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# Introduction to Rahl Symposium

*Joel Davidow\**

This Symposium deals with one of the central questions in James Rahl's illustrious academic career—how to preserve and improve international competition. That issue can be viewed as one of competition policy, trade policy, or antitrust enforcement. This Symposium deals only with the third topic, but the first two issues set the legislative context, which is often crucial.

## I. COMPETITION POLICY

Each nation decides the extent to which it will allow or encourage competition in each sector of its economy. Decisions concerning state ownership of enterprises, state licensing, government procurement policy, regulatory policy, and antitrust policy will all have important effects. For instance, one state may choose to have a single national airline owned by the government. Another state may allow the existence of two or more airlines, but regulate their prices, services, and relations with competitors. A third state may allow a free market in airline service, subject perhaps only to safety regulation.

In the above example, each of the three states presents a different picture as an international competitor. These differences are likely to affect each state's conception of the amount and type of international airline competition which is desirable for its interests. The state which owns an airline is unlikely to be unwilling to submit its enterprise to the risks of all-out competition. Even the state which encourages airline competition at home may not favor it abroad if other states protect their carriers by means of ownership or regulation.

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## II. TRADE POLICY

States can limit competition through trade measures in two ways. First, they can, subject to GATT rules (or in disregard of them), protect their enterprises from competition by means of tariffs, quotas, or other protectionist measures. Second, they can, and do, enforce rules of unfair competition which are stricter than their domestic antitrust rules. States which encourage international trade cases often limit competition by means of voluntary restraint arrangements, orderly marketing agreements, and anti-dumping settlements which stabilize prices. Some of these arrangements virtually require the formation of cartels; others make cartels superfluous.

## III. ANTITRUST RULES AND INTERNATIONAL ENFORCEMENT

We turn now to the central issue of this Symposium, namely the actual or potential effect of antitrust enforcement on international competition. Our examination presumes, as it realistically must, that there will not be an internationally applicable antitrust law in the foreseeable future. In 1980, the U.N. General Assembly agreed on a set of principles and rules for the control of restrictive business practices. However, these rules, like all other resolutions of the General Assembly, have no binding force on states or enterprises.

The U.N. guidelines state that enterprises should avoid cartel practices which unduly restrain competition and have adverse effects on international trade. The principles applicable to states provide that nations or regional groupings should adopt, improve, and effectively enforce legislation for the control of restrictive business practices. It is further provided that states should seek to prevent or control restrictive business practices within their competence which adversely effect international trade.

Despite the unanimous adoption of this U.N. resolution, only about 35 of the 155 or so member states of the United Nations have antitrust laws of any kind. Those 35 countries include about 20 of the developed market economy countries, which are members of the Organization for Economic Co-Operation and Development ("OECD"), and more than a dozen developing countries, particularly large ones such as Argentina, Brazil, Korea, and India. Antitrust laws have not been deemed relevant by governments of socialist countries and are extremely rare in countries at early stages of economic development. These statistics may be misleading, however, in that antitrust laws do exist in nations which account for over 75% of world trade.

Even in countries which have strong antitrust laws and which en-

force them regularly and effectively (a clear minority of all countries having antitrust laws), there is virtually no acceptance, despite international resolution of the type quoted above, that any nation is obligated to enforce its laws for the benefit of parties affected in another nation. This point can be illustrated first by presuming a domestic transaction, such as a merger. If, for instance, Boeing and Lockheed wished to merge, the transaction would be subject to the normal jurisdiction of the U.S. Federal Trade Commission or Justice Department. If those agencies chose to allow the merger, on some rationale such as the failing company defense or the attainment of needed efficiencies, there is no serious possibility that U.S. enforcers could be convinced nevertheless to prevent the transaction because foreign commercial aircraft buyers would prefer two U.S. sellers rather than one.

There are rare instances in which a foreign state could apply its antitrust law to prevent the joining of local subsidiaries, even though it has no way to prevent the off-shore merger of the parent companies. This limited relief was obtained by the United States in preserving the independence of the Ciba and Geigy subsidiaries in the United States, while the parent companies merged in Switzerland. If, however, all or most of the relevant productive activities take place offshore, preservation of separate local subsidiaries may have very little competitive effect.

The most ambitious effort yet to project the interests of one state into the domestic antitrust policies of another is the revised version of Section 301 created by the U.S. Omnibus Trade Act of 1988.<sup>1</sup> That law provides, among other things, that the president can take protectionist action to retaliate against any goods from a state that injures U.S. international trading interests by the purposeful non-enforcement of its antitrust laws. Of course, many questions spring to mind concerning what such a principle can or should mean in practice, and about its essential fairness. Can, or should, the U.S. president determine that the Japanese Fair Trade Commission should have prosecuted a particular cartel, without the United States conducting its own factual investigation and deeming itself an expert on Japanese anti-monopoly law? Is it fair to penalize a country with a weak or unenforceable antitrust law more severely than a state which has no such law, and which trades through a state monopoly?

When conduct in a state is aimed solely at foreign markets, that state will usually conclude that it has no substantive jurisdiction over the conduct. The state may conclude that its legislature and courts have no

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<sup>1</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164-68 (1988).

duty to judge the legality or acceptability of conduct aimed at foreign markets, or even that it would be inappropriate under international law to exercise such jurisdiction. This is the position taken by the Commission of the European Community ("Commission") in enforcing Common Market antitrust law, and the position of the U.S. Congress in enacting Title IV of the Export Trading Company Act of 1982.<sup>2</sup>

It follows from the above analysis that if three U.S. firms conspire to raise prices together in sales to France, such concerted action will not violate U.S. antitrust law. Conversely, the Commission would not attack a European price fix aimed at U.S. consumers. A central question of this Symposium is whether the situation described above is an optimum one, or even a tolerable one. An initial argument that the situation is tolerable is that the affected country has the right to use its own law to protect its own consumers.

This proposition rests on two subsidiary assumptions, which are usually true. First, it assumes that states will merely permit or approve export cartels or other outward-bound concerted conduct, rather than compel such conduct or have the government monopolize the export of the product. Given mere permission or approval, the defenses of "foreign compulsion" or "act of state" will not apply, and the conduct will be subject to applicable antitrust law. Second, the existence of an adequate remedy in the affected country presumes that that nation or group of nations uses an "effects test" to give itself jurisdiction over offshore conduct aimed at its consumers. The United States reiterated in 1982 legislation that its Sherman Act applies to any offshore conduct having a direct, substantial, and foreseeable effect on U.S. commerce.<sup>3</sup> In the recent *Woodpulp* case, the European Court of Justice embraced a similar test for the Common Market.<sup>4</sup>

Thus far, the situation seems clear, rational, and satisfactory. On further analysis, however, nothing is very clear, and the situation is only sometimes satisfactory. A state victimized by offshore price fixing or bid-rigging may be unable to obtain personal jurisdiction over the defendants. If the products are sold FOB the country of origin, there may not even be jurisdiction over the goods, which will usually be in the hands of innocent purchasers when they reach the affected country. Moreover, the target country may have difficulty acquiring information about the

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<sup>2</sup> Pub. L. No. 97-290, Title I, §§ 101-104, 96 Stat. 1233-35 (codified at 15 U.S.C. §§ 4001-4003 (1982)).

<sup>3</sup> Pub. L. No. 97-290, Title IV, §§ 401-03, 96 Stat. 1246 (amending 15 U.S.C. § 1 (1982)).

<sup>4</sup> A. Ahlström Osakeyhtiö v. Commission, 4 Common Mkt. Rep. (CCH) ¶ 14,491 (Sept. 27, 1988).

price fixing or the bid-rigging, and may be unable to obtain hard evidence to use in a prosecution in its own courts.

If the country from which price-fixed goods are shipped is unwilling or unable to prosecute outward-bound cartels, it has sometimes been assumed that its minimum obligation is to assist the antitrust enforcers of the victimized nation. There are OECD resolutions which appear to commit nations to such cooperation, and the United States has bilateral agreements with Germany, Canada, and Australia to the same effect. Nevertheless, there is less to this cooperation than the agreements imply. Most antitrust agencies have no authority to investigate a transaction that does not affect their country, so they would usually possess knowledge of outward-bound activity only when it is combined with domestic cartel activity they are investigating. Also, secrecy laws in most countries regarding antitrust investigative files prohibit government officials from disclosing detailed confidential information to foreign officials. It would appear under U.S. law that U.S. antitrust officials would disclose only their general conclusions or suspicions, but not the relevant evidence, unless it is public information or otherwise lacks legal protection. To make matters worse, a substantial group of nations, including the United Kingdom, Canada, Australia, France, The Netherlands, and South Africa, have enacted legislation to block cooperation with U.S. antitrust enforcers regarding local conduct aimed at the United States. It does not appear that such legislation will be repealed in the near future.

Is there any basis then for being content with the present state of affairs or hopeful about the future? Certain real-world factors make the situation somewhat less unsatisfactory than it seems. First of all, most companies selling a lot of products to a major consuming country eventually desire to establish a physical presence there, in order to engage in promotion, distribution, or manufacturing. Thus, the pure offshore cartel immune from jurisdiction is a relatively rare phenomenon.

Secondly, most export cartels selling from a single nation lack market power when competing offshore. For example, an export association handling 60% of U.S. phosphate production might only account for 20% of all phosphate being offered for sale in international commerce. If so, there is little reason to expect that such an association will be able to command a supra-competitive price. Under the per se rule used in domestic U.S. antitrust enforcement, such a cartel could not defend itself on the grounds that it lacks power to raise prices. This aspect of the per se rule, however, is really one of convenience for prosecutors and does not mean that joint selling arrangements with small market shares are really an economic danger. It follows that national export cartels are

likely to be of significant concern only in regard to those few products that are obtainable from only a single nation. Of course, a coalition of national export cartels, such as the one which was challenged under the *Woodpulp* case, will create a greater distortion of world trade. Such multi-national coalitions, however, are difficult to organize, control, hide, justify, or make immune from jurisdiction.

#### IV. CONCLUSION

Creating a relatively cartel-free world will require a combination of competition policy (privatization, deregulation, etc.), trade policy, and effective antitrust enforcement. In this whole picture, the export cartel is but a tiny piece. Control of such outward-bound practices will continue to rest primarily with the purchaser states, which must insist on the principles of transparency, effects doctrine, and full antitrust cooperation. In return, purchaser states probably should employ a modified rule of reason, market power/price effect test to avoid challenging mere export joint ventures which have no market power.