

Washington University Global Studies Law Review

Volume 1

Issue 1 *Symposium: APEC Competition Policy and Economic Development*

2002

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Recommended Citation

Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy*, 1 WASH. U. GLOBAL STUD. L. REV. 463 (2002),
https://openscholarship.wustl.edu/law_globalstudies/vol1/iss1/18

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INTERNATIONAL COOPERATION IN THE ENFORCEMENT OF COMPETITION POLICY

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I. THE SHRINKING WORLD AND COMPETITION POLICY

In the nineteenth century, a German jurist, Rudolf Von Ihering, stated: “While the States were fighting one another, trade found out and levelled the roads that lead from one nation to another, and established between them a relation of exchange of goods and ideas . . .”¹ In the twenty-first century in which we live, Ihering’s statement applies with even more validity than at the time he made it. Transnational activities are expanding at an unprecedented rate and it is expected that this trend will accelerate through the growth of e-commerce and computer networks.

It is the nature of business to cut across national boundaries. Private enterprises export, invest, transfer technology, and engage in all sorts of business activities across national boundaries in pursuit of profit. Such activities tend to increase the wealth of trading nations, which was the original objective of the General Agreement on Tariffs and Trade (GATT). Today the international trading system consists of the International Monetary Fund, the World Trade Organization (WTO), the World Bank, the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD), and other international institutions that aim to maximize the wealth of nations.

At the same time, the nation-state system is still the reality throughout the world, and the legal or regulatory framework to control trade is that of national governments. National objectives and competition law and policy differ from country to country. This may create tension among trading nations, which, in turn, may create instability for enterprises that conduct business across national boundaries.

The differences in competition law and policy among major trading nations often create a disparity in competitive conditions, which ultimately may cause the ease or difficulty of accession to the national market of other trading nations to vary. For example, if Country A’s competition law

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1. RUDOLF VON IHERING, *LAW AS A MEANS TO AN END* 175 (Isaak Husik trans., 1913), *quoted in* 1 SIDNEY POST SIMPSON & JULIUS STONE, *LAW AND SOCIETY* 313 (1948).

prohibits a boycott to exclude foreign products but it is allowed in Country B, enterprises in Country B are at an advantage over their counterparts in Country A. In Country B, enterprises can exclude foreign competing products with impunity while enterprises in Country A cannot. This creates the sentiment that Country B's lax enforcement of competition law is unfair to enterprises of Country A, which could result in trade friction between the two countries.

The situation described above shows that international cooperation among trading nations with regard to the implementation and enforcement of competition law and policy is necessary, and that some degree of convergence or harmonization of competition laws is desirable. Of course, the national traditions and unique circumstances of each nation should be respected, as the competition law and policy of each nation reflect such traditions and circumstances. However, one should recall that since the time of the Havana Charter, the establishment of international competition policy has been an important subject among international policymakers. It has been discussed in international arenas such as the GATT, OECD, UNCTAD, European Community, and, currently, WTO. Especially important is the establishment of a working group at the WTO commissioned to study the relationship between trade and competition and subsequently recommend to the WTO what policy it should follow. The working group already has published several reports detailing the positives and negatives of introducing an agreement on competition policy into the WTO.² The draft charter of the International Trade Organization (the Havana Charter) included Chapter V, which dealt with restrictive business activities such as price fixing and the division of markets. Due to the abortion of the Havana Charter, Chapter V was put into limbo. However, the recent talks at the WTO of introducing competition policy into the WTO may be a sign of the resurrection of this concept.

The need for introducing an international cooperative framework for competition policy has become an important subject matter for international discussions. Globalization of economies necessitates that there should be more international cooperation among trading nations with respect to competition law and policy. Multinational or transnational business

2. *See, e.g.*, World Trade Organization, Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/3 (Oct. 11, 1999); World Trade Organization, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/2 (Dec. 8, 1998); World Trade Organization, Report (1997) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/1 (Nov. 28, 1997).

enterprises can engage in activities in such a way that no one nation's jurisdiction can control such activities effectively. For example, multinational enterprises can conceal evidence necessary to prosecute them from the authority of one nation by utilizing international connections and transferring such evidence from that jurisdiction to another. To cope with this situation, domestic authorities in some jurisdictions (most notably the United States) have extended the scope of application of their domestic laws to conduct that occurs outside their territories.³ The above situation symbolizes that, in the era of economic globalization, the enforcement of competition law and policy by each nation is insufficient and the gap between the international nature of business activities and the insularity of national jurisdiction is widening.

Today, many transnational mergers and acquisitions (M & A) occur. The agencies that enforce competition laws in many nations require that M & A be reported if the transactions exceed a certain threshold in terms of assets and market shares, even if the transactions occur outside the nations' borders. The reporting requirements may be different from one jurisdiction to another. This imposes a tremendous burden on enterprises carrying out M & A.⁴

In some situations, M & A that are allowed or encouraged in one jurisdiction may be prohibited in another. Recently, General Electric (GE) attempted to acquire Honeywell. Both are U.S. companies that conduct business in the aviation equipment industry. This acquisition passed antitrust scrutiny in the United States but was rejected by the European Community because it purportedly would create undue market power for GE among the member states of the Community.⁵ This kind of conflicting enforcement policy of competition laws creates a tremendous uncertainty within business communities. The GE-Honeywell merger is yet another example of the need to coordinate the enforcement policies of competition laws of different nations.

3. See JAMES R. ATWOOD, KINGMAN BREWSTER & SPENCER WEBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* §§ 14.1-14.25 (3d ed. 1997).

4. See generally INTERNATIONAL MERGERS: THE ANTITRUST PROCESS (J. William Rowley & Donald I. Baker eds., 2d ed. 1996) (discussing antitrust regulation of mergers and acquisitions in various nations).

5. See *Mergers and Acquisitions: EU Commission Bars Acquisition of Honeywell by General Electric*, 81 ANTITRUST & TRADE REG. REP. 14 (July 6, 2001); *Mergers and Acquisitions: Antitrust Division Chief Reacts to EU Decision to Prohibit GE/Honeywell Deal*, 81 ANTITRUST & TRADE REG. REP. (BNA) No. 128, at 15 (July 6, 2001).

II. COOPERATION IN THE ENFORCEMENT OF COMPETITION POLICY AND LAW

A. *Forms of International Cooperation in Competition Law*

There are several kinds of cooperation among competition law enforcement agencies: (a) bilateral agreements between two nations; (b) regional agreements; (c) plurilateral agreements; and (d) multilateral agreements. There are many bilateral agreements entered into between two nations in which the terms for the cooperative relationship in the enforcement are stipulated. There are, for example, the agreements between the United States and the European Union,⁶ the United States and Canada,⁷ Australia and New Zealand,⁸ and the United States and Japan.⁹ There is a strong likelihood that there will be a similar one between the European Communities and Japan before long.

Bilateral and regional agreements on competition policy are the only types of international cooperative agreements on competition policy that exist today. The most successful and far-reaching regional agreement is the European Community. However, Articles 81 and 82 of the Treaty Establishing the European Community ("EC Treaty") and the Merger Regulation¹⁰ probably should be likened to a national competition law rather than an international cooperative agreement on competition laws. The European Community as a whole should be regarded as one jurisdiction as far as the enforcement of competition laws is concerned. Other than this, some regional arrangements like the Asia-Pacific Economic Cooperation (APEC) and Southern Common Market (MERCOSUR) include provisions for competition policy.

6. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.U., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504. *See also* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 3-4, 1998, 37 I.L.M. 1070 (entered into force June 4, 1998).

7. Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,503.

8. Australia-New Zealand: Closer Economic Relations-Trade Agreement, Mar. 28, 1983, 22 I.L.M. 945 (entered into force Jan. 1, 1983).

9. Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,507 [hereinafter U.S.-Japan Agreement].

10. Council Regulation 4064/89, O.J. (L 395) 1 (1989), *amended by* Council Regulation 1310/97, O.J. (L 180) 1 (1997).

Notwithstanding the aforementioned regional agreements, bilateral agreements prove to be the most successful for several reasons. First, it is easier for two parties to reach an agreement than for many parties to do so. Second, a bilateral agreement can address issues that are important to the two parties concerned. Third, a proliferation of bilateral agreements will create a network of such agreements and could pave the way for a plurilateral or multilateral agreement through the accumulation of experiences in international cooperation in competition law matters, thereby creating the spirit of cooperation among the officials of enforcement agencies. In light of such experience, bilateral agreements on competition policy should be promoted in spite of their inherent limitations.

In a plurilateral agreement, parties conclude an agreement setting forth principles to be observed by the parties. The membership is not as comprehensive as in a multilateral agreement in which all or the majority of nations with competition laws are parties. An agreement that includes all of the members of the OECD or WTO would be regarded as a multilateral agreement (e.g. the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)). The membership of a plurilateral agreement may be few or many. Even if a plurilateral agreement is concluded within the framework of a large international organization such as the WTO, the entry is optional. Plurilateral agreements can be included within the framework of the WTO in Annex IV. However, a plurilateral agreement need not be enacted within the framework of an international organization. It can stand unilaterally.

A plurilateral agreement is probably more practical than a comprehensive multilateral agreement. For example, we can envisage a plurilateral agreement among major industrial nations, or an agreement among the “quad” (Canada, the European Union, Japan, and the United States) member countries of the WTO, plus Australia, New Zealand, Korea, Taiwan, and certain Latin American nations. There is no plurilateral agreement on competition policy currently enforced today. However, if tailored properly, a plurilateral agreement can be a useful instrument for the cooperative relationship among nations concerning international competition policy. In order for such an agreement to be successful, it is important that the number of nations party to the agreement remain small, that there are sufficient common interests among the participants, and that the membership is voluntary.

A multilateral agreement originally was proposed as Chapter V of the Havana Charter, which never came into existence. It is not foreseeable at present that anything resembling Chapter V of the Havana Charter will be formulated and implemented. However, multilateralism serves as an

ultimate goal for any agreement on international competition policy. Hopefully, there will be a time in the future that the globalization of economies has progressed to the point that a multilateral agreement on international competition policy can become a reality.

B. A "Non-Binding Law" Approach vs. a "Mandatory Law" Approach

A non-binding agreement is a type of agreement in which obligations contained therein are hortatory in nature and are not compulsory on the contracting parties to implement within their domestic laws. For example, there may be an agreement that requests the participants harmonize their domestic laws as much as possible but does not require them to do so. There may be a provision within that requests each party to supply evidence to the other and exchange information with regard to the enforcement of competition laws, and yet leaves the ultimate implementation to the discretion of each party. In international law, this type of agreement may be referred to as a "soft law," as opposed to a "hard law," which requires contracting parties to observe the terms of an agreement.

In a mandatory agreement, the participants are required to observe the terms of the agreement and modify their domestic laws according to the mandates of the agreement (if necessary). For example, a mandatory agreement may require the participants to change their domestic laws and regulations so that they meet the minimum requirements set forth in the agreement.

All bilateral agreements that exist today are non-binding "soft" laws. They stipulate such matters as cooperation in investigation, exchanges of information, notifications of actions that each party takes that affect enterprises of the other party, and positive and negative comity. The provisions in those agreements generally do not require changes in the parties' domestic laws and leave discretion to each party as to whether to take action under the agreement. For example, the U.S.-Japan Agreement provides that each party should exchange information because it would assist in the enforcement of competition laws. However, neither the United States nor Japan is obligated to submit to the other information that it believes it should not submit. Confidential information is specifically excluded from the coverage of this agreement.

The OECD Recommendation,¹¹ which is a multilateral agreement, also is

11. OECD, Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, July 27-28, 1995, 35 I.L.M. 1313, 1314-16 (1996).

non-binding. Within the OECD, a party whose actions affect enterprises of another member should notify the affected member of the actions. However, this is the only proffered guidance. Neither the notifying party nor the notified party is required to take, or refrain from taking, any action beyond the notification.

A typical example of a mandatory agreement is the EC Treaty,¹² which creates an international agreement binding on all member states of the Community. If an agreement on international competition policy is incorporated into the framework of the WTO, it is likely to be mandatory in nature if it is drafted based on the example of existing WTO agreements like the TRIPs Agreement. The mandatory nature of such an agreement would obligate a party to the agreement to implement the contents of the agreement domestically. For example, if such an agreement provides for the prohibition of cartels and boycotts, the members would be obligated to enact domestic laws containing the same prohibitions. Non-implementation of a mandatory agreement would violate the agreement, and a non-implementing party could be challenged at an appropriate forum and receive sanctions for noncompliance.

There are advantages and disadvantages to both non-binding and mandatory types of agreements. However, given the fact that there is little consensus among nations as to the objectives, forms, and enforcement processes of competition laws, it would be difficult to enact a bilateral, plurilateral, or multilateral agreement that legally would compel the parties to subject their domestic norms to international disciplines. In fact, this is probably the reason why all bilateral agreements on competition policy are of a non-binding nature. The effect of such an agreement is limited since the parties legally are not obligated to execute the mandates of the agreement and possess a wide scope of discretion. However, such an agreement would create the framework for cooperation and, in spite of its discretionary nature, contribute to the promotion of international cooperation. After accumulating experiences of this type of international agreements, in the long run, a "hard law" type of agreement likely will come into existence.

Outside of the European Union, national jurisdictions are the only forum in which competition law can be implemented effectively with the force of law. International agreements on competition law and policy supplement national enforcement of competition laws with support, opitulation, and vigor.

12. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11.

C. Positive and Negative Comity

Positive comity is incorporated within many bilateral international agreements. Positive comity means that a party to an agreement invokes, upon request of the other, its domestic competition law to remove anticompetitive practices that occur within its jurisdiction and that adversely affect the other party. This is a way to control anticompetitive activities that adversely affect a party without resorting to an extraterritorial application of its competition law that may result in a conflict of jurisdiction.

Positive comity is a device to promote international cooperation in the enforcement of competition laws. It is effective in prohibiting or controlling anticompetitive conduct carried out across the boundaries of more than one nation. When, for example, a cartel or boycott excludes the export of a product from one nation to another and yet the *situs* of the conduct is located where the affected nation may not have jurisdiction, the affected nation may invoke the principles of positive comity. Competition laws may have extraterritorial application,¹³ but usually extraterritorial application is not as effective as one would hope.

In such a situation, a positive comity approach can play a useful role. When the effects of a cartel or boycott cut across the boundaries of more than one nation, the nation affected may request the nation in which the cartel or boycott originates to take action *vis-a-vis* this cartel in its territory. If the host country takes action, the conduct in question can be controlled effectively.

In *United States v. Nippon Paper Industries*,¹⁴ U.S. and Canadian authorities cooperated closely in their investigation of a Japanese cartel in which several paper mills fixed the price of fax paper to be sold in the United States and Canada. Their close cooperation resulted in the successful criminal enforcement of U.S. and Canadian competition laws against this cartel.

On the other hand, the effectiveness of positive comity often is limited. This approach can be effective only when the anticompetitive effects of conduct affect not only the jurisdiction of the requesting nation but also that of the requested nation. If the conduct affects only the requesting nation, the requested nation has no reason to intervene to prohibit the conduct, which it actually may permit and encourage within its jurisdiction. For example, an export cartel is exempted from application of antitrust laws in the United

13. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Joined Cases 89, 104, 114, 116, 117, & 125-129/85, A. Åhlström Osakeyhtiö v. Comm'n*, 1988 E.C.R. 5193.

14. 109 F.3d 1 (1st Cir. 1997).

States under the Webb-Pomerene Act,¹⁵ and in Japan, under the Export and Import Transactions Law.¹⁶ Export cartels are allowed in other jurisdictions as well.

Suppose that Japan requests to the United States that a Webb-Pomerene association of woodpulp should be prosecuted in the United States because it fixes the price of woodpulp to be exported to Japanese paper mills, injuring Japanese interests. Will the United States prosecute? In addition, if the United States asks Japan to prosecute a Japanese export cartel organized under the Export and Import Transactions Law because it fixes the export prices of a commodity exported to the United States, thereby burdening U.S. commerce, will Japan prosecute? The only answer in both cases seems to be that prosecution is not possible since it is exempted from the application of the domestic competition laws.

In *Nippon Paper*,¹⁷ the cartel was created and partly carried out in Japan. However, the effects of this cartel were felt in the United States and not in Japan. The Japanese government did not do anything with regard to this cartel. Therefore, the question is whether it is realistic to expect the requested nation to invoke its domestic law to control conduct that is permitted under its own law.

The GE-Honeywell merger is a case in point here. The merger took place in the United States and the U.S. authorities did not proceed against the merger, viewing the merger as permissible under U.S. antitrust laws. However, the European Commission considered this merger to be anticompetitive and proceeded against it. When the European Commission announced that it would prohibit this merger, U.S. officials stated that the European Commission and the United States differed substantially in their views regarding the merger. In this case, the application of positive comity is out of the question because the competition policies of the two nations regarding the same subject matter were not only different but also entirely inconsistent with each other.

Despite its limited effectiveness, positive comity is a useful concept. It is more effective when the substance of the competition laws of participating nations is in harmony. A positive comity approach ultimately may prompt the parties to push forward the eventual harmonization of most, if not all, of their respective competition laws.

Negative comity also is incorporated in a number of bilateral

15. Webb Pomerene Act, 15 U.S.C. §§ 61-66 (1994).

16. *Yushutsunyu torihiki ho* [Export and Import Transactions Law], Law No. 299 of 1952 as amended.

17. 109 F.3d 1 (1st Cir. 1997).

agreements. With negative comity, a party to a bilateral agreement refrains from applying its competition law to the conduct of an enterprise if such application collides with governmental policy of the other party. If, for example, a state applies its competition laws to prohibit an international merger and the merger is strongly promoted by the government of another state, such application may go against the policy of the latter state. In this situation, a negative comity approach suggests that the former state refrain from applying its competition law to that merger out of respect for the governmental policy of the latter state.

There are antitrust cases in the United States in which courts expressed the principle of the “jurisdictional rule of reason” and suggested a number of factors to be taken into consideration when a country decides whether to apply its domestic competition law to conduct if such application is likely to have international implications.¹⁸

D. Cooperation in Investigation

When a country applies its domestic competition law to conduct that occurs abroad, the key issue is how to obtain evidence of a suspected violation. In a number of cases in which the United States applied antitrust laws to conduct abroad, extraterritorial investigations were conducted. This created numerous conflicts with other nations, occasionally resulting in the invocation of blocking statutes to prevent the United States from collecting evidence and testimony on foreign soil. In this respect, cooperation in investigation between the parties to an international agreement is useful in order to avoid such conflicts and effectively control conduct that occurs in the jurisdiction of one of the parties and brings about harm in that of the other.

A number of bilateral agreements incorporate provisions for cooperation in investigation. Generally such provisions state that a party to the agreement endeavors to provide evidence to the other when requested without making the provision of information obligatory. The question is whether the provision of evidence and information can be made obligatory, and whether such evidence and information must include confidential information. In many jurisdictions, the disclosure of confidential information obtained through an investigation to any outside person (including a foreign government) is contrary to the confidentiality laws of that state. Presently, therefore, we must be satisfied with an international agreement that allows

18. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

for the voluntary provision of evidence and information, rather than a mandatory obligation to do so.

Under the International Antitrust Enforcement Assistance Act (IAEAA),¹⁹ the United States will investigate conduct that occurs in the United States and adversely affects the jurisdiction of another country, and transfer evidence obtained (including confidential evidence) to that country on the condition that the country enforce and reciprocate a comparable law on investigation. The underlying policy behind the IAEAA will enhance the effectiveness of domestic competition laws against anticompetitive conduct that cuts across national boundaries. Although the possibility that this type of agreement will be concluded is remote, it should be considered as a goal for the future. In addition, it is noteworthy that Article 26 of the U.S.-Japan Tax Treaty requires the parties to provide information and evidence (including confidential evidence) to each other. If it is possible in tax law, it may be possible in competition law.

III. THE CONVERGENCE OF COMPETITION LAWS

No matter how closely countries cooperate with each other in competition law enforcement, there is a limit to the effectiveness of such cooperation if there is a great divergence in the substance of the competition laws of the countries involved. Cooperation may be hampered if there is an inconsistency in the provisions of competition laws of different countries. In light of this, the convergence or harmonization of competition laws is, to a degree, indispensable in order to effectuate the cooperative relationship among countries in the enforcement of competition laws.

A. The Convergence of Substantive Competition Laws

Although the advance of globalization has caused the economic boundaries between nations to become less clear compared with when “nation-states” were in their heyday, it is still true that each nation-state jealously safeguards its sovereign right to control business activities in its own territory. Considering this state of affairs, any proposal for the convergence or harmonization of competition laws should aim to reduce or eliminate the harmful effects of anticompetitive conduct that cuts across borderlines without unduly encroaching upon purely domestic competition matters. Therefore, the primary objective of the convergence of competition

19. International Antitrust Enforcement Assistance Act (IAEAA) of 1994, 15 U.S.C. §§ 6201-6212 (1994).

laws should be to establish and declare principles that are essential for the maintenance of a liberal trade order.

It is submitted that the following items should be considered: Anticompetitive conduct that *directly* affects the smooth operation of international trade and investment should be declared unlawful and each country that is a party to an international agreement should enact or amend its domestic law to carry out this mandate. This would include the prohibition of: (a) an international cartel that fixes prices or divides; (b) an export or import cartel that clearly restricts trade; (c) a boycott, the objective of which is to exclude foreign products; and (d) any activity, the primary purpose or impact of which is to exclude foreign commodities or enterprises and deny market access. It should be relatively easy to reach an agreement among trading nations that there should be promotion of international economic activities through the WTO and OECD.

With regard to vertical restraints, price discrimination, and M & A that may or may not affect market access and the entry of foreign enterprises directly, the general policy should be that each country maintains its own right to control them. As long as the impact of conduct on market access by foreign enterprises is not certain (such as resale price maintenance which may or may not directly block the entry of competing foreign products), discretion should belong to each individual country.

B. Convergence of the Enforcement Process

There seem to be two major competition law enforcement systems: that of the United States and that of the European Union, with others falling on the spectrum in-between. For example, the Japanese enforcement system, which originally was based on the U.S. system, has deviated somewhat and now bears a closer resemblance to the European Union system. The U.S. system places a heavy emphasis on the criminal prosecution of cartels, the utilization of litigation by the government and private parties, and treble damage suits. On the other hand, the European Union system is characterized by an emphasis on the administrative process, such as the imposition of administrative fines and administrative orders restraining unlawful conduct.

A competition law enforcement system reflects the legal history and traditions of the nation in which it operates, and a hasty transplant of one nation's enforcement system to another with a different legal system has little chance of success. Any attempt to harmonize the enforcement process should not focus on the uniformity of the enforcement system at the expense of the traditions of national enforcement. A convergence or harmonization

of enforcement systems is probably more difficult than that of substantive laws.

For the time being, an effort to harmonize the enforcement process should concentrate on such matters as the procedural due process of law and transparency of the enforcement process. An international agreement on competition policy should provide that the parties guarantee that the due process principle is observed whether it is an administrative, civil, or criminal process, that a well-founded complaint filed by a private party suffering from a violation is not rejected without good cause, that there shall be no distortion or disregard of duly filed evidence, and that the process as a whole generally is made public.