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International Competitive Harm and Domestic Antitrust Laws: Forms of Analysis

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I. INTRODUCTION

Professor Rahl has focused this Symposium on the potential harms to states and to the international economic and political systems caused by export exemptions to antitrust laws. The problem is that states generally apply their antitrust laws only to conduct that affects their own territory. Assuming that anticompetitive conduct produces harmful effects somewhere,[1] a state's decision not to apply its antitrust principles to export conduct[2] encourages competitive harm at the international level ("international competitive harm") by increasing incentives for businesses to engage in such conduct. The question Professor Rahl poses, therefore, is: How can we explain this problem, and how, if at all, should states respond to it?

I suggest here that the international antitrust problem presented in this Symposium (the "Symposium Problem") can be viewed from two distinct analytical perspectives, each reflecting a distinct vision of the decision-making process and the nature and function of legal analysis.

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1 I am not concerned here with the extent and nature of such harms. There is no question that conduct that reduces competition tends to harm consumers by raising prices above the competitive level. There is, of course, much debate about the cause and effect relationships involved in creating such harms, potentially countervailing social benefits, and related political issues. For discussion of some of these issues, see generally Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817 (1987).

2 The term "export conduct" refers to private business conduct that occurs in one state and is intended to effect economic consequences outside of that state's territory.

Both perspectives must be employed in order adequately to explain the Symposium Problem. The first perspective, which analyzes the external influences on the state's decisional process, is conceptually simple and intuitively accessible. The second perspective, which analyzes the internal influences on the decisional process, is more complex and requires the use of analytical tools that tend to be underutilized in approaching legal problems.

In this Article I describe these two basic perspectives, analyze some of their more central consequences, and demonstrate their importance for understanding the Symposium Problem and responding to it more appropriately.

II. Normative and Policy Analysis: External Influences on the Decisional Process

Conventional analysis of the Symposium Problem focuses on how factors external to the decision-maker influence the decisional process and its outcomes. Such analysis is primarily concerned with the information to which the decision-maker responds, and it considers two sets of factors: (1) the impact of legal constraints, and (2) the impact of non-legal economic and political incentives.

A. Normative Legal Analysis

Most legal analysis relates to law's normative impact. Legal norms often constitute a central external influence on decisions, and there is a tendency to assume that they represent the sole influence of law on decisional outcomes. Sanctions imposed for the violation of applicable legal norms clearly tend to impede the proscribed conduct, and legal obligations certainly encourage conduct that meets those obligations.[3] While the extent of the law's normative influence will depend on issues such as the clarity of the norms and the characteristics of the sanctioning system, the direction of influence is incontestable.

Applied to the Symposium Problem, however, normative legal analysis provides little insight. The only body of law that can establish norms of state conduct is public international law, and there are no norms of international law which regulate the conduct under investigation. International law neither requires nor prohibits the application of antitrust

[3] Normative analysis must consider not only whether international law requires or prohibits the conduct at issue, but also the effects of restraining or encouraging related or alternative conduct. For example, a state's decision to regulate export restraints may be influenced by its right, or conceivably its duty, to regulate import conduct.

laws[4] to export conduct. The only information generated by normative analysis, therefore, is that although states are free to regulate such conduct, they typically have chosen not to do so.

B. Policy Analysis

Given that normative legal analysis provides little insight into the problem, one might attempt to explain the pervasiveness of export exemptions through the use of what is often called "policy analysis."[5] Since states have chosen not to take regulatory action to which they are clearly entitled, this analysis seeks to identify the policy considerations that may have led to such decisions.

Policy analysis is closely related to normative legal analysis because both ask how incentive structures affect decisional outcomes. While normative legal analysis asks how legal norms influence such outcomes, policy analysis seeks to explain conduct by identifying non-normative incentives and disincentives to state action and assessing the probability of particular responses to them.

Such policy analysis is based on the assumption that the relevant decisions result from rational and objective choices by decision-makers acting on the basis of reasonably full knowledge of the consequences of their choices. This assumption is necessary because it provides the explanatory link between the incentive patterns and the likelihood of their impact on conduct. Only to the extent that decision-makers are assumed to act objectively and with full knowledge of relevant incentive structures can policy analysis provide information concerning the impact of incentives on decisions. Thus, the explanatory power of this form of analysis depends on the degree to which the conditions of predictability—a rational, objective and informed decision-maker—are satisfied.

In the context of the Symposium Problem, policy analysis has an obvious and intuitively appealing focus. Where domestic enterprises are permitted to cooperate in relation to export sales, they are presumably able to compete more effectively in foreign markets than would be possible if such cooperation were not permitted.[6] The presumed increase in profitability resulting from the improved competitive position of such

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[4] I use the term "antitrust law" here to refer to laws which seek to prevent restraints on economic competition. Such laws are often referred to as "competition laws." For further discussion, see Gerber, *Law and the Abuse of Economic Power in Europe*, 62 TUL. L. REV. 57, 60 n.8 (1987).

[5] The term "policy analysis" is often used loosely, and its use often reflects little thought as to the content or implications of the analysis.

[6] Whether this assumption holds will depend on a variety of factors, such as the number of participants, their market position, their supply capacities, and the nature of the relevant production process, but it is widely assumed to hold in many cases.

firms inures to the benefit of the state that exempts them from regulation. The state's revenues are likely to improve, for example, due to a higher tax base, and its expenditures should shrink due to factors such as lower unemployment insurance payments.[7] Moreover, there may be significant benefits to individual governmental decision-makers because they may receive personal rewards from governmental and private sources for providing these benefits.

Given such obvious disincentives to regulating export conduct, policy analysis appears to explain the Symposium Problem. It suggests that governmental decision-makers have chosen not to regulate export conduct for the simple reason that it is not in the interests of states to do so. This explanation is appealing because the incentives identified obviously are likely to influence decisions. Moreover, the intuitive appeal of this analysis easily leads to the assumption that this explanation is sufficient, and no further analysis is necessary.

C. Implications of the Analysis

Limiting the search for insight into the Symposium Problem to an analysis of the external influences on decisions carries with it certain implications that are not always apparent. These implications frequently are significant for understanding the Problem and for influencing reactions to it.

1. Assumptions About the Decisional Process

External factors analysis implicitly makes certain assumptions about the governmental decision-making process that are questionable at best. It assumes, for example, that governmental decision making is a rational and objective process. There is, however, increasing awareness that such decisions often are influenced by factors that have little to do with rational response to existing incentive structures.[8]

Moreover, this analysis assumes that such decisions are fully in-

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[7] For example, in 1982, Congress passed the Export Trading Company Act, 15 U.S.C. §§ 4001-4021 (1982), which provided limited antitrust immunity for U.S. exporters to engage in concerted practices in relation to export markets. It was thought that this immunity would result in increased domestic employment. *See generally* Unkovic & LaMont, *The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion*, 87 DICK. L. REV. 205, 213-14 (1983). According to President Reagan, "Greater export power means a better balance of payments for our country . . . more trade for American firms, and more jobs for our people." Remarks of President Reagan on Signing S.734 Into Law, 18 WEEKLY COMP. PRES. DOC. 1283 (Oct. 8, 1982).

[8] *See, e.g.*, Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in THE THEORY OF PUBLIC CHOICE 11 (J. Buchanan & R. Tollison eds. 1984); Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191 (1988); Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

formed, *i.e.*, that the decision-makers have considered and evaluated the probable consequences of their decisions. Again, there is much evidence that governmental decisions often are based on limited information concerning the likely consequences of decisions and that decision-makers often tend to evaluate information only when it is perceived as relevant to the political context of the decision.[9]

Finally, external factors analysis ignores the impact of perception on the decisional process. Decision-makers can only respond to what they perceive. Consequently, the concepts, experiences, and expectations that mold decision-makers' perceptions shape the decisional process and have a major impact on the outcomes produced through that process, and yet this form of influence is defined away by the rationalist assumptions of policy analysis.[10] Failure to recognize these influences also leads to the fallacious assumption that there is only one way of viewing a given situation.

2. *Postures of Response*

The assumption that state decisions to exempt export conduct from antitrust regulation are rational and fully informed easily yields an inherently conservative, change-resistant view of such decisions. Since states generally exempt export restraints from their antitrust laws, and these decisions are assumed to be rational responses to an identified incentive/disincentive structure, there is little reason to expect those decisions to change. Presumably, only a change of circumstances, particularly of incentives, would lead to a change in this conclusion.

D. Conclusions

Standing alone, therefore, the external factor analysis provides a biased perspective on the Symposium Problem. It is based on assumptions about the decisional process that are unjustified, and, as a result, it provides information that has uncertain explanatory power. Moreover, the analysis suggests that the problem is intractable, having been uniformly rejected as a course of action, and thus not worthy of reconsideration.

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[9] *See, e.g.*, Rose-Ackerman, *Progressive Law and Economics — And the New Administrative Law*, 98 YALE L.J. 341 (1988) [hereinafter Rose-Ackerman].

[10] *See infra* sec. III.

III. Perceptual Analysis: Internal Influences on the Decisional Process

A. Methods and Objectives

While the analysis of external influences on the decisional process provides insights into the Symposium Problem, a broader conception of legal analysis generates valuable additional information about the Problem and suggests different responses to it. The objective of perceptual analysis is to reveal internal influences on the decisional process which derive from the legal concepts and associated patterns of thought utilized in that process.[11] Whereas normative analysis asks how conduct is affected by awareness of the existence of legal norms related to such conduct, perceptual analysis asks how such norms structure the decisional process itself.[12]

Perceptual analysis centers on the role of legal norms in identifying problems facing a legal community—here, the international community—and focusing the attention of decision-makers on such problems. These functions are particularly important in the international context because customary international law is made through individual state responses to perceived legal issues. The evolution of legal principles depends to a significant degree, therefore, on how states perceive legal issues. In addition, international law's enforcement mechanisms are decentralized and relatively weak, consisting primarily of individual and cooperative state actions. As a result, the perceptual function of legal norms conditions state response patterns and in doing so often determines the effectiveness of such norms in achieving community goals.

B. Recognizing and Responding to the Symposium Problem

Whether a state recognizes the harms associated with export exemptions from antitrust laws will depend on the perspectives employed and the information generated in the decisional process, as well as on the values or standards applied to that information. Assuming a state recognizes the problem, its responses to it will depend on the *perceived* interests of the decision-makers and their decisional units.

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[11] There may, of course, be other internal effects on the decisional process such as, for example, the structures of power in which the decisional process is embedded. *See generally* Rose-Ackerman, *supra* note 9.

[12] Issues such as those here discussed under the rubric of perceptual analysis are occasionally dealt with in legal literature, but they are seldom analyzed systematically and, as a result, the full implications of the analysis frequently go unrecognized.

1. Recognition

Exempting export conduct from the application of national antitrust laws is perceived as a problem only when viewed from a transnational rather than a single-state perspective. This is because the harms created by export exemptions are international. Export exemptions have effects somewhere in the international economy, but their economic impact on the exempting state occurs only indirectly as a result of their adverse effects on other countries.[13]

The time frame of the perspective is also critical. A short-term perspective is less likely than a long-term perspective to identify the indirect harms to the exempting state that result from the impact of export exemptions on the international community. The longer the time frame of the perspective, the better able a state is to appreciate that the harms caused to other states may eventuually affect its own interests. For example, the harm to developing countries from discouraging their indigenous economic development may require years or even decades to manifest itself in harm to developed countries.

In addition, the Symposium Problem is not likely to be recognized unless information relating to the potential harms of the export exemption is well developed, readily accessible, and consistently adduced. Such information pertains not only to the general causal relationships between particular conduct and particular harms, but also to the likely operation of such relationships in specific factual circumstances. Thus, another important factor in recognizing the Symposium Problem is the form and amount of information available to relevant decision-makers.

Finally, recognition of the Symposium Problem requires that values and standards which identify the harms as significant for the exempting state be applied to the available information. Even where information is presented concerning the likely consequences of the exemption, the perceived importance of these consequences for the exempting state will depend on the standards or values applied to the information. Decision-makers may, for example, take the position that they will disregard potential harms to the international community and other states, except where such harms have immediate and obvious consequences for the exempting state.

2. Responses

Assuming that states recognize the Symposium Problem, their re-

[13] The resulting harms to other states may, of course, have important political repercussions for the exempting state as well.

sponses to it will vary according their individual perceptions of the relationship between the problem and their own policy objectives.[14] Given the incentives for exempting export conduct,[15] decision-makers may conclude that the political or other benefits of the exemption to them outweigh any benefits of eliminating the exemption.

At this point, assumptions concerning the likely responses of other states and the potential for cooperative action become relevant. Since the exemption of export conduct promises immediate benefits to the exempting state, individual states are not likely to forego such benefits unless other states agree to do so as well. Unilateral conduct would provide potentially significant advantages to firms from states that provide this exemption. Thus, individual state responses to the problem are likely only in the context of international cooperation, and this means, in turn, that responses will depend on the degree to which the conditions of cooperation are met. Among the more important conditions of cooperation are low levels of conflict among states concerning the general area of regulation, perception of a common objective, cooperative rather than adversarial interests, and confidence in the fairness and effectiveness of the legal mechanisms that would have to be used to achieve the cooperative objectives.

C. Obstacles to Recognizing and Responding to the Symposium Problem

Analysis of the law's perceptual impact on the Symposium Problem reveals that the international jurisdictional framework and the issues, controversies, and problems associated with it have tended to obscure the problem and prevent response to it.

1. The Impact of International Jurisdictional Concepts

The first obstacle to recognition of the Symposium Problem is international jurisdictional law itself. Thought relating to international antitrust issues is shaped by the international jurisdictional paradigm—i.e., the structure of legal concepts applied to issues of international prescriptive jurisdiction.[16] This paradigm tends to prevent recognition of the

[14] The likelihood of response by decision-makers to personal rather than public incentives will not be treated here.

[15] *See supra* text accompanying note 7.

[16] The concern here is with prescriptive jurisdiction, *i.e.*, the principles used to determine whether a state is authorized under international law to prescribe norms for particular categories of conduct. For discussion of this and other forms of jurisdiction under international law, see 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 401 (1986) [hereinafter RESTATEMENT (THIRD)].

Symposium Problem[17] because it ignores the perspectives, values, and information on which such recognition depends. At the same time, it emphasizes competing values, perspectives, and interests.

The current framework of international jurisdiction authorizes a state to prescribe norms for conduct where it has a "basis of jurisdiction," *i.e.*, where the state has a particular, legally defined relationship to the conduct. The requisite jurisdictional base exists, for example, where the conduct occurs within the state's territory or is performed by a national of the state.[18] This conceptually simple framework considers the connection between the prescribing state and the conduct to be the sole legally relevant issue. Therefore, the only relevant perspective is that of the individual prescribing state, and the perspectives of the international community and particular groups of states are ignored. As a result, these jurisdictional concepts direct the attention of the international community away from the Symposium Problem.

Similarly, information concerning the effect of export exemptions on other states, on the international community and on the attainment of cooperative goals is irrelevant under the current international jurisdictional framework. This eliminates transnational concerns from legal analysis and often from the consciousness of those involved with international antitrust issues.

2. The Controversy over the Effects Principle

The controversy over the effects principle, which has dominated international antitrust thinking since the *Alcoa* decision in 1945,[19] has further exacerbated the perceptual distortion caused by the current international jurisdictional paradigm. The controversy has focused attention on single-state defensive interests, and it has created conflicts over jurisdiction which have impeded transnational perspectives and cooperative action relating to international antitrust issues.

For more than four decades the status of the effects principle under international law has been a dominant theme of international jurisdiction.[20] Specifically, the issue is whether, under international law, a state may prescribe norms relating to foreign conduct merely because such

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17 For a leading discussion of the role of perception in similar situations, see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

18 *See, e.g.*, 1 RESTATEMENT (THIRD), *supra* note 16, at 402; Castel, *The Extraterritorial Effects of Antitrust Laws*, 179 RECUEIL DES COURS 21, 33 (1983).

19 United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

20 For discussion of the controversy and further references, see Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 198, 202 (1985) [hereinafter Gerber].

conduct has certain effects within the territory of that state. Proponents argue that the effects principle is necessary in the modern world in order to allow states to achieve legitimate domestic regulatory goals. Without it, the argument goes, important forms of domestic regulation, primarily antitrust laws, would be undermined because conduct having domestic effects often could merely be transferred onto foreign territory. Opponents argue that international customary law does not support such an extension of jurisdictional prerogatives, and that application of the effects principle may violate the territorial sovereignty of nations in which the offending conduct occurs.

The controversy over the effects principle was particularly intense because of its context. Originally, the effects principle was associated primarily with the application of U.S. antitrust law, until recently the most highly developed and seriously enforced antitrust law in the world.[21] Given the dominant political and economic power of the United States during much of the post-war period, many saw the effects principle as a means for the United States to impose its economic philosophy on its less-powerful political and economic allies.[22] As a result, states attached particular importance to protecting themselves against manifestations of U.S. power.

States increasingly have accepted and applied the effects principle, and the scope and virulence of the controversy have diminished. Nevertheless, its long dominance of the international antitrust arena contributed to obscuring the Symposium Problem. The intense and often acrimonious conflicts it generated between states virtually foreclosed cooperative perspectives on competition law issues. Moreover, the effects principle produced an adversarial relationship between those states employing it and those seeking protection from it, with the latter induced to place primary emphasis on self-protection.[23]

3. The Inadequacy of the Jurisdictional Paradigm

Introduction of the effects principle also impaired recognition of the Symposium Problem by impairing the functional capacity of international jurisdictional law. Prior to the introduction of the effects doctrine,

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[21] U.S. antitrust law has been particularly feared because of its reliance on private litigation as a means of enforcement. Private enforcement tends to immunize the enforcement of the antitrust laws from political influence, thus reducing the ability of foreign governments to protect important interests.

[22] *See, e.g.*, Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 354-56 (1983).

[23] States that use the effects principle in applying certain laws sometimes reject its application to them in other contexts.

the international jurisdictional framework provided a generally effective means of minimizing jurisdictional conflicts among states. Jurisdictional law was based on the principle of territoriality, and there were no major exceptions to this principle.[24] The territoriality principle is an effective conflict-resolution mechanism because it authorizes regulation only by the state in whose territory the conduct occurs, thus eliminating the possibility of conflicting jurisdictional claims in most cases.

As I have described in more detail elsewhere,[25] the effects principle has eroded the effectiveness of international jurisdictional law because it is fundamentally inconsistent with the law's current conceptual framework. Particularly when used in economic regulation, the effects principle exponentially increases the likelihood of jurisdictional conflicts, because conduct in one state can and regularly does have effects in many other states. Since the jurisdictional framework looks solely to the relationship between the prescribing state and the conduct, however, it provides no protections for the sovereignty concerns or interests of the states that might be affected by the prescribing state's exercise of jurisdiction. As a result, international jurisdictional law does not currently provide an effective means for minimizing jurisdictional conflicts.

The ineffectiveness of the jurisdictional framework hampers the development of cooperative perspectives relating to international antitrust issues by increasing the likelihood of conflicts among states. It also reduces confidence in law as a mechanism for mediating competing interests in this area, thus discouraging the search for transnational solutions which would necessarily depend on the effectiveness of that mechanism.

4. Domestic Legal Responses

In response to the effects principle controversy and the resulting impaired effectiveness of international jurisdictional law, states increasingly have created domestic legal doctrines to compensate for deficiencies in international law. These doctrines, in turn, have become independent obstacles to recognition of and response to the Symposium Problem.

States that perceive threats to their interests from broad jurisdictional assertions increasingly have introduced measures to protect those interests. Most common among these defensive measures are blocking statutes, which generally prohibit compliance with foreign proceedings where such compliance may affect the state's sovereignty or other inter-

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24 The only significant exception was the nationality principle, which allows states to prescribe conduct norms for their nationals, regardless of the locus of the conduct. The limited opportunities for use of this principle have prevented it, however, from having a substantial disruptive effect.

25 *See* Gerber, *supra* note 20, at 198-202.

ests.[26] Directed primarily at U.S. antitrust jurisdiction, such blocking statutes themselves generate additional conflicts among states because they encourage one state to intentionally interfere with the legal proceedings of another state. Moreover, these statutes intensify adversarial relationships between states applying the effects doctrine and those resisting its application.

The ineffectiveness of international jurisdictional law also has led some states to develop domestic legal doctrines to limit their own jurisdictional assertions. For example, the United States developed the doctrines of comity and foreign sovereign compulsion, which restrict U.S. courts in their application of U.S. law where certain interests of foreign countries might be harmed. The comity doctrine is a broad mandate to U.S. courts to consider limiting U.S. jurisdictional assertions where such assertions may have negative effects on the interests of foreign states that outweigh their benefits to the United States.[27] The foreign sovereign compulsion doctrine requires U.S. courts not to prohibit actions on foreign territory that are compelled by that state.[28]

These doctrines tend to be viewed in the United States as effective means of assuring that the legitimate concerns of states affected by U.S. jurisdictional assertions are addressed, but they do not mollify foreign fears and resistance to such assertions.[29] Thus, they do little to reduce conflicts in the area or to generate confidence in the likelihood of effective cooperation. Moreover, such doctrines represent restrictions on the application of U.S. antitrust laws to export conduct, thus exacerbating the Symposium Problem.

5. Antitrust Laws: The Lack of Consensus

The characteristics of antitrust law systems, as well as their distribution among states, increase the obstacles to the recognition of the Symposium Problem described above. Antitrust laws are generally significant only in the more economically developed states.[30] Moreover, there are substantial differences among existing laws, including their specific goals,

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26 *See generally* Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L & POL. 1061 (1984).

27 *See, e.g.*, Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500 (1981).

28 *See generally* Note, *Foreign Sovereign Compulsion in American Antitrust Law*, 33 STAN. L. REV. 131 (1980).

29 These doctrines are intended to take into consideration factors that are more appropriately considered within the framework of international law because they involve a weighing of state interests protected under international law.

30 Such laws are sometimes found in developing countries, but they tend not to be seriously enforced in such countries.

their economic and jurisprudential assumptions, and, in particular, the extent, nature, and effectiveness of the procedural arrangements through which they are enforced.

This lack of consensus concerning antitrust laws inhibits the development of shared perceptions of the potential harms resulting from export conduct exemptions and undermines confidence in the likelihood of achieving generally acceptable cooperative solutions. Moreover, the uneven distribution of antitrust laws creates an incentive for those states having antitrust laws to exempt export conduct from application of their laws in order to secure advantages for domestic companies.[31] If most states had antitrust laws that were seriously enforced, this incentive would decrease correspondingly.

Finally, the two factors together create particularly intense conflicts among states. Those states with no antitrust laws or weakly enforced antitrust laws fear that states with developed antitrust regimes, such as the United States, are permitted to impose their political wills and economic philosophies on the former group of states.

6. Perceptual Obstacles and their Cumulative Impact

The combined impact of these obstacles has been to obscure the Symposium Problem and to prevent response to it. The international jurisdictional paradigm and its concomitants create conflicts, controversies, and fears which preclude the development of the transnational and cooperative perspectives that are essential to recognition of the problem. The information generated by applicaton of the legal concepts tends to neglect the benefits of controlling anti-competitive export conduct and undermine confidence that effective legal measures could be implemented to deal with the problem. Finally, the structural weakness of the jurisdictional framework impedes development of cooperative attitudes and responses in the area.

D. Perceptual Analysis and the Symposium Problem: Some Implications

Analysis of the law's perceptual role, *i.e.*, its role in shaping the way factual situations are perceived and understood, adds important insights into the Symposium Problem which are not generated by either normative or policy analysis. Moreover, this form of analysis has significant implications for both the interpretation of the problem and the response to it.

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[31] *See supra* text accompanying note 6.

1. Reinterpreting the Symposium Problem

One important function of perceptual analysis is to liberate thinking relating to the Symposium Problem. By providing insights into potentially powerful and frequently unnoticed influences on thought in the area, this type of analysis calls for fresh examination of the Symposium Problem in light of these influences. Conventional normative and policy analysis suggests that states have chosen not to regulate export conduct on the basis of full and objective assessment of the issues; perceptual analysis suggests that the concepts and patterns of thought in the area have tended to prevent full and objective consideration of the potentially relevant issues. This insight frees analysts and decision-makers to view such issues anew.

2. Reevaluating the Response

Reevaluation of the problem dictates that states reconsider their failure to regulate export conduct. Conventional analysis suggests that absent changed circumstances, states have no cause to reevaluate such decisions because the previous decisions are assumed to have been well founded. Perceptual analysis urges such reconsideration because it shows that those decisions are likely to have been based on distorted perceptions of the situations and interests involved. This fundamental insight should cause states to be more receptive to change.

3. Modifying the Jurisdictional Framework

Finally, the perceptual impact of the existing legal framework on the Symposium Problem provides an example of why that framework should be modified. The central function of international jurisdictional law should be to prevent conflicts among states by accommodating and reconciling their legitimate interests.[32] Conceptual and factual changes during recent decades have rendered the current jurisdictional framework incapable of adequately performing this function. Under current conditions, that framework generates rather than resolves conflicts, and it protects one set of state interests, while ignoring legitimate opposing interests.

IV. CONCLUSION

Adequate assessment of the Symposium Problem thus requires con-

[32] For discussion of this accommodation process and specific suggestions for its operation in a related area, see Gerber, *International Discovery After Aerospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521 (1988).

ventional normative and policy analysis as well as perceptual analysis. These two forms of analysis yield different insights into the problem, each illuminating different influences on the decisional process. Standing alone, each of these forms of analysis provides an incomplete picture of the factors that influence decision-making and the issues that should be considered in deciding whether to regulate export conduct. Without both perspectives on the current situation, there may be little hope for solutions to the Symposium Problem.