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GLOBAL TECHNOLOGICAL INTEGRATION, INTELLECTUAL PROPERTY RIGHTS, AND COMPETITION LAW: SOME INTRODUCTORY COMMENTS

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In this Symposium we view global technological integration from two public policy vantage points. One, the international intellectual property rights regime, is concerned with creating and protecting rights and the incentives associated with them. The other, competition law, seeks to protect the process of competition from restraints. If the normative framework for international trade and investment is to be coherent, these two legal projects should be coordinated; each should operate so as to support—or at least not interfere with—the other's effectiveness. Yet the current state of our knowledge and thinking about these issues does not allow us to assess with any confidence how the international expansion of property rights may affect competition on the international level.

Our central objective here is to contribute to fashioning useful and analytically sound perspectives on the intersection of these two legal regimes, and in these introductory comments I sketch some factors that might be considered in fashioning a competition law perspective on the evolving intellectual property rights system. Developing such a perspective means posing questions that are seldom posed: How should we view competition law in the international context? Is there a distinctly identifiable "process" of competition on the international level? If so, to what extent can we use law to protect such a process? Assuming we can, should we? The new international intellectual property rights regime is likely to influence the process of international competition in ways that are as yet only dimly perceived, and thus we need to develop a perspective from which these effects can be analyzed and policy responses can be developed.

I will look at three basic components of such a perspective. First, how do we assess harm to competition? If we are to consider using law to protect competition, we need to be confident of our perceptions of the competitive process and of harms to that process. Second,

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how do we assess the need for an international response? Presumably, we only want to respond to harms if we are convinced that those harms justify a response. And, third, how do we fashion appropriate international responses?

I. IDENTIFYING HARM ON THE INTERNATIONAL LEVEL

The first of these issues is central to the entire project. If we are to use law to protect competition, we need a relatively clear conception of the process that we are seeking to protect and what constitutes harm to that process. Only if the new intellectual property regime poses significant threats to such a process should we consider normative responses to protect that process.

How then should we conceive of the process of competition on the international level? Curiously, this presumably fundamental question is seldom posed. The implicit assumption seems to be that we can look at harm to competition on the international level the same we look at it on the domestic level. This assumption may help explain why these basic issues are seldom addressed: If we can merely use domestic perspectives on the international level, why bother to fashion an international perspective?

But surely this assumption—this leap from a national to an international perspective—deserves examination. There are at least two major concerns. The first is “Who is ‘we’”? Existing competition law systems differ significantly in their conceptions of the process of competition and of harms to that process. United States antitrust law thinking, for example, differs in many important respects from that in other competition law systems. The short-run efficiency model that is currently fashionable in the United States often operates according to assumptions and values that are quite different from those in Europe or Japan, where the analytical time-frame is longer and other values tend to play a greater role. As a consequence, we have different “we’s,” and to the extent that we do, the assumption that we can use domestic conceptions on the international level is a recipe for conflict, misunderstanding, and ineffectiveness.

Even if there was only one “we,” however, there would be no justification for assuming that domestic assumptions and analyses are appropriate for use on the international level. National perspectives have been developed in the context of individual national markets and in response to domestic concerns and interests. The international context obviously differs greatly from that of a single national market,

and many issues and interests that are relevant to protecting competition on the international level do not operate on the domestic level. National perspectives may, therefore, fail to take into account factors that affect transnational competition but do not play a role on the domestic level. Accordingly, to use such a perspective as the basis for normative responses on the international level may cause unforeseen consequences that are not likely to be positive.

What is required, therefore, is a conception of the process of international competition that reflects such factors and that thus can serve as the conceptual basis for assessing threats to competition on the international level. The starting point for developing such a conception is likely to be the same as on the domestic level—i.e., the process of economic competition as depicted by economic theory. The core concept is that each business unit in a given market is free to try to maximize its own interests and enjoys opportunities to do so which are approximately the same as those of other participants on that market.

The process of competition on the international level has, however, additional dimensions that are not addressed by this discourse. Competition there necessarily occurs across the boundaries of nation-states rather than within a single market, and the factors conditioning competitive freedom and opportunity often vary significantly as one crosses those boundaries. Despite frequent references to the “global market place,” national—and occasionally, regional—boundaries continue to be a defining feature of transnational business operations.

For these purposes national boundaries have both static and dynamic aspects. The static aspect refers to those obstacles to the flow of, *inter alia*, goods, persons, and capital that are created by the very existence of nation-states. The borders of states create costs of many kinds, including, for example, the need to comply with import and export formalities, registration requirements, and the knowledge and compliance costs of operating in different legal and regulatory environments. The effect of these borders is static in the sense that it does not imply the manipulation of these boundaries by governments for political or other purposes.

The dynamic aspect of these borders refers, in contrast, to the capacity of states to manipulate flows across their borders of goods, capital, and persons. Governments have authority to control such movements, and they often use that authority in pursuing their own interests. They may raise or lower tariffs, impose or change import or

export quotas, or alter technical or other requirements in ways designed to affect the costs of nondomestic products, services, or capital.

These aspects of national borders mean that the existence and conduct of governments are an integral part of the competitive process on the international level. No image of that process can be convincing or effective unless it depicts the role of governments in that process. The challenge then is to develop a convincing competition law perspective that includes reference to the impact of governments on the structuring of transnational markets and can thus serve as the basis for normative claims.

II. TOWARD AN INTERNATIONAL RESPONSE?

Assuming that we develop a coherent and convincing conception of the process of competition at the international level and thus a basis for evaluating harm to that process, how do we assess the potential for using international legal tools to respond to these harms? What, if anything, can and should be done at the international level?

A. *The Capacity to Respond: Can Anything be Done?*

One obstacle to evaluating the capacity to respond is the futility assumption—i.e., the assumption (only sometimes articulated) that no international response will be effective and that it is therefore futile to consider such responses. This assumption is particularly prevalent in talking about the use of law in two spheres of social life—the international and the technological. In both areas one often hears comments such as the following: “We do not know enough about what happens here. The process of change is too fast, too powerful, too We do not have enough information, and, therefore, we cannot do anything.” Since our concerns here involve both technology and international issues, the futility assumption is likely to be a significant factor in considering international responses.

While skepticism and caution are certainly called for in considering any use of prescriptive authority, especially in areas where there has been little experience, the futility assumption is not. Particularly during the last decade, experience with domestic competition laws has expanded dramatically in many parts of the world. We also have acquired significant international experience in using tools of international law to address economic problems generally (e.g., the GATT Tokyo and Uruguay rounds), and this experience may be useful in

developing strategies for protecting international competition. Finally, a normative and institutional "infrastructure" has been created—from cooperation agreements between governments to international institutions such as the newly-created World Trade Organization ("WTO")—that makes possible normative initiatives that would be different or impossible to implement without such structures. We are in a position, therefore, to move beyond the futility assumption to careful examination of potential responsive strategies.

Whether these tools can be effectively mobilized to protect the process of competition on an international level will depend on a variety of factors that will need to be assessed. Is there, for example, a shared discourse about the value of competition that can provide both communicative and political support for strategies to protect that process? If there is no such discourse at present, can one be developed, and what are the obstacles to, and costs of, doing so? Is there sufficient political support among national, regional, and international actors to support a response? Are differences in the respective interests of small and large states, developed and developing states, or various regions of the world too great to permit effective arrangements regarding the protection of competition?

B. The Costs and Benefits of Response: Should Anything be Done?

The question of whether anything should be done raises other issues. It involves analyzing costs and benefits, and here again we face a situation in which there has been little systematic thinking. Yet the effective assessment and comparison of costs and benefits presupposes a framework to which these functions can be referred. On the domestic level, such frameworks are established by factors such as the existence of a common currency, the conventions of a common budget, and an authoritative political process. These do not exist on the international level (except perhaps in the most rudimentary of forms) and without such a framework, assessing benefits and costs will necessarily be haphazard, ad hoc, and of limited value.

The primary benefit of an international response will normally be its effectiveness in reducing the potential harms to the process of international competition discussed above. Evaluating its effectiveness will depend, therefore, on the extent to which the underlying conception of international competition adequately reflects influences on transnational decision-making. As we have noted, this will include

not only purely economic factors, but also factors such as the impact of national governments on factor flows across their borders.

But what about assessing costs on the international level? Are the benefits likely to be justified by the costs of achieving them? Effectively analyzing such costs requires reference to the resources, broadly conceived, of the international "community," for the benefits are intended to inure to that community, and any mechanism of implementation will require the participation and cooperation of its members. This requires, in turn, a concept of "system" which comprehends the relationships among the members of that community. This would allow the "costs" of response to be framed in relation to their impact on this system. Would a particular response, for example, deter international investment? How might it intersect with the international intellectual property rights regime? Will it interfere with technological progress? Will it impede the participation of particular types of states in other international cooperative arrangements? These are some of the questions that will need to be related to each other and to specific response initiatives.

III. FASHIONING AN INTERNATIONAL RESPONSE

How then do we begin to fashion an international response? What kinds of issues do we face? What criteria do we use in determining its shape and contents? What kinds of structures can we develop for organizing thought about these issues? We can separate the issues into two main categories. The first involves the content and form of the norms themselves. Which conduct norms should be established, and what form should they take? In shaping norms for this objective, national competition law regimes furnish models, but, as we have seen, protecting competition on the international level involves a variety of issues that are not faced in the domestic context. It is likely, therefore, that in order to be effective, international norms will have to be crafted to address these specifically international factors.

A second set of issues involves the type of system that should be developed for seeking compliance with these norms. Which institutions should be involved and what methods should they be authorized to use? If we look at national competition law systems, there are two main models. In Europe and Japan, the central component of the system is administrative decision-making, whereas in the United States, private suits before regular courts play the central role. Neither of these models in its current form is likely to be politically acceptable or

effective at the international level. On that level, therefore, it will be necessary to create compliance-inducing mechanisms with very different characteristics that utilize some combination of national and international mechanisms in creative ways.

One criterion for evaluating such mechanisms will be their likely effectiveness in deterring the conduct deemed harmful. Given the lack of generally effective enforcement mechanisms at the international level and the resulting need to rely to some extent on national institutions for compliance pressure, such responses are not likely to be effective unless they reflect widely-held values and interests within the international community and thus can anticipate political support from such national institutions.

A second major criterion will be the compatibility of such a system with other interests and goals of the international community. This will require thinking through the ways that international competition issues relate to issues such as the protection and encouragement of international trade, the protection of intellectual property rights, and the protection of the environment.

In recent years, two strategies have emerged for responding to problems of protecting competition on the international level, and in this Symposium we look at both. Our objective is to describe these strategies themselves, as well as the forces that are shaping them and some of their consequences, with particular reference to the relationship between technological integration and the new intellectual property rights regime.

The first of these strategies is increased and improved cooperation between competition law authorities. In principle such cooperation can hardly be faulted, but the issue is whether it provides an adequate response to this specific problem. Judge Diane Wood examines what is perhaps the most developed form of such cooperation—that between the United States and the European Union—and discusses its dynamics. As a high official in the U.S. Department of Justice during the early 1990s, Judge Wood played key roles in developing this cooperation.

The second strategy involves what may loosely be called the harmonization of competition laws. The most prominent example of this strategy is the Draft International Antitrust Code (“DIAC” or “Munich Code”), which was recently developed by an international group of scholars and which provides a basic framework of competition rules and procedures for use internationally. Professor Wolfgang Fikent-

scher is one of the leading figures in this group, and in this Symposium, he discusses the objectives and methods of the DIAC and responds to criticisms of it.

CONCLUSIONS

I have sought in these introductory comments to adumbrate some of the issues that may arise in developing an effective "competition law" perspective on the expansion of intellectual property rights. A central theme has been the importance of creating a perspective that "sees" the specifically international characteristics of the situation rather than merely projecting national thought and experience onto the international level. I view it as part of a broader (and barely begun) project of "internationalizing" the perspectives from which we view issues of international economic integration and law's relation to it.

The obstacles to fashioning such perspectives are many and high. Not the least of them is the psychological inertia which resists the fundamental rethinking of both problems and solutions. Such resistance is particularly difficult to overcome where it is neither perceived nor acknowledged. Indeed, the temptation to treat issues of international competition protection with the conceptual and institutional tools of national competition law systems is attractive because it avoids the need to recognize such obstacles. We hope that this Symposium will heighten awareness of those obstacles and contribute to reducing them. At the very least, experimenting with new conceptualizations, perceptions, and potential solutions should help to reveal the need for attention to the public policy issues in this area.

The task that the international community faces in developing competition law perspectives on intellectual property rights, in particular, and on the process of globalization, in general, reminds me of a somewhat analogous situation in Europe in the early decades of this century. At that time, scholars in several European states began to formulate ideas about how law might be used to protect the process of competition. In order to develop such ideas and begin to secure their acceptance, they had to develop a convincing conception of the process of competition itself and an image of law's potential roles in protecting it.¹ This process took decades of intellectual and political initiative and refinement, and only recently has it come to fruition in

1. I explore this development in detail in DAVID J. GERBER, *PROTECTING PROMETHEUS: THE DEVELOPMENT OF COMPETITION LAW IN EUROPE* (forthcoming, 1997).

the form of a conception of competition law that enjoys support throughout Western Europe.

One lesson from that experience is that early conceptualizations and perceptions can have exceptional durability, as subsequent thought and practice tend to develop within and around these structures of thought and patterns of conduct. In Europe, conceptions of competition law developed in response to the new and highly visible problem of cartels, and competition law thought and practice in Europe continue to be heavily influenced by many conceptions that were formed very early in this process of development. It may well be that in developing conceptions of international competition law the phenomenon of technological integration will play a role similar to that played by cartels in the evolution of European competition law thought.