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# The US-European Conflict over the Internationalization of Antitrust Law

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# **The U.S. – European Conflict Over the Globalization of Antitrust Law:**

## **A Legal Experience Perspective**

David J. Gerber\*

### **I. INTRODUCTION**

“Do we take the next step?” This question is at the center of the conflict over the “globalization” of antitrust law (or, more generically, competition law).<sup>1</sup> Conceptually, the step is a big one. Legally and politically, it may be even bigger. It would move from a normative regime in which states (including, for these purposes, the European Union) rely exclusively on their own domestic legal systems to combat restraints on competition to one in which a framework of multilateral commitments conditions their responses. It would create a new and specifically transnational antitrust regime for the global economy, and one reason why the issue is drawing so much attention is that some see it as prefiguring the process of normative globalization generally.

Another reason for this attention is that these issues are the site for a conflict between the European Union and the United States. The European Union has proposed that the World Trade Organization (WTO) consider developing an international competition law framework, and the nations of the WTO have set this evaluative process in motion. European leaders and commentators have tended to favor such a framework, while voices from the United States, including both public officials and private commentators, have generally rejected this project.

The outcome of this conflict will shape the globalization of antitrust law, particularly in its early and most formative stages, and thus it de-

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1. The term “antitrust” refers to general legal regimes whose specific role is to combat restraints on competition. It represents United States usage, but it has gained currency in other countries as well. “Competition law” is a more generic analogue which is used more commonly outside the United States.

serves scrutiny. Much has been written about these issues recently, and some of it has been valuable and insightful.<sup>2</sup> In general, however, this burgeoning body of literature has failed to examine the factors that shape the perspectives and positions of the parties and thus the dynamics of the conflict itself. This is hardly surprising, given that the problem is new, but its importance lends urgency to developing new tools for analyzing the conflict and to refining the application of other tools to it.

This essay will look at the conflict from a perspective that has seldom been utilized in any systematic way in this context. I identify a set of experiential factors that influence European and U.S. perspectives and positions in the conflict and thus structure the conflict itself.<sup>3</sup> Many factors influence decisions in the area. Domestic politics, international politics (assuming the two can be separated), and economic incentives are among those that tend to receive attention, and they are often important. Here, however, I look at the conflict through a different lens — a lens that focuses on the role of legal experience in shaping the conflict.

Legal experience influences conduct in a variety of ways, but we can identify three artifacts of experience that are particularly relevant for our purposes here. One is its lens-shaping or perception-shaping function. Legal cultures shape the perceptions of those who participate in them — i.e., the ways in which they interpret current situations and imagine future ones. For example, they shape conceptions of both the roles and operations of legal systems. Second, legal experience shapes the preferences and values that are used in assessing what is perceived. Finally, it shapes the expectations that are created with respect to the operations of legal systems.

My hypothesis is that these three factors combine to shape the current conflict over the internationalization of competition law. In this conflict, two sets of observers are looking at the same set of facts, but “seeing” very different images and evaluating what they see very differently.

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2. Among U.S. writers, the works of Eleanor Fox and Diane Wood have been particularly valuable and influential. See, e.g., Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997); Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1 (1995); Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289 (1995). There are also valuable recent works from leading European scholars. See, e.g., Ernst-Ulrich Petersmann, *International Competition Rules for Governments and for Private Business*, J. WORLD TRADE L., June 1996, at 5; JÜRGEN BASEDOW, *WELTKARTELLRECHT* (Tübingen, 1998).

3. For fuller treatment of European experience, see DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998) (giving extensive treatment of the development of European competition law ideas and practices).

Moreover, their respective sets of expectations concerning the roles and operations of legal systems, in general, and competition law systems, in particular, are major factors in shaping decisional constraints and defining the "rationality" of specific decisions. I intend this essay to be part of a larger project that will explore the relationship between these factors, on the one hand, and economic and political factors, on the other, but I leave that as yet largely uncharted project for another day.

I look first at the problems to which the conflict is related,<sup>4</sup> then briefly describe the conflict itself,<sup>5</sup> and thereafter apply a legal experience perspective to develop insights into it.<sup>6</sup> I emphasize that in this exploratory essay I can only brush the surface of the issues involved. My aim is to experiment with the use of these perspectives.

## II. THE DUAL PROBLEMATIC OF INTERNATIONAL COMPETITION LAW

The so-called "globalization" of antitrust law is a response to the globalization of economic activity. In brief, as competition becomes increasingly transnational, so do restraints on competition. Where a group of firms dominates a market that extends beyond national boundaries, for example, the collusive conduct of the group — for example, to raise prices — has impacts throughout that market. It affects the interests of those who purchase directly or indirectly on that market and, as a consequence, the states and communities of which they are a part. Such restraints transfer wealth from consumers to producers and owners, and this in itself represents economic and often social harm. In the international context, however, there is an additional dimension: they frequently transfer wealth from consumers in one country or region to owners and producers in another. These are the fundamental economic and politico-economic problems to which the globalization of antitrust law relates. They raise issues of what steps, if any, states and/or the international community can and should take to combat such restraints. I use the term "deterrence problem" to refer to this set of issues.

The current legal regime imposes significant limits on the ways in which individual states and groups of cooperating states can respond to this problem. Under current international law principles, domestic antitrust laws are frequently unable to treat international restraints effectively. For example, administrators and courts in a country where conduct causes harm, or even where conduct has occurred frequently, lack authority to impose sanctions on those who have engaged in the conduct. Even if they achieve such jurisdictional competence, they frequently cannot acquire the

4. See *infra* Part II.

5. See *infra* Part IV.

6. See *infra* Part V.

evidence that would be necessary to take action against those responsible.

There is, however, a second dimension of the problem, and it inheres in responses to the first. To the extent that national decisionmakers increase their efforts to respond to the harms associated with restraints on competition, they create an increasingly dense network of norms and institutional forces that in themselves create compliance costs for the firms subject to them and, indirectly, for those who purchase from such firms or compete with them. Moreover, national competition law systems differ greatly in the degree of restrictiveness of their norms and, especially, in the strictness with which they are applied and enforced. This, in turn, causes uncertainty, creates incentives for firms to seek "havens" in which competition law systems are weaker, and therefore distorts the competitive process. Responses to the problem are, in other words, part of the problem. I use the term "system-conflict problem" to refer to this second-order problem.

So not only are current legal arrangements of limited utility in reducing restraints on competition, but they also tend to create additional costs and uncertainties that burden the firms involved. These two interrelated problems are likely to be endemic to the globalization of normative regimes.

### III. CURRENT STRATEGIES: CONVERGENCE AND COOPERATION

Given widespread agreement that unilateral responses to the problem of transnational competition are unlikely to be adequate in combatting restraints on competition, the question is how the international community should respond, if at all, to these problems. So far, two basic responses have emerged.

One is a strategy of convergence. The basic idea is that the problem will gradually go away as national competition laws "converge" — i.e., become increasingly similar and, presumably, increasingly effective. The focus of effort in this area has been to introduce effective competition law regimes in areas of the world that have not had such regimes, most notably in Eastern Europe and parts of Asia (e.g., Korea). During the 1990s, the Organization for Economic Co-operation and Development (OECD), the World Trade Organization (WTO), the United States, and the European Union (EU) have all organized campaigns to spread competition law ideas.

A second strategy that is currently being implemented is that of bilateral cooperation. Here the idea is that antitrust officials cooperate with each other in enforcing existing domestic laws through informal contacts and bilateral agreements. A few such agreements have been entered into in recent years (e.g., between the United States and the European Union). Typically, these agreements create an obligation on the part of each sig-

natory state to provide certain types of information requested by the other signatory state that might be used as evidence in legal proceedings to enforce the requesting country's antitrust laws. An extension of this idea is the concept of "positive comity," which obligates a signatory state, state A, to consider a request by another signatory state, state B, that state A take action under its own laws to prevent harms to the interests of state B resulting from anticompetitive conduct. This type of provision remains rare.

There is also an informal component of cooperation, and here significant progress has been made in recent years. Officials in the United States, for example, now often exchange information with their counterparts in Europe and Canada. They frequently discuss issues such as whether enforcement efforts are contemplated, the likelihood of success of such suits, and informational deficits. These practices tend to reduce costs, conflicts and burdens on firms, and to improve enforcement generally.

Note that bilateral cooperation is often associated rather vaguely with convergence. It is frequently assumed that cooperation will somehow lead toward convergence. The claim is that as public and private actors cooperate, they are likely to perceive that they should have the same kinds of laws and procedures.

#### IV. THE CONTEXTS OF CONFLICTS

The conflict over the globalization of antitrust law centers on whether the strategies of convergence and cooperation are likely to be adequate responses to the current problems and harms or some type of international legal framework should be created for use in combatting restraints of competition. During the last few years, Europeans have increasingly argued for the development of an international framework for competition law, while U.S. officials and commentators have generally rejected the idea. I do not seek here to recap all of the arguments, much less to analyze them, but merely to indicate their basic contours.

##### *A. European Initiatives*

European initiatives began to take shape in the mid-1990s. Two have been prominent, but prominent for different reasons. The so-called "Munich Draft Code" (also known as the Draft International Antitrust Code (DIAC))<sup>7</sup> has been prominent because it has provided a conceptually well-developed and audacious effort to define a workable international competition law framework. It has also galvanized U.S. resistance to the notion

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7. Draft International Antitrust Code, *reprinted in* PUBLIC POLICY AND GLOBAL TECHNOLOGY INTEGRATION 285 app. 2 (Frederick M. Abbott & David J. Gerber eds., 1997).

of a framework. The European Union initiative has been prominent because it has given the issue high visibility and spearheaded efforts in the WTO to consider the issue.

The importance of the DIAC can easily be overlooked, because it has not garnered widespread or enthusiastic support. Even in Europe, there has been little support for its adoption. It has, however, been a key part of the dialogue. This "code" was published in 1995 as part of a report by a private group of scholars, whose drafting meetings were typically held in or near Munich, Germany.<sup>8</sup> This group included U.S. and Japanese scholars, but the membership was predominantly European, with particularly strong representation from German scholars. The group's aim was to develop a code that would at least provide a basis for international discussion and perhaps for international agreement.<sup>9</sup>

The DIAC's substantive provisions contain norms proscribing what the authors consider to be "hard-core" restraints that are generally agreed to warrant prohibition. Most prominent is condemnation of horizontal agreements to raise prices and reduce output. The authors acknowledge that vertical restraints and mergers are too controversial for inclusion at this stage.<sup>10</sup>

These principles are not intended to be applied by an international institution; instead, the proposal is for an international agreement that would obligate states to apply them through their own institutions. The DIAC would also provide a mandatory mechanism for resolving disputes among signatories over compliance with these obligations. This mechanism would include an office that would monitor compliance with the treaty and encourage states to fulfil their obligations under the agreement. In certain egregious cases of failure of a state to implement its obligations, this office would be authorized to apply to the appropriate national institutions of the state involved (typically, its courts) to request that it fulfill its obligations under the treaty.

At about the time the Munich Draft Code was presented to the WTO for consideration, the European Union began to develop its own position.

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8. See Wolfgang Fikentscher, *The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration*, in PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 211-20 (Frederick M. Abbott & David J. Gerber eds., 1997) (containing further discussion and references regarding the Draft International Antitrust Code) [hereinafter *DIAC in the Context of International Technological Integration*].

9. See *DIAC in the Context of International Technological Integration*, *supra* note 8, at 296-98. This report included a minority position in which Eleanor Fox of the United States, among others, generally supported the substantive principles, but argued that the procedural mechanism was too interventionist. See *id.*

10. See *id.* at 297.



Karel van Miert, the European Commissioner for antitrust, took the lead in appointing a group of so-called "wisemen" to draft recommendations on the subject, and their report, "Report of the Group of Experts," (Report) was issued in 1995.<sup>11</sup> This "wisemen" report basically argues that in order to foster competition in the "new," more open international trading order, competition law must be aggressively pursued. According to van Miert, "As regards competition policy, how can we imagine that this new trade order could produce its full, positive effects when, throughout the world, companies are subject to different rules on competition and, of even more concern, certain national authorities (or regional authorities in the case of the EU) rigorously apply their antitrust legislation while others have a more lax approach?"<sup>12</sup> The report argues that by themselves convergence and cooperation strategies are unlikely to produce the desired results — at least any time soon — and, therefore, that the international community cannot afford to rely on them exclusively.<sup>13</sup>

The authors of the report believe that a comprehensive and systematic framework for competition law is needed. They call, therefore, for consideration of an international agreement that would obligate states to apply the principles of such a framework, presumably under the auspices of the WTO. They do not specify the contents of such a framework, but the general idea is that it would proscribe the same types of hard-core anticompetitive conduct referred to in the DIAC.<sup>14</sup>

In contrast to the DIAC, however, the report envisions a minimalist procedure. It calls for a mechanism which would resolve disputes among signatory states over whether one or more states are violating their obligations under the agreement. The only issue would be whether such a state failed to conform to its obligations and enforce adequately the competition law principles of the agreement.<sup>15</sup>

Many European leaders have espoused the contents of the Report, and at its Singapore meeting in 1996 the WTO called for establishment of a working group to study the issue.<sup>16</sup> The working group issued its first

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11. See EUROPEAN COMMISSION, DIRECTORATE-GENERAL IV, COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING INTERNATIONAL COOPERATION AND RULES: REPORT OF THE GROUP OF EXPERTS (3 July 1995) [hereinafter REPORT OF THE GROUP OF EXPERTS].

12. Karel van Miert, *Introduction to EUROPEAN COMMISSION, DIRECTORATE-GENERAL IV, COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING INTERNATIONAL COOPERATION AND RULES: REPORT OF THE GROUP OF EXPERTS* 3-5 (1995).

13. See REPORT OF THE GROUP OF EXPERTS, *supra* note 11, at 18-20.

14. See *id.* at 18-19.

15. See *id.* at 20-21.

16. They agreed to establish a working group to study issues "relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework."



report in December 1998, basically recounting the views on the subject presented to it by state representatives and recommending further study.<sup>17</sup>

### *B. U.S. Rejection of the European Proposals*

Representatives of the United States have generally opposed these European initiatives, as have most U.S. commentators. As Eleanor Fox has written, "[i]t is not a surprise that many Americans prefer things the way they are. Americans are not steeped in the postwar Western European tradition of community building. They have the tools of unilateralism, they fear the compromises of bargaining, and they abjure the 'relinquishment' of sovereignty."<sup>18</sup>

Because there is no single, well-defined proposal requiring a formal government position, it is sometimes difficult to identify with precision what U.S. commentators reject. Some criticisms appear to be directed primarily at a "strong" form of internationalization such as that in the DIAC, although the actual subject of the controversy is the notion of a substantive framework supported by international dispute-resolution procedures — as included in the Report.<sup>19</sup>

There are also several arguments that appear to represent "strawmen." For example, it is claimed that an international framework would "water down" antitrust. Yet neither of the proposals on the table call for an international regime that would replace or weaken domestic antitrust regimes. They are designed to strengthen domestic systems. Some commentators imply that international agreement on minimum standards would reduce pressure on states to create anything better than the minimum standards and thus ultimately impair the quest for more effective competition laws. Maybe, but this seems unlikely in most situations.

The main argument, however, is that international agreement on a framework for competition law is simply not necessary. Commentators from the United States typically express much confidence that the strategies of convergence and cooperation are enough to solve the problems.

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*Singapore Ministerial Declaration*, WTO Conf. Doc. WT/MIN (96)/DEC., para. 20 (Dec. 13, 1996).

17. See World Trade Organization, *Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, Dec. 8, 1998 WT/WGTCP/2 (visited Sept. 27, 1999) <<http://www.wto.org/wto/online/ddf.htm>>.

18. Fox, *Toward World Antitrust and Market Access*, *supra* note 2, at 12.

19. For example, the argument is often heard that the framework idea would create a new level of bureaucracy and that the last thing we need is another layer of bureaucracy. This is evocative language, but the framework proposals currently being considered do not envision the creation of bureaucracy.

## V. POINTS OF CONFLICT

This brief overview reveals that the conflict is primarily about the *perceived need* for an international framework for competition law. It centers on perceptions, preferences and expectations relating to the three strategies involved: convergence, cooperation, and an international framework.

## A. Confidence in Convergence

"Convergence" is a central concept in the conflict, but there is little consistency in the way the term is used, and thus much confusion about what it involves. Therefore, in order to give the term analytical utility, I specify how I am using it here. At its most basic, "convergence" refers to movement from a state of difference to a state of similarity. For present purposes that means an increase in characteristics shared by competition law regimes and a reduction in non-shared characteristics.<sup>20</sup> Comparison must also account, however, for the relative prominence and importance of the features being compared. If, for example, a fundamental characteristic such as the role of administrative decision-making in the respective systems diverges, while many presumably less central characteristics (such as, the filing period for mergers) move closer together, we would presumably not refer to this as "convergence." I will here use the term, therefore, to refer to an increase in shared characteristics and a reduction in non-shared characteristics, adjusted for the relative importance of those characteristics in the general operations of the systems.

Note that I use "convergence" to refer only to independent choices by states — i.e., those that are not the subject of international agreement. Current usage often fails to distinguish between two very different ideas: in one, decisions are the subjects of international obligations; in the other, they are not. This confusion creates analytical chaos, because a single term is being applied to two fundamentally different notions.<sup>21</sup>

## 1. Identifying the Convergence Mechanism

This ambiguity regarding the term's referents plays a role in the conflict, because it tends to obscure the need for careful thought about how convergence is likely to work. What mechanisms will generate it and under what conditions? Claims about convergence presuppose theories — or at least assumptions — about causation, but in the current controversy, little attention has been paid to identifying such causal mechanisms. Claims

20. "Convergence" here includes the idea that states that do not currently have competition law regimes will introduce them and thereby more closely resemble states that already have them.

21. I avoid the term "harmonization" in this context because its referents are not only vague, but often contradictory.

appear to be based on vague and perhaps little recognized assumptions of how the process is likely to develop.

Nevertheless, we can identify three assumptions about the causes of convergence. The first is socialization. Here the idea is that through frequent contact and discussion, individual decision-makers will gradually come to see problems and solutions in similar ways and thus "naturally" move their systems closer to each other.<sup>22</sup> A second, and related, mechanism centers on the hortatory efforts of international organizations as well as those of the United States and the EU. These efforts, so the argument goes, will induce national decision-makers to move their systems closer together. A third idea is that the "invisible hand" of rationality will lead to convergence. The assumption is that decision-makers will tend to recognize the attractiveness of a defined set of characteristics and move toward them.

For U.S. commentators, each of these assumptions of causality tends to generate confidence in the effectiveness and desirability of convergence. The idea that "socialization" will generate convergence tends to inspire confidence and support because the United States is the "chief socializer," in other words, U.S. participants are at the center of the community of international competition law officials. For example, they host many of the most important meetings and publish many of the most important journals in the area. This creates strong incentives for them to have confidence as well as to promote confidence in the convergence process.

Similarly, U.S. experience in promoting competition law development throughout the world during the last half century has instilled confidence in many U.S. participants that these hortatory mechanisms are likely to lead to further convergence. Whether operating directly through United States institutions or indirectly through organizations such as the OECD, many U.S. participants have long "taught" foreign officials about competition law and urged foreign states to adopt competition laws. They often attribute the growth of interest in and commitment to competition law around the world during recent years to these efforts, and this reinforces their belief that hortatory efforts will also be effective in the future.

Perhaps the most prominent theme in U.S. references to this issue is,

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22. Joel Klein, the current U.S. Assistant Attorney General for the Department of Justice, Antitrust Division, frequently emphasizes his belief that a "culture of competition" will emerge out of discussions of competition law issues among competition law authorities and growing awareness of the benefits of a competition-based system and that this culture of competition will lead to greater convergence among competition law systems. See, e.g., Joel Klein, *Anticipating the Millenium: International Antitrust Enforcement at the End of the Twentieth Century*, Address Before the Fordham Corporate Law Institute, Twenty-Fourth Conference on International Law and Policy, (Oct. 16, 1997) (visited Oct. 20, 1999) <<http://www.usdoj.gov/atr/public/speeches/1233.htm>>.

however, the assumption that the simple mechanism of rationality will lead decision-makers everywhere to reach similar competition law decisions. Many U.S. commentators believe that there is an identifiable and objectively verifiable "better way" and that if foreign decision-makers are allowed to make choices for themselves, they will sooner or later choose that better way. Not surprisingly, this better way tends to be similar to or identical with U.S. antitrust law. This assumption is consistent with several aspects of U.S. legal experience. For example, during the last two decades, U.S. law and economics scholarship has fundamentally changed many of the intellectual underpinnings of U.S. antitrust law. This new paradigm has quickly come to be seen by many as the "correct" way of thinking about antitrust law, and its rapid progress is touted as evidence of its manifest "correctness".

Europeans tend to be less confident that convergence will solve the problems by itself. They tend to assume that national decision-makers will not move necessarily move toward convergence unless there is some agreement that requires decisional convergence. This is consistent with European experience. In postwar Europe, convergence occurred only very slowly and uncertainly, despite strong hortatory efforts by the United States and some international organizations.<sup>23</sup> Only when international obligations created an explicit alignment of the interests of the decision-makers did convergence achieve notable successes.

## 2. Imagining Points of Convergence

Another factor that tends to influence confidence in the convergence strategy involves perceptions of that strategy. Implicit in the notion of convergence is the idea that there is some identifiable state of competition law toward which the process is moving — however inchoate and unarticulated it might be. Put another way, the concept of convergence presupposes imagining a point toward which the process tends. It is far easier and more attractive to have confidence in the process of convergence if one can assume that there is such a point.

For U.S. participants, points of convergence are easily imagined: a world of competition law systems resembling the U.S. system. These participants typically know only their own system in any detail. Moreover, that system has been seen for decades as the most influential competition law system in the world. The U.S. antitrust community is large, sophisticated and well-financed, and its intellectual contents are well-honed. The image that the rest of the international community will gravitate toward this model is, therefore, compelling.

From a European perspective, this one-model imagery has considerably

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23. See generally GERBER, *supra* note 3, at 165-231, 392-416.

less force. Although images of a European "countermodel" are not sharply etched, European commentators are at least aware that European systems often operate very differently from U.S. antitrust law. They have often studied not only their own systems, but U.S. antitrust law as well, and thus they are aware that there are at least two models. As increasing numbers of non-European states look to Europe for guidance in developing their own competition laws, the idea that there is a second model toward which convergence might plausibly move is likely to gain force.

### 3. The Shape of the Convergence Process

Assumptions also diverge regarding the likely shape of the process itself. Supported by one-model assumptions, references to convergence from the United States appear to assume a continuous and linear pattern of development: countries will just get closer together.

Perhaps, but from a European perspective it is equally conceivable that convergence will display considerable discontinuity. There might be convergence on some issues, reaction and increasing differentiation on others. If one views the process as bi-modal, with two (or more) models of competition law competing for attention and support, one expects conflicts between the competing models on specific issues. In the early stages of convergence, where the primary issues are whether states have competition law and whether they engage in serious compliance-inducement efforts, such discontinuities may be uncommon. As attention shifts, however, to more specific issues of how such systems should operate, including the respective roles of the courts and of economic policy in competition law decisions, the likelihood of conflict and discontinuity increases correspondingly.

In addition, predicting the shape of the process, its rate of change, and its outcomes may become increasingly hazardous. To the extent, for example, that conflicts between the United States and European models develop in particular areas, there may be little basis for assuming that the U.S. model will prevail, particularly given that European competition law experience tends to be more similar to the situations faced by decision-makers in Eastern Europe, Latin America and Asia. Furthermore, their legal systems tend to be structurally closer to European legal systems than to the legal system of the United States.

Divergent assessments of convergence as a strategy for addressing international competition law issues thus appear to rest in no small measure on experiential predispositions and assumptions rather than on careful analysis or firmly based arguments. This creates strong incentives to unravel the conflicting positions and pronouncements regarding convergence.

Note that even if convergence is effective in the sense that more states introduce competition law statutes and states generally take competition law more seriously, this only responds to the compliance problem — by reducing obstacles to competition. It is likely, however, to exacerbate system conflicts. Recall that as states increase their normative intervention, the costs of such conflicts and the resulting burdens on firms increase. To the extent that conflicts generated by national responses are part of the problem, therefore, strengthening national regimes may make the problem worse rather than better.

### *B. Assessing Cooperation*

Assessing the potential effectiveness of cooperation is a second key element in the conflict. Cooperation among enforcement authorities has increased significantly in recent years, and few would question its value. Nevertheless, current cooperation levels are universally recognized as inadequate responses to the dual problematic of international antitrust law. Properly framed, therefore, the issue is whether cooperation — either by itself or in conjunction with convergence — is likely to become sufficiently effective to obviate the need to move to an international framework. This involves two inquiries: how much cooperation will be authorized and how effective is it likely to be. On both levels, differences in legal experience are likely to condition the development of cooperation as a strategy.

#### *1. The Scope Issue: Political Obstacles*

Whether the scope of cooperation will be expanded is a political question, and legal experience is likely to be prominent in constructing the decisional space within which these decisions are made. In particular, experience-based expectations are likely to be a central factor in constraining the range of decisional options.

Take, for example, the issue of how much information a state will allow its competition authorities to release to other competition authorities. This is probably the central issue relating to the development of cooperation as a strategy. Antitrust cooperation is essentially about transferring information, and the transfer of many of the most important forms of information requires authorization by the political authorities of the revealing state.<sup>24</sup>

The extent to which political decision-makers authorize the release of

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24. Other concerns also create disincentives for political decision-makers to authorize the release of particular types of information. Antitrust law often involves economically and technologically sensitive information, frequently about large firms that possess significant political influence, and thus there is often concern. For example, there is concern that the receiving state might use information to the advantage of its own firms and to the disadvantage of the transferring states' firms.



information is likely to depend to a significant extent on expectations derived from legal experience. Where a state's citizens expect a certain degree of protection for business information, for example, this expectation tends to constrain political authorities from authorizing the release of information that would violate those expectations. Recently, such considerations appear to have led the Canadian government to delay ratification of an antitrust cooperation treaty with the United States.

The willingness of political officials to authorize the release of information is likely to be further diminished where there are procedural differences among states with regard to acquiring and using such information. For example, the U.S. antitrust system features private legal actions in the regular courts, while very few other competition law systems permit private litigation. This leads to the fear that information made available to U.S. government officials may also be made available to private litigants. This concern has been noted as a significant impediment to the release of certain kinds of information to U.S. government officials.

## 2. Effectiveness Issues

A second set of issues relates to the effectiveness of the cooperation measures that states authorize. Officials who are supposed to work together to achieve common goals are conditioned by their own legal experience, and thus their respective perceptions, preferences, and expectations can create obstacles to cooperation. I note a few such areas as examples.

Effective communication is necessary for effective cooperation, and differences in concepts, languages, perspectives, and expectations present obstacles to effective communication. In public, competition law officials (particularly, and not surprisingly, U.S. officials) tend to downplay such obstacles, but few are unaware of at least some of these obstacles.<sup>25</sup>

Experience with differing substantive and procedural regimes can also impede the effectiveness of cooperation in other ways. Where, for example, an official has learned to view a fact pattern through a specific conceptual framework according to which the relevant conduct is unobjectionable (e.g., many vertical restraints in U.S. law), the official may not appreciate the harms perceived by officials who view the fact pattern through other lenses. When the official is asked for assistance, therefore, she may not perceive the relevance of information that is considered relevant by the requesting officials. Another example relates to differences in

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25. This reluctance may be tied to the general popularity of cooperation among competition law officials. Cooperation enhances the potential for compliance inducement, while often also providing attractions for individual administrators, such as foreign travel opportunities and relationships with foreign officials.



the need for documentation between systems. Where one set of officials requires high levels of documentation because in their system decisions are subject to strict juridical procedures and methodologies, other officials may require much less documentation because they operate in systems with looser procedural and methodological requirements.

As a consequence, when officials from the former group ask for documentation from the latter group, they may find little awareness of their concerns as well as insufficient or inadequate documentation.

### 3. The Prospects for Cooperation

Participants from the United States and Europe thus tend to assess differently the obstacles to expanding the scope and effectiveness of cooperation, with U.S. participants generally less aware of and less concerned about those obstacles than their European counterparts. The reasons for these differing assessments are, as we have seen, associated with the respective legal experiences of the two sets of participants. Cooperation among competition law officials is likely to continue to increase in both scope and effectiveness, but both types of developments may be more problematic than some observers assume.

As the scope of cooperation increases, these obstacles may also increase. Cooperation treaties remain relatively rare and limited in scope. Most are between industrialized countries with developed competition law systems. As the scope of such agreements increases, they are increasingly likely to encounter the expectation-based resistance mentioned above. Moreover, as such treaties are extended to countries with very different economic interests, political structures, and cultural values, these differences are likely to increase information and cooperation costs.

### *C. Imagining Framework*

The idea of creating an international framework for competition law is the third, and arguably most central, of the issue complexes around which the conflict revolves. If the idea were supported by all parties, the convergence and cooperation strategies would be seen not as alternatives to the framework strategy, but complementary to it. The three strategies would be seen as operating together. Lack of support from the United States for the framework idea is thus the crux of the conflict.

"Imagining" — projection and prediction — is particularly central to this issue. There is at least some experience with the other two strategies; they have begun to be implemented, and thus there is an experiential base for use in making predictions. There is, however, no prior experience with a general international legal framework for competition law. Moreover, the framework issue takes a form that ties it directly to domestic legal experience. The issue is how a particular type of legal regime — i.e., a framework of general principles supported by a dispute resolution mecha-

nism — is likely to operate. Not surprisingly, domestic legal experience appears to exercise a particularly strong influence in this area.

Perceptions of how such a mechanism *would* work are intertwined with preferences for how it *should* work. How parties perceive the proposal for a framework affects their assessment of the consequences of such a proposal — and vice versa. We look first at perception factors and then at preferences, remembering that the two are interwoven.

### 1. Perceiving the Project

A legal experience perspective reveals important differences in perceptions of the project. The proposal for a "framework" looks quite different through the lenses of U.S. legal experience than it does through the lenses of European experience.

From the perspective of European experience, the framework idea is familiar, congenial and validated by success on both the domestic and transnational levels. On the transnational level, it corresponds to the basic mechanism of European integration. The Treaty of Rome<sup>26</sup> has often been likened to a "constitution" — a fundamental framework within which the nation states of Europe have developed the norms, institutions and arrangements of integration. In this context Europeans have experienced "framework" as a process of community building. They know how it works. Moreover, if we look specifically at competition law's role in European integration, it has served much the same kind of function.<sup>27</sup> The basic competition law principles of the Rome Treaty have gradually been given form and effect through the interpretations and interactions of individuals, states, and regional institutions.

The framework idea also corresponds to the domestic experience of Europe's civil law countries. The operations of their legal systems center on the concept of a legal framework which guides decision-making, but which is itself given definition and content by the legal and political communities that use it. This process represents, in effect, "standard operating procedure" in European civil law systems. A "code" in the civil law sense is basically such a framework. It is a conceptually integrated linguistic structure that contains the norms to be applied to a particular category of conduct.

In contrast, there is little experience with this type of framework in the United States other than in the very special situation of constitutional law.

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26. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY (TREATY OF ROME), Mar. 2, 1957, 298 U.N.T.S. 11.

27. See generally David J. Gerber, *The Transformation of European Community Competition Law*, 35 HARVARD INT'L L. J. 97 (1994).

Statutes typically have very different characteristics and functions. They are seldom conceived as frameworks providing general conceptual guidelines for an entire area of conduct, and they seldom serve as the focal point of a process of political and legal community-building.

If we look at experience with U.S. antitrust law, we find little that relates in any way to the framework project. In general, U.S. antitrust law is a heavily case-centered enterprise in which cases are understood in relation to each other rather than in relation to a general "framework" text. Antitrust law has seldom been seen, at least in recent memory, as a constructive, didactic process.

The perceptual lenses shaped by legal experience in Europe thus present a view of the framework proposal that is very different from those created by U.S. experience. From a European perspective, the framework proposal is familiar and well understood. It corresponds generally to the way things work, and there are well-established conceptions of how it is likely to operate. In the United States, both the concept of a framework and the process by which it might be used to guide decisions and develop community are largely alien to legal experience.

## 2. Preferences

Not only do perceptions of the framework proposal differ significantly between the United States and Europe, but preferences — both systemic and competition-law specific — lead to very different evaluations of the idea. Take, for example, preferences regarding the framework's basic mode of operation. European arguments in favor of the framework idea frequently stress the importance of consistency, comprehensiveness and systematization. As the "wise men" Report noted after discussing cooperation and convergence issues, "a more systematic and complete approach to restrictions on competition resulting from the activities is still necessary."<sup>28</sup> There is a preference for comprehensiveness, a text that guides decisional processes, that gives coherence and structure to decisions.

Commentators from the United States, on the other hand, typically emphasize that law should be created through ad hoc, factually dense decisional processes.<sup>29</sup> Their rejections of the framework idea are often accompanied by claims that law works best when it is not guided by abstract principles, but created by decision-makers required only to view new fact situations in light of prior decisions. This preference developed long ago

28. REPORT OF THE GROUP OF EXPERTS, *supra* note 11, at 7.

29. See, e.g., A. Douglas Melamed, Address Before Fordham Corporate Law Institute, Twenty-Fifth Annual Conference on International Antitrust Law and Policy (Oct. 22, 1998) (visited Oct. 20, 1999) <<http://www.usdoj.gov/atr/public/speeches/2043.htm>>.

in the common law tradition, and in recent years it has been reinforced by the values of the law and economics movement.

In addition to these general, systemic preferences, we can identify preferences that relate specifically to experience with competition law. In the European integration process as well as in European national experiences, for example, competition law often has played constructive and educational roles that are often referred to as positive and desirable components of the framework process. In U.S. experience, in contrast, competition law has seldom played such roles. There the measure of success of a competition law regime tends to be understood as a direct correlate of the strength of enforcement efforts. As a result, U.S. commentators tend to accord little value to this aspect of the framework proposal.

These examples suggest some of the ways in which differing legal experiences and the perceptions, preferences and expectations created by such experiences shape the conflict over the globalization of antitrust law. Both sides tend to favor an international response that functions along lines with which they are familiar and corresponds to the values that support the decision-making processes they use.

#### VI. SOME IMPLICATIONS OF THE ANALYSIS

This brief review of the conflict over the globalization of competition law reveals some of the potential uses of a comparative legal experience analysis. Legal experience — as coded and deposited in perspectives, preferences, and expectations — plays a central role in shaping the positions and arguments of the participants as well as the incentives and constraints that are likely to influence the success of particular globalization strategies.<sup>30</sup> A legal experience perspective provides a means of analyzing the positions and arguments that constitute the substance of the conflict and of relating them to each other.

As we have seen, legal experience appears to influence the ways in which the participants perceive the data of the conflict, such as issues, proposals, positions, and arguments. For example, the idea of agreeing on a "framework" of state obligations regarding competition law is refracted very differently through the U.S. experience than it is through European experience. Sometimes observers are aware of the degree to which their views are shaped by the lenses through which they view the data, but often they are not, and as a result, revealing these influences can be of value not

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30. The high degree of consistency in the approaches and the positions of U.S. commentators and scholars on these issues is telling. Note, however, that those who write from a social science perspective rather than a legal or governmental perspective tend to be less influenced by these factors. See INSTITUTE FOR INTERNATIONAL ECONOMICS, GLOBAL COMPETITION POLICY (Edward M. Graham & J. David Richardson eds., 1997).

only to those who seek to understand the conduct of a participant, but also to the participants.

Interwoven with perception are preferences and values that shape the assessment of specific decisional options, and these preferences often correlate with the legal experiences of the participant. European preferences for framework proposals and U.S. suspicion regarding such proposals are rooted in the respective experiential frameworks of the two communities.

A third factor relates to the expectations created by legal experience. Expectations relating to the operations of legal systems, in general, and competition law systems, in particular, shape and constrain the decisional options of the participants. They are a central feature of the path-dependency effects in which the conflict is embedded.

In revealing some of the factors that shape individual positions and arguments, the perspective used here also provides insights into the dynamics of the conflict itself, thereby helping to illuminate a process that often appears opaque and cognitively impenetrable. It identifies more clearly the characteristics of the differences involved and the ways in which these differences influence decisions.

It reveals, for example, the extent to which the conflict is about differing predictions concerning the likely consequences of particular strategies. International policy discussions often contain assertions and conclusions that are presented as factual or "authoritative," but that do not identify the grounds on which they are based. The language of "policy" is often undifferentiated and one-dimensional, failing to distinguish among verifiable facts, solid analysis, perceptual influences, and preferences. Focusing on the influence of legal experience on the positions and arguments of the participants, however, calls for separation and identification of these components.

Accordingly, this perspective fosters clearer identification of the specific differences between the two sides in the conflict. Are they, for example, differences in the respective knowledge bases of the participants? Who knows what, with what degree of certainty, and on the basis of what kinds of evidence become key questions. This question is often skirted by officials and "experts," who seldom like to admit that their views are based on thin knowledge. Yet the dynamics of the conflict are likely to be influenced significantly by the characteristics of the respective knowledge bases of the participants. For example, the extent to which the positions of the participants turn out to be based on objectively verifiable information or on loose speculation may fundamentally affect the nature of the conflict.

This type of analysis can thus also reframe the conflict. On a general level, it foregrounds issues of difference and cognition rather than ignoring or avoiding them. It thus creates incentives to understand and deal with such differences. On the level of specific issues, it can reconfigure incentive structures. Where, for example, it reveals that arguments rest on

preferences rather than on analysis, it increases the costs of making such arguments and thus creates incentives to alter or abandon specific arguments and positions. Similarly, where experience is the basis for predictions, this type of analysis requires close and focused scrutiny of that experience. When U.S. participants, for example, assess the likely success of convergence by reference to U.S. leadership in the area, this perspective urges close analysis of that historical experience.<sup>31</sup>

Finally, this analysis provides a means of narrowing the differences among positions and arguments within the conflict. Identifying perceptual biases, knowledge base discrepancies, and expectation-based decisional constraints provides a mechanism for reducing or eliminating differences in the positions and arguments of the participants. Where these factors lurk in the background, they inevitably undermine efforts at cooperation and conflict resolution, but to the extent that they are identified, they become amenable to discussion and, perhaps, resolution.

## VII. CONCLUDING COMMENTS

Few would dispute the proposition that experience conditions the perceptions, preferences and expectations of individuals and communities, and in that sense, the perspective used in this essay is not new. Yet this basic perspective is rarely used in discussions of the globalization of anti-trust law. Political, economic and institutional perspectives and explanations have tended to dominate the discourse.

In part this is a reflection of current intellectual fashions in the communities involved, but other factors also play a role. One is the lack of a developed conceptual framework for analyzing the influence of legal experience in such contexts. There is no developed language for describing and analyzing this type of data, and thus there are few incentives to look at the data from this perspective.

This essay has suggested some ways in which this perspective may be used, demonstrated some benefits of using it, and proffered some analytical tools for its use. I have not sought to integrate this perspective with other perspectives such as those of law and economics and of political science, but this is my ultimate goal.<sup>32</sup> Economic, political and institutional factors also shape the conflict over the globalization of competition law, and a more refined conceptual framework is needed to analyze the

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31. In practice, states have tended to use U.S. experience for help in understanding particular kinds of problems rather than as a basis for structuring the operations of those competition law systems.

32. This is part of a broader project that I have recently outlined. See David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719 (1998).

relationships among these factors.

Another factor that impedes use of a legal experience perspective is a kind of "marketing" attitude that appears to be based on the assumption that to acknowledge differences is to raise awareness of obstacles to agreement and concord. In this view, the recognition of difference is threatening and should be avoided — its issues best left unspoken.

While this view is understandable, it is inappropriate for the kinds of issues and objectives involved in the conflict over the globalization of antitrust law. Differences are part of the conflict — whether we like it or not, and no one doubts they exist. To ignore them not only invites misinterpretation of statements, decisions and events, but it also impedes progress toward the construction of effective arrangements for protecting the competitive process without imposing undue costs on international business.