Overdeterrence, Non-Competition Policy Goals, and Inadequate Defense Rights—Identifying (and Fixing) Antitrust Constraints on International Trade

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OVERDETERRENCE, NON-COMPETITION POLICY GOALS, AND INADEQUATE DEFENSE RIGHTS—IDENTIFYING (AND FIXING) ANTITRUST CONSTRAINTS ON INTERNATIONAL TRADE

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When the United States adopted the world's first functional antitrust enforcement system with the passage of the Sherman Act in 1890, U.S. international trade was limited, and U.S. antitrust enforcement rarely applied to international competition. The century following passage of the Sherman Act witnessed both a dramatic increase in the size and significance of global trade and the enactment of effective antitrust systems in scores of jurisdictions worldwide. Thus, the actions of multinational firms are now almost always subject to the scrutiny of multiple antitrust enforcement agencies. Accordingly, the influence of antitrust on international trade has become significant. With more than 130 jurisdictions now involved,[1] a wide variety of antitrust rules and institutions come to bear on the conduct of international business.

This essay will draw attention to the fact that not all of these rules and institutions are consistent with the broad objective of fostering a dynamic international competitive environment in order to expand trade for the mutual benefit of the global community. Specifically, where antitrust authorities adopt overinclusive rules that deter or punish competitively beneficial or neutral conduct, where they pursue policy objectives in conflict with the main goal of promoting trade-enhancing competition (e.g., protection of "national champion" firms), or where they deny adequate defense rights to the targets of antitrust proceedings, robust competition suffers and global trade is restrained. I describe these issues in greater detail and identify possible approaches to

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[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation 2 (2017), www.justice.gov/atr/internationalguidelines/download.

reduce or eliminate these trade-limiting elements of the current international antitrust enforcement environment.

For nearly a century after passage of the Sherman Act, antitrust law was largely a U.S. phenomenon. Although a handful of other jurisdictions had competition statutes on the books, their enforcement efforts were sporadic and generally inconsequential. In that era, the field of international antitrust mostly comprised a set of specialized legal and policy questions on the applicability of U.S. antitrust law to foreign parties or to conduct occurring in foreign jurisdictions—e.g., can U.S. antitrust be applied to anticompetitive acts that occur outside the United States? Because the volume of global trade was relatively limited during most of that period, questions about the antitrust laws of other jurisdictions, or about how to resolve overlapping or conflicting antitrust enforcement efforts involving distinct jurisdictions, were largely academic. Consequently, any international trade impacts attributable to antitrust were minimal.

Growth in international trade since World War II has been impressive, increasing by a multiple of more than 30 (merchandise trade)[2] and reaching almost 25 percent of global gross domestic product (GDP) at present.[3] Few, if any, nations are now insulated from the effects of trade. Growth in international antitrust enforcement since the 1980s has been even more impressive—perhaps "astounding" is the right word. As the sheer volume of trade and the level of antitrust enforcement have skyrocketed, both the influence of antitrust on trade and the overall economic significance of that influence have increased substantially.

Several developments combined to launch competition law into every corner of the globe, beginning in the mid-1980s. First, expansion and strengthening of key supranational European institutions ultimately produced a 28-member European Union with a volume of economic activity comparable to that of the United States. The European Commission was endowed with authority to enforce competition rules against "undertakings." As it evolved, the European Commission became a strong new global advocate for "competition culture," with competition rules as a critical element. Second, the Soviet Union, the only United States competitor as a superpower, suffered an economic and political collapse, then officially disbanded on Christmas Day 1991. This destroyed the global Communist movement, forcefully demon-

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[2] *See Trends in Global Export Value of Trade in Goods from 1950 to 2020*, STATISTA, www.statista.com/statistics/264682/worldwide-export-volume-in-the-trade-since-1950/.

[3] *World Trade Statistics*, WITS, wits.worldbank.org/CountryProfile/en/WLD#:~:text=world%20All%20Products%20Exports%20and%20Imports&text=world%20services%20export%20is%205%2C919%2C719%2C566%2C100,percentage%20of%20GDP%20is%2029.34%25 (last visited July 1, 2021).

strated the inferiority of command-and-control economies, and silenced most opposition to reliance on competitive markets (subject to antitrust rules) as a fundamental economic policy option. As a result, the leading developed nations (and their shared international economic policy agents, including the Bretton Woods institutions and the OECD) encouraged, facilitated, and welcomed the adoption of competition laws around the world.

With near-universal support for competitive markets governed by antitrust rules, there was a rapid expansion in the number of jurisdictions with actively enforced antitrust-law regimes. In 1990 the list contained at most only a handful of nations and the supranational European Economic Community (soon to become the European Union); at present, more than 130 distinct national and supranational jurisdictions are included. This total does not count scores of subordinate jurisdictions, such as U.S. states, Spanish autonomous regions, Chinese provinces, etc., with their own antitrust rules and enforcement agencies. Virtually all global commerce (domestic and international) is now governed by competition law. Even jurisdictions that remain officially committed to Communism (China, Laos, and Vietnam) have chosen to engage in or allow substantial productive activity, to participate in global trade (through private, public, or hybrid business entities), and to adopt competition law as a general rule of business conduct (although the Laotian antitrust enforcement agency appears to be in start-up mode at the time of this writing). The exceptions—e.g., Cuba (still officially Communist with strict state control of the economy) and North Korea (no longer officially Communist but maintaining total state control of the economy)—are truly rare.

With a near-universal preference for markets as a method of organizing production and broad support for antitrust as a key tool for policing marketplace conduct, one might have expected a kind of economic utopia in which international trade flourishes, supported by a legal framework that protects markets and global trade from anticompetitive conduct. In a certain sense, this is precisely what has occurred in the last 30 years: anticompetitive conduct—cartels, other restrictive agreements, anticompetitive structural transactions, and unreasonably exclusionary conduct by firms with monopoly power—now attracts profound legal risk when engaged in almost anywhere in the world. Given the severe consequences of antitrust liability—huge potential criminal and civil fines, the possibility of actual incarceration for guilty individuals, massive treble-damage civil liability in the United States, and possible dissolution of dominant firms that act abusively, to say nothing of the enormous expense, disruption, and ignominy of defending against antitrust accusations (even if unfounded)—business enterprises of all types must take great care to avoid antitrust violations or even the suspicion of them. Given that few, if any, antitrust agencies take a territorial view of their own authority, anticompetitive conduct by any substantial enterprise, if it has any nontrivial connection to international trade, is exposed to jeopardy in multiple jurisdictions, thus compounding the risk of antitrust missteps.

Were this the full story, lawmakers, economic policymakers, and antitrust enforcers could relax and take a victory lap. Of course, that is not the full story—very far from it. First, much economic activity is still conducted by government, thus displacing the market. Second, laws and regulations at all levels of government create numerous significant exceptions to exclusive reliance on competitive markets as the operative approach to economic activity and trade. Agriculture and resource extraction are classic examples due to the common presence of legally sanctioned cartels such as OPEC. Even apart from policies that explicitly displace competition, every jurisdiction engages in myriad interventions in market processes—e.g., targeted subsidies, consumer protection regulation (health and safety or anti-fraud/deception), utility-style economic regulation, and foreign-ownership restrictions. While some competition-restricting government mandates (import exclusions, quotas, or tariffs) are directed specifically at international trade (or investment), most forms of government intervention restrain domestic competitors. Such interventions are usually justified on the grounds that they address and remedy market failures (e.g., environmental externalities, underprovision of public goods, information asymmetries) and therefore, on balance, they contribute to enhanced economic success. However, a significant number of these interventions do not stand up to economic scrutiny, and thus they represent excessive restraints on both economic and trade objectives.

Most government actions that restrict competition are safely beyond the reach of antitrust law, although there are exceptions. For instance, the European Union prohibits certain "state aids" that distort competition and places limits on Member State authority to take market-restrictive actions that undermine EU objectives, while China's Antimonopoly Law (Article 8) broadly prohibits regulatory agencies from abusing their powers to "eliminate or restrict" competition. In general, however, antitrust does not apply to most forms of government intervention. Furthermore, antitrust cannot be applied effectively to private-sector activity that is subject to comprehensive regulation that displaces market processes by, e.g., prescribing prices, quality, and output; restricting entry and exit; or limiting capacity. But this still leaves a generous portion of world commerce subject to market competition and therefore open to application of antitrust law.

Because this essay focuses on how antitrust and trade policy relate, it ignores myriad sources of government displacement of market competition to focus exclusively on the influence of competition law on international trade. There is expanding recognition that antitrust enforcement, despite its broad tendency to encourage the expansion of trade and economic activity, is itself sometimes at odds with the main objective of international trade policy. At least three key factors give rise to significant tensions between market competition and the global antitrust law environment on the one side and the objective of enhancing trade on the other: (1) excessively strict substantive antitrust prohibitions—e.g., the use of per se rules to condemn purely vertical restraints; (2) competition-law systems that incorporate policy objectives in tension or in conflict with market competition—e.g., protection of small and medium-sized enterprises; and (3) competition law enforcement schemes that provide inadequate defense rights and thereby deter or punish procompetitive or competitively benign conduct. The remainder of this essay identifies the role and consequences of these three elements and discusses some potential solutions that might allow further expansion of international trade via some systematic limitation of these trade-restraining elements of antitrust enforcement.

I. OVERINCLUSIVE PROHIBITIONS

The trade-restraining impact of overinclusive antitrust prohibitions is well illustrated by developments in the long and uniquely extensive American experience with antitrust enforcement. The key provisions of the Sherman Act and Clayton Act were phrased generally, prohibiting agreements "in restraint of trade," "monopolization," and structural transactions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." These phrases provide almost no operational guidance to enforcement agencies and courts but invite development through application to individual cases via common law traditions. Although the Supreme Court quickly determined that naked cartel conduct would be treated as anticompetitive per se, it required application of a "rule of reason" to other alleged offenses.[4] The rule of reason allows the accused to defend its conduct based on facts and circumstances specific to the individual case.

For the 60 years following the Court's announcement of the rule of reason, however, the per se rule steadily displaced the rule of reason. Often with encouragement from the federal enforcement agencies, the courts extended the per se rule to vertical price agreements in *Dr. Miles Medical v. John D. Park & Sons*, then to tie-in sales in *International Salt v. United States*, then to numerous patent-licensing restrictions (e.g., *United States v. General Electric Co.*), and finally to all vertical territorial restrictions in *United States v. Arnold, Schwinn & Co*.[5] In monopolization cases the burden was shifted to the

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[4] *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61–63 (1911); United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235 (1899).

[5] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Gen. Elec. Co., 82 F. Supp. 753 (D.N.J. 1949); Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

accused to demonstrate that monopoly power had been "thrust upon it," even if the impugned conduct was undertaken for legitimate and competitively benign business reasons (e.g., expansion of capacity to meet demand).[6] In addition, the Supreme Court established a presumption against the legality of mergers.[7] At the peak of the per se craze, the Supreme Court openly mocked the idea of relying on economic analysis to judge the legality of non-price restraints supporting a procompetitive joint venture.[8] By so doing, the Court simultaneously extended the per se rule and reaffirmed its broader legitimacy despite doubts about its consistency with the fundamental objective of antitrust law. Thus, it was virtually impossible for companies accused of antitrust violations to mount any substantive defense, since the per se rule allows no opportunity for consideration of facts and analysis showing lack of market power, absence of anticompetitive effects, procompetitive justifications for the behavior, or other exonerating circumstances.

Regardless of how this highly restrictive approach came to be, history has shown that precluding defenses based on case-specific facts and forbidding reliance on economic analysis to establish an antitrust violation was a mistake in most antitrust cases. Restrictive federal antitrust rules, combined with a range of other regulatory and macroeconomic policies characteristic of the 1960s and 1970s, created (1) a noticeable slowdown in U.S. economic growth; (2) declining U.S. competitiveness in major sectors such as automobiles, consumer electronics, and machine tools; and (3) historically high rates of interest, inflation, and unemployment by the time of the Carter-Reagan transition in the early 1980s. Public alarm about the economic decline brought forth a variety of new U.S. approaches to both micro- and macroeconomic policy. On the micro side, sectoral economic regulation was a specific target for criticism.[9] The result was legislative action that substantially reduced regulatory control of competition in transportation (passenger and cargo aviation, railroads, and motor carriers), energy (petroleum resource extraction and electricity generation), telecommunications, and other industries.

Antitrust was no exception to the reform of microeconomic policy during this period. Supported by a rising generation of legal and economic scholars, the Supreme Court and the federal antitrust agencies gradually accepted economic analysis and reaffirmed the rule of reason as the default approach to

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[6] United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945). *See also* United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.* United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954).

[7] *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[8] United States v. Topco Assocs., 405 U.S. 596, 609–10 n.10 (1972).

[9] NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, PART II (1979).

most non-cartel antitrust cases. Merging parties were allowed broader latitude to defend transactions based on case-specific evidence and economic analysis.[10] The per se rule against vertical restraints was limited to vertical price agreements (in *Continental TV*) and, eventually, both maximum vertical price agreements (in *State Oil*) and minimum vertical price agreements (in *Leegin*) were restored to the rule-of-reason category.[11] Joint ventures were once again permitted to defend their ancillary agreements—even those concerning price, as was the case in *BMI v. CBS*—although not always with success, as was the case in *NCAA v. Board of Regents*.[12] Supreme Court monopolization analysis backed away from presumptions of liability and recognized the importance of dynamic considerations.[13] Many other defense-hostile antitrust doctrines—those involving proof of agreement (e.g., *Monsanto* and *Matsushita*), admissibility of expert testimony (e.g., *Daubert*), standards for dismissal (e.g., *Twombly*), and standards for summary judgment (e.g., *Matsushita*)—were mollified as the Supreme Court in *Brunswick* became committed to an antitrust approach favoring "protection of *competition*, not *competitors*" and economic substance rather than legal formalism (e.g., *GTE Sylvania* and *Ohio v. American Express*).[14] This collectively profound realignment of federal antitrust doctrine—coupled with productivity-friendly changes in a broad range of other federal policies, including elimination or reduction of sector-specific economic regulation and strengthening of intellectual property protection, among many others—helped bring the U.S. out of its then-worst recession (1981–1982) since the Great Depression. A powerful economic expansion and a period of extraordinary innovation ensued.

The next 40 years witnessed material increases in U.S. productivity and living standards, substantially attributable to dramatic advances in technology (especially information technology, which continues to create entire new industries and to spark enormous improvements in many other sectors). Although punctuated by a variety of challenging economic downturns—the savings and loan crisis in 1990, the 2000–2001 collapse of the dot-com bubble, and the Great Recession of 2007–2009—U.S. real GDP has more than tripled over the period, and remained in a pattern of continuous growth un-

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[10] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[11] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); State Oil Co. v. Khan, 522 U.S. 3 (1997); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[12] Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

[13] *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[14] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Monsanto Co. v. Spray-Rite Servs. Corp., 465 U.S. 752 (1984); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); *GTE Sylvania*, 433 U.S. at 36.

precedented in U.S. history until the economic shutdown mandated in response to the 2020 pandemic. In contrast with the meltdown leading to the 1981–1982 recession, the risks of high inflation, severe unemployment, and high interest rates were all but vanquished prior to the pandemic (although mountainous and growing public deficits remain worrisome). Although many factors could have impacted this result in some way, the increasing and consistent sensitivity of both the federal judiciary and federal antitrust agencies to well-grounded economic analysis focused on competition, not competitors, and on economic substance rather than legal form has allowed antitrust enforcement to contribute to the historically unique U.S. economic performance of the last 40 years.

Although this trend is reflected in antitrust enforcement in many other jurisdictions around the world, few have matched the United States in applying the discipline of well-founded economics and a focus on competition rather than competitors to the full scope of their competition rules. This gap has various origins: U.S. antitrust developed its sensitivity to economic analysis based on more than 80 years' experience, whereas many newer antitrust regimes have not had the direct benefit of such an extensive enforcement record. A certain amount of "catching up" therefore remains to be accomplished before there can be more widespread acceptance and implementation of the bedrock economic principles that largely govern the U.S. approach.

The European Union furnishes an important example. EU competition rules trace back to the 1957 Treaty of Rome, which created the European Economic Community (EEC), one of the European Union's main institutional ancestors. This treaty included prohibitions on restrictive agreements and "abuse of dominance"; structural transactions were not covered explicitly (a gap filled in 1990 by the European Community Merger Regulation). The Treaty of Rome's rules on restrictive agreements and abuse of dominance were roughly analogous to the U.S. Sherman Act; however, there were serious differences that persist to the present day.

The 1962 regulations that first implemented the competition articles in the Treaty of Rome adopted strict and formalistic prohibitions. Many agreements between firms were broadly presumed to be restrictive and thus, void *ab initio* and subject to substantial fines. Protection from fines required notification to the European Commission. Restrictive agreements could be exempted by the Commission but only if the parties met a very high burden. The immediate effect of these regulations was to bury the Commission under an avalanche of thousands of such notifications and exemption applications from concerned firms eager to continue a broad variety of common commercial arrangements. Only a tiny fraction of these exemption applications were ever resolved by formal Commission decision. While the Commission made accommodations as a practical necessity (e.g., excluding de minimis agreements; adopting various forms of collective or "block" exemptions for agreements meeting specified criteria; allowing Commission staff to provide non-binding "comfort letters" rather than engaging in formal proceedings leading to final exemption rulings by the Commission itself), relief from this straitjacket was both slow to arrive and incomplete. Notably, when the European Union finally adopted the first modern Block Exemption Regulation for Vertical Restraints (and accompanying Guidelines) in 1999, it maintained (and still maintains) strict prohibitions on vertical agreements that set prices or price minima and on agreements that impose certain territorial limits.

To be fair, no American can feel comfortable being too critical of the early European preference for strict and formalistic rules, given that the United States was bingeing on per se rules itself during the 1960s, when the EEC competition regime was being launched. The trends in scholarship that ultimately produced the U.S. antitrust reorientation that began in the mid-1970s were only beginning to emerge and were not broadly appreciated even in the United States at that time.[15] The main point, however, is that unlike the U.S. antitrust approach, the European rules were not updated with the benefit of sound economics until long after key new policy insights became widely accepted. To this day, vertical restraints remain significantly more vulnerable under EU law than under cognate elements of U.S. antitrust doctrine.

Analogous points can be made regarding the European approach to unilateral conduct by firms with monopoly power. The 1957 Treaty of Rome provision on abuse of dominance adopted a more eclectic approach than the cognate provision of U.S. law condemning monopolization. Setting unfair prices or "other trading conditions" and "applying dissimilar conditions to equivalent transactions" were deemed abusive if trade between Member States could be affected. This created the potential for a quasi-regulatory approach to single-firm conduct within a system of rules otherwise dedicated to the preservation of competition within the emerging Common Market. Like the EEC's early treatment of restrictive agreements, the abuse provision might not have represented any sharp departure from U.S. monopolization law as practiced at the time. But again, U.S. enthusiasm for antitrust intervention in single-firm conduct (exemplified by *Alcoa* and *United Shoe Machinery Corp.*) eventually encountered intense criticism based on insights gained from empirically based economic analysis and accumulating experience with enforcement realities.[16] In response, the federal antitrust agencies in the United States

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[15] The culmination of this scholarship is best represented by ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978), and RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

[16] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953); *aff'd mem.* United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954).

and then the Supreme Court—albeit after a considerable time lag—applied key economic insights in monopolization cases.[17] As a result, U.S. monopolization law became sensitive to: the paramount role of dynamic competition (including innovation); the potential chilling effect of massive, costly, and prolonged antitrust proceedings; decision-theory considerations affecting the choice of substantive rules; and the comparative institutional advantages and disadvantages of markets, courts, and regulatory agencies for controlling anticompetitive business conduct.

In contrast to the evolution of U.S. monopolization doctrine, the European Union's abuse-of-dominance provision is construed and enforced in certain ways that remain in tension with the implications of sound economics and a realistic assessment of the practical challenges of controlling dominant-firm conduct. This is most apparent in the European Union's harsh treatment of loyalty discounts, its skeptical approach to product bundling and to economies of scope and exclusive arrangements, and its persistent attraction to the notion that dominant firms must be required to share their source of competitive advantage with competing firms (frequently, albeit somewhat misleadingly, referred to as the "essential facilities doctrine").[18]

The EU example is important, not only because the European Union is one of the world's largest trading blocs, comparable in size to the United States, but also because many of the new antitrust systems that sprang up worldwide beginning in the 1980s follow the EU antitrust approach. The EEC was an early adopter of antitrust rules and played a prominent supporting role in the creation of many competition-rule systems around the world, as well as those of the EU Member States. The significant expansion of the European Union (from 6 EEC Member States in 1957 to 27 at present) and its institutional vigor in the competition realm—as well as in other realms, such as monetary policy, as shown by the successful launch of the Euro and foundation of the European Central Bank; the aerospace sector, as shown by the success of Airbus; and basic science, as shown by world-leading facilities and programs involving astronomy, space exploration, and fundamental physics—led it to become a prestigious role model for newer antitrust systems around the world. Many of the European Union's competition rules—including those that are

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[17] *Brooke Group*, 509 U.S. at 209; Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993); *Trinko*, 540 U.S. at 398; Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007). While *Brooke Group* arose under the Robinson-Patman Act, a depression-era price-discrimination statute, the resolution of the main points in the case, involving the alleged offense of "oligopolistic price coordination," are applied more or less directly to issues of predatory pricing litigated under the U.S. monopolization provision, Sherman Act § 2. *See Brooke Group*, 509 U.S. at 221, 227.

[18] *See, e.g.*, Joined Cases 6 & 7/73, Istituto Chemioterapico Italiano S.p.A. & Commercial Solvents Corp. v. Comm'n, 1974 E.C.R. 223 (CJ); Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-07791 (CJ).

questionable given current economic learning—are followed or echoed in numerous other jurisdictions.

It would be difficult to precisely assess the trade-suppressing impact of antitrust doctrines that fail to account for the insights of sound economic analysis. To begin with, outside the sphere of cartel conduct there can be room for argument regarding the exact implications of economic analysis for antitrust enforcement.

This essay adopts the perspective that current U.S. substantive antitrust rules are valid implementations of sound economic analysis. In jurisdictions like the European Union, however, the use of per se rules outside the cartel category, skepticism regarding vertical arrangements and bundling, and endorsement of the essential facilities doctrine and similar approaches should be counted as trade retardants. The magnitude of such effects (individually and collectively) remains to be determined.

II. POLICY OBJECTIVES DISCORDANT WITH THE ECONOMIC OBJECTIVE OF COMPETITION LAW

In addition to overinclusive prohibitions, a second element of antitrust enforcement that works against the expansion of global trade is the existence of competition rules that require or allow enforcement agencies to pursue policy objectives that are at odds with the central economic objective of competition law. Compare the European Union's strict prohibition of certain vertical territorial restrictions with the U.S. treatment of such restrictions. In the United States, it took decades to incorporate economic learning into vertical restraint law. For example, in *Arnold, Schwinn & Co.* in 1967, all vertical restraints were deemed per se illegal.[19] However, this rule was later revised in *GTE Sylvania* a decade later, such that only vertical price agreements were deemed per se illegal based on the recognition that it was unwise to disconnect the assessment of vertical territorial restraints from sound economic analysis.[20] After *GTE Sylvania*, all vertical territorial agreements became subject to the rule of reason, and U.S. antitrust challenges to such agreements became scarce.

In contrast, the European Union still regards some vertical territorial agreements as a "hardcore" restraint; a supplier cannot prohibit its distributors from making "passive sales"—i.e., accepting and fulfilling unsolicited orders from

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[19] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[20] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). Eventually, the United States removed vertical price agreements from the per se category as well, although some U.S. states have not followed this federal rule for vertical minimum price agreements. *See id.* at 36; State Oil Co. v. Khan, 522 U.S. 3 (1997); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

customers in other Member States. Other forms of conduct that provide de facto disincentives to such transactions (e.g., discounts or subsidies that favor intrastate sales) may also be treated as forbidden passive-sales bans.

The European Union explains its hardcore approach to these vertical territorial practices by claiming that they conflict with one of the original fundamental European objectives, namely, to eliminate impediments to the free movement of goods within the common market.[21] The difficulties with this argument are hard to ignore: supplier-originating vertical territorial restrictions—as distinct from government limits on free movement of goods—are characteristically motivated by benign objectives, such as the management of product distribution to encourage the competitive success of the supplier's products. Thus, the incentives of a business to create such restrictions tend to align with increased competition and the ultimate objective of enhancing the value of economic output.[22] In contrast, government restrictions on the movement of goods generally do not have a comparable motivation and thus can only be justified based on sound public policy rationales. Despite persistent debate on the question, the European Union adheres to its non-economic approach and seems unlikely to change in this regard.

Numerous other jurisdictions incorporate various non-competition objectives into their competition laws. The Competition Act of the Republic of South Africa incorporates rules explicitly favoring small and medium-sized enterprises, as well as enterprises owned by "historically disadvantaged persons."[23] The Chinese Anti-Monopoly Law includes the "healthy development of the socialist market economy" among its principal objectives and allows otherwise illegal monopoly agreements to be exempted in pursuit of a variety of non-competition considerations (e.g., "increasing the efficiency and competitiveness of small and medium-sized undertakings[,] serving public interests in energy conservation, environmental protection and disaster relief ").[24] China's Anti-Monopoly Law also has an open-ended provision allowing the State Council (the chief administrative authority of the Chinese government) to create additional grounds for exemption.[25]

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[21] Eur. Comm'n, *Green Paper on Vertical Restraints in EC Competition Policy* ¶ 78, COM (96) 721 final (Jan. 22, 1997) ("The elimination of barriers to trade may not achieve its objectives if producers and/or distributors introduce practices contrary to integration.").

[22] There may be circumstances—involving substantial market power, blockaded entry, or sectoral regulation—where this alignment could be reasonably questioned.

[23] Competition Act No. 89 of 1998, ch. 1 §§ 2(d)–(f) (S. Afr.).

[24] Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 15, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China).

[25] *Id.*

Even the United States is not 100 percent pure in its antitrust approach. U.S. law retains the Robinson-Patman Act, a Depression-era statute forbidding particular forms of price discrimination and product promotion. This law invited condemnation of certain forms of price-cutting and promotion on the theory that they could harm incumbent distributors, but in some cases without any demonstration that such practices would harm competition. It was long recognized that Robinson-Patman enforcement might conflict with the ultimate economic objective of antitrust law by protecting favored distributors at the expense of robust competition. More recently, however, federal antitrust agencies have been reluctant to prioritize Robinson-Patman enforcement, and the Supreme Court has attempted to harmonize the statute with the current economic approach under other antitrust laws, to the extent consistent with statutory text.[26] To choose another U.S. example, a 1933 Supreme Court case, *Appalachian Coals*, appears to endorse the legitimacy of depression-era cartels.[27] Although the vitality of the decision is now in serious doubt, it has never been explicitly overruled. As a result, statements about non-economic objectives in antitrust law are necessarily relative, because not even the United States avoids the issue entirely.

The ultimate impact on trade of allowing non-competition elements in antitrust enforcement is difficult to assess precisely, but the U.S. experience provides some understanding of the nature and magnitude of the costs. Even before passage of the Sherman Act, the federal government was compelled to address public concern about the growing economic power of railroads—by far the most significant industry that emerged in the United States at the start of the so-called Second Industrial Revolution. Prior to passage of the Sherman Act, Congress responded in 1887, creating the first system of sector-specific economic regulation, by passing the Interstate Commerce Act, which was to be administered by a newly created administrative agency, the Interstate Commerce Commission (ICC).

Over time, the ICC won a broad mandate to regulate the prices, terms, and conditions of service in the railroad industry, as well as entry, exit, and structural transactions involving railroads and other forms of surface transportation. The mandate of the ICC was to assure "just and reasonable" rates and charges and to prohibit discrimination in rates, among other things.[28] Although originally conceived as a mechanism for ensuring the preservation of

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[26] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).

[27] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). The Supreme Court attempted to distinguish *Appalachian Coals* in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 216 (1940), on the basis that it did not involve any attempt to fix prices, but this distinction seems unsupported by the facts of the case.

[28] 49 U.S.C. § 1(5) (repealed by Interstate Commerce Commission Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803, Dec. 19, 1995).

railroad competition, ICC regulation evolved into a command-and-control system that placed strict limits on most forms of competition. Competitive markets were replaced with bureaucratic control in the surface transportation sector. As a result, the ICC could justify nearly any outcome in particular cases because the legislature had provided few, if any, instructions regarding the methodology for defining what was "just and reasonable." It had been imagined that through detailed understanding of the regulated industry, the agency would develop expertise and thereby develop methods to implement the broad standards contained in the statute. Reviewing courts generally deferred to the ICC on what was "just and reasonable," provided that the agency followed the procedures prescribed in the Interstate Commerce Act. The stage was set for industry capture of the agency.

The ICC became the chief model for economic regulation of other critical sectors in the United States, including not only the surface transportation industries eventually covered by the Interstate Commerce Act, but also passenger and cargo aviation (regulated by the Civil Aeronautics Board), ocean shipping (Federal Maritime Commission), electricity generation and transmission and other segments of the energy sector (Federal Power Commission), and telecommunications, including both broadcast media and point-to-point communication (Federal Communications Commission). Each instance of sectoral regulation by an administrative agency with a broad regulatory mandate followed the pattern set by the Interstate Commerce Act and the ICC. Established for purposes largely described as procompetitive or supportive of broader public interests, each system eventually gained a (well-deserved) reputation for protecting incumbent suppliers from various forms of competition, including competition from innovations that would otherwise have allowed the regulated sector to be bypassed—e.g., the FCC's successful efforts to obtain jurisdiction over cable television to limit disruption of the over-the-air broadcast industry.

All of these sectoral economic regulations came under intense scrutiny as the economic policy choices of the 1960s and early 1970s began to produce adverse economic trends noticed in the late 1970s and early 1980s—i.e., stagnant or declining output accompanied by high inflation, interest rates, and unemployment as well as loss of U.S. competitiveness in major sectors. Scholars and policy experts pointed out how agency administration of economic regulation pursuant to vague policy standards produced competitive restrictions, high prices, static technology, limited entry and expansion opportunities, and other deficiencies in the performance of regulated sectors.

Pursuant to a bipartisan consensus that emerged during the Ford and Carter administrations and extended through the Reagan administration and beyond, virtually all sectoral regulatory programs and institutions were eliminated or substantially reformed. The ICC—once viewed as almost equal in prestige to the Supreme Court—lost most of its regulatory powers and was finally abolished in 1995. The Civil Aeronautics Board was substantially reformed by legislation in 1978 and then abolished in 1985. The Federal Power Commission was substantially reformed and replaced by the Federal Energy Regulatory Commission in 1977, retaining utility-style economic regulation only for those energy-industry segments demonstrating natural monopoly characteristics. FCC regulation underwent a similar evolution, as radical changes in technology (packet switching, wireless communication, the internet, etc.), as well as the break-up of the former Bell System (monopoly provider of telephone service and equipment) resulting from a government monopolization case,[29] undercut the policy rationales for economic regulation as an alternative to market competition subject to antitrust rules.

These examples demonstrate that the introduction of non-economic policy objectives into competition rules and institutions creates a constant risk that political or protectionist tendencies will affect competition decisions. A departure from standards that are based on empirically supported economic analysis becomes easy to mask and difficult to detect or remedy. There are few objective criteria available to permit agencies to structure, measure or control the trade-off between economic and non-economic objectives. For this and other reasons, appellate bodies that review competition decisions are rarely able to engage in the kind of searching reexamination of trial proceedings (whether judicial or administrative) that would permit them to ascertain the degree to which decisions are based on competition considerations or on more parochial concerns, such as the promotion of national champions, the protection of local competitors, or simply favoritism toward those who are enjoying a turn in the spotlight of political fashion.

For example, in the run-up to reform of the CAB, it was discovered that its decisions had an otherwise inexplicable tendency to ensure that members of Congress who occupied important positions on committees with CAB oversight responsibility had frequent and convenient airline service between their districts and the federally controlled airport located in Northern Virginia, less than three miles from the U.S. Capitol. The fact that economic regulation can be captured easily and turned to anticompetitive and protectionist purposes was well documented by the studies and investigations that led to the reform of sectoral regulation in the United States. This lesson is no less applicable to antitrust regimes that attempt to incorporate non-economic objectives.

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[29] United States v. W. Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

III. INADEQUATE RIGHTS OF DEFENSE

The third source of impediments to trade arises from inadequate rights of defense in competition proceedings worldwide. Although less commonly discussed in the usual international antitrust dialogue, antitrust procedure—meaning the full range of rules and institutions through which antitrust enforcement operates, as distinct from its substantive rules, remedial options, and guiding policy objectives—has recently attracted much greater interest among practitioners, scholars, enforcement agencies, and multilateral institutions, such as the OECD's Competition Committee and the International Competition Network (ICN).

Every antitrust enforcement agency may wish for a legal environment in which "the Government always wins"—as U.S. Supreme Court Justice Potter Stewart summarized antitrust standards for mergers in his famous dissent in *Von's Grocery*.[30] As explained above, the United States came close to having such an environment in the early 1970s, when per se rules or heavy presumptions favoring the government (or private plaintiffs) applied to virtually every type of antitrust case. As demonstrated by legal and economic scholarship that came to prominence at that time, overbroad substantive rules chill procompetitive conduct and are themselves restrictive of competition, thwarting the fundamental economic objective of antitrust law. Even a system with substantive rules that are well crafted and based on sound economic understanding, however, can be subverted by inadequate rights of defense.

Successful implementation of basic procedural objectives must confront both the vast complexities that characterize any specific legal system and the enormous variety of questions that must be considered. This reality can be understood by considering the U.S. system and how it handles antitrust disputes.

In the United States, the combination of highly evolved and carefully structured rules with the practice of composing the record before an independent judge who will be the actual first-instance decision-maker, confining the appellate process to the record created below, and providing equal opportunities for advocacy by each party provides assurance to U.S. antitrust litigants (as to litigants in every other type of case) that procedures are impartial. As may be seen from examining the content of the various categories of rules, U.S. procedures are fashioned to ensure that all litigants (government and private) have the opportunity to present evidence and arguments on all pertinent facets of a dispute and respond to the evidence and arguments presented by the opposing party. Strict control of the case record and prohibition of ex parte contact are essential underpinnings to that objective, as well.

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[30] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

As described above, the breakneck international expansion of antitrust law in the last 30 years brought to scores of jurisdictions a competition-law structure involving roughly similar substantive prohibitions—restrictive agreements, abusive dominant-firm conduct/monopolization, and anticompetitive structural transactions. While substantial variations exist among the substantive standards found in various antitrust laws around the world, the diversity of procedural rules and practices is far greater. Antitrust rules have been transplanted to legal systems that are at very different stages of development and that originate from vastly different cultural and legal traditions. In the early stages of the antitrust diaspora, U.S. practitioners had limited awareness of the profound differences between U.S. and foreign legal institutions. As antitrust around the world has become a daily concern—and often a bet-the-company concern—for an increasing number of major businesses, as well as for their counsel, the magnitude and serious implications of these procedural and systemic differences have come into sharper focus.

To take an example near the extremes, the legal institutions and traditions of China are radically different from those of the United States and other nations with historical roots in Western Europe. This is reflected in current procedures that apply to proceedings to enforce China's Anti-Monopoly Law. In Confucian philosophy, which heavily influenced Chinese government and civilization for over 2,000 years, the idea of dispute resolution through adversary proceedings was disfavored.[31] Although the Republic of China (1912–1949) took steps to adopt a legal system resembling Western models, under Communism, the then-existing Chinese legal system and the legal profession itself were essentially abolished. After Mao, and especially as China accepted a degree of economic liberalization, increasingly engaged in international trade, and acceded to WTO membership, construction of a functional legal system has proven essential. China still firmly rejects, however, certain bedrock principles of the U.S. legal system, namely the separation of powers and the concept of an independent judiciary. Chinese antitrust enforcement is discharged almost exclusively as an administrative function within the national and other levels of government (under the ultimate control of the State Council), and judicial review of that process is exceedingly rare. There is an evolving system for court adjudication of private antitrust disputes, but the Chinese courts that have antitrust jurisdiction are very dissimilar from U.S. trial courts: several judges oversee each case, with supervisory involvement

[31] David Baharvar, *Adversarial Legalism as China's Primary External Model of Legality: What Does It Mean for China's Future?*, 2 U. PA. E. ASIA L. REV. 65, 66–68 (2006).

by senior judges of the court, all subject to overall supervision by officials of the ruling political party.[32]

One need not search distant jurisdictions, however, to find significant departures from the type of formalized and highly structured adversary procedures that are characteristic of U.S. antitrust enforcement.[33] In fact, the antitrust enforcement process of the European Union constitutes one of the antitrust community's most significant departures from the idea of a legal system based on decision-making by a neutral and independent official as an assurance of impartiality. For example, European competition matters are the responsibility of only a single commissioner, who supervises a distinct unit of the Commission known as the Competition Directorate (DG Comp), headed by a Director General. DG Comp carries out the full range of tasks associated with enforcement of the relevant treaty articles, pursuant to Regulations and Directives adopted by the European Union. This includes case identification and selection, all steps of the investigation, the laying of charges (via a "Statement of Objections") and the presentation of evidence, the conduct of any hearing, and the assessment of evidence and rendition of judgment, as well as the formulation of any remedy. The full European Commission must then approve any finding of infringement, as well as the prescribed remedy.

The EU hearing is nothing like a judicial proceeding or even a quasi-judicial on-the-record administrative hearing of the sort usually undertaken in FTC proceedings. Targets of European Commission accusations of infringement are entitled to a variety of procedural rights—notably, the right of "access to file"—but under no circumstances is the target entitled to any of the bedrock features of a U.S. judicial proceeding. Hearings are conducted by a designated hearing officer who is a Commission official lacking any authority to render substantive rulings. The accused has no right to present evidence or argument to the decision-maker. Furthermore, neither the College of Commissioners, the Commissioner, nor the Director General of DG Comp has ever been known to appear at such a hearing. In fact, the accused has no right to present views to any of these three entities, although it is customary for firms subject to competition allegations to present written views or have meetings to advocate their positions before any of these officials. Each Commissioner generally has at least one staff member with overall responsibility for advising the Commissioner on competition matters that reach a stage requiring Commission involvement. The circulation of evidence and argument within the European Commission is, however, largely not visible to the accused, nor is

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[32] *Private Antitrust Damage Actions in China: An Emerging Force?* LATHAM & WATKINS CLIENT ALERT (2016), www.lw.com/thoughtLeadership/private-antitrust-damage-actions-in-china-an-emerging-force.

[33] For purposes of this discussion, I leave aside FTC administrative proceedings.

there any known process for determining whether the Commissioners have received only information available through access to file. Moreover, for a variety of reasons, European judicial review of Commission competition decisions is not as effective as in the United States. For example, judicial review takes longer. Following an investigation that began in 2001, Intel was the recipient of an adverse European Commission decision in 2009.[34] Furthermore, the Commission benefits from a degree of deference, or "margin of appreciation," when defending its decisions before the European courts.

Procedures that do not provide assurance that the targets of antitrust investigations and accusations will receive a full hearing before an impartial decision-maker are functionally equivalent to excessively strict substantive standards, particularly when judicial review is either too deferential or too slow to provide effective accountability. A lenient or forgiving substantive standard will be meaningless to the defense if there is no genuine opportunity to present evidence, analysis, and arguments to a neutral decision-maker. Although there are few jurisdictions like the European Union—in which the actual decision-maker is generally insulated from the direct presentation of evidence and argument by the accused—most jurisdictions have adopted other basic elements of EU procedure, namely, a single administrative agency that initiates and conducts the investigation, lays charges based on that investigation, prosecutes the case throughout the assessment process, renders judgment, and formulates and then enforces the remedy. Many of these administrative agencies do permit some direct presentation of arguments to the members of the agency, but the safeguards provided by a requirement for composition of the record and presentation of argument to a specific decision-maker, independent of the government agency pursuing the case (analogous to a trial court or administrative law judge in the U.S. system), is relatively rare.

On balance, it is extremely difficult to assess the net impact of the widespread use of procedures that do not involve a searching and balanced assessment of evidence and arguments by a neutral decision-maker. Because, in most competition disputes around the world, there is no neutral decision-maker involved at early procedural stages or during the assessment of evidence and rendition of judgment, it is often of little benefit to targets of antitrust allegations to register procedural objections. Unless there is a high degree of confidence that the appellate process will produce an impartial and conscientious assessment of the agency's compliance with procedural protections, there would seem to be little point in raising such objections before the agency. In a system like that of the European Union, where any meaningful

[34] Eight years later, in 2017, Intel received a favorable ruling from the Court of Justice, which remanded the case to the General Court for further proceedings. *See* Case C-413/14 P, Intel Corp. Inc. v. Comm'n, ECLI:EU:C:2017:632 (CJ 2017).

appellate rectification of procedural shortcomings is many years in the future when the case is at the investigation and hearing stage, such review would seem unlikely to provide meaningful protection. As firms seek to minimize the cost and disruption of ongoing proceedings and avoid severe remedies that will be formulated and imposed by the agency responsible for the prosecution and the assessment of liability, insistence on a high degree of procedural regularity would rarely seem worth the expected benefit.

IV. THE WAY FORWARD

Having identified three key trade- and welfare-reducing characteristics of the sprawling worldwide antitrust enforcement network, an obvious question is how these defects and their negative impact can be reduced if not eliminated. As explained below, there are several mechanisms available for the resolution of conflicts and inconsistencies that arise between different antitrust jurisdictions. None, however, has proven especially useful for the particular tasks of reducing overreach of substantive law, eliminating non-competition objectives from antitrust decision-making, or improving antitrust procedures designed to assure accurate, efficient, and impartial decision-making. Although these institutions are extremely useful for some purposes, they have obvious limitations in addressing the issues under discussion. Some additional suggestions have been made for distinct new approaches to solving these problems—most notably, the incorporation of antitrust provisions in international trade agreements. These are still at a preliminary stage, however, and represent very limited progress toward the important objective of reducing trade-limiting features of antitrust enforcement. This objective deserves a greater degree of urgency.

As antitrust law began its explosive worldwide expansion in the 1980s, it was foreseen that conflicts could arise due to jurisdictional overlaps. One of the first manifestations of serious conflict arose from U.S. attempts in the 1970s to pursue members of an alleged global cartel in fissionable uranium used for civilian nuclear power.[35] As a result of attempts by the Department of Justice and private plaintiffs to assert jurisdiction over foreign members of the alleged cartel, a number of jurisdictions (Australia, Canada, France, and the United Kingdom) enacted blocking, or "clawback," legislation. These were attempts by foreign governments to protect their own nationals from exposure to what they perceived as a brazen and misguided U.S. antitrust dragnet. Cases involving international passenger air transportation and other sectors

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[35] Raymond J. Pikna, *The Uranium Cartel Saga—Yellowcake and Act of State: What Will Be Their Eventual Fate*, 12 CASE W. RES. J. INT'L L. 591 (1980).

also brought to light the possibility that antitrust enforcement efforts in one jurisdiction could result in international conflict.[36]

More high-visibility conflicts arose as numerous jurisdictions followed the United States in adopting prior notification and approval requirements for structural transactions. In 1997, the United States and European Union reached an impasse when the United States approved Boeing's acquisition of competing airframe manufacturer McDonnell Douglas and the European Union balked. Eventually, the European Union relented, following direct intercession by then-President Clinton. The pattern repeated—without the happy ending—when General Electric's attempt to purchase Honeywell International had to be aborted in 2001 when the European Union refused to approve the merger following U.S. clearance.[37] At about the same time, 13 leading antitrust jurisdictions (including the United States and the European Union) formed the International Competition Network (ICN), a voluntary organization intended to facilitate dialogue, cooperation, and mutual understanding among antitrust enforcement agencies around the world.[38] Ultimately the ICN was joined by nearly every active antitrust agency (supranational and national), with the single major exception of the People's Republic of China, although the Region of Hong Kong is a member.

The ICN has become a thriving organization, serving as a forum for interaction among global antitrust enforcement officials. It develops various forms of best-practice recommendations and sponsors a wide variety of programs and publications helpful to the antitrust enforcement community. It has undoubtedly assisted in fostering mutually helpful relationships among the various global antitrust agencies; served as a resource for information on antitrust law, economics, and policy; and provided important opportunities for direct interaction among officials from antitrust regimes of very different size, experience, and legal tradition through its annual meeting.

The ICN, however, is less well known for achieving concrete reforms in specific areas where there are significant departures from best practice, such as reliance on sound economics, exclusion of non-competition factors, and adequate procedures. Desultory implementation of ICN recommendations and best practices has become a persistent issue among those who observe the ICN, but it is not difficult to understand why. The ICN made a deliberate choice at the time of its formation that it would not include any nongovern-

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[36] *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983), *remanded* 704 F.2d 785 (1983).

[37] Case COMP/M.2220—General Electric/Honeywell, Comm'n Decision, 2004 O.J. (L 48) (declaring concentration to be incompatible with the common market and the EEA Agreement).

[38] For a description of the ICN's purpose and the structure of the ICN, see its website at www.internationalcompetitionnetwork.org.

mental members. Although numerous private practitioners, academics, and others are invited to contribute to ICN's publications and programs, none has any formal role in the management of the organization, the selection of its agenda, or the adoption of recommendations and best practices. None of the principles adopted by the ICN is binding on any member. Unsurprisingly, since the ICN is formed exclusively of government antitrust agencies, it behaves much like an association of enforcers. Its greatest strengths are its considerable resources in funneling accumulated enforcement expertise to new agencies through publications and programs. But its failure to deliver significant reform on issues like those identified in this essay is a reflection of its composition and structure. The identified structural weaknesses in antitrust enforcement are most often at the direct expense of the business community—those who must comply with antitrust standards. But this community has no formal role in the ICN other than as a provider of input. It is no wonder that the ICN activity reflects primarily the interests of its community of voting members, i.e., the enforcement agencies. Any such community presents an inhospitable environment for pointed criticism among its own members.

Similar remarks can be made about a much older but no less active multijurisdictional antitrust forum, the Competition Committee of the Organisation for Economic Co-operation and Development (OECD). The OECD itself is a remarkable specimen within the menagerie of international public institutions. Its main ancestor was a committee formed to oversee the disbursement of Marshall Plan funds for the reconstruction of Europe following World War II. It evolved into an economics databank and think tank serving the major developed-world jurisdictions, and its membership continues to broaden. Its headquarters now occupies the Chateau de la Muette located in Paris's 16th arrondissement.

Competition law was among the OECD's first subjects of interest, and the Competition Committee currently embodies that focus. Like the ICN, the Competition Committee develops recommendations and engages in a wide variety of studies and programs focused on antitrust issues, including conducting peer reviews of antitrust agencies from around the world. Also like the ICN, OECD membership is limited to governments, and although there are officially sanctioned pathways for the submission and consideration of views from the business community (through the Business and Industry Advisory Committee), consumer groups, and labor groups, no decision-making authority is available to any of these stakeholders. Like the ICN, the Competition Committee of the OECD functions at its best as a discussion forum and as a provider of resources and expertise to antitrust agencies and to its member governments, and the public. Also like the ICN, its recommendations are not binding on OECD members, and, owing to the member governments' monopoly on decision-making authority, it has not been a source of substantial reform in regard to any of the issues identified in this essay.

A certain degree of frustration has grown up within the private sector and, to some extent, within the antitrust bar regarding the absence of an effective forum for combating antitrust enforcement practices that limit competition and trade. Specific disputes tend to be handled on an intergovernmental basis at the initiative of aggrieved parties, essentially following the pattern that was established in the Boeing-McDonnell Douglas confrontation. But, as illustrated in the General Electric/Honeywell affair, this approach is not always successful. The desire for a more effective and regular means of settling such disputes has recently given rise to several generations of trade agreements that contain antitrust provisions. The United States has at least seven trade agreements (including the United States-Mexico-Canada Agreement) with provisions intended to control trade-obstructing antitrust enforcement practices, including inadequate procedures. But none of those provisions has any binding enforcement mechanism, thus ensuring that specific conflicts will continue to be handled government-to-government on a more or less ad hoc basis.

The capacity to achieve significant international antitrust reform through existing trade-agreement and dispute-settlement arrangements is in doubt. Trade agencies are not always familiar with antitrust law or the substantive, policy, and procedural nuances of particular details that become the subject of dispute. Moreover, trade agencies may not have the institutional capabilities and incentives to ensure that an agreement on competition-law enforcement, once in place, is followed through with the kind of immediacy that is often required. It seems that the issue of controlling international antitrust abuses is searching for a sui generis solution. This is hardly surprising, given the observed differences in how international enforcement cooperation varies depending on whether the underlying law involves tax compliance, securities and other forms of financial fraud, or various forms of criminal activity, such as trade in illegal narcotics. All the forms of international law-enforcement cooperation that characterize these areas reflect the unique demands of each. There is no reason to suspect that any of the existing mechanisms will be suitable for resolving antitrust conflicts, and no reason not to consider how a unique approach might be best suited to antitrust.

Given that the character of antitrust conflicts and the potential paths to resolution depend so heavily upon the differences in substantive law, policy, procedure, and other legal traditions that characterize distinct jurisdictions, one logical approach would be to start with a bilateral effort. Conflicts that arise between jurisdictions that are already closely aligned in their approach to antitrust might be easier to bridge, as distinct from conflicts between jurisdictions with profoundly different laws, customs, and practices. Thus, for example, the United States might view Canada or the United Kingdom as a logical negotiating partner in a bilateral approach to antitrust harmonization. Both have fundamental legal traditions and institutions that are reasonably congruent with those of the United States. Although the United Kingdom applied EU antitrust law during its period of EU membership (1973–2020), it has been recognized as a leading supporter of economics-based antitrust, and that tendency will arguably have greater prominence now that independence has been achieved.

Antitrust standards and institutions are under extraordinary challenge. Some voices call for abandonment of the consumer welfare approach,[39] which has guided U.S. antitrust into and throughout the period of unprecedented economic growth and prosperity that began in the 1980s. Some seek to graft onto our antitrust institutions a variety of regulatory responsibilities, such as mandatory access remedies for digital platforms and an independent non-competition concern for workers' rights.[40] It would be a shame if the global antitrust movement—with such manifest potential for bringing procedurally sound economics-based enforcement to a substantial fraction of the global economy—were to be smothered by a wave of parochial or otherwise misguided modifications to existing enforcement regimes. Unless these diversions are resisted, international antitrust enforcement might be entering a long period of profound conflict, requiring enforcers and policymakers to hold off two threats, one undermining sound economics as the basis for welfare-enhancing competition law and one undermining the international economic order by failing to recognize and address the shortcomings of the fractured global enforcement network. Either of these threats would be likely to suppress international trade, competition and innovation, ultimately undermining the economic success of the global economic system.

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[39] *See, e.g.*, Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 503 (2001) (advocating a consumer choice rather than a consumer welfare theory).

[40] *See, e.g.*, MARSHALL STEINBAUM, ERIC HARRIS BERNSTEIN & JOHN STURM, POWERLESS: HOW LAX ANTITRUST AND CONCENTRATED MARKET POWER RIG THE ECONOMY AGAINST AMERICAN WORKERS, CONSUMERS, AND COMMUNITIES 42 (2018), rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Powerless-201802.pdf; U.S. House of Representatives Democratic Leadership, *A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power* 1 (2017), forthepeople.speaker.gov/the-proposals/crack-down-on-abuse-of-power.