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International Competitiveness: Changing the Rules or Changing the Will?

Howard M. Metzenbaum

Kelly Signs

INTRODUCTION

INTERNATIONAL COMPETITIVENESS: CHANGING THE RULES OR CHANGING THE WILL?

Senator Howard M. Metzenbaum* and Kelly Signs**

The increasing interdependence of world markets is changing how nations regulate their respective markets. Every national policy maker is concerned about international competitiveness. The United States Congress is no exception.

Whether the debate is over new environmental regulations, fair labor standards, or federal antitrust law, one always hears the argument that American companies will not be able to compete in international markets if Congress pursues this policy or adopts that regulation. The argument is premised on the fear that American companies have lost their competitive edge against foreign competitors, both domestically and overseas, due to excessive or burdensome United States regulations. American companies are often portrayed as vexed with costly regulations while foreign competitors are not only unfettered by government interference, but are, in some cases, organized, encouraged, and subsidized by their respective governments. United States laws are assailed as creating an uneven playing field for domestic companies in relation to the laws governing foreign firms in their home markets.

The growing perception that American policy makers are obligated to remove regulatory and financial burdens from American companies so that these companies can compete for a greater share of the international marketplace highlights two distinctly conflicting views of the United States competitive position in the world economy. The first view

* Chairman, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Senate.
** Former Counsel, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Senate.

portrays the United States as an aging industrial giant, no longer able to compete with better organized and better financed foreign firms that are protected in their home markets and relentless in their quest to dominate overseas markets, particularly in the United States. Advocates of this theory assert that the United States laws assure foreign firms free access to American markets and yet prevent domestic firms from joining together to capitalize on opportunities overseas. These advocates urge Congress to remedy this imbalance by making American laws conform to the laws that American corporations face abroad. Moreover, they propose that the United States limit access by foreign firms to American markets, and encourage cooperation between the government and industry to bolster American competitiveness in foreign markets and improve the U.S. trade balance.

In contrast, the second view portrays the United States as a large, but still powerful, competitor struggling to succeed both domestically and in increasingly important foreign markets. While advocates of this view admit that American productivity is declining, they believe such losses are reversible. In order to restore America's technological advantage, they recommend innovation, aggressive competition, and more effective management of corporate assets. They blame much of the current competitive malaise on the managerial excesses of the 1980s: allowing the desire to merge overcome the desire to compete; suffocating assets with debt; and sacrificing long-term strategies to short-term goals. Advocates of this theory recommend that the United States government persuade other countries to move towards our free market model by changing their laws to remove restrictions on their markets and by enforcing existing limitations on cooperative arrangements both here and overseas.

These two views of corporate America represent more than just a rehash of the age-old debate between "protectionists" and "free marketers." Rather, these theories represent a far more complicated debate about the future of American companies in the world economy. For instance, will American firms succeed in marketing products in the emerging economies of the new democracies of Eastern Europe as these countries reorganize into free market economies? Will European and Asian companies flood American markets with new products, and how will this affect the American economy?

Regardless of the answers to these questions, it is clear that policy makers cannot guarantee the success of American businesses. Domestic companies must face the challenge of foreign competition with better products, better service, and lower costs. American consumers are not likely to give up the variety of imported products that have poured into our country in the past twenty years. The era when United States manufacturers could rely on established customer relationships to sell all their products close to home is long gone.

Thus, legislators are left to ponder the question of whether American antitrust policy fosters or deters the expansion of American firms in international markets.[1] Several bills are pending in Congress to relax United States antitrust standards to encourage joint activity among domestic firms.[2] Proponents of reform argue that American firms are falling behind in innovation and production because no single firm can afford to invest in new technology. Moreover, they argue that the antitrust laws discourage cooperative ventures that would otherwise enable American companies to compete more vigorously against foreign firms. Finally, they claim that restrictive antitrust policies impose additional costs on American firms in relation to rival foreign corporations.

Relaxing the antitrust laws will not make America more competitive. On the contrary, the United States is suffering from a decade of permissive competition policy that allowed mergers and other business combinations of unprecedented size to transform the American economy. During the 1980s, American companies spent more than $1.2 trillion to purchase more than 30,000 companies. While American companies were busy analyzing acquisition prospectuses, foreign companies were investing in new technology and new products. While corporate CEOs signed merger agreements, their customers were wooed away by foreign firms that offered better quality and service.

The proposals to weaken United States antitrust laws stem from a general misunderstanding of the antitrust treatment afforded to cooperative ventures under existing law. Current antitrust laws prohibit only those cooperative ventures in which the threat to competition outweighs the procompetitive benefits. Domestic companies increasingly utilize

1. *See generally Hearings on Production Joint Venture Legislation Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 1, 1 (1990) (statement of Senator Howard Metzenbaum, Chairman of the Subcommittee on Antitrust) (regarding proposals to relax antitrust laws with respect to production joint ventures); *Joint Production Ventures: Hearings on Antitrust Reform Before Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 1, 1 (1989); H.R. Rep. No. 516, 101st Cong., 2d Sess. 1, 1 (1990) (proposing a bill to amend the National Cooperative Research Act of 1984 to reduce liability for joint ventures).

2. S. 479, 102d Cong., 1st Sess., 137 CONG. REC. S2263 (Feb. 22, 1991); H.R. 1604, 102d Cong., 1st Sess., 137 CONG. REC. H2083 (Mar. 22, 1991); H.R. 1024, 101st Cong., 1st Sess., 135 CONG. REC. H318 (Feb. 21, 1989); H.R. 4611, 101st Cong., 2d Sess., 136 CONG. REC. H1761 (Apr. 25, 1990); S. 1006, 101st Cong., 1st Sess., 135 CONG. REC. S5395-97 (May 16, 1989); S. 2692, 101st Cong., 2d Sess., 136 CONG. REC. S7001-02 (May 24, 1990).

joint ventures for specific collaborative projects with competitors or firms in related industries in order to reduce capital costs and spread risks. In fact, antitrust challenges to joint ventures by either government or private plaintiffs are rare.

Moreover, proponents of antitrust reform tend to overestimate the extent and success of cooperation among foreign firms. Dr. Michael Porter of the Harvard Business School spent several years studying the success of various companies throughout the world, resulting in the widely-read *The Competitive Advantage of Nations*.[3] Dr. Porter noted that, despite the fact that the Japanese government strongly encourages Japanese firms to share important new technology with each other, the firms are very protective of their proprietary research.[4] In fact, he found that most of the research that results in commercially successful technology is developed within a single Japanese company, not in consortia.[5] Dr. Porter concluded that "competition among a group of firms was by far the most powerful force for stimulating innovation that resulted in competitive advantage."[6] Accordingly, it is easy to see why removing legal disincentives from cooperative activity may not necessarily result in more cooperative ventures, nor in more productive joint ventures.

The desire to benefit from the fruits of one's own labor is a basic tenet of American business. This jealousy is a much more serious barrier to cooperation among American firms than any legal risks associated with joint efforts. For example, the computer industry lauded U.S. Memories, the IBM-headed consortium of major computer companies and semiconductor manufacturers formed to produce memory chips. U.S. Memories struggled in the early stages as it tried to assess costs among members and protect members' technological contributions. In the end, U.S. Memories died of its own weight: members that looked to the consortia to supply memory chips were unwilling to make long-term commitments while adequate supplies were available at low prices from foreign suppliers.[7] Other chip makers were unwilling to devote their proprietary research "for the good of the whole"[8] without adequate

3. M. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990).
4. *Id.* at 635-36.
5. *Id.*
6. *Id.* at 636.
7. Richards, *Sources Say U.S. Chip Cooperative to Fold*, Wash. Post, Jan. 13, 1990, at C1.
8. *See* Pollack, *Memory Chip Cooperative is Officially Declared Dead*, N.Y. Times, Jan. 16, 1990, at D1, D19 (explaining reasons why the joint venture failed).

compensation or risk allocation.[9] Thus, the failure of U.S. Memories illustrates that conflicting goals and investment targets, not antitrust laws, are the fundamental barriers to the success of any collaborative effort.

The United States needs a strong competition policy with vigorous enforcement of antitrust laws to ensure that American companies are prepared to compete with foreign companies. This will force American companies to adopt basic strategies of good business management and to cease shopping for shortcuts. Not all joint ventures are bad; however, it is equally true that not all joint ventures are beneficial. Current antitrust policy reflects a balance between American businesses' need to reduce costs by avoiding duplicative efforts and the dangers of stifling creativity under a mantle of "management by committee."

There is an additional risk to looking to antitrust reform as a panacea for America's competitive ills. The case for reform asks us to accept the view that America is an aging industrial giant that cannot catch up with ruthless foreign competitors. While United States industry is not without problems—both in industry structures that hamper quick response to new opportunities and in infrastructure deficiencies in education and job training—it has its advantages as well. American manufacturing companies are still the most productive in the world.[10] Moreover, the United States spends more on research and development than any other country.[11] Also, few countries enjoy a standard of living comparable to that in the United States. With other countries gaining on us, the United States is faced with the challenge of capitalizing on its strengths. Arguing for antitrust reform focuses on this country's weaknesses, which places the United States at risk of convincing itself that it has lost its competitive edge. The world is indeed shrinking; but the United States should not respond by circling the wagons.

9. *Id.*; *see also* Yoder, *Lessons Linger as U.S. Memories Fails*, Wall St. J., Jan. 16, 1990, at B1 (examining the impact of U.S. Memories' failure).

10. Carey, *The Myth that America Can't Compete*, BUS. WK., June 15, 1990, at 46.

11. Port, *Why the U.S. is Losing its Lead*, BUS. WK. June 15, 1990, at 35.