Appendix C: Competition Policy Across the Triad

Due to the increasingly global character of modern commerce, competition policy has become an important element of international law and politics.[1] The United States has pursued overseas antitrust problems in bilateral discussions with Japan and other countries, and has participated in OECD, GATT, and WTO discussions of international competition policy issues. In recent years, the Antitrust Division of the U.S. Justice Department has focused a great deal of attention on international antitrust problems involving multinationals in a wide variety of industries. International legal issues are emerging rapidly and changing regularly, increasing the pressure on national governments to understand foreign competition policy regimes, clarify existing policies, and develop channels for cooperation and dispute settlement. As multinational firms become increasingly prevalent in foreign markets, the conflicts between different national competition policy regimes are likely to emerge ever more forcefully.

Nations define and administer competition policy very differently.[2] In the United States, antitrust law is constructed to protect consumers from restraint of trade, monopoly power, and collusive business practices. In Japan, competition policy historically has subordinated consumer interests to policies intended to strengthen and favor do-

[1] Outside the United States, the conventional term used to describe the regulation of competition is "competition policy"; the term conventionally used in the United States is "antitrust policy." Competition policy generally subsumes antitrust policy and addresses a wider range of political and economic objectives.

[2] For a discussion of the different competition policy regimes in Europe, Japan and the Untied States, see: M.C. Huie, "'Intrcxiuction—The EEC & Antitrust in 1992," *The Journal of Reprints For Antitrust Law and Economics 25(*1 -2):3-22, 1993; M.M. Mendes, *Antitrust in a World of Interrelated Economies: The Interplay Between Antitrust and Trade Policies in the US and the EEC* (Bruxelles, Belgique: Editions del'Universite de Bruxelles, 1991); U.S. Congress, General] Accounting Office, *Changes in Antitrust Enforcement Policies and Activities* GAO/GGD-91-2 (Gaithersburg, MD: October 1990); U.S. Congress, General Accounting Office, *Competitiveness Issues. The Business Environment in the United States, Japan and Germany,* GAO/GGD-93- *124* (Washington, DC: August 1993); J.D. Richards, "Japan Fair Trade Commission Guidelines Concerning Distribution Systems and Business Practices: An Illustration of Why Antitrust Law Isa Weak'? Solution To U.S. Trade Problems with Japan," *Wisconsin Law Review* (3):92 1-960, 1993; R.L. Cutts, "Capitalism in Japan: Cartels and Keiretsu," *Harvard Business Review* July-August 1992, pp. 48-55; and E. Fox, "The Tenth Milton Handler Lecture: Antitrust, Trade and the 2 1st Century—Rounding the Circle," *The Record of the Association of the Bar of the City of New York* 48(5):535-588, June 1993.

mestic producers, although there have been some signs that this emphasis may be changing.[3] In the European Union (EU), competition policy is designed to promote economic and political integration and enhance economic competitiveness, although attention is also given to preventing firms from abusing a dominant market position. Asymmetries in the regulation and enforcement of competition policy can affect the relative competitiveness of firms in both domestic and foreign markets.

Some governments have been accused of permitting and even supporting cartels, exclusionary practices, price fixing, market allocation schemes, predatory pricing in third country markets, and other restraints on competition.[4] Although governments can, in theory, enforce their laws against anticompetitive practices in foreign markets, they rarely do so due to intragovernmental conflicts. Private parties have virtually no ability to pursue anticompetitive behavior in foreign markets, apart from bringing actions against local affiliates of the alleged perpetrator. Matters are further complicated when the alleged perpetrators (a) do not have operations within the jurisdiction of the concerned government or (b) are located in jurisdictions that do not allow or encourage private antitrust actions.

U.S. antitrust law prohibits foreign anticompetitive behavior that restricts U.S. exports or limits market access by firms with operations in the United States. Likewise, the European Union and Japan claim extraterritorial jurisdiction over certain actions that have adverse consequences for their domestic firms. Nevertheless, the extraterritorial extension of domestic competition policy rules is frequently rendered ineffective by difficulties in gathering evidence from the alleged perpetrators. Negotiations and discussions aimed at harmonizing review procedures and enhancing cooperation among different national competition policy authorities have not yet created a framework that ensures compliance with the discovery process in foreign countries.[5] Despite precedents established in the area of publicly traded securities, exchange of confidential information between agencies charged with the enforcement of competition policy remains limited.

Ultimately, fundamental asymmetries across the Triad imply that effective enforcement of existing national competition policy rules would be insufficient to ensure fair and open global competition. In the long run, greater convergence across competition policy regimes may be necessary. To move toward this goal, some analysts have advocated a multilateral antitrust agreement such as that proposed by the Havana Charter.[6] But even if countries pursued such an agreement, extensive differences in national policies, political institutions, systems of corporate governance, and cultural norms suggest that an international competition policy regime is a long-term prospect at best. Consequently, it maybe preferable to pursue

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[3] Recently, the Japan Fair Trade Commission (JFTC) has stepped up its enforcement efforts, and some government officials have begun to recognize consumer interests in competition policy matters. To date, though, it remains unclear whether these signs foretell a significant reorientation in Japan's competition policy regime.

[4] See: Coalition For Open Trade, *Dealing With Japan: Responding to Private Practices in Restraint of Trade: An Assessment of Policy Tools* (Washington, DC: March 1994). Although its historical discussion is compelling, the report's recommendations are controversial.

[5] For a discussion of negotiations and agreements intended to enhance enforcement and cooperation, see: J.F. Rill and V.R. Metallo, "The Next Step: Convergence of Procedure and Enforcement," sponsored by 1992 Fordham Corporate Law Institute, B. Hawk (cd.), *International Antitrust Law and Policy (New* York: Translational Juris Publication Inc., 1993), pp. 15-39; R. Pitofsky, "Proposals For Revised United States Merger Enforcement in a Global Economy," *The Georgetown Law Journal 81(2): 195-250*, December 1992; J.F. Rill and V.R. Metallo, "Convergence of Premerger Notification and Review: A Case Study," *Wake Forest Law Review 28(1):35-50*, Spring 1993; and Fox, op. cit., footnote 2.

[6] The Havana Charter was never ratified. For the text of the charter, see: C. Wilcox, *A Charter for World Trade (New* York: The Macmillan Company, 1949), pp. 231-327.

a more limited international agreement, such as a nonbinding statement of core principles, that could set a normative context for greater international cooperation on competition policy matters.

In the short term, governments may wish to focus on achieving more effective enforcement of existing national competition policy laws and, perhaps, improving the ability of national governments to pursue foreign anticompetitive practices that directly affect domestic firms. For the U.S. government, short-term policy strategies could focus on four areas:

1. *Providing resources for the U.S. government to gather and analyze information on international anticompetitive practices.*

In the past, the U.S. embassies were responsible for gathering information on international cartels. The embassies provided antitrust authorities with much useful information on the number, methods of organization, influence, and market power of foreign business groups. At present, however, no agency is charged with this information-gathering responsibility. Consequently, the United States government may not be fully informed in international negotiations, and cannot easily detect foreign anticompetitive behavior that violates U.S. antitrust laws. The U.S. government might consider resuming some method of information gathering to identify antitrust violations for potential prosecution, to support civil suits (especially when brought by plaintiffs with few resources), and to assist ongoing negotiations intended to improve cooperation and harmonization.

2. *Improving international cooperation among competition policy authorities.*

Increased cooperation among different competition authorities may be relatively easy to encourage when the action in question is illegal in both jurisdictions and when the authorities vigorously enforce their laws and regulations.[7] It will be more difficult to foster cooperation when the action in question is legal in one jurisdiction and not in the other, and/or when enforcement is more lax.

Two important agreements which have fostered international cooperation are the Canada-United States 1990 Mutual Legal Assistance Treaty (MLAT) and the 1991 agreement between the United States and the Commission of the European Union to cooperate in the application of their competition laws.[8] The MLAT allows for mutual cooperation in law enforcement for criminal antitrust violations, but it does not require coordinated investigations by both countries.[9] The U.S.-EU Agreement seeks to reinforce competition policies by: a) requiring each party to notify the other of transactions that may affect important interests; b) requiring the antitrust authorities to meet on a regular basis to exchange information regarding pre-merger review, subject to confidentiality agreements; c) allowing coordinated investigations by both parties, when deemed mutually ad-

[7] For a brief discussion of legislation recently proposed by the Clinton Administration to foster greater international cooperation in the gathering of information on cartels organized outside the United States, see: K. Bradsher, "U.S. Seeks Law on Foreign Cartels," *The New York Times*, p. D2, June 14, 1994; and J. Kahn "US Acts to Boost Anti-trust Efforts," *Financial Times*, p. 5, June 14, 1994.

[8] The 1984 Memorandum of Understanding between the United States and Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Law required notification and consultation with the other party when either the interests of the other country were involved or the information needed was located in the other country. Rill and Metal lo, op. cit., footnote 5.

[9] A dramatic example of increased international cooperation was provided by the efforts, including joint raids, of the U.S. and Canadian authorities that led to recent fines of over $8 million and the guilty pleas on the part of four executives in the plastic disposable tableware industry. See J. Davidson, "Four Men Plead Guilty to Fixing Prices of Plastics," *The Wall Street Journal*, p. A5, June 10, 1994.

vantageous; d) specifying means for determining when either government might defer enforcement responsibility to the other; and e) requiring consultation between the U.S. and EU competition authorities.[10] When appropriate, the United States might seek to negotiate similar bilateral agreements with other countries.

3. *Eliciting more cooperation from foreign firms in the discovery process.*

Cooperation could be facilitated in the case of mergers by the harmonization of merger reporting requirements and waiting periods.[11] This could reduce the burden of compliance for firms and assist in the coordination of merger reviews when several national competition policy authorities are involved. Enforcement would be greatly facilitated if agreements could be reached with the competition authorities to compel cooperation in investigations and discovery on the part of firms with operations located within their jurisdiction. Such agreements would need to include adequate safeguards to ensure that they could not be used to harass firms engaged in lawful activities, and that information of competitive interest but unrelated to the activity under investigation was protected.

Compelling cooperation in discovery and gathering evidence from firms based outside the United States, in the absence of active cooperation and support from the other foreign competition authorities, is difficult if not impossible. This is especially so if the alleged anticompetitive actions do not take place in or directly affect the U.S. market. Two possible measures could be considered to deal with such situations: a) providing for a different burden of proof for those cases in which active and effective cooperation proves impossible to elicit in a timely fashion; and b) increasing the damages and criminal penalties for firms convicted if they have failed to provide a satisfactory level of cooperation.

4. *Encouraging better enforcement of existing foreign competition policy laws.*

The United States has long-standing political and diplomatic channels through which it can encourage foreign governments to modify their competition policies and practices. For instance, some observers have noted that U.S. political pressure is partly responsible for improving the enforcement practices of the Japan Fair Trade Commission (JFTC).

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[10] A recent example of such cooperation was provided by the coordinated settlement reached by Microsoft with the U.S. Department of Justice and the European Commission. See: E.L. Andrews, "Microsoft Grip on Software Loosened by Antitrust Deal," *The New York Times*, p. A 1, July 17, 1994; and L. Kehoe, "Microsoft Deal Settles Antitrust Investigation," *Financial Times*, p.1, July 18, 1994. Recently, the European Court ruled that 1991 agreement between the United States and the European Commission was void and should have been concluded by the Council of Ministers instead of the European Commission. It is expected that the Council of Ministers will rapidly give their approval, restoring the legal validity of the agreement. See: E. Tucker, "Commission's Pact with US. Overturned by Euro-court," *Financial Times*, p. 1, Aug. 10, 1994.

[11] See '. Conflicts In International Merger Enforcement," American Bar Association, Section of Antitrust Law, *Special Committee On International Antitrust Report, 1991,* pp. 166-210; and OECD, *Merger* Cases In *The Real World: A Study Of Merger Control Procedures* (Paris, France: OECD, 1994).