

# Northwestern Journal of International Law & Business

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Volume 10  
Issue 1 *Spring*

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Spring 1989

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### Recommended Citation

Eleanor M. Fox, Lawrence A. Sullivan, Antitrust and the Future: World Markets, Transnational Restraints, 10 Nw. J. Int'l L. & Bus. 140 (1989-1990)

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# Antitrust and the Future: World Markets, Transnational Restraints

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## I. INTRODUCTION

In the last decade we have seen a new internationalization of business and a new internationalization of competition/industrial policy. The internationalization of business has led to lively, and some would say destructive, competition within the United States. The internationalization of competition/industrial policy could invite a return of world cartels.

## II. WORLD CARTELS

The shrinking world has produced a complex phenomenon—a mix of competition and restraint, a mix of private action and government action, and a separation of domestic policy from export policy.<sup>1</sup> Even though most industrialized nations now have antitrust laws, virtually all such nations also have policies to treat export collaboration by their nationals as beyond the reach of their antitrust laws.<sup>2</sup> In theory, the country of targeted impact can sue the cartelists, and it sometimes does, but

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<sup>1</sup> See Sullivan, *U.S. Policy in a Mixed World Economy*, 15 N.Y.U.J. INT'L L. & POL. 309 (1983).

<sup>2</sup> See ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT, EXPORT CARTELS 8-21 (1974).

The United States moved in this direction by enacting two statutes in 1982: the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4021 (1982); and the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6(a), 45 (1982). The Export Trading Company Act provides limited antitrust immunity for export plans that are certified as not likely to harm domestic competition. The Foreign Trade Antitrust Improvements Act states that the Sherman and Federal Trade Commission Acts do not apply to transactions not involving import commerce which do not have a

foreign protective legislation<sup>3</sup> and “diplomacy” normally counsel restraint. As a result of broad interpretations of sovereign immunity, the act of state doctrine, the foreign sovereign compulsion defense, and impermissible extraterritoriality, nations, including the United States, have evidenced little interest in challenging even some of the most threatening international restraints, inspired by the notion that export cartels facilitate exports and the hope that leniency to foreign actors will beget reciprocity.

When Thurman Arnold became Assistant Attorney General in 1938, he discovered a multitude of world cartels that had eluded enforcement in the name of joint ventures or extraterritoriality.<sup>4</sup> We are in danger of harboring the same phenomenon today. A positive enforcement and legislative agenda addressed to the world cartel problem could reverse the trend. This would include:

1. A closer look at U.S. export cartels, with a more serious investigation into other possible spill-over effects on the U.S. economy.
2. A closer examination of export collaborations, even those not obviously driven by the cartelists’ desire to eliminate their own competition against one another, also with a view to examining cartel-like effects on the U.S. economy.
3. Much greater efforts to deter export cartels that sell into the United States and willingness to sue foreign producers who join such cartels.

If the United States is sending signals to other nations, such as Japan, that it welcomes their producers’ export restraints,<sup>5</sup> it should stop sending those signals. To the extent that U.S. policymakers are generously construing sovereign immunity, the act of state defense, and the

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direct, substantial and reasonably foreseeable effect on domestic competition, or on export trade of a U.S. exporter.

On November 10, 1988, the Department of Justice published its *Antitrust Enforcement Guidelines for International Guidelines*, reprinted in 55 *Antitrust & Trade Reg. Rep. (BNA) No. 1391* (Spec. Supp. Nov. 17, 1988)[hereinafter *1988 Guidelines*]. While recognizing that even the 1982 legislation preserves some jurisdiction with respect to export trade, the Justice Department said, “the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.” *Id.* at S-21 n. 159.

<sup>3</sup> See, e.g., British Protection of Trading Interests Act (1980). Blocking, and in some cases clawback, legislation has been adopted by nations including Australia, Canada, France, and Great Britain. See 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* §§ 4.17-4.18 (1981 & 1988 Supps.).

<sup>4</sup> See T. ARNOLD, *BOTTLENECKS OF BUSINESS* (1940).

<sup>5</sup> See Farnsworth, *Car Export Limits Kept by Japanese*, N.Y. Times, Jan. 10, 1989, at D1, col. 6. Cf. Hicks, *Effort Begun to Extend Limits on Steel Imports*, N.Y. Times, Feb. 13, 1989, at D2, col. 5.

foreign sovereign compulsion defense,<sup>6</sup> with the effect of insulating foreign cartels merely because they are approved by the collaborators' home governments, they should reverse course. To the extent that the Justice Department is exercising discretion not to sue based upon the foreign nationality of the principal actors involved and the foreign situs of cartel agreements, it should cease this practice. Applying the principle of objective territoriality, U.S. policymakers in the executive, legislative, and judicial branches should protect the United States' and the free world's shared interest in competition.

Professor James Rahl—a leading scholar/thinker and a stalwart defender of competition against those who would compromise it in the name of jurisdictional limits, diplomacy, and reciprocity—would probably add to the agenda the repeal of the Export Trading Company Act of 1982,<sup>7</sup> which enacted a “hands off” policy for outward bound trade, and he would clearly add to the agenda world anti-cartel enforcement. For pragmatic reasons, we have not stressed either of these options. First, the politics of the times led ineluctably to the passage of the Export Trading Company Act of 1982. The rhetorical claim that U.S. business was handicapped in its competition for world markets produced the new law as a symbolic removal of the imagined handicap. The imagery is just as strong today as the United States enters the 1990s.

Secondly, Professor Rahl offers the important idea of a world anti-cartel code that would have the respect of law. Through the Organization for Economic Cooperation (“OECD”) and the United Nations Conference on Trade and Development (“UNCTAD”), scores of nations have, on paper, accepted the central principle of these codes, that cartelization is wrong.<sup>8</sup> But three quite different sets of ideology and fact undermine prospects that this principle will gain the respect of law.

First, the developing countries claim entitlement to a differentiated principle. The claim is that developing countries may need to orchestrate production and distribution of their own resources and manufactures (*i.e.*, cartelize) to promote their development interests and to protect themselves from exploitation by multinationals. This claim was asserted in the course of the UNCTAD negotiations regarding the Restrictive Business Practices Code (“RBP Code”), and it is reflected in the preamble to the RBP Code.<sup>9</sup> In addition, the justifications periodically asserted

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<sup>6</sup> See Brief of the United States as Amicus Curiae, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>7</sup> 1988 Guidelines, *supra* note 2.

<sup>8</sup> See Fox, *Harnessing the Multinational Corporation to Enhance World Development — The Rise and Fall and Future of Antitrust as Regulator*, 10 CARDOZO L. REV. 1981 (1989).

<sup>9</sup> *Id.*

in support of government and multi-government cartels such as OPEC reflect this idea. Wholly apart from the irony that even the United States can learn to love the cartel,<sup>10</sup> there is no realistic prospect of convincing developing countries or communist bloc countries that cartelization, when engaged in by other than industrialized producers, is wrong.

The second source of resistance to an international cartel law is the industrialized nations themselves. Each, to protect or aggrandize its national power, wants to be able to sanction outbound cartels and related national industrial strategies, and each seems willing to trade off the interests of its domestic buyers in order to protect its ability to assert its own economic and political power in the world. An international pact to enforce an international cartel law would make the people of the world better off. Such an agreement, however, would also destroy the stronger players' opportunities for power. If the only game were economic, perhaps the pact could be enforced. But since the stakes are political and ideological, and the game affects the balance of power in the world, only rhetorical support of and selective adherence to a world anti-cartel rule is likely to evolve.

There is a third pull away from a world anti-cartel rule, and while it can be characterized as a detail, we present it instead as a symbol. Nations demand autonomy so that they may serve the interests of their citizens in their own way. While cartelization involves high costs to society because it creates economic and political power<sup>11</sup> and distorts resource allocation, there are times when government and business restraints serve, or are thought to serve, valuable social functions which outweigh the expected costs. Each nation at least should be able to choose to utilize structures and systems other than competition in order to serve its own people, and those other structures might be akin to cartels, with more or less government supervision. Even in the United States, internal cartel structures abound. Many governmental initiatives aim to achieve social purposes other than to correct market failures,<sup>12</sup> and many local governmental initiatives have an effect beyond the boundaries of the political divisions that adopt them. In the United States, the state action defense and a network of antitrust exemptions legitimate such restraints.<sup>13</sup>

While competition undermines despotic power and helps to dis-

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<sup>10</sup> See Schlesinger, *OPEC'S New Friend: Us*, N.Y. Times, Jan. 4, 1989, at A21, col. 4.

<sup>11</sup> See ARNOLD, *supra* note 4, at 16, for a chilling description of how the cartel system in Germany produced Adolph Hitler, and "[h]ad it not been Hitler, it would have been someone else."

<sup>12</sup> See *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

<sup>13</sup> See *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985)(state action); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST*, ch. 9B (1977)(exemptions).

tribute resources to the poor as well as to the rich, the fact that capitalist countries often employ cartel-like forms to serve their citizens weakens the claim to legitimacy of an international principle that cartelization is wrong.<sup>14</sup> For these reasons, we present our modest three-point agenda respecting the problem of world cartels.

### III. WORLD COMPETITION: THE Z-RAM PROBLEM

While the United States faces troublesome world cartels on the one hand, it faces allegedly destructive world competition on the other hand. Even the latter can be in the form of collaboration, such as with a low price cartel designed to wrest markets from the United States.<sup>15</sup> Collaborative or not, low-price competition allegedly threatens the continued viability of entire segments of U.S. industry. The memory chip market typifies this issue.<sup>16</sup>

We present here a prototype problem of the 1990s based on facts of the 1980s and some flight of fancy. As the reader will discover, we do not presume to solve the problem. Rather, we hope to provoke thought and discussion about the kinds of problems likely to arise in the next decades.

#### A. Stage One

The fictional Z-RAM microchip has just been invented by a research consortium of U.S. universities, called RECORS. The Z-RAM is a complex memory microchip that has 500% greater memory and can perform many more functions than any chip previously developed. It promises to revolutionize the data industry.

After conversations with IBM and AT&T, each of which provided generous research grants, RECORS announced that it will license U.S. producers immediately and will license non-U.S. producers after the lapse of one year. The availability of the Z-RAM technology leads to several U.S. merger plans. Before we state these plans, we will describe the market.<sup>17</sup>

The six largest producers of memory chips are Japanese, namely, Toshiba, NEC, Hitachi, Fujitsu, Mitsubishi and Oki Electric. The U.S.

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<sup>14</sup> Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988).

<sup>15</sup> Cf. Matsushita, 475 U.S. 574. See Ordovery, Sykes, & Willig, *Unfair International Trade Practices*, 15 N.Y.U.J. INT'L LAW & POL. 323, 328-31 (1983).

<sup>16</sup> See Markoff, *Experts Warn of U.S. Lag in Vital Chip Technology*, N.Y. Times, Dec. 12, 1988, at A1, col. 1 [hereinafter Markoff]; Sanger, *A New Japanese Push on Chips*, N.Y. Times, Nov. 9, 1988, at D1, col. 3 [hereinafter Sanger].

<sup>17</sup> Sources of the background market facts include Markoff, *supra* note 16; Sanger, *supra* note 16. Z-RAM, RECORS, and all plans for mergers and other strategies are fictional.

industry has been overtaken by the Japanese, who sold "D-RAMs" (dynamic random access memory chips) to U.S. buyers at prices below the U.S. producers' costs. The U.S. producers sought trade relief from their government, and in response, the U.S. government negotiated the 1986 Semiconductor Trade Agreement with Japan. The agreement set floor prices for imported computer chips, pushing up the market price of chips in the United States and giving the Japanese extra profits, which they invested in more research and development ("R&D") and new facilities.

The U.S. Government had hoped that the price umbrella would encourage the U.S. chip producers to increase their R&D investments and expand their chip operations, but it did not. The Japanese continued to make enormous investments in R&D and new plants, and the size of the Japanese commitment discouraged U.S. investment. Three U.S. chip makers, however, continued to be leaders in the market: (1) Texas Instruments, which was recently purchased by a Japanese firm and now makes most of its D-RAMs in Japan; (2) IBM, the dominant computer company, which makes chips and sells them to itself; and (3) AT&T, the dominant telecommunications firm, which is a recent entrant into both memory chips and computers (the biggest market for memory chips). Two other U.S. chip producers more or less have held their own: (1) Motorola, which owns proprietary microprocessor designs and has formed a joint venture with Toshiba to manufacture chips in Japan; and (2) Intel, which, like Motorola, holds proprietary microprocessor designs. The other two significant U.S. chip producers, National Semiconductor and Advanced Micro Devices, have been suffering serious losses.

A few years ago the U.S. chip producers formed an R&D consortium called Sematech. Sematech's mission is to advance chip technology, and it is subsidized by the federal government. Some of the U.S. chip producers have been lobbying for a separate U.S. government organized and supported consortium to manufacture memory chips, accompanied by an antitrust exemption. Others have been lobbying to replace the 1986 trade agreement with tariffs, so that the U.S. Government, rather than the Japanese, can profit from the Japanese producers' low prices.

The memory chip market is international. There are no significant transportation costs or duties. To make an advantageous deal, buyers purchase chips in the country of the producer, wherever that producer is. At present, the Japanese account for 90% of the world memory chip market, and they account for 90% of U.S. open market purchases (this excludes IBM's sales to itself). Also, Japanese producers account for 90% of the memory chip sales in Japan, which is the largest market for chips in the world.

The computer industry will probably account for 80% of all Z-RAM uses, and the telecommunications market will account for nearly 20%. The market for large (mainframe) computers is concentrated, with shares of U.S. sales approximately as follows:

TABLE 1:  
SHARES OF U.S. SALES OF MAINFRAME COMPUTERS

IBM	40%
Digital Equipment	12%
Hewlett-Packard	10%
Fujitsu	8%
Burroughs-Honeywell	8%
Sun Micro-Systems	8%
Control Data	7%
small firms	7%

These market facts and configurations preceded the Z-RAM breakthrough. The announced availability of the Z-RAM technology led to the development of significant new plans by the chip producers. First, Texas Instruments and Advanced Micro Devices wish to merge. They plan to use their joint capabilities as chip manufacturers to develop applications for the chips and to market them. Second, Intel and Micron Technologies, both chip manufacturers, wish to merge with Digital Equipment, a leading U.S. computer manufacturer. The three companies plan to combine their capabilities, have a ready outlet for their Z-RAM production, and experiment on applications with greatest facility and least cost. Finally, Motorola and National Semiconductor, both chip manufacturers, and Hewlett-Packard, a computer manufacturer, likewise plan to merge. They will concentrate on exploiting the horizontal and vertical economies of integration and scale. IBM, AT&T, and each group of merger partners will take licenses to make the Z-RAM.

These merger plans and other initiatives, which will be described below, have been influenced by the expectation of a steep learning curve for production of Z-RAMs. The firms that get to the market first and establish a large market share quickly will gain significant efficiencies and will have most of the market for themselves. Parties in the United States, including the Defense Department, hope it will be the U.S. chip producers, and not the Japanese, who will be able to do this. Moreover, the United States knows that the Japanese are investing billions of dollars in research and new facilities, and hopes that the Japanese will not surpass the new technology before the U.S. producers arrive on the market.

The U.S. firms that expect to get licenses to make the Z-RAMs have



just formed a Z-RAM trade association called "SHAZAM." Under the aegis of SHAZAM, they have discussed the advantages of being out in front first, and they have shared ideas about the value of strategic pricing of the first generation of Z-RAMs. Instructed by the lectures of a business strategist provided by SHAZAM, the U.S. firms have observed that if they price below initial marginal cost, they will get larger markets at home and abroad. As a result, they will get more experience, which will produce significantly lower costs per Z-RAM chip. Thus, they will be able to recoup their foregone profits within five years, and they will continue to produce more and more Z-RAMs. The U.S. producers have agreed that each firm will set its prices independently.

Anticipating a closed Japanese market, SHAZAM also announces a plan to use the combined strength of its members to exploit Japan's need for U.S.-made computers and telecommunications equipment services. By doing so, SHAZAM hopes to negotiate access to the Japanese market for memory chips, especially Z-RAMs.

Toshiba, NEC, Hitachi, Fujitsu, Mitsubishi, and Oki sue for violations of the Sherman and Clayton Acts.

#### B. Stage Two

Four years have passed. The Japanese chip producers have lost their case. Citing *Cargill Inc. v. Monfort of Colorado Inc.*,<sup>18</sup> *Matsushita*,<sup>19</sup> *Reiter v. Sonotone Corp.*,<sup>20</sup> and the Foreign Trade Antitrust Improvements Act of 1982,<sup>21</sup> the district court ruled that the plaintiffs did not have a protectable interest under U.S. antitrust laws. The appellate court affirmed without opinion, and the Supreme Court denied certiorari.

The U.S. firms have carried out their plans. The mergers have taken place; the low-price strategies are in process. While the Japanese have advanced their technology, they have not yet been able to duplicate or approach the technology underlying the Z-RAM. The six Japanese producers obtained Z-RAM licenses, but only after a year of Z-RAM production in the United States. Meanwhile, U.S. memory chip customers switched to Z-RAMs for all but incidental purposes. The Japanese have been unable to make substantial inroads into the U.S. Z-RAM market.

During the first year of Z-RAM production in the United States, Japanese buyers bought Z-RAMs from U.S. producers, but they switched 100% of their Z-RAM business to Japanese producers as soon

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<sup>18</sup> 479 U.S. 104 (1986).

<sup>19</sup> 475 U.S. 574.

<sup>20</sup> 442 U.S. 330 (1979).

<sup>21</sup> 15 U.S.C. §§ 6(a), 45.

as the Japanese began to produce the Z-RAM chip. Thereupon, the members of SHAZAM refused to sell IBM-produced and other desired computers, and AT&T-produced and other desired telecommunications equipment and services, to Japanese buyers until such time as the Japanese should open their market to U.S. Z-RAM sellers.

The Japanese chip producers, computer buyers, and telecommunications service users sue. The unintegrated U.S. computer companies join the suit, alleging imminent monopolization of the chip market, and thus, higher prices for chips.

### C. Stage Three

The suit is still pending. It is mired down in discovery. The defendants claim that they need numerous documents and depositions from the Japanese, but they have thus far been frustrated not only by the language barrier, but also by claims that the act of state, sovereign immunity, foreign sovereign encouragement/compulsion, and extraterritoriality doctrines shield production of key documents located in Japan and depositions of key individuals situated there.

You have been summoned to a meeting of the Attorney General of the United States, the Secretary of Commerce, the U.S. Trade Representative, and the Secretary of Defense. Rumor has it that the Japanese have just surpassed the Z-RAM technology. The subject is the chip crisis and what to do about it.

Imagine a transcript of the meeting. After all officials have spoken, you are asked for your opinion of the best strategy for the United States. What is your answer?<sup>22</sup>

### IV. SUMMARY

This is the question for tomorrow. The answer is not simple, and the answer is not simply antitrust. New forms of competition will inspire new forms of combination. Are they, on balance, pro-competitive or anti-competitive? Progressive or regressive? Enabling or protective?

New technologies and the possibilities for their exploitation inspire targeted national industrial strategies by our trading partners. Japanese industrialists, guided by MITI, successfully orchestrate such strategies. The United States (and the Japanese) fear that the Europeans of 1992 and thereafter will do so too. How should the United States prepare to

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<sup>22</sup> The Z-RAM problem is reprinted from E. FOX and L. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* (West 1989), with permission of West Publishing Company.

meet the world of the 1990s? Counter-industrial strategies will surely seem tempting. Being like the Japanese has seductive appeal.

The answer cannot be derived from a simple model by deductive logic. Practical experience based on knowledge of our culture must be a guide. Although it does not give us a roadmap, practical experience offers a few suggestions. The United States should continue to rely on brain, brawn, incentive, inspiration, the spur of competition, and the aspiration to be better than the best. If not a Rawlsian future,<sup>23</sup> we can hope for a Rahlian one.

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<sup>23</sup> See J. RAWLS, *A THEORY OF JUSTICE* (1971).