Washington International Law Journal

Volume 4
Number 1 *Competition and Trade Policy: Europe, Japan and the United States*

3-1-1995

Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade

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Abstract: The Uruguay Round of the General Agreement on Tariffs and Trade is complete, and the agenda for the next round is being formulated. It is widely expected that issues of competition, the environment, and possibly labor will be on the agenda for the next round of the GATT. This article examines why it is that the world trading agenda may be thus expanding. Specifically as to competition law, it examines the history of devising world competition rules, the wisdom of revisiting the enterprise of doing so, and alternative approaches to competition in the GATT agenda. The article concludes with a modest proposal for forging the links between competition and trade in the context of the GATT.

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I. INTRODUCTION

The Uruguay Round of the General Agreement on Tariffs and Trade is complete, and formulation of the agenda for the next round of the world trading body — the World Trade Organization ("WTO") — is underway. Issues of competition, the environment, and possibly labor are expected to appear on the agenda. This article examines why it is that the world trading agenda is thus expanding. Additionally, it examines the history of devising world competition rules and the new symbiosis between trade and competition law, and it offers a focused approach to world competition policy in the context of the WTO. Finally, it argues for the creation of an enterprise that will deliberately forge the linkage between competition and trade.

II. THE HISTORY AND DEVELOPMENT OF INTERNATIONAL ANTITRUST

Since the late 1920s under the auspices of the League of Nations, international cartels have been identified as an enemy of world trade. In the 1930s, even while cartels gained respectability in the United States as a means to lift the country out of depression, fascist governments used cartels for political ends. In U.S. Congressional hearings, a pattern of cartels in support of totalitarianism began to emerge. Thurman Arnold, Assistant Attorney General under President Franklin D. Roosevelt in the late 1930s, launched aggressive antitrust attacks against such cartels. In 1944, President Roosevelt proposed action to curb international cartels under the auspices of the United Nations. Measures to protect competition in world trade were included in the draft foundational document for the International Trade Organization ("ITO"), the Havana Charter.[1]

The draft Havana Charter would have obliged the members of the proposed ITO to take "appropriate" measures to prevent private commercial enterprises that had "effective control of trade" from "restrain[ing]

[1] HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, U.N. Doc. E/Conf. 2/78 (1948), *reprinted in* U.N. Doc. ICITO/1/4 (1948).

competition, limit[ing] access to markets, or foster[ing] monopolistic control in international trade" where such conduct would "have harmful effects on production and trade and interfere with the achievement" of the charter's objectives.[2] Harmful effects were presumed (though rebuttable) in the case of price fixing, allocation of markets, boycotts, suppression of technology, unauthorized extension of patent monopolies, and other specified conduct.[3]

Under the Havana Charter, member nations would have been entitled to complain to the ITO about prohibited restraints. The ITO would have been authorized to investigate and to demand information in the course of its investigation, and to recommend remedial action to the government of member nations.[4] Upon finding a complaint valid, the ITO would have been required to publish its findings and request full reports from the offending member state about the progress of its remedial measures. The member state would have been obliged to "take in the particular case the action it considers appropriate having regard to its obligations under this Charter."[5]

However, in view of waning support and mounting opposition in the U.S. Congress, the Charter never came to the floor of the Congress, and the United States is credited or blamed for the demise of the ITO.[6] The inchoate ITO became the precursor to the General Agreement on Tariffs and Trade (the GATT), which set the world on a course towards more liberal trade. However, the GATT has never contained rules on competition.

No significant world antitrust initiative was to be taken again until the 1970s.[7] The impulse came from a very different nerve center, also under the auspices of the United Nations. Multinational enterprises ("MNEs") had begun to take root and expand. From the point of view of the developing

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2 *Id.* art. 46, ch. V.

3 *Id.* art. 46(1)-(3). To be subject to the proscription, the enterprises were required to "possess effective control of trade among a number of countries in one or more products."

4 *Id.* art. 48.

5 *Id.* art. 50. For a discussion of the competition provisions of the Havana Charter and their fate, see F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 38 et seq. (1994). *See also* George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089, 1116 (1949).

6 *See* ANDREAS F. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE § 2.2 (2d ed. 1983); Sigmund Timberg, *An International Antitrust Convention: A Proposal to Harmonize Conflicting National Policies Towards the Multinational Corporation*, 8 J. INT'L L. & ECON. 157 (1973).

7 *See* Eleanor Fox, *Harnessing the Multinational Corporation to Enhance Third World Development—The Rise and Fall and Future of Antitrust as Regulator*, 10 CARDOZO L. REV. 1981 (1989) [hereinafter *Harnessing the Multinational Corporation*]. *See also* Debra Miller & Joel Davidow, *Antitrust at the United Nations: A Tale of Two Codes*, 18 STAN. J. INT'L L. 347, 354 (1982).

countries, the multinationals were powerful, abusive, and sometimes rapacious. The developing countries (and some others) wanted a system to control and regulate the business conduct of the multinationals.

Under the aegis of the United Nations Conference on Trade and Development ("UNCTAD"), the industrialized countries, the socialist bloc countries, and the developing countries came to the bargaining table to negotiate a Restrictive Business Practices Code ("RBP Code"). The United States welcomed the invitation to negotiate a world business practices code because officials believed that they could educate less developed countries and socialist nations on the virtues of free markets. They hoped at least to establish a strong anti-cartel principle applicable to state-owned as well as private enterprise, and to jettison the intra-enterprise conspiracy doctrine, which, if applied, could invalidate the MNEs' intrafirm transfer pricing and export restraints.

After years of negotiation, in 1980, the parties reached agreement on a voluntary RBP Code. (Its very birth year would signal an anachronism; the Code was born into the Reagan era.) The RBP Code contains an express preference for less developed countries. It encourages member nations to improve and enforce their national antitrust laws; it states that MNEs should conform to RBP laws of the nations in which they operate; and it provides that states should cooperate with the authorities in other nations that are adversely affected by restrictive business practices. The substantive provisions reflect, essentially, a compromise position between U.S. and European Community antitrust law. Many provisions are vague, and by the current U.S. antitrust compass,[8] could handicap strong competitors and protect weak ones. For example, the Code provides that enterprises should refrain from "below cost-pricing to eliminate competitors" and from "[d]iscriminatory (i.e. unjustifiably differentiated) prices, terms or conditions, including by means of internal transfers," when, through an abuse of a dominant position, the conduct "limit[s] access to markets or otherwise unduly restrain[s] competition, having or being likely to have adverse effects

[8] U.S. antitrust law today is guided largely by goals of efficiency and consumer interest. *See* Eleanor Fox & L. Sullivan, *Antitrust — Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987); *Harnessing the Multinational Corporation, supra* note 7; Eleanor Fox, *Antitrust, Trade and the Twenty-first Century — Rounding the Circle, The Handler Lecture*, 48 REC. ASS'N B. CITY OF N.Y. 535 (1993) [hereinafter *The Handler Lecture*].

In the 1960s and early 1970s, U.S. antitrust law was quite different. It protected small competitors and sought to preserve diversity and autonomy. The anti-cartel principle, however, has been stable. Cartels are and for a century have been illegal per se. *See id.*

on international trade, particularly that of developing countries, and on the economic development of these countries . . . ."[9]

During the period of negotiations for the RBP Code, the Organization for Economic Cooperation and Development ("OECD"), comprised of the industrialized countries of the world, also responded to the perceived need for rules to guide multinational enterprises. In 1976, the OECD adopted Guidelines for Multinational Enterprises. The OECD Guidelines, although shorter than the eventual RBP Code and without special indulgence for conduct in the less developed countries, contain many similar suggested rules. One rule of the Guidelines states that MNEs should refrain from abusing a dominant position by means of, for example, "(b) predatory behavior towards competitors, . . . [or] (e) discriminatory (i.e., unreasonably differentiated) pricing [through intrafirm transfers] . . . ."[10]

Both systems were put into place just before the U.S. watershed in antitrust in the early 1980s, which changed U.S. antitrust law's concern with access, diversity, and governance of markets by competition, to law concerned with efficient outcomes.[11] The principles of law reflected in the RBP Code and in the OECD Guidelines are rooted in a pre-*Sylvania*,[12] pre-*Copperweld*[13] and pre-*Brooke Group*[14] world.

The above developments focus on rules of behavior. Through the years, however, initiatives were taken, also, to moderate jurisdictional

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9 U.N. Doc. T.D.-RBP-CONF-10 (1980), *reprinted in*, 19 I.L.M. 813 (1980). Such a standard could be interpreted to condemn competition itself. For example, it might be applied to prohibit sustained low-pricing by an efficient firm, particularly if domestic firms could not meet the competition.

10 Annex to the OECD Declaration on International Investment and Multinational Enterprises, OECD Doc. 21 (76) 04/1 (1976), *reprinted in* 75 DEP'T ST. BULL. 83 (1976). *See generally* Barry E. Hawk, *The OECD Guidelines for Multinational Enterprises*, 46 FORDHAM L. REV. 241 (1977).

11 *See* sources cited *supra* note 8. In the mid to late 1970s, the Supreme Court of the United States put a lid on theretofore expansive antitrust principles. In effect the Court disallowed antitrust enforcement that could harm consumers.

In the 1980s, during the Reagan Administration, the Justice Department articulated a new paradigm for antitrust. This new paradigm — of efficiency and consumer interests — gradually became widely accepted by the courts. *See id.*

12 Continental TV Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). Before *Sylvania*, it was illegal per se for a firm, by agreement with its distributors, to limit territories within which or customers to whom they could sell. *See id.*

13 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). *Copperweld* overturned the notion that parent corporations and their subsidiaries could conspire within the meaning of section 1 of the Sherman Act. *Id.*

14 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993). *Brooke Group* limits the scope of price predation actions by requiring plaintiff to prove that defendant (charged with below-cost pricing to eliminate competitors) would probably be able to recoup its losses after the predatory siege.

disputes among nations and to enhance cooperation in discovery and enforcement by nations' enforcement agencies. The United States entered into Memoranda of Understanding, separately, with Germany,[15] Canada,[16] and Australia,[17] and it entered into Mutual Legal Assistance Treaties with a number of nations to enhance cooperation in criminal enforcement.[18]

In September 1991, the United States and the European Commission signed the most affirmative arrangement yet made to facilitate mutual aid in discovery and enforcement: the U.S./EC Agreement.[19] The U.S./EC Executive Agreement has been held invalid, however, because of a technical deficiency — approval of the Council of Ministers was required but was not obtained.[20] Nonetheless, because the agreement is considered a progressive model and it has already influenced the direction of multinational cooperation, it is important to describe its terms.

The purpose of the U.S./EC Agreement was "to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws."[21] The agreement provided that one party would notify the other whenever their enforcement activities "may affect important interests"[22] of the other; that officials would meet at least twice a year to exchange information on enforcement activities, priorities and policies, and would provide information relevant to the enforcement activity of the other;[23] that competition authorities would assist each other in enforcement activities where compatible with their interests; and that where both had an interest in pursuing related situations they could

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15 Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956.

16 Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, U.S.-Can., 23 I.L.M. 275.

17 Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 34 U.S.T. 388.

18 For a discussion of the various Mutual Legal Assistance Treaties ("MLATs") which provide for cooperation in criminal enforcement, *see* Christopher L. Blakesley et al., *Extraterritorial Application of Criminal Law*, 85 AM. SOC'Y INT'L L. & PROC. 383 (1991); James I. K. Knapp, *Mutual Legal Assistance Treaties As A Way to Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405 (1988). Thus far the MLATs have only limited application to antitrust.

19 Agreement Regarding the Application of their Competition Laws, September 23, 1991, U.S.-European Communities, 30 I.L.M. 1487 [the U.S./EC Executive Agreement], invalidated on technical grounds by EC Court of Justice, Case C-41/93, France v. Commission (unreported, 1994).

20 *Id.*

21 *Id.* art. I(1).

22 *Id.* art. II(1).

23 *Id.* art. III.

coordinate their enforcement activities.[24] Where one party believed that anticompetitive activities carried out in the territory of the other were adversely affecting its important interests, it was entitled to request the other to initiate appropriate enforcement activities. The latter was required to consider the request and respond.[25] Moreover, to avoid conflicts, where one party's enforcement activity could adversely affect important interests of the other, the parties agreed to consider specified comity factors "in seeking an appropriate accommodation of the competing interests."[26]

The U.S./EC Executive Agreement has often been cited not only for its notification, consultations, and restraint provisions, but particularly for the parties' agreement to consider active assistance to one another in their enforcement activities. Such mutual undertakings to (sympathetically) consider giving active assistance is known as positive comity.

In a further development, the U.S. Congress passed the International Antitrust Enforcement Assistance Act in October of 1994.[27] This law authorizes the Attorney General and the Federal Trade Commission to enter into mutual assistance agreements with antitrust agencies of other nations. Pursuant to such agreements, the U.S. agencies may share certain confidential investigative information with other nations when appropriate in view of expected reciprocity. Moreover, the Justice Department may subpoena documents or testimony to assist a foreign agency's antitrust investigation, even if the suspected violation is beyond the reach of U.S. substantive law.

III. THE WORLD OF THE 1990S

On January 11, 1994, at a press conference in Brussels after talks with European Commission President Jacques Delors and Greek Prime Minister Andreas Papandreou, U.S. President Bill Clinton told reporters that the Brussels discussions had included the "new generation" of trade issues such as competition, the environment, and labor standards, and he

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24 *Id.* art. IV.
25 *Id.* art. V.
26 *Id.* art. VI (3).
27 International Antitrust Enforcement Assistance Act of 1994, Pub. L. 103-438, 108 Stat. 4597 (codified as amended in scattered sections of 15 U.S.C.).

advocated placing all three items on the agenda for the next round of the GATT/WTO.[28]

We ask here why the WTO agenda may be thus extended. Has the world so changed as to demand a new or more complete vision of international antitrust, the environment, and labor standards? Has this need so increased as to change the balance of preferences from a jealous safeguarding of "sovereignty" to a cosmopolitan search for more coherent treatment of problems with a global dimension?

The world has changed. The global economy at the turn of the twenty-first century is more dynamic and free flowing than in decades earlier. Spurred by high technology, telecommunications and ease of data and currency transfers, global transactions swirl over national borders rendering the borders themselves largely irrelevant to the conduct of business. Firms commonly have multi-national locations and seek the lowest cost inputs around the world. Currency transfers occur electronically and instantly. Just as in the 1880s and 1890s when the opening of the railroad lines seemed to shrink the United States, telecommunications, cable, the computer, and fluid financial market transactions, combined with a lowering of trade barriers through successive rounds of the GATT, have shrunk the world in the 1980s and 1990s.

As transactions without borders increase, they put increasing pressure on governments to expand free trade in the name of competitiveness; and as freer trade begets freer trade, we observe two phenomena:

1. Businesses in nations with high standards and high costs of regulation, such as those associated with evironmental and labor regulation, may perceive themselves as besieged with low-priced imports from nations that do not impose these obligations; and the "besieged" competitors claim "unfair competition" and "illegitimate comparative advantage." Businesses mobilize their governments to reestablish barriers to low-priced goods, or to raise the price of those goods directly.

(a) Business people in a nation with higher costs of regulation may form coalitions with environmentalists and supporters of better conditions

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[28] *The President's News Conference with European Union Leaders in Brussels*, 30 WKLY COMP. PRES. DOC. 33 (Jan. 11, 1994); Lionel Barber, *Clinton Places Environment on Top in GATT*, FIN. TIMES, Jan. 12, 1994, at 6.

for workers in an effort to lift the level of protection (and consequently raise costs) in the rest of the world.

(b) Businesses in nations with lower barriers may fear the loss of "their own" markets and seek to keep their markets by market division agreements and other private restraints of trade, and by invoking trade laws.

(c) Governments of nations in which businesses are newly vulnerable to foreign competition, while constrained against GATT-illegal conduct, may find new ways to protect their nationals from foreign competition, often combining public and private action. They may subsidize nationals or place road blocks in the path of non-nationals.

2. Because of increasingly integral transnational transactions, the need increases for a coherent "vision from the top" with attendant common policy, and in the absence of common policy, for procedural mechanisms to resolve clashes of jurisdiction and clashes of national laws.

These new pressures and new incentives are complicated by the fact that, in international and national law, government action and private action have been compartmentalized, and "sovereignty" has become a talismanic word. Government restraints of trade are governed by the GATT (WTO) or bilateral or regional agreements, while private restraints of trade are governed by the competition laws of the nations. A meaningful system of international antitrust has been avoided for fear of loss of national control and the related fear that world negotiations will inevitably entail compromising principle. The world of the 1990s may call for a rethinking of the sanctity of sovereignty and indeed a rethinking of the equation of sovereignty with no (more) world rules.

This article suggests that competition can no longer be separated from trade, that the competition law of one nation can no longer be isolated from that of other nations, and that public restraints can no longer be segmented from private restraints. Perhaps the time has come for a new generation of agreement exemplified by a more focused Havana Charter that forbids the most egregious and most friction-creating anticompetitive restraints in world trade. At the very least, the time is ripe to entertain the concept of some mutually agreed principles of substantive law, jurisdiction and dispute resolution at the intersection of antitrust and trade; and having identified such principles, to assess the costs and benefits of embracing them.

In sum, antitrust has periodically surfaced on the world agenda. In the 1940s, the concern was driven by the horror of world cartels that were used by fascist governments to reinforce their power. In the 1960s and 1970s, the concern was triggered by the growth of multinational corporations and their perceived social, political and economic power to shut off opportunity for outsiders and to repress less developed nations. The 1980s witnessed an unleashing of world competition along with freer trade, dissipating much of the market power that large corporations had accumulated in the 1960s. The years 1989 and 1990 saw attempts to construct free enterprise economies from the ashes of communism. Freer competition and trade continues to break down economic and political power and to create incentives for new forms of nationalism and protectionism, on the one hand, and for new avenues for progressive, integral world transactions, on the other hand. Competition law and trade law have met. The two questions are: First, how should we seek to forge their linkages? Second, is the creation of a program designed to establish these linkages worth its costs?

IV. DEVELOPING AN AGENDA

A. An International Versus a National Approach

There are three basic approaches to thinking about competition law and the world trading regime. One is to contemplate a rather complete international competition law system, and to draft a world competition code. This is the approach taken by the Munich group, in which I participated, whose proposed International Antitrust Code was released last fall as a GATT Plurilateral Agreement.[29]

A second approach is to identify specific tensions and opportunities that present themselves in the context of the world competition/trading system, and to formulate a narrowly focused agenda in response. It would start with a vision of freedom of trade in global commerce and link competition to trade at a constitutional level of generality. A third approach begins with an overriding skepticism of the multinational bargaining table. It begins

[29] I was one of the members characterized in the Munich document as rejecting the full-competition-code approach and endorsing a minimal approach that would embody only 15 principles. The 15 principles are set forth in the Introduction to the Munich Code, part VIII. The Munich Code is reprinted in 64 Antitrust & Trade Reg. Rep. (BNA) (Aug. 19, 1993). The alternative minimal approach is included therein at S-7 to S-9.

with the strong presumption that all that needs to be done can be done at the national level with enforcement agency cooperation, and it finds the presumption unrebutted.[30] The second and third approaches both foster competition among different antitrust regimes, and both preserve the flexibility of systems to adapt to their own needs, even in realms of global competition.

The first approach has the virtue of a unified approach for the trading partners of the world. Indeed, if world rules were preemptive for transactions of an international dimension (and if they were reasonably clear and not too complex), the unified approach would have, for business, the virtue of simplicity — a single set of rules for the game. Even if world rules are not preemptive, it may be said, players in a world game should play by world rules.

There are costs, however, associated with the comprehensive approach. It may require a rather complicated enforcement and adjudication system, which may create a growing bureaucracy. Moreover, the very notion implies that there is a set of optimal antitrust rules that fit all businesses and nations of the world, and that nations can identify and reach agreement on these rules through negotiation. But optimal rules may be context and culture specific, and negotiations imply bargaining and trade-offs and may yield rules formed more by politics than principle. Finally, if agreement were reached on a set of world rules, inflexibility would be inevitable. Diversity and roots-up growth would be limited and the law itself may be unresponsive to social and economic change.

The second, targeted constitutional approach has the virtue of avoiding bureaucracy and rigidity while providing a global vision. It would preserve diversity and accept national choice tailored to context, except where a nation chooses to impose costs on others. It has the costs (as well as the virtues) of foregoing a uniform, comprehensive system, and it does entail a modest limit on national choice in the interests of the greater good, as noted above.

The third national approach has the virtue, to a nation, of not giving anything "away," but the cost of not accounting for benefits of a world vision or the costs of narrowly nationalistic ambitions.

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[30] An expansive jurisdictional reach of national law, such as the U.S. Sherman Act, may add to a nation's comfort level that what "needs" to be done can be done by national initiative.

This article gives shape to the targeted constitutional approach. It proceeds on the hypothesis that international problems call for some international solutions, but that diversity is desirable and should be preserved to the extent that tailored solutions can meet the major problems caused by disharmony and lack of unified vision in the world competition/trading system. The process of formulating a targeted constitutional approach invites one to articulate exactly where the problems lie and how they can be specifically addressed, which itself should increase understanding about the problems and their solutions.

Accordingly, the article inquires into ways in which the competition laws of nations, and in which competition laws and trade laws, tend to conflict and thereby foster disputes among nations. Proactively, it seeks to identify specific ways in which coordination may perceptibly enhance the economic welfare of the citizen of the community of nations.

By giving specific form to the targeted constitutional approach, this article should enable the reader to compare it with both the comprehensive code approach and the solely-national-with-reciprocity approach and to consider their relative merits.

This article proceeds on the premise that people are better off by maximizing world economic welfare rather than by maximizing their nation's power vis-à-vis the power of other nations in the world. Moreover, the attempt to maximize a nation's relative power advantage is a strategy increasingly less likely to succeed and increasingly less attractive as multinationals freely move their resources around the world. This article is based on the judgment that nations (and their people) should and could be convinced not to trade off the economic well-being of their people for the nation's relative power advantage, but rather to maximize welfare in the larger community. They may need to be assured, however, that their trading partners will follow the same course. The proposal in this article provides a framework for such assurance.

B. Identifying the Frictions

1. One Nation's Competition Law Against Other Nations' Competition Law

The first inquiry is whether substantive differences in the competition laws of nations cause disharmony in the form of frictions in the world trading/competition system.

There are two principal ways in which disharmonious law may cause such tension. One problem may be illustrated by a reference to environmental law or labor law. If standards in Nation A are high and costly to meet, and standards in Nation B are nonexistent, free trade from B into A may cause trade tensions (whether or not the "problem" should be "solved" or tolerated).

This problem does not exist with regard to competition law. Antitrust is market-freeing, not market regulating. Antitrust law does not steer conduct into cost-increasing channels, as do obligations to clean the air or water. Rather, the market system safeguarded by antitrust enforcement tends to lower costs.[31] Some exceptions can be cited. For example, the abuse of the dominance law of the European Union may sometimes increase the dominant firm's costs of doing business. Even so, such law is calculated to increase access or lower the costs of smaller firms, and the net effect anticipated by the regulating community is cost-reducing.

U.S. antitrust law, as it exists in the 1990s, is clearly not cost-increasing. U.S. antitrust constraints have been notably minimized in the past fifteen years. There is no basis for U.S. firms to fear that their foreign counterparts have lower costs because of lower antitrust standards and that their foreign competitors might therefore wage "unfair" competition.[32]

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[31] Of course, all law entails costs of enforcement, and some nations may have inefficiently high costs of enforcement. If, however, Nation A operates an inefficient enforcement system, that fact does not give rise to a credible claim: "We pay these high costs. Your firms compete with ours; therefore you must make your system inefficient, too, and we will play on a level playing field."

[32] Assertions to this effect had some credibility in the 1960s, when the United States might arguably have "paid" something for antitrust in return for the perceived social and political benefits of a society of entrepreneurs. By the 1980s, however, the country perceived that its investment in "protectionist" antitrust was not worth its cost. In the 1990s, U.S. antitrust law is efficiency oriented. While some U.S. firms and some theorists still claim that U.S. antitrust handicaps efficient firms in world competition, at best the claim concerns a very small margin of big business collaboration, and even then the claim it is highly contestable. The United States has one of the least interventionist antitrust systems in the world today.

A second problem may be illustrated by reference to intellectual property law. If Nation A has intellectual property protection and Nation B does not, free trade in copied goods from B into A may cause trade tensions. Firms in B may free ride on the investments in innovation made by firms in A and thereby undermine the incentives of firms in A to invent, reflecting unfair competition. Again, disparities in competition law pose no such problems. There is no free rider implication from disparities in antitrust treatment.

National differences in legal standards, including competition law standards, do increase the costs of doing business. Business firms and their advisors must learn and keep abreast of a multitude of legal systems. Firms may be obliged to devise one system of distribution for the European common market and another for the U.S. market. They must follow numerous sets of reporting and waiting requirements to obtain approval of a single transnational merger. Certain harmonious approaches could decrease these costs. This phenomenon presents an opportunity for efficiency, which should be taken, but it does not reflect a trade tension among nations.

2. *Competition Law Versus Nonenforcement of Competition Law, and the Problem of Closed Foreign Markets*

Artificial market closure plainly gives rise to trade tensions. Where market entry is barred or deterred by means of private rather than government action, and where the closure or barrier constitutes an antitrust violation, then antitrust law is an available means to dispel the tension. If the home nation refuses or declines to initiate enforcement against antitrust violations, nonenforcement of antitrust can create trade tensions.

The problem of closed foreign markets is one of the most serious competition/trade problems today. The problem became prominent in the course of the U.S./Japan Structural Impediments Initiative launched in 1989. At that time, the United States announced its intention to use antitrust law to pry open foreign markets that had been closed by host-country competitors' conspiracies to boycott foreign goods. U.S. officials stated that, if

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Nor does one hear nations with antitrust that aims to protect a society of small business argue that other nations (such as the United States) have an illegitimate comparative advantage because of their efficiency orientation. No attempt to level the playing field in that direction would have a chance of success in the international arena today.

the host country refused to enforce its antitrust law and thus refused to restrain its nationals from barring U.S. imports, and if personal jurisdiction and comity concerns were satisfied, the United States would be likely to sue in U.S. courts.[33]

The hybrid (public/private) nature of the problem of closed foreign markets and the possibility of a subject matter jurisdictional gap that could frustrate antitrust enforcement by the harmed nation, qualify this issue specially for international discussion.

Four distinct problems present themselves in the context of market access and trade. First, what is the nature of the overlap or the difference between trade and antitrust concepts that safeguard market access? Second, is there a commonly understood antitrust rule that applies to foreclosure-type restraints? Third, is there a gap between recognized antitrust principles that safeguard market access and appropriate principles for competition in world trade? Fourth, even to the extent that antitrust rules are clear and relatively harmonious, and even where a trade/antitrust gap is not the problem, nations become embroiled in severe market access disputes of an antitrust nature, and they often seem not to trust the institutions of one another to resolve the dispute. In other words, there is a dispute-resolution gap; recourse to an impartial decision-maker who is trusted to apply the rule of law to the facts may be the most critical need.[34] Thus, the fourth problem is to devise a meaningful and legitimate dispute resolution system.

The first and second inquiries — the distinction between trade and antitrust and the identification of a commonly accepted market-access antitrust rule — are important so that trade and competition authorities, even within a single nation, can understand one another. The overlap between trade and antitrust market-access rules is narrower than many trade experts suppose. Liberal trade policy seeks centrally to restrain governments from

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[33] Department of Justice Releases of April 3, 1993, 7 Trade Reg. Rep. (CCH) ¶50,084 (Apr. 3, 1992). *See* Anne K. Bingaman, Change and Continuity in Antitrust Enforcement, Address Before the Fordham Corporate Law Institute, New York (Oct. 21, 1993), *in* 7 Trade Reg. Rep. (CCH) ¶50,123 (1993) (reaffirming the policy to use antitrust to open foreign markets).

[34] If, for example, Americans perceive that they are excluded from Japanese markets by artificial restraints, and if Japanese decision-makers (e.g., the Japan Fair Trade Commission) proceed to investigate the matter and find merely that market forces were at play, tensions are likely to persist. If U.S. authorities should proceed to pursue the matter in their own nation and if U.S. courts treat the issue as one for their own competence and the U.S. fact-finder finds that Americans were excluded by a Japanese conspiracy in Japan, tensions are likely to escalate, not dissolve. Escalation is likely to result unless there is a trusted authority to which both sides can appeal.

creating any distortions to trade. Foundational principles are: 1) free flow of goods, 2) nondiscrimination, and 3) transparency of any direct or indirect restraints. Therefore, a liberal trade policy is tough on government action, quick to interfere with government action affecting trade, and ready to assume that government action distorts trade.

A liberal antitrust policy also is tough on government; but for antitrust, this orientation tends to result in a weak rather than robust body of law. While putting to one side cartels, which are by definition designed to override the market, a liberal antitrust policy assumes that private action, unfettered by government mandate (including antitrust law itself), tends to increase trade, competition and efficiency. Indeed, some private restraints (such as exclusive dealing contracts) may be important instruments of competition and efficiency. Simply to call a private contractual term a "restraint" evokes no negative presumptions. Thus, while government restraints that may affect market access are suspect and containment of such restraints is at the core of trade analysis, private restraints that may affect market access are not necessarily suspect, and a full antitrust analysis may be performed without ever reaching the market access questions. A description of "consumer welfare" antitrust analysis may be helpful in clarifying this point.

Antitrust law is intended to eliminate market imperfections that create market power and give sellers incentives to act in disregard of the interests of buyers. While some nations' antitrust laws have additional purposes, all such laws seek to keep firms from getting or using power to override the market.

In a non-cartel case involving, for example, exclusive dealing, the antitrust analysis might start with the question whether the market is competitive or noncompetitive or whether defendant lacks market power. If the market is competitive or defendant lacks power, the analysis might stop there, for firms without power are pressured by the forces of competition to behave responsively to buyers.[35] A competitive market implies that there are sufficient forces within the market to provide the right incentives to the market actors. Thus, effective competition does not depend upon potential competition, and the analysis need never consider whether there are would-be importers who aspire to compete in the market.

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[35] *See* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 595-97 (1st Cir. 1993); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir. 1987).

If the market is noncompetitive and defendant has market power, the analysis proceeds further. One inquires whether defendant is employing the restraint to use, maintain or increase its market power, on the one hand, or to gain efficiencies and respond to buyers, on the other hand.[36]

There are two instances in which foreclosing restraints are deemed anticompetitive in the consumer welfare sense. The first is the case of a cartel involving a competitors' conspiracy to exclude outsiders and thus to keep the market for themselves. This is a typical anticompetitive horizontal restraint. The conduct is, by definition, intended to override the market. It is illegal under antitrust laws virtually everywhere in the world.

The second is the case in which the restraint is vertical only (i.e., it is not a result of agreement among competitors); but the market is concentrated, the firm employing the restraint has market power, the entrants would limit the dominant firm's or oligopolist's market power, thereby aiding consumers, and the entrants cannot penetrate the market in a significant way due to the restraint. A restraint of this type is or may be illegal under antitrust laws of all nations, although nations have a range of differences. In some nations, such a restraint may be efficiency-justified. Other nations' laws focus on access rights of would-be entrants and find violations at a lower threshold.[37] These are the common parameters of antitrust law on market access.

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[36] *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983).

[37] For European Union law, see Hoffmann-La Roche v. Comm'n [1979] E.C.R 461. *Hoffmann-La Roche* is compared with U.S. law in Eleanor Fox, *Monopolization and Dominance in the United States and the European Community — Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 501 (1986) [hereinafter *Monopolization and Dominance*].

For further EU precedent, see Case C-393/92, Gemeente Almelo & Ors v. Energiebedriif Ijsselmij NV, 4 Common Mkt. Rep. (CCH) ¶97,409 (1994) (a public undertaking may maintain exclusive purchasing requirements that restrict competition and would otherwise violate the Treaty of Rome if the restrictions are necessary to enable the undertaking to carry out the public tasks assigned to it); Scholler Lebensmittel GmbH & Co. KG, 2 CEC (CCH) 2,101 (1993); Langnese-Iglo GmbH, 2 CEC (CCH) 2,123 (1993) (exclusive purchasing agreements between ice cream manufacturers and retailers in the German ice cream market held to infringe Article 85(1) and not to be entitled to the benefits of the block exemption or to an individual exemption under Article 85(3) because they strengthened the duopoly position of the firms and made access to the retail ice cream market difficult).

Market access is an important concern in the EU's Exclusive Purchasing and Distribution Regulations. In EU Commission Regulations, article 14 provides that exemptions under the Regulation shall be withdrawn where "access by other suppliers to the different stages of distribution in a substantial part of the common market is made difficult to a significant extent." Commission Regulation 1984/83 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Purchasing Agreements 1983 O.J. (L173/5), *reprinted in* 2 Common Mkt. Rep. (CCH) ¶2733 (1983).

In other Commission Regulations, Article 6(b) similarly provides that exemptions shall be withdrawn if the agreement makes access by other suppliers "difficult to a significant extent." Commission

Third, we asked whether there is an unwelcome gap between the above antitrust concepts on market access and appropriate principles of world trade. The question suggests that antitrust law may be too limited in its reach and therefore cannot fully address problems in world competition.

In connection with purely private restraints, one should be cautious in concluding that there is such a gap. This is because, in a non-cartel context, restraints on private firms' freedom to decide how they purchase inputs and how they get to market may actually impair competition, efficiency,[38] and world welfare. It may therefore be perverse to push nations towards a common world antitrust rule that grants a higher level of market access rights than nations choose for their own internal economies.

In some cases, however, the market access restraint is a hybrid public and private restraint, bringing us to difficult territory that has not yet been fully explored. There might be a gap between competition law and appropriate trade/competition rules in this area. The opportunity should be seized to tear down the sometimes artificial wall between public and private restraints. Reference is made to the public/private problem in the State Action discussion below.

Fourth, in the context of the market access problem, the absence of recourse to a trusted, impartial decision-maker may reveal itself to be at the heart of tensions, suggesting the particular need for attention to dispute resolution.

3. *Alleged Zealous Extraterritorial Enforcement*

Zealous extraterritorial enforcement of U.S. antitrust law by U.S. plaintiffs and U.S. courts has been widely identified as a source of international tension. Indeed, enforcement of U.S. antitrust law — with its broad discovery rights, private enforcement, class actions, treble damage remedies

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Regulation 1983/83 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution Agreements, *reprinted in* 2 Comm. Mkt. Rep. (CCH) ¶2730. *See also* Commission Notice on Application of Article 85(3) to Categories of Exclusive Distribution and Exclusive Purchasing Agreements 84/C 101/2, *reprinted in* 2 Comm. Mkt. Rep. (CCH) ¶2702.

In the United States itself the legal principle governing exclusionary restraints is not wholly clear. The law sometimes protects opportunities for competitors, although a focus on consumer welfare alone has been called "the ascendant view." *See* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d at 597.

[38] *See* Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988) (application of the rule of per se illegality to nonprice vertical restraints might undermine distribution and marketing efficiencies and have adverse affects on interbrand competition).

and criminal punishment — against nationals of the UK, Canada, Australia, France and other nations, has triggered enactment of statutes to block U.S. discovery and to "claw back" the two-thirds (penal) portion of foreign (U.S. antitrust) judgments.[39] Numerous commentators have suggested rules of deference and restraint as solutions.[40]

The core of the problem that results in trade tensions is not centrally, however, some nations' overzealous outreach in antitrust enforcement. Efforts to bring to account foreign firms that cause direct and foreseeable harms in a regulating nation's economy are simply a predictable response to the interdependent world, combined with the fact that most nations do not prohibit their firms from taking action that harms "only" foreigners. Business conduct across the globe may directly harm competition in other nations. This phenomenon occurs with more and more frequency as the world economy becomes more international. The effects doctrine[41] was the predictable response to nations' needs to protect themselves. It is no surprise that some form of the effects doctrine is now accepted by virtually all of the major trading nations.[42]

Antitrust enforcement against foreign firms is particularly unremarkable in the case of private cartels targeted at a regulating nation's market (i.e., the inbound trade problem). Cartelists should not be free of the victim nation's law simply because *they* (the cartelists) are remote, while free of their own nation's law because the *harm* is remote. By choosing to do business in or into a country, they are bound to know its law and to accept the consequences of violating the law, be it treble damages, broad discovery, or jail.

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[39] Examples of blocking statutes include the following: Australian Foreign Proceedings (Excess of Jurisdiction) Act, Act 3 (1984); Canadian Foreign Extraterritorial Measures Act, R.S.C. ch. F-29 (1985) (Can.); Ontario Business Records Protection Act, R.S.C. ch. B-19. (1990) (Can.); U.K. Protection of Trading Interests Act, 1980, ch. 11.

[40] *See, e.g.*, Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783 (1984); Harold G. Maier, *Interest Balancing & Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983).

[41] The effects doctrine refers to the judicial inquiry engaged in by U.S. courts when deciding the jurisdictional reach of U.S. antitrust laws over foreign parties. *See, e.g.*, Eleanor Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.YU. J. INT'L L. & POL. 565, 569-572 (1987).

[42] THE RESTAMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, rptrs. n. 3 (1987) [hereinafter RESTATEMENT].

See also Kurt Stockmann, *Foreign Application of European Antitrust Laws*, 1985 FORDHAM CORP. L. INST. 251 (1986); Joseph P. Griffin, *EC & U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353 (1994).

Further as to inbound trade, if tension results from enforcement by the regulating nation against foreign firms, the problem may be either "narrow nationalism,"[43] or the industrial policy of the actor's nation. Regarding the former, nations would sometimes rather protect their own citizens from even well-based antitrust enforcement abroad than cooperate in advancing the mutual interest of nations against a cartelized world.[44]

Regarding the latter, cartel conduct may be actually or purportedly government-authorized, or the collaborative conduct may be regulated and it may be of a sort that is legal even if all of its harms fall in the home country. The uranium cartel[45] is an example of the former. The *Laker Airways v. Sabena, Belgian World Airways* litigation[46] and the *In re Insurance Antitrust Litigation* case[47] are possible examples of the latter. Moreover, there may be serious question as to whether defendants acted concertedly or independently, and if defendants did act concertedly, whether their agreement amounted to an illegal one. Additionally, defendants may be distrustful of the decision-making process in foreign courts. In such cases, outreaching enforcement initiatives do cause tensions among nations.

Recently in the United States, initiatives have centered also on outbound trade. The Department of Justice has challenged restrictions imposed by UK Pilkington that prevented U.S. and other firms from exporting to the United Kingdom and other parts of the world. The challenge was settled by consent decree removing the restrictions.[48] Statements by U.S. officials suggest that additional challenges — perhaps against Japanese firms that allegedly exclude U.S. exports to Japan, may be forthcoming.[49]

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43 *See generally* ROBERT REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21st CENTURY CAPITALISM (1991). Robert Reich articulated the concept of "zero-sum nationalism" (we win or they win) versus cosmopolitanism upon which I draw throughout this article. *Id.* at ch. 25.

44 Consider, in the Freddie Laker matter, the UK pressure to cause the United States to withdraw its criminal information against British Airways, because the UK wanted to privatize British Airways and to realize full value of the airline without the cloud of litigation. *See generally* GEOFFREY SMITH, REAGAN AND THATCHER (1991).

45 *See In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); United Nuclear Corp. v. General Atomic Co., 597 P.2d 290 (N. Mex. Sup. Ct.), *mandamus den.*, 454 U.S. 811 (1981).

46 *See* Laker Airways Ltd. v. Sabena, Belgian World Airways, 731 F.2d 909 (D.C. Cir. 1984).

47 *In re* Insurance Antitrust Litigation, 113 S. Ct. 2891 (1993).

48 United States v. Pilkington plc, 59 Fed. Reg. 30604 (June 14, 1994) (Proposed Final Judgment and Competitive Impact Statement).

49 *See* Keith Bradsher, *U.S. Sues British in Antitrust Case*, N.Y. TIMES, May 27, 1994, at A1.

Enforcement to protect opportunities for exporters has already provoked claims of unilateralism and intrusion into another nation's sovereignty.[50] Use of the effects doctrine in outbound cases is on less established footing than in inbound cases, even though it seems reasonable to assert that trading nations (which, by definition, seek the benefits of open markets abroad) should not countenance unjustified public or private restraints that close their markets at home. An international consensus may exist that there *is* an outbound problem. The point on which the international consensus has yet to develop is how to solve the outbound problem — e.g., by recognizing the legitimacy of an antitrust challenge by the excluded nation, and/or by devising a system for dispute resolution.

Jurisdictional outreach does therefore give rise to tensions and it is possible that those tensions can be sufficiently addressed only in the context of a world agenda. Competition, fairness, legitimacy of process, and choice of law are all at issue.

4. State Action, Act of State

Every nation has some form of a state action doctrine[51] and an act of state doctrine,[52] exempting certain government acts from antitrust. This subject is not principally about dissimilar and conflicting laws of nations; the laws of nations are relatively similar. The problem is largely the overbreadth in the law of all nations in shielding anticompetitive action that harms other nations, while sometimes harming even its own consumers. Government action may be in the form of subsidies, authorized export cartels, or standards which foreigners cannot know or cannot efficiently meet. Some anticompetitive state action is subject to the GATT/WTO, while some is not.[53]

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[50] *See* Yoshio Ohara, *The New U.S. Policy on the Extraterritorial Application of Antitrust Laws, and Japan's Response*, 17 WORLD COMPETITION 49 (1994).

[51] For examples of U.S. law regarding the state action doctrine, see Southern Motor Carriers Rate Conference Inc. v. United States, 471 U.S. 48 (1985); Town of Hallie v. City of Eu Claire, 471 U.S. 34 (1985).

[52] For U.S. law regarding the act of state doctrine, *see* RESTATEMENT, *supra* note 42, § 443. *See also* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 110 S. Ct. 701, 107 L. Ed.2d 816 (1990).

[53] The GATT regulates the provision of export subsidies and other subsidies that seriously prejudice the interests of another contracting state. *See* General Agreement on Tariffs and Trade, October 30, 1947, art. VI, XVI, TIAS 1700, 55 U.N.T.S. 194. *See also* Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, Apr. 12, 1979, 31 U.S.T. 513 (1979) [hereinafter antidumping

The most widely cited case in point is government authorization of export cartels, whereby a nation, even if it prohibits cartels at home, might encourage export price-fixing, profiting the nation by exploiting "the foreigners."[54]

The Motorola incident in Japan is another case in point. Motorola, a producer of cellular telephones, depended on the Japanese government to assign it frequencies in Japan and to create the infrastructure that would enable its phones to work (as Japan had agreed with the United States that it would do). Japan assigned the task to Nippon Telephone & Telegraph, which had its own technology and had incentives not to promote the technology and the business of Motorola.[55]

In a third situation, government-owned businesses or state-designated (e.g. licensed) private monopolies procure their goods and services only from national sources, and in a fourth, nations maintain significant "buy-national" programs that have distinct lasting effects in steering purchases away from foreign goods.

A fifth situation is more ambiguous: a nation (or a subdivision thereof) takes action to cure a failing market (e.g., it orders a crisis cartel) and it fulfills the exempting requirements of its law, but the anticompetitive effects are felt as distinctly or more distinctly in other nations while the benefits are captured by the acting nation.

If one were to solve the problem of externalities in the interests of the citizen of the community of nations, conceding a proper role for subsidiarity, one would prohibit export cartels[56] and government-sponsored

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and subsidies code]. These provisions were supplemented by a new subsidies agreement negotiated during the Uruguay Round. *See* Agreement on Subsidies and Countervailing Measures [hereinafter the Agreement on Subsidies]; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, pt. II Ann. 1A-8, GATT Doc. MTN/FA (Dec. 15, 1993), *reprinted in* 33 I.L.M. 1 [hereinafter Final Act].

54 For an analysis of the legal treatment of export cartels by the major industrial nations, see *Report of the ABA Antitrust Section Special Committee on International Antitrust*, 1991 A.B.A. SEC. ANTITRUST REP. ch. 3 (Barry E. Hawk, Chair).

55 Barnaby J. Feder, *Motorola Long a Backer of Sanctions*, N.Y. TIMES, Feb. 15, 1994, at D7. The dispute was resolved by an agreement between the United States and Japan giving Motorola greater access to the Japanese cellular phone market. *See* David P. Hamilton, *Motorola Resolves Cellular Dispute with Japan's IDO,* WALL ST. J., Mar. 11, 1994, at A8.

56 Three objections are made to limiting states' freedom to order export cartels. One, export collaboration may be necessary for small exporters to achieve efficiencies they could not otherwise gain and thus necessary to promote exports. Second, export cartels may be necessary to protect a nation's exporters from destructive competition against one another. Third, nations (e.g., Japan) may be responding to another nation's (e.g., the United States') request or "interests" to prevent flooding the market, which itself would

discrimination, including barriers with equivalent effects to tariffs and quotas as well as government procurement unless justified by a tightly-drawn public interest (e.g., national defense) standard. One would also prohibit or regulate state anticompetitive action that injured neighbors more than itself, and at least require transparency and justification.

There is currently a gaping hole in the international trading/competition system. The state action doctrine is an antitrust doctrine, not a trade doctrine, and it assumes "virtual representation."[57] The principal harms as well as the principal benefits from anticompetitive state action normally fall within the state, and the interests of the state's citizens are protected by the state. In the increasingly global economy, however, transnational spill-over harms are more likely to occur and are likely to be more pronounced when they do occur. The act of state doctrine is a foreign relations doctrine, not a trade doctrine. Its genesis is political, not economic. It relies upon a notion of sovereignty constructed before the modern economic appreciation of the benefits provided by integration of nations' economies. Some means must be devised for closing the gap between GATT-illegal conduct and acts of states or nations that lie outside of the traditional world trade law yet impose unacceptable costs on the world trading system.

The European Union ("EU") is far advanced in dealing with these problems, for in the European internal market there is no trade law. All former trade law problems have been reconceptualized as distortion-of-

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be likely to trigger imposition of national trade barriers such as local content regulation or antidumping duties.

The answer to the first objection is that export collaborations to achieve efficiencies are not export cartels (to override the market). We make the distinction between procompetitive and anticompetitive cartels every day for our internal markets. There is no reason why we cannot make the distinction in matters of trade.

The second objection is an objection to competition itself. Normally, competition should be presumed beneficial. If a nation — such as China in its silk export trade — experiences destructive below cost export competition, the nation can control the problem by publicizing what happens when firms engage in sustained sales below marginal or average variable cost, and it can prohibit such sales. While below-cost-sales laws are difficult to administer in an efficient way and should have narrow scope, a well-drafted law of this genre is a less blunt instrument than a policy to bless cartels.

The third objection is even more intractable. It involves enormous amounts of lobbying dollars, and is highly political. Domestic businesses may seek to buy as much protection as they can get, up to the point where the cost of protection exceeds the losses from foreign competition (or the cost of re-tooling to compete in a global environment). The interests of the citizen of the community at large lie clearly against such investment in protection. Regulation that would limit states' rights to respond to claims for protection would give state officials needed support to resist anticompetitive private-interest measures.

[57] *See* JOHN ELY, DEMOCRACY AND DISTRUST 82-87, 100-01 (1980).

competition problems. The EC Treaty of Rome and the European Union case law are rich with precedents for working out these problems in the mutual economic interests of a community of nations.[58]

5. *Antidumping Law/Antitrust Policy*

Nations have antidumping laws that prohibit imports sold at less than "fair value"[59] if the imports materially injure a domestic industry. The world trading regime does not promote antidumping laws; rather, it tolerates them.[60]

Antidumping laws create a trading tension, but the most direct tension is internal to each nation. For the United States, the tension is between U.S. antitrust policy, which encourages sustainable low pricing not en route to creating monopoly or oligopoly power, and U.S. antidumping law, which chills just such low pricing in order to shield a domestic industry from prices judged to be "unfair." International tensions may result, because Nation A's competitively low-priced goods may be taxed on entry into Nation B, and A's firms may perceive that they have been denied fair market access. Or, absent dumping duties, beleaguered firms in Nation B may claim harm from the "unfair" prices of products imported from A.

One might in theory expect each nation to examine its own problem and to reconcile the tension between its antitrust policy and its antidumping law. One might expect the United States to worry about harm to intermediate buyers who are forced to buy overpriced inputs and thus are set back in their competition in world markets; to worry about harm to overcharged consumers; and perhaps to retrain and redirect workers whose jobs are lost to competition, rather than to take action to preserve existing higher-cost domestic producers. But, other than in areas such as the European common market and the European Economic Area, wherein charging dumping duties

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[58] *See* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW, chs. 9, 18, 25 (1993).

[59] Under U.S. law, "less than fair value" means less than home country price; if there is no home country price (i.e., if home market sales do not exceed 5% of the exporter's total export sales), it means less than third country prices. If that benchmark is unavailable, "fair value" is deemed to be a constructed cost derived from an evaluation of costs and standard profits for the type of exporter involved. *See* 19 U.S.C. § 1673; *see also* 19 C.F.R. ch. III, § 353.42-353.60 (1991).

[60] *See* Final Act, *supra* note 53, art. VI; *see also* antidumping and subsidies code, *supra* note 53. The Uruguay Round introduced a new agreement on antidumping which will revise the antidumping code. *See* Agreement on the Implementation of art. VI of GATT 1994, *in* Final Act, *supra* note 53.

is a clear violation of the law, this internal examination and reconciliation is not occurring. The politics of reconciliation are formidable. Even within the North American Free Trade area, antidumping laws presently remain intact.

In the context of our world trading system, with its falling barriers, incentives towards ratcheting down the dumping-duty barrier could increase for three reasons. First, intensified world competition puts pressure on nations to assure their intermediate producers access to lowest price inputs. Second, as barriers insulating national markets fall, nations have less opportunity to shelter their own firms, and the firms have less opportunity to make the ultracompetitive profits that gave them flexibility to charge prices as low as marginal cost abroad. As opportunity for "unfairness" through price discrimination thus diminishes, importing nations may be less anxious about according national treatment to their neighbors' goods. Third, from a (narrow) political perspective, nations may view the "right" to impose antidumping duties as a valuable chit, not to be relinquished unilaterally. As nations become more attuned to decision-making in their common interests, or if they simply value sufficiently the reciprocal benefit — the right to national treatment in the trading partners' markets — they may be more likely to rein in their antidumping laws.

6. *Subsidies and Countervailing Duty Law and Antitrust Policy*

Nations give subsidies to firms and industries in various forms. Some are GATT-illegal and may be subject to a nation's countervailing duties.[61] Since the conclusion of the Uruguay Round, there is a greater opportunity to challenge subsidies.[62]

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[61] GATT law prior to the Uruguay Round prohibited export subsidies except on primary products, and urged parties "to avoid injuring the domestic industries of another signatory" when they use other types of subsidies. Signatories could impose duties to countervail subsidies that violate the GATT provided the nation complied with procedures outlined in the countervailing duties code. *See* Final Act, *supra* note 53, art. VI, XVI. *See also* antidumping and subsidies code, *supra* note 53.

[62] The Uruguay Round Agreement on Subsidies will probably result in increased challenges to subsidies. It clarifies many of the ambiguities in the predecessor antidumping and subsidies codes. For example, unlike its predecessor, the Uruguay Round Agreement defines subsidies and then sub-divides subsidies into categories, and specifies the legal status of each. A subsidy is defined as a financial contribution by a government that confers a benefit. The constraints set out in the Agreement apply only to subsidies that are "specific," which, for the most part, are those that are available only to an enterprise, industry, or group of enterprises or industries within the jurisdiction of the authority granting the subsidy. "Prohibited subsidies" are those contingent upon export performance and those conditional upon the use of

Subsidies are normally inefficient. They create artificially large demand for the subsidized product, which is sold below its cost. Therefore subsidies create inefficiencies in the allocation of resources.

While they may sometimes be justified as necessary to correct market failures, subsidies create a tension. They create a tension between one nation's right to implement industrial policy (by supporting chosen business or industry) and other nations' businesses' right to compete on the merits.

From a U.S. perspective, the conflict is one of trade law versus antitrust theory. From a European Union internal market perspective, the linkage is even closer. The subject of "state aids" (including subsidies) is a part of EC competition law and is a subject within the competence of the Competition Directorate. Because the EU articulates competition policy as the interest in "undistorted competition," and because state aids by one member state to its businesses distort competition within the common market, it is easy to see why the European competition law umbrella covers state aids.

In the EU, state aids must be reported, and they must be justified in accordance with specified standards, or eliminated.[63] While the system works far from perfectly, it provides a framework for dealing with a tension-provoking problem, and a more direct and complete approach than that provided by the GATT/WTO.

C. *Identifying the Opportunities*

1. *The Integral Global Transaction*

Gains in trade and competition may also flow from an integrated view of the world. Increasingly, transactions or patterns of conduct are integral transnational transactions. Their benefits and costs cannot be appreciated without vision from the top. A law as broad as the transactions it regulates must necessarily have positive qualities.

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domestic goals in preference to imported goods. "Actionable subsidies" are those that cause adverse effects to the interests of other signatories. The final category of subsidies is "non-actionable." This category includes non-specific subsidies and various specified specific subsidies. *See* the Agreement on Subsidies, *supra* note 53.

[63] Treaty Establishing the European Economic Community, March 25, 1957, arts. 92-94, 298 U.N.T.S. 3, 51 A.J.I.L. 865 (1957) [hereinafter the EC Treaty]. The EC Treaty, as amended by the Maastricht Treaty, can be found in 3 Common Mkt. Rep. (CCH) ¶25,400.

In the late 1880s, the Rockefeller Standard Oil Trust was formed in Ohio. It combined most of the refiners of oil in the nation under one roof. Ohio sued the oil trust for violation of the state antitrust laws. The trust dissolved and incorporated in New Jersey.[64]

A century later the United States withdrew its 16-year old antitrust lawsuit against IBM, perhaps because it feared that success in the lawsuit would handicap an exemplary, inventive global producer. The European Community began proceedings against IBM Europe and announced that it would seek relief requiring IBM to disclose changes in its main frame interfaces in advance of IBM's marketing the new products so that IBM's competitors in the supply of peripheral plug-in attachments would not be set back in their competition. U.S. officials argued that the relief proposed by the EC officials would harm IBM worldwide and that it would harm U.S. technological progress, while EC officials argued, to the contrary, that the relief would enhance competition and progressiveness.[65] A settlement between IBM and the EC followed,[66] but had there not been a settlement, the European Commission and the EC Court of Justice might well have ordered the disclosure based on their view of what is good for competition. No institution extant had the competence to assess whether the relief would have been good or bad for the broader community of nations. No institution is in place to hear, impartially, the voices of those claimed to be harmed by one nation's externality.

In the 1990s, firms within nations and across nations are contemplating combinations to build a data superhighway. A given cooperative effort (with or without safeguards for access) might be a benefit for the world or it might be a monopolistic monster. If we do not have a unified understanding of global impacts, and perhaps a unified legal treatment, one nation might strike down a blessing for the world, or all nations might lack the tools to control a manipulative monster.

Because of externalities and common goods, some problems cannot be appropriately solved except by a common solution. Environmental problems are commonly cited as the paradigmatic example. U.S. clean air will not stay clean, despite high and well-enforced environmental standards,

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64 *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 38-41 (1911).

65 For a discussion of the U.S. and the European proceedings against IBM, see E. Fox, *Monopolization and Dominance*, *supra* note 37, 61 NOTRE DAME L. REV. at 100-15.

66 The settlement is reprinted in full at [1979-1981 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶8708; [1982-1984] Comm. Mkt. Rep. (CCH) ¶10,608.

unless cross-border Mexican or cross-border Canadian air is similarly treated. Externalities and the common good is one important reason why environmental law is likely to appear on the agenda of the WTO. The "integrated whole" problem is a reason why antitrust law, likewise, is a candidate for common policy, or at least for a forum in which to confront the problems for the common good.

2. *Harmonies and Synergies*

Freer trade creates opportunities for trade and competition policies to work together. As trade restraints are lifted, existing private restrictions become more apparent, and private firms may be motivated to preserve their customary turf by new private restraints.

Moreover, as trade becomes freer and the world becomes more nearly integrated, gaps become more apparent in and between trade and antitrust law in dealing with artificial restraints that block the free movement of goods, services and capital.

The law of the European Union has a unified approach to such restraints in the internal European market, and its basic economic blueprint holds lessons for the rest of the world on how harmonies and synergies may be achieved. The EC Treaty of Rome prohibits member state restraints on free movement of goods, services and capital across state borders, and it assures freedom to establish business across borders. The law prohibits discrimination based on nationality.[67] It aggressively reaches disguised as well as obvious restraints. Dumping duties in the internal market are prohibited, and (in theory) subsidies are transparent and controlled.[68] The competition law explicitly goes hand in hand with the free movement law; government enterprises and government licensing of exclusive rights are subject to the competition principles. Anticompetitive state legislation is subject to limits.[69] Government procurement is constrained by rules of nondiscrimination. Standards, such as telecom standards, are required to be

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67 EC Treaty, *supra* note 63, art. 7.

68 Regarding subsidies, see EC Treaty, *supra* note 63, arts. 92-93. Regarding the tension between free movement and availability of antidumping duties, see generally John Temple Lang, *Reconciling European Community Antitrust and Antidumping, Transport and Trade Safeguard Policies - Practical Problems*, *in* 1987 FORDHAM CORP. L. INST. ch. 7 (Barry E. Hawk ed., 1989).

69 *See* EC Treaty, *supra* note 63, arts. 3(f) (now 3(g)), 5(2), 30, 85, 86, 101 and 102. *See* BERMAN, GOEBEL, DAVEY & FOX, *supra* note 57, at 882.

transparent and not to operate as non-tariff barriers. The common policies, and linkages of national policies to one another, are (again, in theory) subject to the principle of subsidiarity to preserve national autonomy and diversity. Decisions that can best be taken at a lower (e.g. national) level should be taken at the lower level.[70]

While any world compact for competition and trade would be different from that of the European Union, which arose from a political need at the end of World War II and aspires to be more tightly integrated than the rest of the world, lessons may be learned and adapted from the European internal market blueprint. Though far from perfect in its execution, it offers a model to achieve free competition and trade, undistorted by artificial government or private action.

V. A MINIMAL BUT UNITARY SYSTEM FOR GLOBAL COMPETITION

Specified below is a targeted approach to the problems raised and opportunities identified for a world competition/trading regime.[71] The principles are based on the notion of a community of nations, commonly striving to create robust and competitive business and to enhance competition, efficiency and technological progress for the benefit of the citizen/consumer of the larger community. The system is dependent on national enforcement of existing law and shared principles of law, with recourse to impartial dispute resolution in the event of conflicts and global impacts.[72]

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[70] *See* EC Treaty, *supra* note 63, art. 3(b). The subsidiarity principle was added to the EC Treaty by the Treaty on European Union (Maastricht). *See* Treaty on European Union, Feb. 7, 1992, *reprinted in* 3 Common Mkt. Rep. (CCH) ¶25,300. *See generally The Handler Lecture*, *supra* note 8, at 566.

[71] This is a refinement of principles I have suggested elsewhere. *See* Introduction to Munich Code, *supra* note 29; *The Handler Lecture*, *supra* note 8, at 567-75.

[72] The reader may wish to also consider the remarks of Claus Dieter Ehlermann, Director General, DG IV:

> The Commission is in favor of a multilateral approach to anticompetitive practices of companies. . . .
>
> With the WTO following the GATT, there can only be an increase in the level of commitment of the world's trading partners towards competition and increased trade. As part of its immediate agenda, the WTO should cover competition policy issues, focusing particularly on restrictive business practices and cartels. The aim should be to establish minimum substantive rules and lay down procedures for the effective enforcement of these rules by the contracting parties. The enforcement measures should be strict in order to provide the positive market-

A. Substantive Principles

1. The contracting nations should articulate strong shared antitrust principles of relevance to the world trading/competition system. These principles should be: 1) an anti-cartel rule, subject to the right of a nation to adopt tailored, transparent derogations to address internal market problems; and 2) a market access rule, contemplating that markets not be blocked by artificial restraints that harm competition.[73]

2. The nations should agree to incorporate or maintain these consensus principles in their national antitrust laws. They should agree to extend their national laws in scope so that each regulating nation treats harm caused by its nationals to competition, efficiency or technological progress anywhere in the community of nations as seriously as it treats harm within its borders. The nations should agree to enforce the consensus principles, especially when the harm is to another contracting nation.

3. The nations should agree that they will not authorize, encourage or carry out any anticompetitive act where a principal effect is harm to other contracting nations.

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opening effects needed for a strong multilateral agreement. In addition, the right to recourse to GATT panels should be strengthened, as should the effectiveness of adjudications.

Any multilateral agreement on competition would have to provide for agreement on competition rules, for reinforced cooperation procedures between the competition authorities involved, for an improved exchange of information, as well as for effective enforcement measures.

Claus Dieter Ehlermann, speech delivered in Brussels (June 22, 1994). For an approach that is at first minimal but increasingly ambitious, beginning with transparency and graduating to investigations regarding cartels, later monopolistic practices, and later mergers, and requiring compulsory licensing of technology to dissipate persistent control of world trade in certain statistical categories, see F.M. SCHERER, *supra* note 5, at 91-96.

[73] While the formulation of an appropriate world market-access principle would be a formidable task, this proposal does not contemplate such a task. Rather, nations would formulate (as they have formulated) their own rules. As the jurisdictional principle below contemplates, if a restraint is essentially an internal market restraint, it is governed by the law of the nation within which it occurs. *See* Private Int'l Law of Switzerland, *infra* note 77. Thus, if Japanese firms exclude U.S. imports by reason of a vertical distribution restraint in Japan, the legality of the restraint is tested by the vertical restraint law of Japan, and vice versa. The agreement suggested would not direct nations as to how they must formulate their market access rule, but simply require that they must have one.

4. The nations should adopt and enforce principles of national treatment of other contracting nations' goods and services, and should move towards the same ends for capital and freedom of establishment.

5. Each nation should bring its antidumping rules more nearly into correspondence with its antitrust price-predation rules, with a view to encouraging sustainable low-price competition.

6. The nations should develop a short list of principles or subject areas as to which certain freedoms of action are important to a world of freer competition (e.g., to engage in certain R&D joint ventures, networks and alliances), and should develop either common principles, jurisdictional rules of priority and deference, or procedures for adjudication of conflicts so that no one nation could obstruct covered transactions whose dominant effect is to enhance competition, efficiency or technological progress in the community of nations.

B. Enforcement, Jurisdiction and Dispute Resolution

1. Nations whose competition or commerce is injured by consensus wrongs[74] launched from or in another contracting nation may request the authorities of the injuring nation[75] to enforce the injuring nation's antitrust law, and failing satisfaction, they should be accorded the right in the injuring nation to seek enforcement of the latter's antitrust law. The right of action should be an effective one, accompanied by appropriate access to information. Alternatively, failing satisfaction, the injured nation should be accorded the right to bring action in its own nation.[76]

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[74] This term refers to violation of the consensus principles in the agreement. Alternatively, "consensus principles" could include all common principles of an injuring and injured nation, e.g., a common proscription of anticompetitive mergers.

[75] "Injuring nation" is used to mean the nation of the firm or firms that allegedly cause the antitrust harm by conduct within that nation. "Injured nation" is used to mean the nation whose citizens or firms experience the harm. Normally the harm experienced would be harm to the competition process in the injured nation, but it could also be harm to exporters of a nation blocked from foreign markets by anticompetitive conduct.

[76] Private persons have certain rights under the existing systems of law, and these would remain in tact. Where new rights are contemplated, it would seem wise to confine such rights to governments, which can act as a screen, pressing only those claims that they judge to be meritorious and of national or community importance.

2. Nations should develop and agree to principles of permissible and impermissible use of national law to reprehend acts of persons of another contracting nation performed largely on the territory of the latter nation. Nations should accept as permissible use of national law to reprehend such acts if the acts are consensus wrongs under the agreement or facial wrongs under the law of both the injuring and injured nation and they significantly affect the regulating nation's commerce. Nations should regard as impermissible use of national law to reprehend acts of foreign persons on such persons' home territory if the acts are neither consensus wrongs nor facial wrongs under the law of the actors' nation and they are essentially internal market transactions within the actors' nation.[77]

3. A system should be devised for resolution of disputes that cannot be resolved in national courts or by the nations themselves. A panel comprised of experts from the disputing nations and an impartial nation might be authorized to hear the claim of one nation against another nation, with a right of appeal to an appellate tribunal. Such recourse should be available at least on grounds that the respondent nation has failed to carry out in good faith its responsibilities under the agreement. Competence of the panel should include instances of both inaction by a nation that causes harm to another and excessive action by a nation that causes harm to another. In the first instance the panel could have power to issue an order to a nation to enforce its national law; in the second, when one nation's enforcement interferes unduly with competition, efficiency or technological progress in the territory of another nation or in the larger community, the panel could have power to issue an order of noninterference. The dispute resolution system should follow an adjudicatory and rule-of-law model, not a compromise model. The designers of the system might profit from references to NAFTA[78] and GATT/Uruguay Round[79] dispute resolution.

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[77] In other words, if antitrust harms are caused, the effects fall primarily within the actors' nation. In cases of internal market transactions, however, a nation whose nationals suffer antitrust injury should be entitled to recourse. If the nation can and does maintain suit in its own courts, the defendant should be entitled to application of the law of its own nation. *See* Private Int'l Law of Switzerland, art. 137(1) ("Claims of restraint of competition are governed by the law of the country in whose market the restraint directly affects the damaged or injured party.") Federal Statute on Private Int'l Law of Dec. 18, 1987.

[78] The North American Free Trade Agreement done at Washington, D.C. on December 8 and 17, 1992, at Ottawa on December 11 and 17, 1992, and at Mexico City on December 14 and 17, 1992, chs. 19, 20, H.R. Doc. No. 159, 103d Cong., 1st Sess. (1993), *reprinted in* 32 I.L.M. 289, 682-98 (1993). For a dis-

C. *Cooperation and Transparency*

1. For efficiency in enforcement, nations' antitrust authorities should cooperate, along lines contemplated by the U.S./EC Executive Agreement of 1991 and by the U.S. International Antitrust Enforcement Assistance Act. For efficiency of business, the agencies should harmonize certain procedures to avoid costly redundancies. Most obviously, they should agree to a common merger notification and reporting form, and at the option of the merging parties, a central filing system.

2. Nations should make their antitrust law and its applications transparent. They may do so by issuing guidelines or analyses of hypothetical fact patterns. They may do so by periodic workshops among enforcers and academic experts, comparing their respective applications of law to facts and identifying and explaining differences.

Other efforts are necessary to remove distortions in competition. For example, state aids, including subsidies, are distorting, and the time may come when trading nations require reporting and justification, under specified rules, of all trade-affecting subsidies, as in the EU internal market. Transparency in standards, nondiscrimination in government procurement, and national treatment of foreign investments are important initiatives to remove distortions. These problems are not treated in this focused agenda, in part because they are items of continuing discussion in world trade talks, and in part because they are one step removed from the inner core of competition policy.

VI. CONCLUSION

Having specified the problems and opportunities, and having identified a minimal but unitary system, we are in a position to reconsider the

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cussion of NAFTA's dispute resolution mechanism see *Report of the Association of the Bar of the City of New York on the North American Free Trade Agreement*, 49 REC. ASS'N B. CITY OF N.Y. 143, 158 (1993).

[79] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, pt. II, Ann. 2 of Uruguay Round Agreements, Final Act, *supra* note 53, at 112. For a discussion of the new GATT dispute resolution system, see Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 481 (1994).

three approaches to the problem of restraints in competition and trade, namely: 1) the comprehensive approach: a world competition code; 2) the targeted issue-and-opportunity approach with trade/competition linkages of a constitutional dimension and room for growth of world policy from the bottom up; and 3) the solely-national approach, based on national enforcement and reciprocal agency cooperation, when and as the agencies choose to cooperate.

The comprehensive approach is very likely to produce a code of unwise rules — the result of trade-offs — or rules so generalized that they are meaningless. If agreement could be reached on rules acceptable to the trading nations, the approach is most likely to produce undue bureaucracy, contested applications of the rules, and more rather than less tension among nations. Moreover, the approach necessarily requires nations to cede control over the formulation and interpretation of rules of law.

Since the third (national only, with reciprocity) approach contemplates the least change, we may ask the following questions. Do we gain everything we need by the solely-national approach? What if anything is lost by the solely-national approach that is gained by a more comprehensive approach? And if something is lost by the solely-national approach, what exactly would be the loss, particularly the claimed loss of sovereignty, entailed by the targeted constitutional approach?

While national enforcement with cooperation by foreign agencies is important and can go far to solve many problems of restraints in international commerce, something very important is lost by a view of world policy seen from the eyes of national interest. The thing that is lost is a vision of community. Vision of community is not mere altruism. It is supported by a practical reality of cosmopolitanism that promises to benefit business, consumers, and all participants in the economic enterprise. It promises non-discrimination, a check on beggar-thy-neighbor strategies, efficiency, fluidity, and economic opportunity. It would provide a fail-safe forum for resolution of disputes on a cosmopolitan, not a nationalistic, basis. As a by-product of the integrated trade/competition system, the targeted constitutional approach would provide legitimacy to the use of antitrust lawsuits to protect exporters' rights to be free of anticompetitive restraints.

The expanded vision brings the most basic precepts of competition policy into synchronization with the global economy and enables business and consumers to realize gains. It enhances competition on the merits by

making it more transparent, and by containing national industrial strategies that distort competition by imposing costs on others. Like the national approach, the targeted constitutional approach encourages the competition of systems with regard to substantive antitrust rules and procedures.

If a measure of national autonomy is "lost" by the targeted constitutional approach, it is lost only in the following ways and senses, which the reader may recognize as a diminished "right" to narrow nationalism:

- As to consensus antitrust principles on cartels and market access, business actors would be obliged to avoid antitrust harms to foreigners, and the nations of the perpetrators would be obliged to give the harmed foreigners recourse to law and remedies.

- As to antitrust harms that result from internal market transactions in another nation, complainants would be obliged to accept as applicable the law of the latter nation.

- Nations would give up the right to take action that is profitable to them because it shifts the costs to another nation.

- Nations would limit their right to discriminate against foreign goods and services, and against foreign goods sold at competetively low prices.

- Nations that default in the good faith execution of their responsibilities may be called to account in dispute resolution proceedings (in which they would participate in the choice of the panel); and since the proceedings would be judicial, not legislative, they would not be able to vote their way out of a judgment against them.

Importantly, under the targeted constitutional approach, a nation would not give up the right to formulate and interpret its own rules of law. National law would be applied. Nations would merely be obliged to have and enforce law on the two points most critical to trade — cartels and market access; and they would be obliged to increase the transparency of interpretations accorded to national law.

In short, what is lost by the targeted constitutional approach as compared with the solely-national approach is something that ought to be lost: the license of a nation and its nationals to cause antitrust harm to others, or unduly to impose their standards on others. What is gained is the gains of competition and trade, and the gains from dispute resolution on a world-welfare basis by institutions designed to be accepted as legitimate.