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The international nature of economic activity runs parallel with the international nature of restraints on competition. Cartel agreements, mergers, and even unilateral measures, such as calling for a boycott, can have effects that cross national borders. In contrast, the actual enforcement of an individual state's laws is confined to that state's territory. Due to this divergence, loopholes have arisen in the endeavors to combat restraints on competition. In principle, there are two possible approaches to finding a solution to this problem. One is international, the other national. Each includes a number of variations.

I. The International Approach

A. The Supranational Variation

The most far-reaching approach to addressing the problem of international restraints on competition is the establishment of a supranational competition order, in which the political system responds to the international activities of enterprises. Regional economic unions along the lines of the European Communities represent an appropriate example of such a system. The European Economic Community (the "EEC") is a constitutional community. The EEC Treaty[1] provides competition rules (primary legislation) which are completed by numerous regulations (secondary legislation). This law has direct applicability in the member states and enjoys precedence over purely national legislation. In the final analysis, however, a supranational competition order should include the

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[1] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

possibly naive idea of a type of "world law" and "world legislative organ."

The particular success of the European Community ("EC") as a legal community stems from three specific premises. First, the Member States of the EC form a small and relatively homogeneous group of states. Second, the conclusion of the founding treaties was greatly facilitated by recourse to a range of loosely defined legal concepts and formulas for political compromise. Even with regard to the EEC Treaty competition rules themselves, it was originally unclear as to whether the rules dealt with a program for action or were to be regarded as self-executing law. Finally, the Communities have in place institutions that are charged with carrying Community law into effect which operate free of political preoccupations. These institutions are, in essence, the Commission in Brussels, which functions as "Guardian of Community law" and the establishment of subjective rights for individual Community citizens, and the European Court of Justice in Luxembourg, which operates as an independent organ of the Community.

B. Multilateral Treaties

A second approach to addressing the problem of international restraints on competition is to utilize multilateral treaties, such as the General Agreement on Tariffs and Trade (the "GATT"),[2] various Organization for Economic Co-Operation and Development ("OECD") liberalizing codices,[3] and the United Nations Code for the Control of Restrictive Business Practices.[4] Harmonization efforts of this type are not, *a priori*, to be underestimated. The multilateral dismantling of tariffs was very successful in the period following the Second World War. The achievements in the removal of non-tariff trade barriers have been somewhat less impressive.

A further benefit of multilateral treaties is the changing awareness that can emerge in the participating states. For example, there currently are efforts in the Uruguay Round to bring about a greater liberalization

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[2] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948)[hereinafter the GATT].

[3] *See Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade*, OECD Doc. C(86)44 (1986), *reprinted in* 25 I.L.M. 1629 (1986); Davidow, *Some reflections on the OECD Competition Guidelines*, 22 ANTITRUST BULL. 441 (1977); Benz, *Trade Liberalization and the Global Service Economy*, 19 J. WORLD TRADE L. 95 (1985).

[4] *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF.10/Rev. 1, *approved* GA. Res. 35/63, 48 U.N. GAOR Supp. (No. 61c), U.N. Doc. A/RES/35/63 (1980), *reprinted in* 19 I.L.M. 813 (1980); Lowe, EXTRATERRITORIAL JURISDICTION, AN ANNUAL COLLECTION OF LEGAL MATERIALS, 255-257 (1983).

in the international trade of services. It is impossible to imagine that this issue ever would have reached the negotiating table without the prior liberalization of the international trade in goods.

There remains a degree of skepticism in the area of competition, however, which is based on two grounds. First, the differences among politico-economic philosophies concerning competition are still considerable. It is not necessary to hark back to the failure of the 1948 Havana Charter.[5] One can refer to modern blocking statutes in highly industrialized countries, such as Australia, Canada, the United Kingdom, France, and the Netherlands, which run counter to the far-reaching regulatory demands of U.S. antitrust law.[6] Essentially, the problem consists of different understandings of the nature of competition. On the one hand, there is a degree of instrumentation in competition, usually with a view to achieving a particular industrial policy goal. This is a constructive approach to competition based on a philosophy of targeted results. On the other hand, there is the idea that competition establishes the rules for play in the free market process. What emerges in detail from this process is necessarily unknown. Von Hayek's formula of "competition as a discovery process" characterizes this idea.

The second basis for skepticism is that protectionist practices continue to be widely applied, even in countries that pursue international free trade policies. Some voluntary restraint agreements, such as those governing the relationship between Japan and the United States and between Japan and the EC, are just as much evidence of this as the wide-ranging subsidy policies practiced in many countries. It was typical that the December 1988 GATT negotiations broke down because of disagreements over agricultural subsidies. The deadlock was less a question of differences between highly industrialized countries and less-developed countries, and more the result of disagreements between the Western countries.

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5 HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, U.N. Doc. E/Conf.2/78 (1948). *See generally* Jaenicke, *Havana Charter*, 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 260 (R. Bernhard ed. 1985).

6 British Protection of Trading Interests Act, 1980, ch. 11; Canadian Foreign Extraterritorial Measures Act, *reprinted in* 24 I.L.M. 794 (1985); Australian Foreign Proceedings Act (Commonwealth Act), *reprinted in* 23 I.L.M. 1038 (1984). *See* Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783 (1984); Novicoff, *Blocking and Clawing Back in the Name of Public Policy: The United Kingdom's Protection of Private Economic Interests Against Adverse Foreign Adjucations*, 7 NW. J. INT'L L. & BUS. 12 (1985); Atwood, *Blocking Statutes and Sovereign Compulsion in American Antitrust Litigation*, 27 SWISS REV. INT'L COMPETITION 5 (1986); Lowe, *Blocking Extraterritorial Jurisdiction, The British Protection of Trading Interests Act 1980*, 75 AM. J. INT'L L. 257 (1981); J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD I § 4.17 (2d ed. 1981).

There is a price to be paid for choosing to use multilateral treaties, with their tendency towards ubiquity, to address international restraints on competition. This lies in the lack of stringency in such regulations. Multilateral treaties have more the character of non-binding, "soft law"[7] guidelines, and they provide the participating states with a wide range of opportunities to escape through derogations and safeguards. Realistically, the only option is progressive harmonization. This can benefit national governments to the extent that with harmonization, government officials may protect themselves from domestic pressure groups by following the path of international treaties. There is no evidence at the moment of any general agreement in the competition law area on a universality principle, such as there has been in penal law in connection with crimes such as genocide, drug traffic, and air piracy.

C. Bilateral approach

A bilateral approach to the problem of international restraints on trade would include cooperation treaties such as those the United States has entered into with the Federal Republic of Germany, Canada, and Australia[8] There is a similar treaty between the Federal Republic of Germany and France,[9] and in a wider sense, one could include free-trade agreements such as the 1987 Canada-United States Free Trade Agreement.[10] It is considerably easier to achieve a harmonization of interests and effective regulation of competition through bilateral agreements than it is by pursuing multilateral agreements. The price for this success is that such agreements are confined to two signatory states.

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[7] *See* Seidl-Hohenveldern, *International Economic "Soft Law,"* 163 RECEUIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 165 (1979).

[8] Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, BGBl.II 1711, *reprinted in* 15 I.L.M. 1282 (1976); Joint Statement Concerning Cooperation in Anti-Trust Matters, Nov. 3, 1969, United States-Canada, *reprinted in* 8 I.L.M. 1305 (1969); Agreement between Australia and the United States, June 29, 1982, *reprinted in* 21 I.L.M. 702 (1982). *See generally* Garvey, *American Retreat from Extraterritorial Policies for an International Competitive Economy*, 51 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (RABELSZ) 401, 432 (1987).

[9] Abkommen zwischen der Bundesrepublik Deutschland und der Republik Frankreich über die Zusammenarbeit in Bezug auf wettbewerbsbeschränkende Praktiken (Agreement concerning Cooperation on Restrictive Business Practices), May 28, 1984, BGBl.II 758, *reprinted in* 26 I.L.M. 531 (1987).

[10] U.S. DEP'T OF EXTERNAL AFFAIRS, THE CANADA-U.S. FREE TRADE AGREEMENT SYNOPSIS (1987).

II. THE NATIONAL APPROACH

A. The Link to the Host State

1. Extraterritorial Antitrust Application

A national approach to transborder restraints on competition can result from the operation of the "effects doctrine." Under this doctrine, a legal order whose members have been negatively affected by restraints on competition may take remedial action. This extraterritorial application of competition law results in well-debated problems of possible conflicts of law.[11] Numerous countries follow the effects approach, including the United States.[12] The European Court of Justice in its September 27, 1988, judgment in the *Wood Pulp* case[13] confirmed a similar result in relation to European competition rules. In theory, it is possible to ensure a water-tight application of a country's competition rules by invoking the effects doctrine. The efficiency of a state's competition rules, therefore, is dependent on the degree of commitment with which the individual state pursues the goal of enforcing its norms.

There is some evidence to support the thesis that U.S. antitrust law exercises a considerable deterrent effect. This is evident from experience in advising enterprises on cartel matters. It is not unusual, for example, in relation to research and development cooperation between enterprises, for side agreements to be reached as to which party will concentrate on which export country. Such agreements generally exclude the United States, because the parties fear the strength of its antitrust law. A primary reason for this exclusion is the possibility of a private action in the United States resulting in treble damages. Even the possible risk of such claims acts as an enormous deterrent. Furthermore, under U.S. civil procedure rules, even someone who is unjustly accused is regularly obligated to pay his own costs, particularly attorney's fees. Compared with

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[11] *See* Castel, *The Extraterritorial Effects of Antitrust Laws*, 179 RECEUIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 21 (1983); Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500 (1981); Meesen, *supra* note 6; Maier, *Extraterritorial Jurisdiction at a Crossroads: Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982); Waller & Simon, *Analyzing Claims of Sovereignty in International Economic Disputes*, 7 NW. J. INT'L L. & BUS. 1 (1985). *Cf.* ENFORCING ANTITRUST AGAINST FOREIGN ENTERPRISES (C. Canenbley ed. 1981).

[12] *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Turner, *Application of Competition Laws to Foreign Conduct: Appropriate Resolution of Jurisdictional Issues*, 26 SWISS REV. INT'L COMPETITION L. 5 (1986); Garvey, *supra* note 8; Meessen, *Conflicts of Jurisdiction under the New Restatement*, 50 LAW & CONTEMP. PROBS. 47 (1987); Fox, *Extraterritorial Antitrust and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.Y.U. J. INT'L L. & POL'Y 556 (1987).

[13] A. Ahlström Osakeyhitiö v. Commission, 4 Common Mkt. Rep. (CCH) ¶ 14.491 (Sept. 27, 1988).

European standards, these costs can mount up quite quickly and reach extraordinary sums.

The exclusion of the United States in this way, bearing in mind that we are usually talking about some fifty percent of a world market, results in cartel agreements having external instability. This has contributed to the disappearance of international cartels, such as those that were operated as permanent features by the electrical and chemical industries in the pre-War period. The chief cause of this disappearance lies less in the legal domain and more in the dynamic of international economic activity and the resultant pressure of competition.

The greatest enemy of restraints on competition remains competition itself. This is confirmed by the observation that international cartels remain immune where they have received the blessing of sovereign states. Examples of such enduring cartels are the Organization of Petroleum Exporting Countries cartel ("OPEC"), the international commodity agreements, and various orderly marketing agreements initiated by states. These significant international restraints on competition may indicate policy failure more than a problem of competition law.

2. The Case of Less-Developed Countries

The situation in less-developed countries can be viewed as an exceptional case. Less-developed countries often have no functioning competition law, and at least in theory, these countries may be "exploited" by enterprises from highly developed countries. This is even more likely to be the case given the fact that the home states of these exploitative enterprises tend to treat restraints on competition in the markets of developing countries with benign neglect.[14] The loopholes in the application of competition law can be confirmed to this extent. These findings are even more disagreeable in view of the fact that less-developed countries are among the poorest and weakest in the world.

On the other hand, it should not be overlooked that such regulatory loopholes can be considered the responsibility of the developing countries as well. These countries could mend their defective fences and end the state of legislative abstinence or inefficiency. What seems to be important here is the fact that the economies of developing countries frequently are firmly in the hands of, or indeed are even dominated by, the state. This is very much the case in relation to those investment areas where performance is called for by the industrialized countries. The nature of the problem then changes. The suggestion that Western tax authorities are

[14] *See infra* sec. II.B.

prepared to regard sums (bribes) paid by exporters to developing countries as necessary business expenses for the exporting enterprises illustrates the difficulty. The roots of the problem lie even deeper; they have to do with the political structures. Deficiencies in the application of a competition law belong to the more superficial category.

B. The Link to the Home State

A national approach could follow the "initiation principle," which provides that a home state always takes action against restraints on competition when the enterprises involved are subject to its jurisdiction. The general practice in reality, however, is quite the opposite. Undistorted competition in the domestic market tends to be the exclusive objective of competition law. Restraints will remain unchallenged if they are directed towards a foreign market and exercise no indirect effect on the home market.[15] The contradiction in the application of legal standards is quite obvious: states that protect their domestic markets by applying the effects doctrine are totally indifferent to what their own enterprises are doing abroad. This is particularly obvious in the treatment of pure export cartels. These are even permitted in the United States, which has been at the forefront in promoting worldwide antitrust law. The traditional justifications for exempting pure export cartels, leaving aside the mercantilist aspect, are not convincing.[16]

The "foreign exchange argument" recognizes pure export cartels as having value in that they contribute to the balancing of national foreign exchange reserves. For countries such as the United States, which trade solely in their domestic currency, or for countries such as Japan or the Federal Republic of Germany, which have stable surpluses, this justification is immaterial. The "small business argument" postulates that pure export cartels smooth the way for inexperienced enterprises to enter foreign markets. In reality, however, the majority of the enterprises indulging in export cartels are big corporations. In addition, competition itself is the best means of maintaining long-term competitiveness, rather than reliance on the shelter of restraints.

The "defense argument" seeks to justify pure export cartels as necessary to strengthen the position of domestic enterprises vis-à-vis competi-

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15 Garvey, *supra* note 8, at 422; *cf.* P. AREEDA & D. TURNER, ANTITRUST LAW § 230(a) (1978).

16 *See* Rehbinder section in GWB-KOMMENTAR ZUM KARTELLGESETZ § 6, no. 20-29 (U. Immenga & E. Mestmäcker eds. 1981); *Export Cartels*, Report of the OECD Committee of Experts on Restrictive Business Practices (1974); *Foreign Trade Antitrust Improvement Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 42 (1981)(statement of James Rahl).

tors organized in cartels, or vis-à-vis monopoly or cartel-organized demand on the foreign markets. However, domestic producers prevented from joining foreign cartels would then be in a free-rider situation and would have a competitive edge. It would be different if there were the danger of predatory pricing on the part of the cartelizing competitors. This would require specific market structures,[17] which seem increasingly unrealistic in international trade terms. Monopoly or cartelized demand situations would appear to be rare in transnational activity. The erection of countervailing market power is no answer to these situations because it would contribute to increased distortion of the markets, rather than to their opening. A preferable option would be to pursue a "cause approach," such as fighting cartelized demand by applying a domestic principle of extraterritorial effect.

The "rationalization argument" regards pure export cartels as a form of distribution cooperation. In practice, though, price cartels dominate, usually together with quota arrangements. Market division is the name of the game in international export cartels. Even if one could see any justification for pure export cartels in this or any of the other arguments, this does not mean that one should conclude that a *general* acceptance of these cartels is appropriate.

III. A Proposal for Reform

What is clear from the international practice of exempting pure export cartels from the application of domestic competition law is essentially a traditional "beggar my neighbor" policy. It leads to a paradoxical situation: if you stand up in the movies, you have a better view; if everyone does it, nobody is better off. My reply to Professor Rahl's question as to what is to be done is that we must do away with the acceptability of pure export cartels on a national basis. The best way to accomplish this would be through concerted action along the lines of the successful dismantling of tariffs under the GATT.

This suggestion has four advantages: (1) if practiced generally, everyone would benefit from these changes; (2) the suggestion can be realized individually by states without serious accompanying disadvantages for them; (3) the industrialized states would bring about a sort of institutional assistance in favor of the developing countries; and (4) internal and external morals would be in harmony, benefiting the credibility of a competition policy in general.

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17 Calvani & Lynch, *Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction*, 51 Antitrust L.J. 375 (1982); Liebeler, *Wither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 Notre Dame L. Rev. 1052 (1986).