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Antitrust and the Challenge of Internationalization

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FOREWORD: ANTITRUST AND THE CHALLENGE OF INTERNATIONALIZATION

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I. INTRODUCTION

The antitrust laws of the United States were created to regulate a domestic market in which foreign goods played a comparatively minor role and in which the geographic parameters of competitive decision-making were largely defined by national boundaries. Today U.S. markets for goods and services are often filled with goods produced abroad, and participants in these markets are likely to be competing on a scale that includes numerous nations and even several continents.[1]

This internationalization of markets and of the process of competition challenges fundamental assumptions on which antitrust laws and antitrust thinking have been based, and it thus demands a critical reassessment of antitrust law. This Symposium is intended to contribute to that reassessment.[2]

My objectives in this Foreword are to sketch points of impact of the internationalization of competition on the antitrust laws, to suggest themes for the reassessment that is called for, and to locate this Symposium in the context of that reassessment process.

II. THE INTERNATIONALIZATION OF MARKETS AND OF COMPETITION

The process of internationalizing markets has many facets and thus many potential points of impact on the antitrust laws. Four aspects of the process are, however, central: the increasing satisfaction of domestic consumer wants by foreign goods; the increasing internationalization of competitive decisions to satisfy those wants; the changing characteristics of the economic enterprises engaged in this process; and the increasing

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1. *See, e.g.*, I. MAGAZINER & R. REICH, MINDING AMERICA'S BUSINESS: THE DECLINE AND RISE OF THE AMERICAN ECONOMY 29-30 (1982).

2. The internationalization of competition has similar effects on the competition laws of other developed countries, but due to space limitations this Foreword focuses only on the situation in the United States.

potential relevance of governmental decisions to private economic competition.

A. Foreign Goods/Domestic Wants

From the perspective of the consumer, the process of internationalization is represented primarily by increases in the variety and quantity of foreign-produced goods in United States markets.[3] This means that the wants of U.S. consumers increasingly are being satisfied through decisions involving foreign production. Sometimes these are sourcing decisions by domestic firms—*e.g.*, the decision by a U.S. automotive manufacturer to produce components in Brazil.[4] They may also be decisions by foreign firms either to produce for the U.S. market or purchase for resale in that market. In each of these cases significant foreign elements are involved in the process of satisfying domestic wants.

B. Competition on an International Scale

Another component of the internationalization process is the increasingly international framework for economic decisionmaking and hence economic competition. The decisions that lead to the presence of foreign goods in U.S. markets, for example, are influenced increasingly by economic, political and legal factors in numerous countries, and the competitors of domestic firms increasingly are foreign-based and/or foreign-owned.

This means that firms seek to satisfy wants with decreasing regard for national political boundaries. They increasingly tend to make strategic decisions concerning the sales of products and services by reference to markets that include the territory of more than one state.[5]

Such strategies also are influenced increasingly by the actions and anticipated actions of rivals from foreign countries. Competitive decisions involving the U.S. market must respond, for example, to rivals that are structured differently from U.S. firms and subject to different cultural, political and economic influences. This requires, in turn, that the effectiveness of these decisions be based on increased information about such factors. Because competitive decisions involve prediction about the

3. For statistics concerning imports from 1978 to 1987, categorized by country, see ECONOMIC REPORT OF THE PRESIDENT 367 (1988).

4. *See Chrysler Move in Brazil*, N.Y. Times, Mar. 7, 1986, at D2, col. 3.

5. For discussion, see, *e.g.*, Pagoulatos & Sorensen, *Industrial Policy and Firm Behavior in an International Context*, in WESTERN ECONOMIES IN TRANSITION 305 (J. Leveson & J. Wheeler eds. 1980); Porter, *Changing Patterns of International Competition*, 28 CAL. MGMT. REV. 9 (1986); Thurow, *Revitalizing American Industry: Managing in a Competitive World Economy*, 27 CAL. MGMT. REV. 9 (1984).

probable conduct of rivals, such prediction now must encompass a broader base of information.[6]

Finally, a firm is normally not in a position to engage in international competition unless it has the capacity to implement its competitive decisions with little regard for national boundaries. This typically means that it must be able to carry out its operations in many countries, including producing its goods or services, securing financing, marketing and distributing its goods or services, and acquiring necessary information about purchasers and rivals.

C. Potential for Government Involvement

The internationalization of markets and of competition tends to increase the number and variety of governmental decisions that may influence a firm's competitive decisions. Each state has the authority under international law to control the flow of goods, persons and capital across its borders, and as these flows increase so does the potential importance of government decisionmaking to the competitive process.

Not only do the unilateral actions of states increase in importance, but their international cooperative actions also acquire increased relevance for the competitive process. Treaties and agreements among states concerning tariffs, intellectual property rights, emigration, taxes and information exchange—to name a few—become critical factors in determining competitive strategies.

D. Characteristics of Internationally Competitive Firms

From the standpoint of antitrust policy, a particularly important aspect of the internationalization of competition is its impact on the characteristics of firms affected by and/or participating in that process.[7] Certain characteristics are generally thought to allow firms to compete more effectively in an international context. As a result, firms seek to acquire such characteristics. Moreover, this often leads states to pursue policies designed to provide their national firms with such characteristics or at least encourage their development. Foremost among the characteristics thought to be necessary for international competition is large size.[8] It is widely assumed that—at least in many industries—firms can com-

6. *See generally* Borner, Stuckey, Wehrle & Burgener, *Global Structural Change and International Competition Among Industrial Firms: The Case of Switzerland*, 38 KYKLOS 77, 81-82 (1985).

7. *See, e.g.*, Ordover, *Transnational Antitrust and Economics*, in ANTITRUST AND TRADE POLICY IN INTERNATIONAL TRADE 233, 234-35 (B. Hawk ed. 1985).

8. *See, e.g.*, Adams & Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CALIF. L. REV. 1516, 1519 (1986).

pete effectively on an international scale only when they are very large, and this assumption easily leads to competition among firms, as well as states, to create ever larger firms.

The importance of size is often associated with the geographical dispersion of operations and assets. In particular, control of production facilities in numerous countries is thought to be necessary for effective international competition. Firms must have the ability rapidly to shift production from country to country in order to respond to changing conditions in the markets in which they operate. Moreover, the strategical and tactical exigencies of international competition are thought to require firms to maintain information and supply lines in many countries.

III. THE INTERNATIONALIZATION OF COMPETITION AND THE GOALS OF ANTITRUST

The internationalization of competition raises fundamental questions about antitrust law—its methods, values, assumptions, institutions and even its reason for being. In this regard two questions are central: (1) What is the impact of the internationalization process on the goals and objectives of the antitrust laws? and (2) What is its impact on the capacity of the antitrust laws to achieve those objectives?

A. The Impact of Internationalization

The impact of the internationalization of competition on the goals of antitrust law must be assessed first, because only when there is reasonable clarity concerning objectives is it meaningful to discuss the issue of how antitrust can be used to attain them. Unfortunately, however, there has been much confusion regarding goals in antitrust law,[9] and this confusion has obscured the potential impact of the internationalization process on this issue.

1. The Stability of Goals

At one level of analysis, it would seem axiomatic that the goals of antitrust statutes do not change merely because there is a change in the factual circumstances to which those laws are to be applied. The antitrust laws were intended to achieve certain domestic goals, and, consistent with our constitutional scheme, a judge presumably must apply those statutes in a manner consistent with her understanding of those

9. *See generally id.*; Hawk, *Antitrust in Today's World Economy*, 9 CARDOZO L. REV. 1161, 1162-67 (1988).

goals.[10]

2. International Competitiveness and the Antitrust Laws

By altering the context in which the antitrust laws operate, however, the internationalization of markets calls attention to a policy objective that heretofore has not been considered a goal of antitrust law—namely, the protection and enhancement of the international competitiveness of domestic enterprises. Some argue, for example, that since the internationalization of markets requires larger and more cooperative domestic firms in order to meet foreign competition, the antitrust laws should permit or even encourage firms to acquire the characteristics thought to be necessary for success in this competitive environment.[11] The internationalization process suggests that established antitrust goals be weighed against the need to protect and enhance the international competitiveness of domestic firms.

This raises the issue of how, if at all, international competitiveness is to be taken into account in applying the antitrust laws. Assuming no change in the antitrust statutes, a judge could not legitimately base her decision on a goal such as international competitiveness that is unrelated and arguably antithetical to the established goals of the antitrust laws.

3. Uncertainty About Antitrust Goals

The problem is exacerbated by the perceived vagueness of the goals of United States antitrust law, which are often thought to provide little guidance for decision making. This perception has been particularly acute during the last decade and a half, because a fundamental controversy has developed between two opposing views of antitrust goals.[12] One group considers antitrust goals to be pluralistic, based on legislative intent and judicial interpretation of antitrust statutes.[13] In this view anti-

10. For discussion, see R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 82-84 (1978).

11. *See, e.g.*, Adams & Brock, *supra* note 8, at 1518-19. Due in part to the internationalization of markets, the United States enforcement agencies have liberalized enforcement policy toward domestic mergers. *See generally* Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CALIF. L. REV. 959, 978 (1987); Pollock, *Vertical Restraints and the Secularization of Antitrust*, 75 CALIF. L. REV. 951, 953 (1987).

12. For discussion, see, *e.g.*, Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987); Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987); Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817 (1987); Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797 (1987).

13. *See generally* Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Katzman, *The Attenuation of Antitrust*, 2 BROOKINGS REV., Summer 1984, at 23, 23-24; Lande, *Wealth Transfers as the Original and Primary Concern of*

trust goals include, for example, limits on the concentration of economic power, maintenance of economic opportunities for smaller competitors, and the promotion of consumer welfare. A second group argues, however, that economic efficiency, as defined by neo-classical economic theory, is the only legitimate goal of antitrust law.[14]

This uncertainty concerning the goals of antitrust obscures the impact of international competitiveness concerns. The obvious popular appeal of arguments based on the need for international competitiveness has increased receptiveness to antitrust theories and enforcement postures that reduce the impact of antitrust law. The result often has been a general weakening of antitrust law rather than its careful modification in response to the impact of internationalization.

B. Reevaluating the Goals of Antitrust Law

The impact of the internationalization of competition on antitrust goals requires that we ask whether those goals should be altered—in form or in substance—and, if so, how and by whom?

1. Clarifying the Objectives of Antitrust Law

At a minimum, the internationalization process calls for clarification of the goals to be served by antitrust law. That process fundamentally changes the context in which the antitrust laws must operate. Combined with the existing controversy over antitrust goals, it undermines confidence that antitrust laws are reasonable means to well-considered ends. Since no system of legal norms can function effectively without reasonably clear objectives, these changes in the context in which the system operates require that those objectives be made explicit.

2. Issues in the Reevaluation of Antitrust Goals

This reevaluation of objectives must be as fundamental as the phenomenon to which it is a response. It can only be credible if it avoids the most common and egregious mistake in legal analysis—*i.e.*, starting with the solution (current law) rather than the problem. It must begin, therefore, with the question "What kind of economic system do we want, and how can we achieve it?"

Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 67 (1982); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979).

14. *See, e.g.*, R. BORK, *supra* note 10, at 81-89; Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV., May 1969, at 242; Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

In reevaluating antitrust goals, therefore, we must begin by asking whether the United States should concern itself at all with the regulation of structures of economic relationships within its borders. If it does not, those relationships will be dictated increasingly by the process of internationalization. The incentive structures created by internationalization and perceptions relating to it will mold United States economic relationships. The characteristics thought to be necessary for domestic firms to compete internationally—such as large size and international distribution of assets and operating capacity—will be fostered, while concerns about the domestic economic, social and political implications of such characteristics will not be legally relevant.

Whether such an outcome is desirable will depend, in part, on the resolution of other fundamental issues relating to antitrust goals. The current controversy concerning antitrust goals must, therefore, be placed in an international context, with both sides required to defend their positions in light of the impact of the internationalization of competition. Heretofore the arguments of both sides have been based primarily on a domestic reference framework.

Arguments that economic efficiency should be the sole or at least predominant antitrust goal are grounded in an economic model that refers to the domestic economy. The notion is that the free play of market forces normally will both direct resources to their best use and maximize consumer welfare. The argument for a larger pie, regardless of the distribution of benefits, generally assumes that the pie represents national wealth. If, however, this argument is placed in an international context, new issues arise. If economic efficiency goals would contribute to a larger transnational pie, but distribute the benefits primarily to other nations, serious political issues arise. If, for example, an efficiency-dominated antitrust regime would contribute to a domestic market dominated by foreign firms, the argument takes on a different hue.

Those who argue for a pluralistic view of antitrust goals will be faced with similar challenges. For example, the internationalization of competition may further increase the complexity of the cause and effect relationships to which antitrust norms refer, thereby reducing confidence that the application of those norms will yield the desired results. Moreover, it is likely to cast doubt on the efficacy and dependability of a system based on judicial sorting among pluralistic goals, at least where such goals are as amorphously ordered as they are in current U.S. antitrust law.

3. Who Decides?

Decisions concerning antitrust goals are closely related to decisions concerning the methods by which such goals are to be chosen. Those who argue for pluralistic antitrust goals seek guidance through the conventional procedures of the U.S. legal tradition, finding insight as well as authority in prior judicial opinions.[15] Those who believe that antitrust is largely coterminous with economic theory, however, typically take the position that much of existing case law was simply based on ignorance and, therefore, that prior cases provide no authority and even less insight.[16]

Neither group seems to take seriously the possibility that legislative prescription might play an important role in efforts to clarify antitrust goals. The legislative process may, however, represent potentially the most effective means of establishing such goals. It alone provides opportunity for the type of comprehensive review that the magnitude of the internationalization process requires. Perhaps most importantly, legislative consideration of goals should generate open and responsible discussion of the policy alternatives.[17] The potential harms from disregarding legislative processes are illustrated by concern over the international competitiveness of United States firms. Such concerns should be dealt with openly, but because there is no reasonable likelihood of legislative action to deal with them, they operate as a vague, unspoken threat that influences the behavior of judges and enforcement officials in ways that are not subject to debate and analysis.

IV. ACHIEVING ANTITRUST LAW OBJECTIVES

Assuming reasonable clarity concerning the central goals which antitrust law might serve, the question becomes "How, if at all, can antitrust laws be used to attain these goals?"

A. The Evaporation Effect: Reducing the Need for the Antitrust Laws

One possibility is that the internationalization process reduces or

15. *See, e.g.*, L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 10-13 (1977).

16. "The judges made this law, and they made some of it badly. There is no particular reason why they should not begin to remake the law that is defective so that it serves an understandable social purpose." *Judicial Precedent and the New Economics*, in ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 8 (E. Fox & J. Halverson eds. 1984) (comments of Judge Bork).

17. For related arguments, see Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48-55 (1985).

even eliminates the need for antitrust law.[18] The argument is that the internationalization of competition generates competitive influences on conduct that have an effect roughly equivalent to the effect sought to be achieved by the antitrust laws.[19] International competition creates competitive pressures on firms operating in the United States market and thus reduces the incentives for firms operating there to engage in anticompetitive conduct. In particular, international competition is thought to prevent the development of market power, thus eliminating the possibility of antitrust violations that presuppose the presence of such power. In this view, therefore, the need for antitrust evaporates with increased internationalization.

While international competition does tend to increase competitive pressure within domestic markets and, as a result, reduce incentives for at least certain types of anticompetitive conduct, caution is required in drawing conclusions from this general tendency. To say that increased international competition tends to reduce the need for antitrust law in some circumstances does not justify the assumption that this effect would occur with respect to any particular norms under any particular circumstances. What is needed, therefore, is careful analysis of the impact of internationalization on specific functions and goals of antitrust.

In addition, this evaporation argument is easily confused with arguments that the importance of international competitiveness requires a reduced role for antitrust law, because both arguments suggest a diminished role for antitrust on the basis of very general tendencies. The two arguments are, however, fundamentally different. The international competitiveness argument relates to the goals and values that are used in determining state policy; the evaporation effect argument suggests a change not in the desired social objectives, but in the need to use law to achieve that end.

18. *See generally* L. THUROW, THE ZERO-SUM SOCIETY 146 (1980); Axinn, Greene, & Denis, *Importing Foreign Competition into American Antitrust Analysis—Is This the New "New Learning"?*, in ANTITRUST AND TRADE POLICY IN INTERNATIONAL TRADE 191, 218-20 (B. Hawk ed. 1985); Fikentscher, *Third World Trade Partnership: Supranational Authority vs. National Extraterritorial Antitrust—A Plea for "Harmonized" Regionalism*, 82 MICH. L. REV. 1489, 1498 (1984) (arguing that internationalization of the world economic system reduces the utility of national antitrust policies).

19. For background, see Grossman, *Import Competition from Developed and Developing Countries*, 64 REV. ECON. & STATISTICS 271 (1982) (discusses the competition domestic producers face regarding imports from developing and developed countries). *See also* Axinn, Greene, & Denis, *supra* note 18, at 203-05.

B. *Internationalization and the Capacity of Antitrust Law to Achieve Its Goals*

Assuming that antitrust law is necessary to achieve the desired social objectives, the next question is whether the internationalization process affects the capacity of antitrust law to achieve its objectives.

1. The Effectiveness of Antitrust Concepts

The internationalization of competition may alter the effectiveness of concepts used in antitrust law. Concepts that may be effective in achieving particular objectives in a domestic context may be rendered less effective in achieving such goals in the context of international competition. Antitrust concepts—like most legal concepts—assume particular causal relationships between conduct and its effects. International competition may, however, alter these causal relationships, with the result that it also alters the outcomes generated by applying the legal concepts based on them.

The issues of market power and market definition provide examples. Many antitrust provisions—*e.g.*, those relating to monopolization and merger control—require the measurement of economic power,[20] and, under current law, such power must be assessed in relation to specific geographic and product markets. These markets, in turn, must be defined. While the definition of markets and the measurement of market power are not precise even in purely domestic cases,[21] the internationalization of competition increases difficulties associated with their use and thus tends to impair the effectiveness of the conceptual structure based on them.[22]

One aspect of this phenomenon relates to the issue of supply potential that is a central analytical element in market definition and market power analysis. Where competition takes place exclusively or predominantly among firms whose operations are confined to a delimited geographic sphere such as that created by national boundaries, the issue of supply potential tends to be relatively unproblematic because competing firms cannot quickly and easily alter the supply of product they bring to market. In order to do this they would have to invest in new production

20. *See, e.g.*, Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 3 (1984); White, *Antitrust and Merger Policy: A Review and Critique*, 1 J. ECON. PERSP., Fall 1987, at 13, 14-16.

21. *See generally* Areeda, *Market Definition and Horizontal Restraints*, 52 ANTITRUST L.J. 553 (1983); Harris & Jorde, *supra* note 20.

22. *See* Baker, *Market Definition and International Competition*, 15 N.Y.U.J. INT'L L. & POL. 377 (1983); Leitzinger & Tamor, *Foreign Competition in Antitrust Law*, 26 J.L. & ECON. 87 (1983).

facilities or retool existing facilities. Where competing firms produce and distribute on a transnational scale, however, they may be able to alter their supply of product to purchasers in a particular geographic area merely by shifting the flow of existing production. The ease with which product flows can be manipulated thus increases the difficulty of defining markets, assessing the power of firms within those markets, and adjudging the influence of potential foreign competition on domestic competitive relationships. Here a concept that functions at least tolerably well where the level of internationalization is low is likely to function less well in an international context.

2. Jurisdiction and Enforcement

The internationalization of competition may also reduce antitrust law's capacity to achieve its goals by impairing antitrust enforcement.[23] A large multinational firm generally has a greater capacity to shift components of its operations quickly, conveniently and efficiently from one country to another, thus reducing the ability of any one state to regulate those activities, at least unilaterally.

a. Lack of Prescriptive and Judicial Jurisdiction

The increased capacity of firms to manipulate the location of their activities means that some conduct relating to competition in the U.S. market may not be subject to U.S. law because of jurisdictional restraints. Domestic jurisdictional concepts provide, in general, that U.S. laws extend to conduct outside U.S. territory by non-U.S. firms only where the conduct has particular types of effects (*e.g.*, foreseeable effects) within the United States.[24] Moreover, jurisdictional entitlements of states are restricted under international law, which normally allows a state to prescribe norms of conduct only where (1) the conduct occurs within the territory of the state, (2) the object of jurisdiction is a national of that state, or (3) there are particular effects of the conduct within the territory of that state.[25] Since U.S. jurisdictional concepts exhaust entitlements under international law, the United States could not signifi-

23. Some scholars have called for a comprehensive reassessment of United States antitrust enforcement. *See, e.g.*, Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 206 (1982).

24. *See* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, §§ 401-403, 96 Stat. 1246, (codified as amended at 15 U.S.C. §§ 6a, 45(a)(3) (1982)).

25. *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); Castel, *The Extraterritorial Effects of Antitrust Laws*, 179 RECUEIL DES COURS 13, 26-35 (1983); Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 190 (1984).

cantly expand the jurisdictional reach of its laws without violating international law.

Even where conduct is subject to U.S. laws, United States courts may not be permitted to exercise jurisdiction with respect to a firm committing an offense because that firm may not have the contacts with the United States that are requisite to personal jurisdiction under U.S. law. Constitutional requirements of due process have been interpreted, for example, to require courts to consider in assessing jurisdiction the relative burdens on the parties as well as the regulatory justifications for imposing such burdens.[26]

Finally, in order to avoid conflicts with other states, U.S. courts have developed several principles that may prevent a court from exercising jurisdiction to which it might otherwise be entitled. For example, principles of comity require U.S. courts to consider the interests of other states as well as the foreign relations interests of the United States in applying U.S. law—courts may not exercise jurisdiction where the probable harm to such interests cannot be justified by the regulatory interests of the United States.[27]

b. Impediments to Effective Application of United States Law

Assuming that a U.S. court has requisite personal and subject matter jurisdiction, the foreign location of the conduct and/or information relating to it may prevent effective application of U.S. law. The court and the parties may both lack access, for example, to relevant evidence or other information.[28] This is particularly likely where the foreign state in which the information is located has enacted so-called "blocking statutes" to prohibit nationals and residents of such state from providing information to, or otherwise cooperating with, foreign proceedings.[29] This lack of access to information may prevent a court from obtaining evidence necessary for the application of U.S. law.

c. Limits on the Enforceability of U.S. Judgments

Finally, even if judgment is obtained in the U.S. against a foreign firm, the foreign location of defendant's assets may reduce the impact of that judgment. A foreign state may refuse to enforce the U.S. judgment,

26. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-16 (1987).

27. *See, e.g.*, Gerber, *supra* note 25, at 203-06.

28. For discussion of such access issues, see Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986).

29. *See, e.g.*, Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982).

increasing the uncertainty and the potential cost of litigation and thus reducing the deterrent effect of the U.S. regulatory provisions.[30] U.S. reliance on private litigation for enforcement of the antitrust laws amplifies the significance of limits on the enforceability of United States law because private litigants are presumably more likely to be deterred from litigation by the reduced probability of enforcement than are public authorities.

d. Additional Consequences

These limitations on the ability of the U.S. to enforce the antitrust laws against foreign firms have additional consequences. They create the perception, for example, that competition in the U.S. market may be unfair because such laws impose greater costs on U.S. firms than on foreign firms. This, in turn, leads to the conclusion that since the antitrust laws cannot be applied evenly to all competitors, their scope should be reduced. The greater the severity of the antitrust laws, so the argument goes, the greater the advantage to foreign firms who may not be subject to the full effects of those laws. Moreover, the apparent ineffectiveness of antitrust laws in reaching some conduct of some competitors fuels the argument that those laws are ineffective and, therefore, cannot be justified.

C. Reevaluating the Means Used to Attain Antitrust Goals

The internationalization of competition thus has far-reaching implications for the effectiveness of antitrust laws in achieving antitrust goals. Consequently, it calls for rethinking the substance, procedure and jurisdictional framework of U.S. antitrust law. Moreover, it urges recognition of the dependence of the United States on international cooperation for the attainment of many of its antitrust goals.

1. Basic Characteristics of System

The depth and breadth of the impact of internationalization require reevaluation of the basic characteristics of the U.S. antitrust law system. That system has operated in a competitive context that is being fundamentally altered by the internationalization of competition. Consequently, the system must be examined to determine whether it continues to achieve the goals for which it was instituted.

The central characteristics of any system of legal constraints are de-

30. *See, e.g.*, Gerber, *supra* note 28, at 775.

termined by the configurations of authority, power and initiative within it. In particular, the respective roles of the legislature, the courts and the executive shape the way the system functions.[31] In the United States, antitrust law is developed primarily by the courts, with the legislature playing a decidedly minor role. The Sherman Act, the basic antitrust statute, is exceptionally general, providing little specific guidance for courts.[32] Moreover, it is more than a century old, and it has been but little modified. At times the executive (including administrative agencies) has a significant impact on antitrust enforcement, affects perceptions of the law, and influences the courts,[33] but the courts remain the central institutions of United States antitrust law.

The increasing internationalization of competition calls into question the dominant position of the courts and thus the basic characteristics of the system. Analysis of the goals of antitrust and of the measures needed to achieve those goals may, for example, suggest that the legislature should play a greater role in the antitrust system. Congress alone is in a position to implement comprehensive and fundamental changes in the United States antitrust system, and without a significant probability of such changes, thorough analysis of the impact of internationalization of competition is unlikely. Moreover, Congress may be in a better position to make the types of political judgments and international compromises that will be required by the internationalization process.

2. The Efficacy of Substantive Legal Concepts

The substantive concepts of the antitrust laws—both individually and in relation to one another—must be scrutinized to determine their appropriateness for attaining antitrust objectives in an increasingly international context. Such a review may reveal, for example, that the current concepts of market definition and market power are ineffective and should be revised or replaced. It may indicate on the other hand that concepts of economic power should play an even greater role in U.S. antitrust law than they play today.[34]

31. At times, and especially during the last decade and a half, the legal academy has also played an important role in the development of antitrust law.

32. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976) (original version at ch. 647, § 1, 26 Stat. 209 (1890)). *See generally* 1 E. KINTNER, FEDERAL ANTITRUST LAW 239 (1980).

33. *See generally* Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 673-82 (1982); Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEX. L. REV. 649 (1982); Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U.L.Q. 977 (1986).

34. For a discussion of the role of economic power in European antitrust laws, see Gerber, *Law and the Abuse of Economic Power in Europe*, 62 TUL. L. REV. 57 (1987).

3. The Procedures of Antitrust Law

Because the effectiveness of the antitrust system may be influenced as much by the procedures through which norms are sought to be enforced as by the content of the norms themselves, the methods of applying and enforcing U.S. antitrust law must be a central object of review. U.S. reliance on private causes of action for enforcement of the antitrust laws—the private attorney general concept—may, for example, be found inappropriate in the international context. It is used only occasionally in other competition law systems, and the costs and uncertainties of litigation against foreign firms may significantly reduce its effectiveness. Moreover, its lack of amenability to political control may impede U.S. attempts to achieve international cooperation in enforcing antitrust principles.

4. Jurisdictional Issues

Given its impact on the enforcement of U.S. antitrust law, the internationalization of competition demands assessment of current jurisdictional doctrines. Although the ability of the U.S. independently to combat the enforcement problem is limited by international law as well as by political considerations, U.S. jurisdictional principles should be examined to reduce inequalities in treatment between foreign firms in competition here with U.S. firms to evade U.S. regulation of that competitive process. Doctrines such as comity that limit the application of antitrust laws where foreign conduct is involved may require reshaping in light of the internationalization process. Similarly, constitutional principles relating to personal jurisdiction may need to be reexamined.

The enforcement problems associated with internationalization also emphasize the ineffectiveness of the current international jurisdictional system. As I have described in more detail elsewhere,[35] that system has become ineffective because it looks solely to the relationship between the prescribing state and the conduct. It thus fails to provide effective accommodation of the interests of states attempting to regulate their marketplaces with the interests of states that might be affected by the prescribing state's exercise of jurisdiction.

5. International Cooperation

Increasing internationalization of competition combined with jurisdictional limits on the capacities of individual states to achieve their reg-

35. *See* Gerber, *supra* note 25, at 198-202.

ulatory goals by themselves means that the U.S. will become increasingly dependent on foreign cooperation to accomplish its economic regulatory objectives. Evaluation of the U.S. antitrust law system therefore must recognize this dependence. Moreover, effective response to the impact of internationalizing competition requires analysis of the opportunities for cooperation as well as the feasibility, benefits and costs of such cooperation.

The potential role of international cooperation must be evaluated in all major areas of analysis, including substantive, informational and enforcement issues. An effective means of reducing avoidance of national regulations is agreement among states to include specific substantive principles in their respective legal systems. Although there are significant differences among antitrust law systems, and the scope and breadth of such agreements are likely to remain limited, some problems such as the potential harm from international cartelization are widely recognized, and agreement on substantive principles to combat such cartelization may be attainable among discrete groups of states. Regional integration as is occurring in the European Economic Communities may facilitate such cooperation.

Agreements among states to cooperate in the exchange of information relative to possible antitrust violations would reduce the ability of foreign firms to avoid the application of U.S. laws on grounds of lack of access to necessary information. In order to achieve cooperation in this area, however, procedural differences between the United States and much of the rest of the world would have to be reduced because such differences currently cause significant resistance to cooperation.[36] Again, cooperation here is likely to be limited to small groups of relatively homogeneous states. The United States and Canada have, for example, agreed to exchange information of this type.[37]

Cooperation in the enforcement of competition laws is likely to be particularly difficult to achieve. States generally resist enforcing regulatory norms of other states, and the economic and political pressures that accompany economic regulation are likely to increase this resistance. Nevertheless, jurisdictions with similar economic regulatory systems may be willing to agree to mutual assistance to reduce at least egregious evasion of these laws.

36. For discussion of these differences, see generally Gerber, *supra* note 28.

37. *See* Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States of America-Australia, T.I.A.S. No. 10365 (also published at 21 I.L.M. 702 (1982)).

V. The Role of Comparative Law

Comparative legal analysis is indispensable for effective assessment of the impact of internationalization and of potential responses to it. The internationalization of competition is a global phenomenon; all states confront the same economic processes. Since antitrust laws everywhere are designed to protect competitive processes by influencing the characteristics of economic conduct, the nature of economic relationships and the structure of markets, the basic functional objectives of competition law as well as the factual developments confronting those regulatory objectives are everywhere much the same.

The value of shared information concerning both the impact of internationalization and the effectiveness of responses to it is therefore likely to be high. Although there are many differences among competition law systems, comparative analysis of common issues such as the definition of markets promises significant benefits.

Moreover, adequate assessment of the potential for international cooperation and achievement of such cooperation is unthinkable without such comparative insights. Only where the differences between systems are fully understood can cooperation be achieved and, more importantly, be effective.

VI. Objectives of the Symposium

This symposium issue of the *Chicago-Kent Law Review* is intended as a contribution to this much-needed analysis of the effects of the internationalization of competition on antitrust law. We have sought to provide here insights into the general issues as well as analysis of several specific issues.

We have been guided by the conviction that effective analysis of the internationalization process and of appropriate responses to it requires the use of perspectives that can generate insight into the many facets of the phenomenon. Thus we have sought diverse perspectives on the problem, including, *e.g.*, those of doctrinal, historical, economic and comparative analysis.

Accordingly, we have also chosen contributors to the Symposium on the basis not only of their excellence as thinkers, but also of the variety of their analytical perspectives. We have sought to win as contributors creative and perceptive analysts of the predicament of antitrust law, and, fortunately, we have been exceptionally successful in doing so.

VII. CONTENTS OF THE SYMPOSIUM

In order to achieve depth of analysis sufficient to yield the desired levels of insight, we have focused on one central aspect of the internationalization process and its effects on antitrust law. We realize that the price of this selectivity is the necessity of omitting many extremely important issues such as jurisdiction or touching on them only in passing.

The Symposium's central concern is the assessment by one antitrust law system of the impact of foreign firms and foreign conduct on competition within its territory. Three of the four principal articles are concerned primarily with the measurement of economic power, particularly the problem of market definition, while the fourth article analyzes transnational predation.

The contributions have varying objectives. They include an explanation and analysis of current thinking; a critical challenge to the core of current thinking; an analysis of the way the problem is analyzed in Germany, where national competition law is perhaps the most sophisticated outside the U.S.; and an economist's demonstration of the potential values of economic theory in antitrust analysis.

A. The Internationalization of Competition and the Definition of Markets

The issue of market definition is critical to the assessment of economic power under U.S. antitrust law, and that assessment is central to antitrust analysis not only in monopolization and merger contexts, but increasingly even in claims under Section One of the Sherman Act. The internationalization of competition directly and significantly affects this issue, and thus the first three articles in the symposium center on this conceptual mechanism.

The first article, by George Hay, John Hilke and Philip Nelson,[38] examines the role of market definition in United States antitrust law and the special problems involved in defining markets where there is significant foreign competition. It discusses the recent evolution of market definition concepts in the context of international competition and analyzes some of the more important scholarly responses to the effect of internationalization of markets on the market definition issue.

Richard Markovits' contribution[39] has a fundamentally different ob-

38. Hay, Hilke & Nelson, *Geographic Market Definition in an International Context*, 64 CHI.-KENT L. REV. 711 (1988) (Messrs. Hay, Hilke and Nelson's article appears in this symposium issue).

39. Markovits, *International Competition, Market Definition, and the Appropriate Way to Ana-*

jective. It challenges the entire concept of market definition as an analytical tool for assessing the competitive impact of conduct, and in so doing it challenges much of the structure of antitrust doctrine. Focusing on mergers, particularly horizontal mergers, Markovits criticizes current legal thinking as flawed and ineffective. He argues that the concept of market-definition is chimeric and misleading because the market-aggregated data on which it rests are intrinsically weak as predictors of the anticompetitive effect of mergers and, by implication, of other conduct. The internationalization of markets plays an important role in this argument because Markovits concludes that the weaknesses of the conventional approach are particularly pronounced—and, therefore, harmful—where there is international competition. Thus the internationalization of markets emphasizes the need to change the framework of analysis.

Professor Markovits does not, however, stop at criticism of the current situation. He proposes a fundamentally different analysis of the power of firms to achieve anticompetitive effects.[40] He argues that antitrust analysis should focus on relationships among suppliers and potential suppliers as well as on relationships between those two groups and particular categories of purchasers. Such an analysis of disaggregated data, he claims, is not only more effective as a predictor of anticompetitive impact, but likely to be more amenable to efficient and inexpensive use in the legal process. Moreover, he believes that this type of analysis is more effective than traditional analysis in evaluating the impact of foreign competition.

B. Power, Jurisdiction and Market Definition: German and European Contexts

Dr. Kurt Markert, director of the German Federal Cartel Office and a central figure in European competition law, provides comparative perspectives on internationalization and competition laws, in general, and on the issue of market definition, in particular.[41] He analyzes the role of market definition in the competition law of the Federal Republic of Germany and assesses the effects of internationalization on the relationship between European Economic Community law and the national law of the Federal Republic.

lyze the Legality of Horizontal Mergers Under the Clayton Act: A Positive Analysis and Critique of both the Traditional Market-Oriented Approach and the Justice Department's Horizontal Merger Guidelines, 64 CHI.-KENT L. REV. 745 (1988) (Professor Markovits' article appears in this symposium issue).

40. *Id.* at 768-72.

41. Markert, *German Antitrust Law and the Internationalization of Markets*, 64 CHI.-KENT L. REV. 897 (1988) (Dr. Markert's article appears in this symposium issue).

Dr. Markert's article focuses on merger law, the area in which the internationalization process has most seriously affected European competition law systems. He describes the methods which are used to define markets under German law, the problems that have been encountered in applying these methods, and the conceptual and procedural responses that have been made to the increasing internationalization of competition. He shows how the real problem of market definition, particularly in an increasingly international competitive context, is economic power, and he describes the ways in which German legal thought has responded to this problem by using a pragmatic definition of markets and a flexible analysis of economic power.

C. *Law, Economics and the Evaluation of International Predation*

The final article, by Kenneth Elzinga, a professor of economics,[42] considers the relationship between economic analysis and antitrust law in the context of international predation. Using as an example the recent case of *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,[43] which involved alleged transnational predation by Japanese television manufacturers, Elzinga describes the problems of analyzing and evaluating alleged international predation within the framework of the United States procedural system. He analyzes the interaction of economic and legal reasoning in the *Matsushita* case and offers insights into the potential roles of economic analysis in applying United States law to foreign-based conduct.

VIII. ANTITRUST LAW AND COMPETITION: A NEW RELATIONSHIP?

The process of internationalizing competition is not new. Even if we limit our view to the two centuries or so since the beginning of the industrial revolution, we can identify international elements that increasingly have influenced economic competition throughout this period. Nevertheless, increases in the extent and complexity of the internationalization process since the end of the Second World War have been unprecedented, and their impact on the capacity of states to regulate their marketplaces and on the effects of such regulation is only beginning to be a

42. Elzinga, *The New International Economics Applied: Japanese Televisions and U.S. Consumers*, 64 CHI.-KENT L. REV. 941 (1988) (Professor Elzinga's article appears in this symposium issue).

43. 494 F. Supp. 1161 (E.D. Pa. 1980), *aff'd in part, rev'd and remanded in part, sub nom. In re* Japanese Elec. Prod. Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd and remanded sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *aff'd on remand sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir. 1986), *cert. denied sum nom.* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 401 U.S. 1029 (1987).

subject of serious study. Although specific issues relating to internationalization have been studied, what is critically important is an improved understanding of the process of internationalization in which these specific elements are imbedded.

The internationalization of competition represents a fundamental challenge to United States antitrust law. The function of antitrust law is to regulate the process of economic competition, and the new competitive context created by internationalization calls into question not only the substance and procedure of antitrust law, but also its justifications.

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I would like to thank each of the contributors for participating in this venture and for providing us with highly valuable material. I would further like to thank the staff of the *Chicago-Kent Law Review*, particularly Editor-in-Chief Steve Wood, for effectively and judiciously performing the editorial and publishing tasks connected with publication of this symposium issue. I hope and believe that our efforts will become part of a serious and thorough evaluative process which could well have an important effect on the course of economic activity in the future. The regulatory responses of the industrialized states to the process of internationalization will surely have a significant impact on shaping that process.