International Harmonization of Antitrust Law: The Tortoise or the Hare?

Diane P. Wood

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
International Harmonization of Antitrust Law:
The Tortoise or the Hare?
Diane P. Wood*

Harmonization is something to which only a curmudgeon would take exception. After all, the word conjures up images of musicality, pleasing relations, accord, and orderly combinations.¹ To “harmonize” one country’s laws with those of another must be a Good Thing. That type of harmonization suggests the structuring of both sets of laws in a way that will facilitate smooth, joint, or simultaneous application, without the cacophony of disagreements or opposing purposes. Yet it is a plain fact that in a world with 190 sovereign nations,² diversity among legal systems abounds. It is also logical to assume that sometimes this diversity creates frictions for actors who seek to operate in more than one country. The hard question, posed not only in the area of antitrust law, but in many other fields, is whether these frictions are serious enough that the international community should strive to reduce or eliminate them. The alternative is to tolerate the difficulties inherent in national differences, either because of respect for the right of each people to govern themselves, or because no acceptable measures are available to address the problem.

Antitrust law, or competition law as it is more commonly called outside the United States, lies at the center of the network of laws and regulations that cumulatively support the free market system that has served the United States so well. As such, it rests and depends upon the broader American democratic system of government: a system in which people are free to form companies, to enter professions or lines of business, to move from place to place as whim and economic opportunity dictate, to raise money in established capital markets, and to resort to courts that are reliable and free of corruption when problems arise. The United States is certainly not

---

* Circuit Judge, US Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago Law School.
2. United Nations, List of Member States, available online at <http://www.un.org/Overview/unmember.html> (visited Sept 6, 2002) (listing United Nations member states). There are other ways of counting the number of sovereign entities, but the UN membership figure suffices for present purposes.
the only country in the world with this kind of legal and economic system and this
mobility of persons, capital, and goods, but—even during a time like the present when
the stock market has taken a turn for the worse—most would agree that the United
States enjoys these benefits to a high degree.

It is against that broad backdrop that I propose to consider the question of
international harmonization of competition law. The desire on the part of the United
States and like-minded countries to spread the antitrust gospel has been around for at
least sixty years, and to a lesser degree longer. Nevertheless, the adoption of domestic
competition laws in other countries did not pick up serious momentum until at least
the 1960s. By this time, the European Union had put in place the necessary tools for
enforcing the competition provisions of the Treaty of Rome, competition laws had
been enacted by most member nations of the Organisation for Economic
Co-operation and Development ("OECD"), and the developing countries had
undertaken serious consideration of the topic of restrictive business practices under
the auspices of the United Nations Conference on Trade and Development.

Today, according to US Department of Justice spokespersons, there are over
ninety countries with competition laws, and those countries collectively account for
nearly 80 percent of world production. Those numbers furnish some evidence that
the philosophy of competition law has indeed spread to all corners of the globe, and
that the first step toward international harmonization has already been accomplished.
Yet the picture is not quite as rosy as this might suggest: these laws differ from one
another, sometimes subtly, sometimes unabashedly so. That fact raises a number of
questions that are the topic of this article: How different, as of 2002, are the various
competition laws in reality? Are these differences anything we should be worried
about, and if so, why? Finally, assuming that the case for harmonization has been
made, what models are available to accomplish this goal, and which one should we
adopt? I will argue that significant differences do persist, even between such like-
minded entities as the United States and the European Union, and to a greater degree
between the kinds of countries one finds in the Group of Seven ("G-7") and countries
that are still working through the transition from socialism to liberal democratic

3. For a description of the history of international antitrust efforts, see Diane P. Wood, The Impossible
4. See Treaty Establishing the European Community (Amsterdam Consolidated Version), arts 81–82,
1997 OJ (C 340) 208–09 (hereinafter EC Treaty); see also Council Regulation 17/62, 1962 OJ (L 13) 62 (the first and central implementing regulation that launched European competition law in
earnest).
5. See The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business
A/RES/35/63 (1980).
Dimensions of Competition Law Conference, at ¶ 4 (Mar 22, 2002), available online at
capitalism, or between the G-7 and the developing countries.\textsuperscript{7} While these differences impose certain costs on the world economy, and it seems likely that those costs could be reduced if harmonization were possible, I argue further that a tortoise-like approach to harmonization is the one that will win the race more effectively over the long run, and that it would be unwise to push too fast for global competition law standards.

\textbf{I. COMPARISON LAW: SAME NAME, DIFFERENT SONG}

In the article I wrote ten years ago for \textit{The University of Chicago Legal Forum}, I described the achievement of a truly international law of antitrust as an "impossible dream."\textsuperscript{8} I suggested that a number of barriers existed then that stood in the way of such an achievement. On the substantive side, something as fundamental as the purpose of competition law was still a matter of debate. The United States by that time had achieved a rough consensus that the purpose of the antitrust laws was to promote consumer welfare, and that this could best be done by banning only those transactions or practices that were economically inefficient. Other countries, however, were (and are) not so single-minded. Consider, for example, the statement of purpose that still introduces Canada's Competition Act:

\begin{quote}
The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.
\end{quote}

Or, to take a country with a significantly different history up until quite recently, consider the statement of purpose found in the Competition Act of the Republic of South Africa:

\begin{quote}
Purpose of Act:
The purpose of \textit{this Act} is to promote and maintain competition in the Republic in order –
(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
\end{quote}

\textsuperscript{7.} The G-7 countries are, in alphabetical order, Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. See \textit{The G-7 Countries and Russia: Key Economic Data}, available online at <http://www.state.gov/www/issues/economic/fsg7data.html> (visited Sept 6, 2002). Although for many current purposes it is now more correct to refer to the G-8, thereby including Russia, points about traditions of competition law and market capitalism made in the text apply only to the traditional seven.

\textsuperscript{8.} See Wood, 1992 U Chi Legal F 277 (cited in note 3).

\textsuperscript{9.} Competition Act, RSC, ch C-34, § 1.1 (1985) (Can).
(c) to promote employment and advance the social and economic welfare of South Africans;
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. 10

These examples could be multiplied manifold, but they suffice to show that the passage of ten years has not changed the fact I noted in 1992: that the United States, at least, has envisioned a different purpose for its competition laws than have countries as diverse as Canada and South Africa. To the extent that the underlying purpose of any law is reflected in its specific substantive provisions and in the manner in which it is enforced, this means that—despite the common title “competition law” or “antitrust law”—we are really looking at a diverse set of legal regimes that at least potentially might not always work harmoniously together.

A second-level difference that I noted in 1992 and that also continues to exist today relates to the meaning of “competition” itself. Again, several variants can be found among the ninety-some competition laws in the world. “Competition” might be seen as a synonym for the type of allocative efficiency that is the stuff of industrial organization economics. So understood, it describes the process engaged in by firms without market power; it is the opposite of monopoly. It might, however, also imply something about equal access to markets, or restrictions on large accumulations of wealth, or limitations on what percentage of a market a single firm may control, or a code of fair business behavior. The choices different countries have made reflect not only their economic and social preferences, but also the procedural milieu in which the competition law operates. In the United States, one of the most powerful arguments for a narrowly focused antitrust law has been the lack of predictability that results when juries weigh numerous factors in litigated cases. A related argument focuses on the political legitimacy issues that arise when unelected federal judges make trade-offs between economic efficiency and the protection of small businesses. These factors have little bite in a country that gives its courts a far more limited role in competition law enforcement, and that does not have the institution of a civil jury at all.

10. Competition Act No 89 of 1998, as amended by the Competition Second Amendment Act No 39 of 2000 (S Afr), available online at <http://www.compcom.co.za/documents/the%20law/the%20act/consolidated.doc> (visited Sept 6, 2002) (emphasis in original). The preamble to the Act also makes clear that the context in which this statute is designed to operate is far broader than the comparable context for the US antitrust laws. It begins with a recognition on behalf of the people of South Africa “[t]hat apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.” Id, preamble.
As the preceding comment implicitly notes, the line between substantive differences and procedural differences is not a crisp one: policy choices can be reflected just as clearly in the institutional mechanisms and the procedural codes that implement competition laws as they can be in the words of the statutes themselves. And it is not hard to find important procedural differences among countries with competition laws. One key difference, which once again has not changed in the last decade, is the identity of the people who are entitled to enforce the laws. In the United States, that is virtually everyone: two federal agencies (the Antitrust Division of the US Department of Justice and the US Federal Trade Commission), the state attorneys general, and any private party that has been injured in its business or property by virtue of a violation of the antitrust laws, or that faces an imminent enough injury that it may seek injunctive relief. Once again, the United States is unusual. Private rights of action to enforce competition laws are not unknown elsewhere, but no one would disagree that private suits for damages or equitable relief are a minor part of the competition enforcement arsenal in almost every country except the United States. Far more typical is the enforcement system that prevails in the European Union, which is principally an administrative system. The Competition Directorate of the European Commission is responsible for enforcing articles 81 and 82 of the EU Treaties. Historically, it has had a near-monopoly over this task, although the competition authorities of the Member States have had a formal voice in the Commission's work. For the most part, however, the Member State authorities have been confined to enforcing their own national laws, and private actions have been a rarity. This may be changing, but only to the extent that the Commission has plans to share more powers with the Member State authorities; a vigorous private action is a long way off, if it is on the horizon at all. Even more rare is criminal enforcement of hard core antitrust violations, which is an important part of US antitrust enforcement, and which exists as well in countries like Canada and Japan, but is still a relatively unusual phenomenon.

Having said that, it is important to note as well that there is undoubtedly more consensus globally about the economic harms caused by hard core cartels than about any other topic in the field of competition law. So, for example, in 1998 the OECD adopted the Council Recommendation Concerning Effective Action Against Hard Core Cartels, which defines such cartels as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to

---


fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce." That Recommendation urges member countries to ensure that their laws "effectively halt and deter hard core cartels," through sanctions strong enough to create effective deterrence and through adequate enforcement procedures and institutions. Given the number and economic importance of the countries included within the OECD's membership, this Recommendation represents a degree of convergence or harmonization that is truly impressive. While divergences are still possible, for example when an important national industry is facing stiff international competition and pressures build to permit the formation of so-called rationalization cartels in the name of broader national interest and public policy, these instances are quite rare.

That same degree of consensus has not yet been achieved in the area of merger regulation. There are at present three major tests used around the world for evaluating the compatibility of a proposed (or sometimes a consummated) merger or acquisition with the local competition laws. The first, reflected in the law of the United States, asks whether a particular merger is likely substantially to lessen competition in a particular (economically relevant) market, abbreviated as the SLC test. The second, reflected in the laws of the European Union, most of its Member States, and many countries aspiring to EU membership, is a "dominance" test. As phrased in article 2 of the EU's Merger Regulation, it provides as follows:

A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market. A dominant position, in turn, is understood in the competition law of the EU to "relate[ ] to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its


15. OECD Council Recommendation, 2 OECD J Competition L & Pol at 58 (cited in note 14). The current Member States of the OECD are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, (South) Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The Commission of the European Communities also takes part in the work of the OECD.


competitors, its customers and ultimately of the consumers.\textsuperscript{18} The third test, which until recently was the one used in the law of the United Kingdom, looks solely to the question of whether a given merger would be in the public interest. Some countries, such as South Africa, combine these approaches. Under the South African law, the Competition Commission or Competition Tribunal must first consider whether a merger would be likely substantially to prevent or lessen competition. If the answer is yes, after taking into account any pro-competitive benefits or efficiencies the merger might yield, the authority must then decide whether the merger is nonetheless justified on “substantial public interest” grounds, which are spelled out in detail in the statute.\textsuperscript{19} Particularly for large international mergers, the existence of three different approaches can lead to difficulties to the extent that a single global deal must conform to multiple criteria.\textsuperscript{20}

Putting to one side the fact that approximately half of the UN member states still do not have a competition law at all (although those without such laws tend to be underdeveloped countries, those that believe their economies are so small that they cannot afford to adopt the competition model, or those that have not abandoned higher degrees of government intervention in markets), the striking point today is that important differences exist within the family of competition laws. Often, of course, these differences will be unimportant: everyone will agree that a particular hard core cartel deserves condemnation, or everyone will agree that a small merger poses absolutely no competitive threat to anyone. But in the harder cases—exactly the point at which one would expect to see regulatory or legal challenges—the distinctions matter. Different results for the same cases are not only possible, but they occur, as the recent highly publicized divergence between the United States and the EU in the proposed General Electric/Honeywell merger made clear.\textsuperscript{21} The mere fact of such

\begin{footnotesize}
\begin{enumerate}
\item<sup>18</sup> See Hoffman-La Roche v Commission, Case 85/76, 1979 ECR 461, at ¶ 38 (1979).
\item<sup>19</sup> Competition Act at § 12A(1) (cited in note 10). The statute states the following about the consideration of the public interest:

When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or Competition Tribunal must consider the effect that the merger will have on—
\begin{enumerate}
\item a particular industrial sector or region;
\item employment;
\item the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
\item the ability of national industries to compete in international markets.
\end{enumerate}
\end{enumerate}

Id at § 12A(3) (emphasis in original).
\item<sup>20</sup> I participated in an OECD study of this phenomenon eight years ago. See Richard Whish and Diane Wood, Merger Cases in the Real World: A Study of Merger Control Procedures (OECD 1994) (considering nine cases in which authorities from more than one country undertook a review of a particular merger or joint venture, and examining the problems that arose as a result of multiple reviews).
\item<sup>21</sup> After the US Department of Justice indicated that it would not object to the merger, the Commission of the European Communities announced that it would block the merger as
\end{footnotesize}
differences, however, is not enough in itself to suggest that the differences are intolerable, or even undesirable. The case for harmonization is one that must be made, and it is to that question we turn next.

II. THE CASE FOR HARMONIZATION

Several questions come to mind in connection with the desirability (or not) of harmonization among the competition laws of the world. First, who needs it? Producers? Consumers? Law enforcement authorities? Second, what economic harms are resulting from the current, imperfectly harmonized system? Candidates include higher transaction costs for firms because of regulatory inconsistencies; deprivation of access to foreign markets that are closed de facto to entry because of private anticompetitive arrangements; global consumer welfare losses to the extent that some laws do not make consumer welfare their principal or sole purpose; and frustration of regulatory effectiveness to the extent that Balkanization of competition law enforcement responsibilities allows firms with an anticompetitive inclination to “game” the system. Third, are these harms substantial enough in absolute terms to justify corrective measures? Finally, would there be other unintended consequences from a push to harmonize competition laws, resulting from the fact that each country and region presently has a competition law that fits within its own legal system and reflects its own history and enforcement priorities? Only after weighing each of these considerations can we come to a conclusion about both the desirability of harmonization and the shape it ought to take.

Who Needs It? One of the ironies about competition law, even in the United States, is the disjuncture between those whom it is supposed to benefit and those who have a voice in shaping competition policy. As I have already noted, antitrust law in the United States is widely accepted as a consumer welfare body of law. The Supreme Court tirelessly reminds us that “the antitrust laws [ ] were enacted for the protection of competition not competitors.”2 Competition, in turn, is supposed to lead to lower prices, better product choice, greater output, and other like benefits for consumers. Nevertheless, it is the businesses subject to the laws that appear to fear enforcement actions against them more than they welcome the opportunity to use the laws to their own benefit (although businesses clearly encounter the laws in both capacities), and

incompatible with the common market. See EU Institutions Press Releases, The Commission Prohibits GE’s Acquisition of Honeywell, IP/01/999 (July 3, 2001) (decision is currently on appeal to the European Court of First Instance), available online at <http://europa.eu.int/rapid/start/cgi/guesten.kshdrp_action.gettxt=gr&doc=IP/01/99901AGED&lg=EN&display=> (visited Sept 6, 2002).

that have the greater voice in public policy circles. To a large degree public choice theory probably explains why this is so: consumers are diffuse and hard to coordinate, whereas single firms that fear monopoly lawsuits or concentrated industries are better able to organize and make themselves heard.

In any event, the first group that has made it clear that greater harmonization of competition laws at the global level would be beneficial to it is the business community. And the first topic to which it has turned is that of merger control. This is understandable, for several reasons. First, unlike hard core cartels, mergers are not presumptively illegal. With very few exceptions, mergers and acquisitions are nothing more than business transactions that the parties hope will benefit both sides through asset or management moves from one entity to another with efficiency gains and market success. There is no reason to view mergers in general with a jaundiced eye, nor is there any reason deliberately to put a millstone around the feet of the merging parties that will cause them to think twice before they go forward. Yet that is what the current global system of merger control has done, to a troublesome degree. Today, two firms attempting to merge (company A and company B), both of which are global firms manufacturing a consumer product sold in all countries, might need to notify more than a score of competition authorities before they can complete their deal. They will need to use different forms for each one, meet different timetables triggered by different events, and conform their deal to different substantive standards of legality. The transaction costs alone can be staggering, even though this may not be entirely bad news for the multinational law firms and consultants who do this work. In some instances, the merging parties might conclude that it is cheaper to carve out certain national markets from their consolidation than it would be to satisfy all the needed formalities. If the merger was not anticompetitive to begin with, such a carve-out creates a clear loss, both for global welfare and for consumer welfare within the affected country. It is hard to disagree with the assessment of the business community that greater harmonization of merger law enforcement, at both the substantive and the procedural levels, would be of significant benefit.

Businesses are less enthusiastic, yet in the end sympathetic, to greater harmonization of the standards that govern single-firm conduct. In the United States, section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and also, but redundantly with section 1, conspiracies to monopolize.23 In the EU, the functional equivalent is article 82 of the EC Treaty, which prohibits "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it . . . as incompatible with the common market in so far as it may affect trade between Member States."24 Suppose, to take something that is hardly a hypothetical case, that a single firm holds the rights to the computer operating system

that is used on 90 percent of all personal computers globally. Suppose further that this firm is accused of engaging in practices that allegedly would amount to both “monopolization” under US law and “abuse of a dominant position” under EU law. It is in that firm’s interest, if it wishes to conduct a global marketing strategy, to be held to consistent standards in both markets, and if a remedy is needed, to have that remedy be the same for the entire world. Otherwise, once again, differences in legal systems will lead to one of two outcomes, neither desirable: a “race to the top,” under which the requirements of the most stringent system will de facto become the global standard, or extraordinary measures to adopt different rules for each national or regional market. Harmonization is a much more attractive alternative.

For obvious reasons, to the extent they see themselves as potential targets, businesses are not cheerleaders for harmonized cartel laws. This, they fear, would lead directly to coordinated enforcement actions by the authorities of different countries, and thus a higher risk of detection and a greater level of anticipated penalties. To the extent the perspective is ex ante, however, businesses that hope to stay on the right side of the line may also favor harmonized cartel rules. Certainty is worth money in the bank. And it is worth recalling that not every arrangement between competitors is a hard core cartel. Joint ventures are potentially efficient arrangements that are viewed hospitably under the laws of most countries. Characterization of a particular horizontal arrangement as a prohibited cartel or as a permitted cooperative venture is not always easy. For the same reason that disparities are harmful for businesses in the areas of mergers and single-firm rules, they are equally harmful for these kinds of horizontal arrangements.

From the point of view of businesses, while the content of a harmonized law is certainly not unimportant, consistency is probably more important as long as the law is not wholly out of bounds. The same cannot be said for consumers. Whether or not harmonization of competition laws will serve consumer welfare worldwide depends entirely on which kind of law serves as the norm around which other laws converge. If all countries of the world decided that their competition laws should stress the protection of small businesses, employment in distressed regions of the world, and fair business practices, it is almost certain that allocative efficiency would suffer, and thus consumer welfare in the economic sense of the term would also diminish. Harmonization, in short, cannot be seen as an end in itself from the consumer standpoint; it will be beneficial only to the extent that countries around the world...

become persuaded that the consumer welfare goal should take precedence over all other potential purposes for competition law.

Enforcers stand somewhere between businesses, for whom I argue that harmonization is generally desirable regardless of which of the current models is used, and consumers, who will benefit only to the extent that harmonization occurs along the lines of the consumer welfare statutes. To the extent that laws are prohibiting the same conduct, in the same way, enforcers will find it easier to work together. Joint projects such as guidelines describing enforcement policy with respect to horizontal arrangements, vertical arrangements, intellectual property licensing, and mergers could be envisioned on a global or regional level. This already occurs to a limited degree within the OECD, as the hard core cartel recommendation mentioned earlier illustrates. Enforcement coordination will be impossible, however, in areas where a particular country's law stresses its own individual welfare or public interest, except insofar as two nations' interests might happen to coincide in a particular situation. Thus, the gains from harmonization for enforcers will accrue only to the extent that the standards adopted relate to the economic side of competition law, as opposed to the more amorphous public or industrial policy side.

*What Harms Does the Current System Inflict?* The most evident harm that the current system inflicts comes in the form of the transaction costs imposed on businesses that are hampered in adopting a global strategy because of differing substantive and procedural rules around the world. If one is persuaded that consumer welfare is the optimal standard for competition laws to use, then a second harm exists to the extent that this standard is not a universal one. For example, the standard is important from the standpoint of global consumer welfare, even if consumers in one particular country (for example, the United States) are indifferent to the possibility that consumers in another country (for example, the United States) are indifferent to the possibility that consumers in another country are suffering from monopolies or cartels that have been permitted in the name of broader industrial policies. Indeed, another harm that many have argued exists in the current system is precisely this narrowness of focus: widespread exemptions in national laws for export cartels, which harm only consumers in another country, exist only because we do not yet take a global welfare perspective.26

Another perennial candidate for the list of harms from the present system is the denial of access to foreign markets that are closed not because of state-imposed tariffs, quantitative restrictions, or other non-tariff barriers, but because of private restraints that mimic those kinds of governmental restrictions.27 The Right Honorable Lord


27. It is commonly accepted that this possible linkage was an important reason why the original Treaty of Rome in 1958 included competition policy provisions as part of the broader set of rules designed to forge a common market from the six national markets that were joining together. See, for
Brittan of Spennithorne, former Commissioner for the European Community for Competition, and then later for External Trade, has argued that this kind of linkage compels the world community to adopt competition rules at the level of the World Trade Organization. That, of course, is not our topic, but it is reasonable to think that the lesser topic of harmonization falls within the greater topic of new internationally binding rules, and that those convinced that private restrictions might substitute for state restrictions should favor harmonization.

Harmonization would accomplish the goal of breaking down private anticompetitive arrangements, on certain assumptions. First, once again, the substance of the harmonized rule would have to be one that was economically based. Second, it would have to be feasible for possible new entrants into the anticompetitively structured market to invoke effective remedies. (Also note that some of those possible new entrants might be from the closed nation itself, and others might be foreign: all would benefit equally from this kind of reform.) As the US Supreme Court’s decision in *Matsushita Electric Industrial Corporation v. Zenith Radio Corporation* illustrates, it is hard to make the case that the closed foreign market hurts other national markets where the products of the alleged cartel are sold. If those products are sold at low prices (perhaps because of implicit subsidies from the consumers in the closed market), consumers in the open market get a bargain; if those products are sold at high prices, consumers in the open market will presumptively prefer more reasonably priced domestic alternatives. But none of this means that consumers in the closed market are not harmed; nor does it mean that for purposes of efficient location of production facilities, distortions do not occur. Harmonized competition law that

---


29. *475 US 574* (1986). This was the case in which US manufacturers of consumer electronic products alleged that a twenty-year conspiracy existed among their Japanese rivals, whereby the Japanese firms would sell their wares at artificially high prices in Japan and thereby subsidize (loosely speaking) low-priced sales in the United States. The Supreme Court held that summary judgment was properly granted for the defendants, largely because of the economic implausibility of the alleged conspiracy.
emphasizes economic efficiency would therefore help to eliminate the distortions caused by private anticompetitive restraints tolerated in individual countries.

Finally, from the standpoint of the public antitrust enforcer, harmonized law would sometimes facilitate more effective measures. Some cooperative enforcement already occurs in those areas where the overlap between two countries’ laws is sufficiently great that each perceives the same competitive harm from a particular arrangement or transaction. That coordination is close when the two countries in question are entitled under their respective legal systems to share confidential information collected in the course of their investigations. Examples of this include the Mutual Legal Assistance Treaty between the United States and Canada for criminal actions, and the US–Australian Mutual Antitrust Enforcement Assistance Agreement. This consequence of harmonization is a benefit, however, only insofar as both or all countries are satisfied that the model adopted is one that reflects their interests and needs. There are also times when countries wish to reserve the right not to assist their counterparts. The most notable examples of that kind in the area of antitrust enforcement occurred during the era when the United States was enforcing its own laws extraterritorially, as in the case of the shipping cartels of the early 1960s and the uranium cartel in the late 1970s. In both those instances, other countries took affirmative steps to thwart the US efforts, believing that their own national interests were being adversely affected by US actions.

Is Further Action Necessary or Desirable? On balance, the answer to this question seems to be yes. There can be no disputing that the current system imposes substantial costs. The degree of consensus among the ninety or so countries with competition laws is also important to bear in mind. To an extent, we must decide whether we think the glass is half full or half empty. While it would be foolish to assume merely because many countries have enacted laws with the word “competition” at the top of the page that those laws are all identical, there is nonetheless a great deal of common ground among them. The practical differences, as opposed to the hypothetical differences, that exist between the United States and the EU have become quite small. That suggests that the ground is ready for serious efforts at further harmonization, not only among the major economic powers of the world, but more universally.

30. For the US–Canadian treaty, see Treaty on Mutual Legal Assistance in Criminal Matters, 28 UST 2463 (1990); the text of the US–Australian agreement is available online at <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm> (visited Sept 6, 2002).

III. The Model for Harmonized Competition Law

One can identify at least three models that might be followed in a project to harmonize national competition laws: legally binding, or “hard” harmonization; persuasive, or “soft” harmonization; and intermediate harmonization achieved through binding consultation agreements and commitments to generalized “best practices.” Harmonization of the first type is exactly what the Member States of the European Union have achieved. There is a true supra-national government operating in Brussels, and the Competition Directorate of the European Commission administers its antitrust laws. Principles of the supremacy of EU law over national laws have now been established for many years. The competition rules of the EU have “direct effect” on the citizens and enterprises of the Member States, and the national courts and enforcement institutions are obliged to render whatever assistance is necessary to the EU bodies. The second type, “soft” harmonization, describes well what the OECD has accomplished over the years through its Competition Law and Policy Committee. That Committee conducts studies of various anticompetitive practices, holds roundtables for discussions of issues of interest to the member countries, and from time to time recommends to the OECD Council agreed statements of policy like the one concerning hard core cartels. Both under the umbrella of the OECD and otherwise, many member states have entered into bilateral cooperation agreements that oblige authorities in each to notify the other when enforcement proceedings affecting its interests are underway and to render legally permissible assistance (normally not including the exchange of confidential information). Finally, “intermediate” harmonization seems to describe the situation among the three parties to the North American Free Trade Agreement, or NAFTA. Chapter 15 of NAFTA obliges each party to “adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto.” Chapter 15 also obliges the parties to cooperate with one another and to coordinate their enforcement efforts, although at the same time it specifies that the treaty’s dispute resolution procedures may not be used to resolve any matter arising under the competition article.

33. A list of the bilateral agreements to which the US Department of Justice and the Federal Trade Commission are parties can be found on their websites. See, for example, <http://www.usdoj.gov/atr/icpac/lc.pdf> (visited Sept 6, 2002).
35. Id at arts 1501.2, 1501.3.
Although there was a time not very long ago when there was a great deal of pressure to move competition policy into the World Trade Organization and to negotiate some kind of binding international agreement reflecting competition law principles, the momentum for that approach seems to have faded. That was the closest that serious discussion came to proposing “hard” harmonization since the years immediately following World War II when the topic of antitrust law was proposed for one chapter of the stillborn International Trade Organization.\textsuperscript{36} For many reasons, including the lack of consensus on the purpose of competition law, the variety of attitudes toward governmental intervention in economic affairs that exists around the world, and differing levels of economic development, it seems clear that the world is not ready yet for “hard” harmonization of competition laws. Whether it ever will be is doubtful, but that subject can wait for another day and another article. For now, “hard” harmonization at the international level neither will happen, nor should it happen.

What about some kind of intermediate measure? Suppose, for example, that the new International Competition Network\textsuperscript{37} wanted to issue a statement outlining “best practices” or “best policies” for nations to consider in the key areas of competition law: horizontal arrangements, vertical arrangements, and mergers. Or suppose that the WTO put forth a proposal for a commitment among member countries along the lines of NAFTA chapter 15, that merely obligates members to have a competition law covering the key subjects and to have a credible enforcement mechanism in place to support that law? Such a step by the WTO would also be likely to bring the general WTO obligations of nondiscrimination (both the national treatment type and the most-favored-nation type) to bear on competition law enforcement.

In my view, even though these intermediate steps seem appealing on the surface, and they might be desirable for the medium term, the world is not ready for them yet. (Note in this context that I am addressing only the issue of global harmonization; whether two individual countries, or a group of countries in a particular region, wish to harmonize their competition law is an entirely different question.) As matters stand today, it seems inevitable that one of two things would occur: either the statements would be so general as to be meaningless, or they would be so detailed and riddled with exceptions that they would also either be meaningless or worse and would have the perverse effect of diluting the strength of the laws that are in place. Take national treatment: while for an American or a European it makes perfect sense to insist on treating foreign companies exactly the same as domestic companies, that is not the way many developing countries look at the problem. Their memories of the colonial era are still too sharp, and their desire and perceived need to spread economic wealth

\textsuperscript{36} See Wood, 1992 U Chi Legal F at 281–84 (cited in note 3).

\textsuperscript{37} The new ICN has its own website, where further information is available online at <http://www.internationalcompetitionnetwork.org> (visited Sept 28, 2002).
and assets among their own populations still too strong, to make them comfortable with an agreement to treat huge multinationals from North America, Europe, or East Asia with the same solicitude as they treat their own citizenry.

The other substantive differences in the laws outside the OECD group of countries (to use a convenient shorthand) are also cause for concern. In a recent article, Professor Eleanor Fox described with some concern various aspects of the competition law of Indonesia.38 Professor William E. Kovacic, now General Counsel to the Federal Trade Commission, has written extensively about the problems of bringing sound competition policy to economies in transition and to developing countries.39 The short version of the story they tell, which matches my own direct experience with competition policy officials from such countries, is twofold: first, creating a culture and infrastructure conducive to antitrust enforcement takes time; and second, many of these countries see themselves as situated quite differently from the United States, Europe, and similar places, and thus in need of different laws.

Harkening back to the South African law mentioned at the beginning of this article, the political necessity of acknowledging the apartheid era and of taking every possible measure to erase its lasting consequences is palpable there. Adding a broad “public interest” dimension to antitrust enforcement may be an appropriate step to take in such circumstances, even if the United States can afford to keep its antitrust laws more tightly focused on economic efficiency and use other laws and institutions to ensure equality of opportunity for its citizens.

All of this and more suggest to me the wisdom of the “soft” harmonization approach. That effort is well worth it, and the inauguration of the International Competition Network is an auspicious sign. Discussion of specific cases, sharing of expertise, and mutual education about the ways these laws operate will create a solid foundation for eventual formal harmonization. It is quite likely that informal harmonization will occur much sooner. This is exactly what has happened between the United States and the EU over the years since the 1958 adoption of the competition articles of the Treaty. Nothing forced these two giants to come closer together; instead, each one has come to prefer a system in which “competition criteria” alone drive the outcomes of cases. At this point, it is front-page news when results diverge, as they did in GE/Honeywell. In a sense, that story told more about the successes of harmonization than it did about a single failure. And it has all happened

without either side amending a word of its law under any sense of obligation to the other.

If we allow soft harmonization efforts to go forward, paying close attention to the empirical differences between highly developed economies and economies in transition, between large countries and small ones, and among different legal systems (civil law, common law, Islamic law, and others), two desirable things will happen. First, no country will be forced to sacrifice what its experience has taught it is the optimal approach to antitrust law for itself, in an effort to accommodate others. Second, over time the power of the economic model that underlies American and European competition law enforcement will recommend itself to others. Public interest tests will become safety valves of last resort (as they already are in some places); other legal institutions that can target the problems of small businesses, racial discrimination, or depressed regions, will gain credibility and take the pressure off competition law to solve all problems in all cases. At that point, no one will be calling any longer for explicit harmonization of competition laws, because it will already have happened quietly, through conscious effort and friendly persuasion.