "politically sensitive" enforcement. This is seen clearly in Japan (see Rosenthal and Matsushita, chapter 9). But it is also a fact in Europe, Canada, and even the United States.

National and International Antitrust since World War II

At the end of World War II, no nation had a strong antitrust law. The US law was the strongest, with a maximum $50,000 fine for price-fixing among corporate competitors. This law was a criminal statute in name only. No one went to jail. Indeed, there was little punishment and therefore little deterrence. Important economic sectors such as agriculture, transport, utilities, the professions, and sports were largely exempt from rules enforcing open markets. Canada's competition law was even weaker. The fact that the only thing it enjoined was criminal anticompetitive activity virtually ensured that the Canadian law would be rarely enforced. Great Britain's law was weaker still, and quite a few important industrial countries, such as Germany and Italy, had no competition law at all until years later.

The Depression, along with the political polarization and territorial aggression of the 1930s, had led to the abandonment of the goal of open international and national markets. The international trading system through World War II was largely defined by national and international cartels in the major industrial sectors—especially chemicals and mining.

Postwar reconstruction, however, brought an about-face—a surprisingly broad commitment to try again to develop open international markets. Many Western economic policymakers, academics, and business executives believed in the possibility of establishing an international trade organization (ITO), which would provide a political structure and set of principles for reducing tariff barriers between nations. This ITO would also provide a means of ending cartels and private and governmental restraints on national market access. It would channel funds for reconstruction and economic development, enabling nations shattered by the war to reach a level of prosperity that would enable them to remove regulations protecting home industries. An international monetary fund promoting stability in international currency exchanges and fiscal and monetary self-discipline, along with reduced restrictions on investment to promote nondiscriminatory investment opportunities, could make an open trading system work where it had failed before.

It was well understood in the 1940s that open and competitive markets required more than reduced tariffs, more than national competition laws, more even than an international competition code. They also required rules of national nondiscrimination in investment regulations and fair but not overly broad standards for intellectual property protection and deregulation of nontariff governmental trade barriers. The Havana Charter, drafted in 1948, was to set the standard for open national markets, after a short period of reconstruction. It was widely hoped that an institutionalized ITO would lead to an open international system of world trade investment and competition, with the deregulation of markets the primary stimulus to greater economic growth.

By 1950, the ITO initiative was dead. William Diebold's assessment at the time (1952, cited in Gardner 1956) still seems sound. The ITO was killed by a combination of (1) the Cold War; (2) postwar reconstruction taking longer and costing more than had been anticipated; (3) lack of consensus about what the competition, deregulation, and investment norms should be, and how rigorously they should be applied in the face of protectionist resistance; and (4) the same tension between pragmatism and idealism that had undermined the League of Nations. Many free traders in the US business community came to the conclusion that too many of the market-opening deregulatory norms had been qualified to the point that national implementing laws would end up being used more often as nontariff barriers, blocking the access of US enterprises to foreign markets. Protectionists, by contrast, were relieved. Tariff and monetary reform went forward. But a norm of open markets through a multilateral initiative was largely abandoned—except, of course, within Western Europe.

It probably is wrong to assume that, if the Havana Charter had been adopted, an international commitment to the enforcement of competition law would have come sooner than it actually did. Approval of the ITO would not have led to its immediate implementation. The factors that killed it may have slowed the development of antitrust enforcement outside the United States. However, several nations adopted and began to develop competition laws anyway: Germany and Japan were influenced by their American occupiers. Admittedly, the national antitrust laws at that time permitted a number of restrictive practices that would be illegal now. These laws were largely powerless against nationalized enterprises, private national champions protected by regulatory authorities, and broad, continuing industry self-regulation justified by the "imperatives" of reconstruction. Competition agencies received modest funds for law enforcement and continued to exercise weak sanctioning authority. The principal enforcement weapon was the cease-and-desist order. Because there was little deterrence to misconduct, violating the law until discovered could be highly profitable. Even injunctions, without penalties or damages, were rarely applied in significant ways to conduct in heavy industries or important service sectors—except in the United States.

But in Europe, starting in the late 1950s, a number of competition-distorting practices and policies were increasingly brought under supranational control. The six founding member states of the European Community established the first multinational competition law. As Vernon and Nicolaïdes in their chapter on the European Union properly emphasize, for the first time since the Havana Charter the norm of competition, by being included in the Treaty of Rome as a fundamental norm, was given constitutional status—a bedrock status it does not even have under US law. Regulation 17, adopted in 1962, provided an enforcement mechanism with teeth. Within a relatively short time thereafter, Directorate General IV (DG IV), the competition law directorate of the European Commission, began successfully to prosecute horizontal cartel cases, abuses of dominant market positions, and anticompetitive state subsidies. These had never before been the subjects of sustained enforcement in Europe.

In the United States, throughout the 1940s and 1950s, the Justice Department brought important prosecutions attacking cartels and monopolies in major industries and service sectors. Every major unregulated sector was affected: chemicals, steel, automobiles, investment banking, electrical equipment, construction, and oil. In the 1960s, the private antitrust suit, with automatic treble damages plus attorney's fees for prevailing plaintiffs, became an even more important enforcement tool than action by the FTC and the Department of Justice. Many significant economic sectors remained largely immune from open access and vigorous competition, but their number diminished under a surge of deregulation in the 1970s and 1980s in transportation (excepting shipping), energy industries, telecommunications, financial services, and the professions. By the middle of the 1980s, about a dozen US state governments had begun to enforce both state and federal antitrust laws, sometimes in direct conflict with federal enforcement policy.

The European Union has had similar experiences. As a result of its "1992" program, the Union has begun to deregulate and to apply competition law to several previously sheltered sectors, among them telecommunications, air and maritime transport, postal services, and energy utilities. Competition law has been applied even to firms with special or exclusive rights conferred by law. More broadly, in addition to the sectors mentioned above, the "1992" program has opened up public procurement and financial and professional services, and has simplified procedures for product certification and acceptance of partner countries' national standards.

The Relative Weakness of Antitrust Today

US and European antitrust today is stronger than that of other countries, and much stronger since World War II than it was prewar. Despite that, antitrust officials have had disappointingly little impact on their jurisdictions' policies governing industry, investment, intellectual property, trade, and regulatory matters. The following sections provide a cursory look at the limited role of EU competition policy, and of EU competition enforcement officials, in regard to these five sectors.

Industrial Policy

The European Union has long had an industrial policy, even though it was not given the legal competence to formulate such a policy until promulgation of Article 130 of the Maastricht Treaty on European Union.[1] (The Maastricht Treaty took effect on 1 November 1993.) The absence of legal competence did not prevent the European Commission from proposing industrial policy initiatives to member states. The Commission got involved in industrial policy because it feared that, in the absence of any EU initiative, member states would act in support of their own national firms. The Commission's desire to avoid fragmentation of the Common Market along national lines also explains why its early initiatives primarily protected industries of declining competitiveness. It is the propping up of ailing industries that governments find politically irresistible.

The European Union ventured deeply into industrial policy in the 1970s by permitting the establishment of the so-called crisis cartels, which rigged the market (e.g., by means of consensual output cuts and state subsidies) in the false hope that reducing competition would restore longer-term global competitiveness. This medicine did not work, and the declining industries of the 1970s, such as shipbuilding and textiles, are now nearly moribund.

Subsequent EU initiatives have been more subtle. The Single European Act, which revised the Treaty of Rome in 1987, gave the Commission additional responsibility to formulate and implement policies intended to encourage cooperation in basic research and procompetitive technological development. The Commission has always been concerned that the EU research and development effort is suboptimal because it is largely undertaken within the framework of national rather than Union policies. Hence, it traditionally has put a premium on cross-border cooperation and has been willing partly to subsidize it. The Commission has been careful, though, generally to avoid subsidies that would have a direct, adverse effect on competition.

In addition to providing overall horizontal support of European R&D, the European Union still maintains a small number of significant schemes that protect specific key industries such as electronics, automobiles, and textiles from import competition, especially from Asia. The Commission's

1. The European Union has had much stronger powers for more than 40 years to regulate the coal and steel industries, exempt from operation of the Treaty of Rome antitrust articles. These powers were conferred by the treaty establishing the European Coal and Steel Community in 1952. The European Union has used these powers primarily to subsidize these costly, inefficient, but labor-intensive sectors, and to protect them from import competition.

position on such sectoral protection has gradually become less accommodating to demands from member states' governments. However, it is not clear in the present political environment if there will be a complete withdrawal of subsidies and other protectionist measures for these sectors.

A shift in the European Commission's view was also evident in its willingness to interpret more strictly the rules of the Treaty of Rome (Articles 92-94) on state aids or subsidies. Several years ago, under the direction of the then-commissioner for competition, Sir Leon Brittan, the Commission enunciated the "private investor" principle: All state aids schemes would be assessed as if the state were a private investor. If there were no indication of commercial return on a government's investments in private or even state-owned industries, that government would be adjudged as offering subsidies that were distorting competition and would therefore have to withdraw them. This policy commitment has not been eroded with the change in portfolios for Brittan. Karel Van Miert, the current commissioner responsible for competition, is no less aggressive in promoting competition over industrial policy. Here, too, important policy conflicts can be expected between calls for competition and calls for protection in the coming years. Antitrust harmonization will have little impact on this conflict.

Investment Policy

The European Union has no active investment policy that applies to all member states. Nonetheless, a de facto investment policy is expressed in certain trade decisions that have specified rules of origin for manufactured products. It is believed that these have been applied in certain cases to induce foreign manufacturers to relocate within the European Union if their products (e.g., photocopiers and semiconductors) were to be considered European.

Compared with the United States, the European Union may be said to have a negative investment policy. It imposes certain limits on the incentives that member states may offer to foreign or domestic companies that establish offices or plants within their borders. Because of the European Union's concern for integration, such state aids generally are prohibited, unless the investment takes place within a designated underdeveloped region and the received subsidy conforms to strict criteria that specify its final use and intensity (ratio of subsidy to output). Replacing member states' protectionist policies with EU-wide ones may promote market integration; however, it does not promote international competition. Rules of origin and other investment restrictions should be subjected to competition analysis and criticism.

Intellectual Property

The Commission has been trying for years to persuade member states to establish a common framework for patents, copyrights, and trademarks. Even though member states are parties to the relevant international conventions (e.g., Bern and Paris), and despite the progress that has been achieved within the context of the 1992 movement to a single market, member states are still far from a common legal framework. There is considerable tension over where to draw the lines, whether primarily to reward those who assert broad property rights or to limit those rights—for example, as to computer software innovations—for the sake of encouraging nonproprietary innovation. DG IV officials do not play a major role in the formation of intellectual property policy. At this writing, the European Court of Justice has ruled that in at least limited circumstances (not clearly identified), copyright rights conferred by national laws may not be enforced to restrict consumer welfare by denying the introduction of new, efficient products or services into the Common Market (*Radio Telefis Eireann et. al. v. Commission* and *Magill TV Guide Ltd.* Cases C-241/91 and C-242/91 P, 6 April 1995). Compulsory licenses for patents and copyrights are rare in competition law. It remains to be seen how the principle applied in this case will be expressed. It is not, we suspect, likely to be extended to even most situations where intellectual property rights confer significant market-realizing powers.

Trade Policy

Trade measures have distorted competition in several ways. The most significant are antidumping actions which, on several occasions, have shielded already cartelized industries from foreign competition (Messerlin 1989, 563-87). The EU antidumping regulation is more extensive than the domestic competition law provisions on predation (Article 86) in the sense that foreign firms are penalized when they choose aggressive low-pricing strategies as means of injuring domestic competitors. They are not rewarded for promoting consumer welfare through greater competition. International competition is also distorted when in antidumping cases the EU seeks or accepts undertakings by third-country exporters to raise their prices in order to avoid punitive antidumping duties.

Before the advent of the single market on 1 January 1993, the existence of controls at the internal borders of the EC allowed member states to make effective use of a provision in the Treaty of Rome (Article 115) that permitted the imposition of restrictions on third-country products whenever domestic industries faced serious economic difficulty. To its credit, since January 1993 the European Commission has not authorized any so-called Article 115 derogations. Still, EU competition officials have little impact on Union trade policy. Although these officials are formally consulted on competitive consequences before trade restrictions are imposed, something that is not done at all under US trade law, they rarely affect significantly the imposition of such restrictions.

Regulated Sectors

With the exception of the products covered by the European Coal and Steel Community, the EU has no power to regulate any industry in the way utilities are "normally" regulated. That is, the Union cannot set prices, determine output, specify detailed conditions of supply, or determine the number of licensed operators. This does not mean that member states do not have their own regulations or that EU rules do not affect a great many industries. In fact, hardly a day passes without a new regulation or directive being issued that imposes new standards on some industry. In their majority, such EU rules impose on private firms certain quality or technical standards and on governments or their agencies certain obligations toward those firms.

Until the advent of the single market, two of the EU's main problems concerning competition in its internal market were that, first, national regulations differed to such an extent that entry into certain sectors was virtually impossible for foreign firms, and, second, to make things worse, some sectors were controlled by legal monopolies. No matter how vigorously EU competition rules were enforced by the European Commission or national authorities, certain firms led sheltered lives. National regulators granted exclusive operating rights, or laid down such idiosyncratic technical standards or stipulated such complex certification procedures that no foreign firm found it financially feasible to develop products according to those standards and take the trouble to have them certified. This happened routinely in, among other fields, telecommunications, air and road transport, electricity and gas distribution, and virtually all those service industries in which service providers had to be licensed.

The European Union is seeking to overcome this regulatory hurdle basically by doing three things. First, it has defined common licensing procedures and is developing more EU-wide technical standards. Second, it is establishing a "one-stop-shop" system of certification or licensing based on the principle of mutual recognition. Third, in certain monopolized sectors such as telecommunications and air transport, it traditionally has succeeded in abolishing legal monopolies and the exclusive rights granted to certain national firms.

The EU's hard work to create a single market in monopolized sectors is an apt example of how powerless competition policy can be when a sector is heavily regulated or when it is dominated by state-owned companies. Competition is hardly possible when disparate national regulations lead to market segmentation. Although the effort to standardize and deregulate is well under way, certain obstacles still remain. Complex standards, enforced arbitrarily, can place a profound drag on competition. These standards will be a source of policy conflict for at least the next decade. Indeed, the Commission has recently declared that one of its main objectives in the next few years is to achieve a uniform application throughout the EU of single market measures.

Because the European Commission is responsible for overseeing the elimination of distortions to intra-Union trade, greater attention is paid to internal competition issues than in the more decentralized US executive policy process. Nonetheless, the competition directorate, DG IV, plays a relatively limited role in this policy process—except in enforcing EU antitrust law and in reviewing state aids.

The relative ineffectiveness of US antitrust law and policy in promoting the procompetitiveness of US trade, industrial, intellectual property, and regulatory policy in international markets is discussed in greater depth later in this chapter (and in the Rosenthal and Matsushita chapter 9). The interplay between US competition and US investment policy does evidence some existing transparency and public debate. An example of the weakness of antitrust in making US investment policy is the National Cooperative Research and Production Act of 1993 (NCRPA; *US Code* 15 § 4301[7][2]). This legislation requires that joint production, if it is to be entitled to NCRPA's benefits, must take place principally in the United States and be controlled by US citizens or by persons from countries whose antitrust laws are no less favorable to US citizens than to the nationals of that country.[2] NCRPA provides certain clear exemptions from possible application of US antitrust law to qualifying research-and-production joint ventures. Its effect is to discourage the participation of foreign enterprises with foreign production in qualifying joint ventures (Warner and Rugman 1994, 945). An example of the strength of antitrust in US investment policy is the difficulty of blocking a foreign acquisition of US assets on national security grounds under the Exon-Florio provision in the Omnibus Trade and Competitiveness Act of 1988.

There are dozens of legislative, regulatory, and judicial exemptions from and exceptions to US antitrust law. Many affect international trade and investment. To take a few examples, US shipping and ship building are subsidized. Restrictive trade agreements affect many important economic sectors such as agriculture, semiconductors, machine tools, textiles, minerals, and, until recently, steel and autos. There are restric-

2. This equivalence standard is vague and would be difficult to enforce.

tive orders in numerous US dumping cases that significantly reduce competition in US markets. Although it cannot be proved, it is likely that officials of the Bush administration negotiated acceptable price and output levels for exported Saudi oil. This action may have produced a net benefit to US consumers and may have furthered perceived US foreign policy interests, but it was in likely violation of US antitrust law. Saudi-US price-output understandings probably were negotiated as well by previous administrations. It is unlikely in any of these cases that the US attorney general was consulted. When major economic policy issues, especially trade issues, are addressed, antitrust concerns may sometimes play a role—but not a major one. This was further evidenced in US domestic health policy, where antitrust policymakers were given a minor role in developing the Clinton administration's ultimately unsuccessful proposal for health care reform. The Department of Justice is not even represented on the president's Economic Policy Council.

Greater Antitrust Harmonization Will Not Significantly Strengthen Antitrust in International Markets

The norms of US and EU competition law are largely, though not completely, congruent (Fox and Pitofsky, chapter 10). So are those of the other developed states. The norms of member state competition laws and EU law are largely congruent; so are the norms of the antitrust laws of the 50 states and those enforced federally in the United States. All oppose monopolies that abuse monopoly power, and all oppose mer-gers that create monopolies. They all oppose cartels that are price-fixing, supply-restricting, and/or market-allocating. They all oppose extending exempted monopolies beyond the boundaries of their legal exemption. They all proscribe group boycotts and attempts to monopolize through predatory practices.

If one focuses closely on the United States, one sees nontrivial differences in antitrust enforcement approaches and even in substantive doctrine—such as the standing of competitors to attack mergers, or what constitutes predation—among the 13 US circuit courts of appeal. All apply the same federal antitrust law, subject to binding decisions of the US Supreme Court. But the result is a surprising degree of uncertainty about when one may be sued, and by whom, and how many times, and with what potential exposure to damages, for alleged anticompetitive conduct. Proper antitrust standards and the best way to enforce them are both topics of controversy. Evolving judgments, lacking many of the verities one might think could be applied with confidence to legal activities such as interpreting contracts and deciding when a person has committed fraud, limit the potential benefits of harmonization. The FTC and the

Justice Department have some differences in approach. Each new administration's antitrust enforcers are different from their predecessors and successors. Some enforcers of antitrust law at the state level have differences in approach, albeit incremental, from federal officials and from each other. So do the 50 substantive antitrust laws in the 50 states.

But this disharmony does *not* work against vigorous antitrust enforcement. If anything, the emergence of the state attorneys general as antitrust enforcers, plus the willingness of the Justice Department to take over the Microsoft investigation, which the FTC had closed after only two years of effort, and fight to enforce a consent decree against district court disapproval, suggest that disharmony can be compatible with active and decentralized antitrust enforcement authority (Katten 1994, 32).

Outside the United States and the European Union, some competition laws give some protection to small businesses. Some permit crisis cartels. Only US law imposes a virtually automatic treble damage remedy, even in a case in which the law was previously unsettled, and the malice or recklessness required before punitive damages can be invoked in most other legal fields is entirely absent. Still, actual damages and levels of fines against enterprises engaged in anticompetitive activities are increasing in most non-US jurisdictions, often dramatically, as in Europe, Japan, and Canada. Only the United States, so far, has put senior corporate officials in jail for price-fixing. Some jurisdictions, such as the European Union, require extensive notification for big mergers. Some, such as the United States, have modest initial notification requirements. Others, such as Italy, require almost no antitrust notification at all. Some jurisdictions, such as Canada, are more tolerant of mergers that promote oligopolies. Most jurisdictions do not encourage private antitrust enforcement. Only US law strongly encourages private antitrust enforcement as an important supplement to government action.

Many of the jurisdictional differences in antitrust enforcement, internationally and within the United States, are less the result of conflicting norms and more a question of either different ideas about what will best work to achieve common norms or bureaucratic turf battles over who will decide. For example, DG IV has set stricter definitions of geographic and product markets than have enforcement officials, scholars, and the courts in the United States. In Europe, where markets have until very recently been segmented along national lines and where consumer preferences vary considerably, it has been difficult to persuade enforcement authorities that products that do not seem plausibly to be close substitutes may in fact be so. It is not so difficult in the more homogeneous United States. Furthermore, in Europe the Commission requires that notifiers seeking authorization for a large merger tell its staff what they think are the relevant product and geographic markets. In the United States, this burden is not imposed on those making premerger notifications.

An international code is not likely to accomplish harmonization of means to shared ends when there are legitimate grounds for disagreeing as to the best means, and no simple empirical test that will show one approach to be correct and another to be wrong. Conflict between the United States and the European Union over merger enforcement is now inevitable. Some conflict of enforcement policy between the European Union and Canada in the *de Havilland* case, and some conflict between the Union and a US district court in the *Minorco-Goldfields* case. There is now the possibility of a trade war over the merger between Boeing and McDonnell Douglas. If such a collision does happen, absent an as-yet unestablished dispute-resolution mechanism, the merger at issue will probably be stopped. It only takes one authority in one important market saying "no" to stop a big merger. But the question now is whether the EU Commission would risk a major confrontation with United States trade and security officials.

Changes in perception of where the proper balance lies between conflicting values that both supposedly promote competition can be found throughout the body of antitrust doctrine. These perceptual changes are reflected in ongoing differences, domestic and international, about: (1) the actual harm predatory pricing can cause in the marketplace; (2) whether and when restrictions on intrabrand competition cause more harm than the benefits of interbrand competition that such restrictions may facilitate; (3) whether monopolists should have a unilateral right to refuse to deal with individuals or classes of customers; (4) whether antitrust law and policy enforcers should be concerned when some competitors are driven from the marketplace by joint anticompetitive practices of others, even though no surviving firm in the industry has market power; and (5) what presumptions, or shifts in the burden of proof, concerning liability and damages, should be made from certain types of direct and indirect evidence. The concept of market power itself, central to antitrust enforcement, is the subject of strongly contrasting views about what it is and when it can be abused. As pointed out in Rosenthal and Matsushita (chapter 9), the goal of competition is multivalued, and these values often conflict, even where available facts are reasonably developed—which is unusual. In sum, greater antitrust harmony than already exists will be hard to achieve.

Through the 1970s, there was no strong impetus for an international antitrust code such as that envisaged in the Havana Charter, nor for international harmonization of national competition laws. In Europe, Germany was developing a strong competition law and a relatively strong competition enforcement agency, the Bundeskartellamt. But national antitrust enforcement remained relatively weak elsewhere. To some extent, this did not matter because DG IV continued to gain strength. However, since the directorate's principal mission was to promote a single European market for goods and services, more energy and attention were directed at attacking vertical territorial restrictions than at going after anticompetitive horizontal agreements. DG IV was preoccupied with these restrictions because competition policy was and still is perceived fundamentally as an instrument for breaking down territorial barriers that isolate national markets. Such policy is not equally concerned with opening domestic markets to nonmember state competition.

Perhaps the most important accomplishment of the European Union was the prohibition of protectionist national trade laws such as antidumping regulations, trade-distorting subsidies, quantitative import restrictions, and other measures of equivalent effect applied to trade between member states. This protectionist set of trade regulations was replaced with a single EC competition law enforced by the Commission. Italy, for example, could no longer restrict competition from French products by applying an Italian dumping or subsidies law. The only "legitimate" trade law remedy was to get the Commission to bring an enforcement action against a French manufacturer for abusing its dominant market position in Italy, or to bring a challenge to the anticompetitive nature of subsidization by the French government of exports to Italy. Of course, nontariff barriers such as the establishment of "quality," health, or packaging standards discriminating against foreign imports was one way to evade competition law. However, this kind of evasion has become increasingly difficult as a result of stricter interpretation of the provisions of the Treaty of Rome that prohibit trade restrictions (in particular Articles 30 and 36) and as a result of the "1992" program promoting a system of mutual recognition of national technical, health, safety, and quality standards.

Australia and New Zealand (see Thomson, chapter 12) are the only other nations where competition law has replaced trade law inter se. Both countries offer an open binational market with consumer protection rather than a trade-protection remedy featuring predatory pricing and state subsidization, both of which disadvantage the consumer.[3] The United States rejected an invitation from Canada to dismantle trade barriers between the two countries in the United States-Canada Free Trade Agreement. An opportunity for North American market reform, which would have ended dumping cases in US-Canada trade to the benefit of both nations, was thereby lost. It was never a serious option as part of the NAFTA, once again due primarily to resistance from some US and Canadian businesses and much US labor opposition.

In the late 1970s, the United Nations Committee on Trade and Development (UNCTAD) did adopt a nonbinding international antitrust code. The UN showed sufficient consensus on general competition standards to

3. For a discussion of the broader potential applicability of this approach, see Marceau (1994).

obtain endorsement of the code by the UN General Assembly in December 1980. However, the code was much less an exercise in promoting markets free of monopolizing restraint than an initiative to promote a redistribution of income from have to have-not nations. A majority of the signatories had no interest in open and deregulated national markets, let alone international ones. The UNCTAD code's only discernible impact has been to promote the formation of national competition agencies in several developing states. Indeed, the Thatcher Revolution—with its passionate commitment to the market mechanism as maximizer of economic welfare for all states, developed and developing—probably would have had the same modest impact even had this UN code never existed.

The experience with antitrust harmonization since World War II supports four conclusions:

- Expanding antitrust into closely regulated or protected national and international sectors, over time, was recognized 50 years ago as a key element in the structure of international economic reform, something that has been largely forgotten today.
- Merely harmonizing broad, substantive antitrust norms will not have much impact on anticompetitive behavior and practices tolerated or promoted by other national and international economic laws and policies.
- Antitrust enforcement grew stronger in many nations, even against powerful restrictive policies, but not to the point where it could challenge significant anticompetitive provisions in the GATT, such as the dumping laws, and other national and international laws and policies that adversely affect international competition.
- Complete antitrust harmonization would require the establishment of a single global competition authority or dispute-resolution tribunal—something all but the most ardent national proponents of antitrust harmonization find unacceptable.

US Extraterritorial Antitrust Jurisdiction As a Spur to Antitrust Harmonization

There is one continuing source of international tension arising from national antitrust enforcement which can, but usually does not, adversely affect open international markets: extraterritoriality (ET). In antitrust, export controls, securities law, and discovery in US civil litigation, ET became a significant political issue in the decade from the mid-1970s to the mid-1980s (Rosenthal and Knighton 1982). ET is the conflict between the extraterritorial enforcement of US antitrust (and other) laws to command or punish conduct in a foreign state, on the one hand, and the local regulatory laws or policies of that state which ET enforcement nullifies or undermines, on the other hand. Under US law going back to the Supreme Court's 1911 decision in *United States v. American Tobacco Co.*, US courts have broad "effects" jurisdiction to try to break up international cartels formed and operated abroad that have a substantial adverse effect in United States domestic markets. In the past 80 years, this doctrine has been used more aggressively to challenge and frequently to nullify restrictive practices exempt from foreign-competition laws that are not exempt from US competition law.

In the 1960s, the Supreme Court determined that US antitrust law could be applied to attack private restraints foreclosing US firms from access to foreign markets—as long as requisite minimum contacts with the United States could be attributed to those engaging in concerted exclusionary conduct (*Continental Ore v. Union Carbide & Carbon Corp.* 370 U.S. 690, 1962). Several foreign governments have been outraged at the notion that US law could force open access to their domestic markets if they determined as a matter of sovereign national policy that in some particular policy area some largely domestic protectionist conduct was appropriate or even desirable. The ruling seems particularly arbitrary to these governments since there are numerous protectionist exceptions to antitrust law in the United States. For three main reasons, there was and continues to be little sympathy in the United States for this point of view.

First, Americans do not know what it is like to have other nations use their laws to punish conduct in the United States that is legal under US law. Only the member states of the Arab League have adopted an extraterritorial law making conduct in the United States illegal (trading with or investing in Israel) that is legal and, indeed, encouraged under US law. It is unlikely that US public opinion would be very sympathetic if, say, a US supercomputer manufacturer that obtained US government subsidies by congressional lobbying was found thereby to be in violation of the competition law of a US trading partner, such as Germany, which believed that its computer industry thereby had been anticompetitively disadvantaged by private foreign lobbying.[4] Since the United States has not been the target of such extraterritorial enforcement, many Americans fail to appreciate the viewpoint of others that extraterritorial enforcement by the United States that undermines their local law can be humiliating, appear cynically imperialistic, and frustrate the local political process. To compound this insensitivity, there is an inconsistency in US and European antitrust laws in the sense that both governments' sets of laws attack foreign price cartels aimed at their

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4. The United States took just such a view, affirmed by the US Supreme Court, in applying US antitrust law to hold anticompetitive lobbying to influence the Mexican legislature to be illegal (*United States v. Sisal Sales Corp.* 277 U.S. 258, 1927).

respective markets but at the same time immunize their respective export cartels aimed at collusively raising prices in third markets.

Second, the US government often compartmentalizes responsibility. The Treasury and State Departments used to be jointly responsible for US trade policy. They still retain some indirect involvement. The Commerce Department and the US Trade Representative, with some emerging independence by the International Trade Commission, now share control with Congress of most US trade law and policy. The Justice Department and the FTC are responsible for federal competition law and policy. The intersection of US trade and antitrust law and policy, both in the executive branch and in Congress, is almost nonexistent.

This lack of interaction between law and policy governing the trade and antitrust spheres can have inconsistent, ill-considered consequences. In the 1940s, as part of its Cold War policies, the United States encouraged Canada, France, Australia, and South Africa to develop domestic uranium industries. By the 1960s, the US uranium industry wanted restrictions placed on these foreign producers' access to US markets so that US uranium producers could monopolize the market among private American electrical utilities for fuel to generate nuclear power. With weak opposition from the executive branch and no participation by the Justice Department, Congress passed legislation imposing a multiyear embargo on imported uranium for private sector power generation. Foreclosed from perhaps two-thirds of their potential customers by this US act of protectionism, foreign uranium producers, with the support of their own governments, formed a defensive cartel to salvage their access to the severely reduced electrical utility market still open to them. A few years later, US policy compartmentalization led the Justice Department to challenge this foreign government-supported international cartel as illegal under US antitrust law. This government enforcement facilitated the bringing of additional successful private US antitrust enforcement actions. These led to the payment of more than $100 million in damages by these producers to US utilities, to the Westinghouse Corporation, and to these plaintiffs' lawyers.

The foreign uranium producers and American electricity consumers were the victims of a misguided policy of US trade protectionism beyond the reach of US antitrust law and policy. The problem here was not lack of harmonization among the antitrust laws of the concerned jurisdictions but rather the lack of harmonization, more precisely the failure to intersect, of US trade and competition law and policy with respect to the sale of uranium fuel for commercial purposes in the United States.

The third and only good reason the United States supports extraterritorial national enforcement is that failure to do so discriminates in favor of persons who form and conduct cartels aimed from abroad at US markets. To fail to enforce US antitrust law extraterritorially is unfair to producers in the United States who have to comply with US antitrust law. Mere territorial enforcement fails to protect US consumers and producers who are the victims of foreign cartels.

Experience with extraterritorial enforcement of US antitrust law within the European Union has led most EU competition officials to see the merits of extending EU antitrust enforcement outside Europe. However, this is still a matter of controversy. The United States remains the only nation with an aggressive extraterritorial antitrust policy, feared abroad but popular at home.

Renewed concern over US extraterritorial antitrust law enforcement has led some nations, Japan in particular, to support in principle the drafting of an international competition code. This would, some hope, submerge extraterritorial national enforcement incompatible with agreed international norms. However, there is no near-term prospect for such multilateral consensus on this still-divisive issue. New conflicts in the next few years would not be surprising. Nonetheless, relatively limited ET antitrust enforcement in the United States has not had a major or sustained impact on either the growth or the restraint of the free international movement of goods, services, and capital.

Unwelcome ET conflict, however, does not justify premature efforts at jurisdictional harmonization. It is not a conflict over the conditions of international competition and access to national markets. Rather, it is a conflict over national sovereign prerogatives. Aggressive US extraterritorial law enforcement is perceived by the United States' allies as coercing them to modify their domestic laws illegitimately, outside the framework of diplomacy, and absent an agreed basis in international law. But competition law is only one field among many in which this conflict arises.

ET conflict is present in trade law, in debate, for example, over the validity and propriety of the United States' employment of unilateral trade retaliation under section 301 and super 301 of US trade law for the failure of foreign states to provide access to US exporters in foreign markets. It is increasingly an issue in intellectual property law, for example, whether there should be ET application of national copyright and trademark protection. ET conflict is raised in employment discrimination law and is a major by-product of US insistence on using export controls to prevent its allies from shipping to Cuba from their own foreign ports, even when the goods never pass through the United States, and even when it is illegal under these countries' laws to acquiesce to US laws applied extraterritorially to circumvent the trade policy of exporting jurisdictions. ET conflict is a big problem in criminal law enforcement, especially the episodic circumvention in the United States of bilateral extradition treaties, and it is a problem in civil litigation, where US jurisdictional claims and broad pretrial discovery rules often conflict with foreign adjudicatory standards. ET conflict is therefore too broad an issue to be resolved by harmonized standards of antitrust alone.

ET eventually will diminish as a problem if the United States becomes more accommodating to the desires of foreign states to control activity that takes place predominantly in their home territories, or, conversely, if powerful jurisdictions such as the European Union, Germany, Japan, or even Canada begin to apply their laws extraterritorially to sanction conduct in the United States supported by US laws or policies that adversely affect competition in their home markets. It would have been poetic justice if Canada and the European Union had prosecuted the US uranium industry for conspiring to have Congress legislate an embargo on foreign exports of uranium to US utilities. Foreign uranium producers probably could have proven billions of dollars in actual damages.

Bilateral antitrust cooperation agreements are not likely to reduce ET frictions in the short run, either. These agreements, one of which has been in effect since the late 1950s, provide primarily for notification and consultation. Neither side in any bilateral understanding negotiated to date has been willing to defer, as a matter of principle, to the primacy of the jurisdiction of the other, if the other has predominant contacts with the conduct or persons under scrutiny or a more compelling claim to assert jurisdiction. To so agree would be to cede control, to surrender turf. Governments are bureaucracies, and bureaucracies rarely do this willingly. Moreover, the US executive branch historically has claimed to be particularly concerned that if it agreed to avoid extraterritorial antitrust conflict by deferring to foreign competition authorities in some international cases, it could face congressional criticism for "selling out US interests," and might even face a legal challenge for failing diligently to enforce US laws.

The one legal area where international harmonization is working to avert ET conflict is the prosecution of international securities fraud. The US Securities and Exchange Commission has successfully assisted several foreign governments in establishing enforcement programs to stop stock fraud, including fraud aimed at investors in the United States. But that is a special case not easily adapted to competition enforcement. As a rule, stock fraud is no longer tolerated in many countries. All nations *do* tolerate numerous restrictions on competition. Anticompetition policies are actively and extensively promoted by every nation, including the United States, in selected areas.

One cannot harmonize international ET enforcement in antitrust or, for that matter, substantive and procedural antitrust norms, until one gets consensus on a methodology or procedure for deciding which anticompetitive restrictions should be exempt from antitrust enforcement and which should not. But that brings us back to the insight that stimulated the ITO exercise. Harmonizing competition standards will not work domestically or internationally unless there is substantial harmonization with other standards promoting open markets: nondiscriminatory investment rules; short-term, transparent trade protection measures; limits on beggar-your-neighbor industrial policy subsidies; and greater deregulation of regulated market sectors.

The Real Need for Harmonization: Competition with Mercantilism in the National Economic Policy Process

We have argued that harmonization of substantive antitrust laws is likely to have little impact on market access. Where then is the need and opportunity for competition harmonization? Where it was 50 years ago. It remains necessary to harmonize or initially to engage with transparency the policy process *within* each of the major trading nations if the international economic policy process among them is to become harmonized.

We are not talking about a harmonization that makes competition law and policy paramount and rejects in all cases the legitimacy of values expressed in restricted competition. That will never happen. As this is written, there is concern that rising job insecurity is increasing the level of fear, violence, and alienation in Western societies. This is a threat, if such a concern is well founded, to democratic stability itself. Democratic governments must pay attention. Competition is not an absolute good. There are legitimate national security goals that require trade restrictions—for example, restrictions on sales of armaments to Iraq or of biological weapons to anybody. Some sectors require some government intervention in an otherwise free marketplace to promote equality, fairness, and personal security—health care, for example. Some targeting via industrial policy of high-technology winners is irresistible to policy planners, and sometimes, if too rarely, governments do stimulate economic growth without enormous economic waste. However, US trade law encourages inefficiency when it takes no account of the impact on downstream producers and ultimate consumers when a dumping case is reviewed. It is wrong that US trade law gives monopolists standing to exclude foreign competitors for dumping when these outside firms are merely competing on price for the purpose of getting a toehold in the US market. Such exclusion is disharmonious.

It is wasteful and inefficient when the governments of US states offer subsidies worth tens of millions of dollars to manufacturers to build factories within their borders rather than within neighboring states. In recent years, some of these subsidies have been sufficiently large to provide nontrivial competitive advantages in the marketplace. US competition authorities have no impact on decisions made about either state or federal subsidies.

The US Supreme Court decided two cases in 1993 that represent lost opportunities to begin to harmonize competition law and policy with legitimate noncompetition concerns under US law. In one, the Court refused to find the possibility of antitrust injury, notwithstanding uncontradicted evidence of one competitor's intent to injure another to a point that would lead it to raise its prices back to "appropriate" levels. The Court found that there was little possibility that the predator could in fact recoup its economic losses expended in the predation (*Brooke Group Ltd. v. Brown and Williamson* 113 S.Ct. 2578, 1993). Because the consumer was the beneficiary of the predatory pricing, and competition would remain in the marketplace, even if not, perhaps, as provided by the target of the predation, the Court saw no need to apply the antitrust laws. In international trade, the dumping law, which started out as a predatory pricing law, is now primarily applied in cases in which there is no evidence of below-cost sales, let alone evidence of the possibility of recoupment from price discrimination by the exporter. The antitrust law on predatory pricing and the antidumping law are moving in diametrically opposite directions. The disharmony is manifest. It should be addressed.

Although the Uruguay Round has tightened the definitions of *normal price*, *dumping margin*, and *injury*, it still has not introduced criteria to distinguish between predatory and other, possibly harmless, forms of dumping. Even the Uruguay Round's major innovation, a definition of *de minimis* dumping, has not gone far enough.[5] In competition policy, the concept of *de minimis* normally is applied to two or more firms that collaborate. It does not normally apply to single firms. The actions of a single firm are found to infringe upon competition law only when that firm commands a dominant market position (usually with a market share exceeding 35 to 40 percent). Antidumping rules would still apply to single firms with, say, a 3.5 percent market share.

One of the many problems with the dumping laws is that merely threatening to bring an antidumping action is often sufficient to encourage foreign competitors to raise prices. Following a dumping action through to a determination of material injury is not required. Price signaling through the threat of—or mere commencement of—dumping actions can have anticompetitive purposes and anticompetitive effects. The question of whether this form of nonprice predation could be an antitrust violation presented another important opportunity for harmonization to the Supreme Court. Unfortunately, the Court made such conduct immune from antitrust enforcement when there is any "colorable" (arguable) basis for bringing the dumping action (*Columbia Pictures Industries Inc. v. Professional Real Estate Investors Inc.* 113 S.Ct. 1920, 1993). The Court will not even consider having lower courts look into whether

5. Dumping is considered to be *de minimis* when the dumping margin is less than 2 percent or when the volume of dumped imports is less than 3 percent (as measured by the share of dumped imports in relation to total imports).

there is an anticompetitive purpose or effect in the way the dumping law is used. As Lipstein has documented (chapter 13), it is now so easy to prove dumping injury under the dumping laws of the United States and other jurisdictions, even in the absence of predatory conduct, that it is almost impossible to conceive of a threatened dumping action that could not, if challenged, have some arguable basis for success. Ironically, based on a naive notion of predation, the courts are reducing the potentially constructive impact of US competition law and policy on US trade law and policy. Fragmentation is so complete, and antitrust is so compartmentalized from other areas of international economic policy such as trade, that the courts and many competition experts are not sensitive to these issues.

How to Begin Promoting Competition in Protected Sectors

What we propose here to promote competition in protected sectors can be done without new international agreements and without new international institutions. The first step is to open up the national policy process in each major trading country—to break down the barriers that separate competition from trade, investment, deregulation, intellectual property, and industrial policy. The different ministries and departments need to consult with and debate each other. The second step is to build a strong competition value component into any national law that restricts investment, imposes trade restrictions, endorses selective industrial subsidies, defines the scope of intellectual property protections, or continues regulation of limited-access markets. Conversely, limited possibilities for nonenforcement of the antitrust laws to further other important values, without the requirement of exempting legislation, should be explored. In the United States, this means that antitrust officials should be participants in executive policy in these other areas, and officials representing State, Treasury, Commerce, the US Trade Representative, and the White House who deal with these issues should play a role in shaping antitrust policy. A parallel task in Europe would be to strengthen the role of DG IV in EU economic policymaking.

Recent years have witnessed the Thatcher Revolution, the political scandals in Italy, the despoliation of resources in the former communist states, and the continuing international noncompetitiveness of many companies protected over the past half century by national industrial policies. These events have created a climate in which market access and opportunities to compete are recognized as economically necessary and desirable. State socialism and heavy-handed government regulation are on the defensive. A world with limited resources and a great hunger for democratic accountability promotes greater use of the market mechanism.

However, competition enforcement must pay its dues. To obtain access to the international economic policy process of major jurisdictions, antitrust enforcers must show a willingness and ability to be effective participants in that process. That means, among other things, the ability to make as well as obtain concessions. In the United States, since the days before World War II when Thurman Arnold headed the Justice Department's Antitrust Division, antitrust enforcers generally have welcomed isolation from the national economic policy process. They have said that antitrust enforcement is nonpolitical, like the enforcement of any other criminal statute such as those concerning theft or fraud. Antitrust law, it is said, must be enforced without political interference. Policy interaction, it is believed, invites interference.

The international economic policy process within developed nations is grounded in a recognition that, from time to time, competition concerns must give way to other legitimate policy concerns. This depoliticization of antitrust has had the ironic effect of isolating it from an economic policy process in which concerns about competition need, but often lack, effective advocates or supporters. This, in turn, weakens the voicing of competition concerns when international economic policy is made. Independence from politics has not assured the predominance of antitrust over other values. Arguably, this independence has marginalized antitrust's impact. Independence in most criminal enforcement of per se rules is necessary and appropriate. It is neither necessary nor appropriate in deciding which civil cases to bring under a rule of reason where difficult economic policy trade-offs exist.

Over the past quarter century, there have been some—though not many—major antitrust victories in the conflict between antitrust law and policy and mercantilist policies. In the European Union, it is only recently that competition policy has been applied in traditionally regulated industries such as telecommunications, air transport, and utilities, and only recently has it challenged the preeminence of state-owned firms with legal monopoly rights. It is also encouraging that the Commission has recently begun a study of how to ensure that antidumping measures are in the "interest of the community." The Commission is required by EUs antidumping regulation to examine before the imposition of any antidumping duties whether such duties would be contrary to community interests. Traditionally, community interests have been equated with producer interests. If they are interpreted more broadly to include both user and consumer interests, then the protectionist element of antidumping action will decline. Not surprisingly, the Commission's study has been severely criticized by some industry lobbies. In the United States, a significant victory for antitrust was achieved by Bill Baxter, President Ronald Reagan's first antitrust chief. Baxter won out over Secretary of Defense Caspar Weinberger in getting White House support for deregulation of the US telephone monopoly. In the late 1970s, antitrust officials did play a part in congressional deregulation victories in trucking, rail transport, aviation, and the sale of securities. The Antitrust Division needs an institutionalized policy presence to encourage and empower more such successes.

One formidable obstacle to the effective joining of competition with laws and policies governing trade and other areas is that antitrust law tends to have absolute standards. Anticompetitive conduct, subject to relatively few and limited defenses, is flatly illegal. Horizontal anticompetitive conduct is a felony in the United States, Canada, and Japan and is prosecuted with increasing energy—if still-insufficient resources—in the European Union. Trade law encourages horizontal industry price undertakings that would be illegal if they were not exempt from the antitrust laws. In the attempt to promote national interests, trade policy often encourages international horizontal price-fixing cartels. Criminal enforcement in the United States triggers special rules and procedures—such as grand jury secrecy and prosecutorial independence. These special requirements limit the possibility that antitrust enforcers will participate effectively in the trade policy process—at least when operating in established ways. How does one protect the integrity of the antitrust enforcement process while encouraging those with the greatest relevant knowledge and the greatest potential to develop a procompetition constituency to participate in the wider international economic policy process? It is not an easy question to answer. Today, it is not even being discussed.

At the urging of the Antitrust Division, in the mid-1970s the Supreme Court ruled that noncompetition values such as the promotion of health or safety could never be evoked to justify anticompetitive practices so as to provide a defense against antitrust prosecution (*National Society of Professional Engineers v. United States* 435 U.S. 679, 1978). Although this decision simplified antitrust enforcement, it has worked against a harmonizing of competition and other legitimate policy concerns, not only in law enforcement but in policymaking. It should be reconsidered. Congress included the Exon-Florio provision in the Omnibus Trade and Competitiveness Act of 1988 as a means of taking national security interests into account in assessing whether to permit mergers affecting United States commerce that would be permissible under the antitrust laws. This legislation was opposed by the Antitrust Division. It was feared as a threat to the purity of competition values as the only legitimate basis for the prevention of mergers. Harmonization of competition with other international policy sectors will sometimes, perhaps often, mean a retreat for competition. This will be especially so in periods of strong protectionist sentiment, particularly during economic recessions.

But there cannot be rewards without risks. If the policy process can be made transparent, if the anticompetitive impact of restrictive policies upon the public can be identified and publicized, if the tensions between competition goals and mercantilist goals can be made accessible to the people in continuing public debate, then Americans will be truer to their democratic beliefs. This is so even if it cannot be assured that competition concerns will prevail. There is too little awareness of these issues today, too little debate.

One step toward national harmonization that promotes international competition policy is, we believe, easier than often assumed. Competition criteria should be used to evaluate trade remedies. This can be achieved to a large extent unilaterally or regionally, rather than within multilateral settings. A case in point is competition-distorting and trade-distorting subsidization by a foreign government. Should the importing country's authorities not take any action against the subsidized imported products? We suggest that the question is not whether countermeasures should be taken. It is, rather, what kind of countermeasures? The following case from the European Union illustrates that it may not always be so difficult to achieve the harmonization for which we have argued.

In December 1993, the EU Council decided to levy customs duties on televisions and gear boxes made in Austria[6] because their manufacturers had received state aid (subsidies). The EU-Austria Free Trade Agreement banned state aid that led to distortions of competition between the EU and Austria. The European Union imposed the tariffs to offset the effect of subsidies.

In the case of televisions, the European Commission learned in January 1993 of the decision taken by the municipality of Vienna to grant Grundig's subsidiary in Austria a subsidy that could exceed $11 million. The Commission deemed this an infringement upon the relevant provisions of the EU-Austria Free Trade Agreement. According to the Agreement, before any duties were imposed (or, as in this case, reimposed), there had been prior consultations between the two parties in the Joint EU-Austria Committee. Although this Committee appointed a group of experts to investigate the case and find a solution acceptable to both parties, none was found.

The European Commission proposed a duty of 14 percent because the Vienna area was not eligible for regional aid. The EU Council authorized that duty. It was to be applicable until the aid would no longer have any distorting effects on trade and competition, or at most for a period equivalent to the average duration of the fiscal depreciation. In January 1994, however, following a decision by Grundig to refund two-thirds of the aid, the EU Council reversed its earlier decision.

In a similar case involving trucks manufactured in Austria by Steyr Nutzfahrzeuge, the European Commission in December 1993 withdrew a proposal for duties ranging between 6 and 22 percent because at the

6. Austria acceded to the EU as a full member on 1 January 1995.

consultations in the Joint Committee it accepted Steyr Nutzfahrzeuge's eligibility for regional aid under the European Union's own criteria.

Both cases show how trade measures should be used to offset distortions of international competition. First, the European Commission sought to consult the other party. One might note that the consultation was, after all, required by the EU-Austria Free Trade Agreement. But GATT rules also encouraged such consultations, which members rarely made in a serious way. In this context, it is encouraging that the recent Association Agreements that the EU has signed with 10 central and east European countries contain provision for consultation before antidumping action is taken and for reliance on EU internal rules on state aid in cases of public assistance to industry. Second, the cases were put to a group of experts to find mutually acceptable solutions. Third, the Commission relied on competition policy criteria used to review regional aid within the European Union (i.e., it did not apply one standard to imports and another to products manufactured within the Union). Fourth, the duties were to remain for as long as there was a distortion of competition, not for as long as there was danger of injury from imports. Fifth, the Commission accepted a compromise for repayment of the aid. It recognized that small amounts of aid did not significantly distort trade or competition. In normal countervailing-duty cases, the Commission would not have to accept this argument, and indeed usually did not.

In the United States, a desire for harmonization also needs to be fostered in Congress. The increasing allure of mercantilist solutions in the legislative branch requires more public focus on the interplay among competition and these other policies both nationally and internationally. It would help if international trade, investment, and competition issues were not the responsibilities of different congressional committees. The courts also need educating as to the international context of antitrust, which itself needs to be brought into the mainstream of national and international economic law and policy.

We said at the outset of this chapter that we do not oppose the harmonization of national antitrust laws or the continuing effort to draft an international antitrust code with supernational authority. Those pursuing these projects rightly point out that there is a chicken-and-egg problem involved in finding the precise point of maximum impact. Without a growing international commitment to effective competition laws, competition policy inevitably will be trumped at both the national and international levels by less competitive alternatives. We are just less sanguine, for the reasons set forth here, that these antitrust harmonization efforts have "legs" for the foreseeable future. We are concerned that these efforts could, like the UNCTAD code, result in the capture of competition policy by those hostile to the market mechanism. National deregulation successes, however, have been significant over the past decade on every continent. Catching the momentum of national reform, having national competition agencies more explicitly promote national competition policy in national forums, seems to us a more practical near-term strategy for global-competition reform.

Raymond Vernon, one of the deans of international economy policy analysis, is skeptical about the reality of a remedy, as here proposed, which encourages more extensive and effective interaction between the Antitrust Division and other makers of US international economic policy. He properly points out that effective coordination and consensus building among officials in different US executive branch agencies, and between executive branch and congressional leaders responsible for international economic policy—especially when they are from different political parties—is rare (Vernon, Spar, and Tobin 1991, chapter 1). Our point is that competition officials have hardly tried to be policy participants, to build industry alliances, and to work with the White House to develop and pursue competition policy goals outside a very narrow range of antitrust law enforcement issues. Even if the obstacles are tall, it is unduly negative to conclude that the effort to build a procompetition constituency is not even worth making. It has not been attempted in a concerted manner since Thurman Arnold headed the Antitrust Division more than half a century ago.

Now that the Cold War is over and substantial reconstruction and development have been accomplished in Europe and Asia, perhaps there can be a return to the idea that inspired those who drafted the Havana Charter. The initial focus might be on the desirability of harmonizing antitrust and national economic policy within the United States and Canada and within the European Union. One expects both Europe and the United States to continue to press the Japanese government for more of this harmonization within Japan, in particular for an enhancement of the role of the Japan Fair Trade Commission in Japanese economic life.

This harmonization effort will be difficult and protracted. Support for open markets is broad but shallow. People like competition for their suppliers and customers but do not much like it for themselves. After all, antitrust lawyers are not happy about competition from other antitrust lawyers, and free market academic economists like the tenure system. In the rough-and-tumble of politics, protectionists who can mobilize narrow but deep constituencies often triumph, especially where backed up by ethnocentrism—and today, ethnocentrism is on the rise. It is important that further harmonization efforts go forward internationally on trade, intellectual property, deregulation, open investment, and favoring national champions. But if those efforts are to promote competition and open markets, greater national reconciliation of these policies should be predicate.

Protectionists do not always win, however. Promoting open markets over restricted ones goes to the heart of the key public policy issues of our day. Harmonizing competition with state protectionism is not, like antitrust harmonization, an arcane issue for technical experts.

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