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## A COOPERATIVE FRAMEWORK FOR NATIONAL REGULATORS\*

DIANE WOOD\*\*

My remarks are going to take us back to the question of competition policy, or antitrust more particularly, and I would like to try to place that in some kind of broader institutional setting. This certainly is a subject that is generally important to the way that international trade works, and to the way that international economic regulation is working, because we want markets to be responsive to supply and demand factors. We are interested in serving the ultimate welfare of consumers around the world, and it is not surprising that the question of the appropriate international dimension for competition policy has become debated more and more actively as we make progress with the various governmental barriers to trade.

I would like to stress that we have been discussing a number of dimensions of competition policy and, as Claus Ehlermann said yesterday, we have on the one hand, various governmental measures of many different kinds, such as subsidies, licensing standards, tariffs, and quotas, and on the other hand, we have other measures which private firms may employ. They may cartelize and fix prices or allocate markets; they may decide to merge and create a structural change in the market that might make them a dominant player in the market; they might (if they have a very large share of the market) engage in a whole host of practices, whether boycotts, various kinds of vertical restrictions, distributional restrictions, tying arrangements and the like. Many of those kinds of practices have nothing to do directly with what the governments have put into place, and those are the traditional subjects of antitrust law. So, the question that has concerned us most of all is whether that second group of practices needs to be addressed at the international level, or whether the international concerns that we have will continue to be addressed best at the national level, perhaps with some changes, both in national laws and in the way that different national systems work together.

\* Adapted from a lecture delivered by Judge Wood on October 6, 1995 at the Chicago-Kent College of Law.

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That is the perspective I would like to take here. I am *not* going to be talking about the desirability of international measures to reduce governmental barriers to competition, because I am happy to see measures, anywhere they may appear, that will reduce governmental barriers to competition. In my opinion, one of the events that got this debate moving as vigorously as it has been moving, goes back to the structural impediments initiative talks that took place between the United States and Japan, in the administration before the one that I was fortunate enough to serve in. People started saying, "Well, if there are access barriers to the Japanese market," and I am only using this example because it was what happened, "how can we overcome these barriers, how can individual firms find their way into Japan?" The thought was that better enforcement of the antimonopoly law of Japan might be the answer. Japan does, after all, have a law that addresses the very same subject that U.S. antitrust law addresses. Perhaps if refusals to deal, keeping firms out of markets, or other kinds of anticompetitive practices exist, this is a way of addressing those barriers effectively.

I do not think you could challenge the proposition that better enforcement of competition laws will sometimes have a market-opening effect, but I have a problem with taking this too much further. At its heart, at least in the United States, antitrust law is a law which focuses on the prices and choices available to consumers—final consumers or anybody who is a buyer. From that perspective, it does not really matter who is serving the consumer. It does not matter if it is a foreign firm, it does not matter if it is a domestic firm, and the size of the market does not matter either. For example, for my weekly grocery shopping, I would not dream of going beyond probably about a five mile radius from my home. It does not really matter to me too much that there might be a grocery store available in Frankfurt that I could go to. I am not going to go to Frankfurt to buy my groceries. For the consumer, therefore, groceries are found in a local market. Or if there is a highway construction operator, as I was unfortunate enough to run into driving in this morning on the highway, who is ripping up the road, he is not going to buy his concrete from just anybody. He will go to someone within a fairly narrow area. It is just not that kind of product. There are many things for which markets are very local and some for which markets are national. We must always ask who is out there who can serve this market?

This takes me for just a second back to the Kodak-Fuji dispute. I think we always have to think about markets from the point of view of

the consumer who is interested in buying the product. If the market is in fact quite open because of the lack of government barriers, because of ease of transportation, because of ready substitutability of products, and openness to products offered from all over the world, then in that sense and for that consumer, there is a world market. Another consumer in another country might *not* be looking at a world market. For instance, a consumer in a country that has a very bad transportation system or where some set of local needs means that the other manufactured products are not particularly good substitutes, or in a country that, perhaps in violation of its GATT obligations, maintains technical barriers to trade that make it impossible for those products to enter it, may have choices available only from a smaller set of suppliers. In short, this is a very consumer-oriented subject. If we then try to marry it to the idea of market access, there is only an imperfect fit. The fit is imperfect because the market-access concern of the trade community has been much more focused on the opportunities available to sellers in the market. Which set of consumers will they be able to reach? This is plainly important, but something which, at least from the perspective of U.S. antitrust law, is only an incidental consequence of the way antitrust law operates.

We tell firms that they cannot cartelize. We tell firms that they are entitled to choose their customers and that they may sell or not to any given buyer as they wish, as long as they are engaging in that decision-making process independently. That is our *Colgate* doctrine, which is a very important part of U.S. antitrust law. Our laws have a very strong bias against dictating to individual firms what kind of business practices they should engage in, because we recognize that individual firms would like to take business away from other firms. Put differently, they would like to exclude other firms from the market. When you look at the subject of exclusionary conduct, you find that there are great difficulties in distinguishing between forms of exclusionary conduct that are simply normal competition and the much smaller set of exclusionary conduct practices which are anticompetitive. We normally associate the latter with firms that have very substantial degrees of market power. In the United States, more market power is needed than would be called for, for instance, in Article 86. Markets are defined somewhat broadly, and we look for more power.

Where does this take me in terms of our institutional structures? For a couple of reasons, including the consumer focus of antitrust law and the differing cultural perspectives that still exist today, this is a body of law that, at the moment, is best kept at the national level. I

have a paper which is going to be published in a volume from a conference that was held in May 1995 in Washington, in which I elaborate on this somewhat more extensively. There are a number of arguments for and against taking this to the international level, even in the optional way that the proposed plurilateral Munich code did. We should ask a number of questions. Which kind of rules will produce the most efficient results from the point of view of the cost of regulation on the one hand, and from the point of view of just simply finding efficient behaviors deterring competitively bad behaviors? We should ask, "What is most acceptable from a cultural standpoint or a social standpoint?" We have already touched on, the important question, "What will enjoy the greatest degree of political legitimacy within the regulating country?" We should ask, "What is the best from the standpoint of diplomatic or international relations?" One's decision on either a national or international level for Competition Law enforcement is going to vary, a little bit, depending on which one of these questions we are asking.

My argument is that national regulation coupled with appropriate modifications in the direction of bilateral relationships, or eventually perhaps, networks of relationships, is the best approach. Let me just run through the key factors very quickly: efficiency, transaction costs, and underlying behaviors. The question of the efficiency of many national laws has often arisen. There is a law in Brussels, and all fifteen member states now have some kind of competition law. There are some fifty or sixty countries around the world with antitrust laws. Is that not inefficient in and of itself? Should we not think of beginning to internationalize this simply so that the authorities can work with each other without duplicating all of their work? My answer to that has been that the existence of many authorities does not itself make the case for internationalization, because competition cases in the end deal with competitive conditions in particular markets.

I was very influenced by this in the empirical study that Professor Richard Whish and I undertook for the Organisation for Economic Co-operation and Development ("OECD") before I joined the government. We looked at mergers that had been investigated by more than one authority, some as few as two or three and some as many as fourteen, one potentially twenty. And, I walked into this expecting that both the authorities and the private parties themselves would report that it had been a real nuisance to have to have duplicative enforcement efforts. Quite to my astonishment, this is not what people said. People said, well, yes, there were perhaps *some* additional costs

*some* of the time, but only where the product was exactly the same from market to market. This was frequently not the case because many firms manufacture many different products, and the ones that face a lot of competition in one market are not the same ones that face a lot of competition in another market.

Just to give you an example, the Gillette-Wilkinson acquisition eventually was stopped after some fourteen different authorities reviewed it. But, there we had a very simple product, razors and razor blades, very common, which did not vary from one country to another. So, the fact that people needed to go through all of these stages was in fact a cost. Now, the company did not really seem to mind, because things were going badly for it in some countries, and it was hoping that perhaps in other countries it might be able to get its merger through. There may have been a bit of self-interest in this observation.

But, a case that came out quite differently was the joint venture between Renault and Volvo. At the time, in the European market, the greater concerns about that transaction had to do with automobiles, because the kind of competition that took place among automobiles for those two companies was very significant in Europe. This type of rivalry was *trivial* in the United States, although the United States was also a reviewing authority for that very same joint venture. Instead, in the U.S. market, the problem was very large trucks of a kind that are not even used in Europe—class seven and class eight commercial trucks. For Canada and the United States, that was a very significant aspect.

I give this as an example of why we found this a rather surprising result about efficiency. The bottom line of both the companies and the lawyers was, we have to make the case *anyway* for each individual competitive setting which may happen to be a national market. It may happen to be a continental market, or regional market, or many other kinds of market, but it is not really going to save us much time in our analysis of the competitive setting, whether we are preparing it for one or several authorities. So you might find *some* savings in the bottom line there, but probably not as much as you would perhaps expect, or as I initially expected.

On the procedural side, there are improvements that both can and should be made, if one could actually achieve them. Common timetables were the biggest thing people mentioned. The procedural differences in the existing legal schemes make that rather difficult, just

to take, for example, the merger regulation of the European Union and the U.S. merger law. It is extremely difficult without imagining legislative change on either side to imagine much progress on the timetable issue. It is a completely different system of review in each jurisdiction. Some transparency costs, in short, plainly exist on the regulatory side.

The real efficiency concerns the question whether we must have the same competition law. Do we, in fact, all need to decide whether there will be a competition law focused only on efficiency? Whether there will be a multigoal competition law where small and medium-sized enterprises and their encouragement is part of it? Whether market integration is part of it? Or whether unfair disloyal competition concepts are part of it? Several models exist in today's world, and I think that each model is perfectly explainable in the context from which it arose.

It is easy enough to see why market integration is not a particular concern of the U.S. antitrust law. The law came along one hundred years after the Commerce Clause was already part of the Constitution. The market *was* integrated and the rest of the market integration that we achieved took place though the vehicle of Commerce Clause decisions at the constitutional level, from the Supreme Court. To put it very briefly, the Commerce Clause prohibits any state measure that discriminates against interstate commerce. So, if the state of Mississippi decides that the only milk you can buy in Mississippi stores has to come from Mississippi cows, and they will not let in milk from Alabama cows, that is unconstitutional. And indeed, there are all sorts of contexts ranging from garbage, to mud flaps on trucks, to other things where discrimination against interstate commerce has been struck down. Going beyond that, the states are not permitted to enact legislation that is facially neutral but which burdens interstate commerce. This is often referred to as the dormant commerce clause. Even if Congress has not spoken, there are some things that are so inimicable to an open market in the country, that the states are forbidden to intervene.

We have simply chosen a different legal vehicle for achieving the market integration goal, and antitrust law plays little or no part in it. Thus, we do not really care if somebody decides to assign distribution territories and give an exclusive territory of Illinois to somebody and an exclusive territory of Wisconsin to somebody else. They can do that if they are not a dominant firm and if they are not, in some extraordinary way, preventing competition. In Europe, an exclusive

territory that was air-tight with France, and the same kind of exclusive territory for Germany, would at a minimum raise much greater concerns. But, this simply illustrates that the laws are different and they come from different traditions. This is where, it seems to me, we have to move onto some of the other concerns.

The social and cultural factors are extremely important for effective antitrust enforcement. This is because you need to have public support for a law that tells businesses what they can do and when they can do it. If you have a law that says, for example, that a merger will go forward and the people in the local community know that that merger means that the local plant is going to shut down, and thirty percent of the community will now lose their jobs, somebody must be supporting that law. You must have a law that people accept if it prohibits, for example, the American Bar Association from telling law schools how they should handle their accreditation procedures. There are many other kinds of cases. Some people thought the Antitrust Division should not have been pursuing a case against Microsoft. Other people thought the Division should have taken more vigorous steps against Microsoft. These are measures which have tremendous impact on people, and so, I think if you try to put in place an antitrust law or a competition law that does not have the fundamental support of the business community and of the society more generally, you are going to have a law that does not get enforced.

For a long time, this undoubtedly explained part of the history of the enforcement, or lack thereof, of the law in Japan. People were simply organizing their society in a somewhat different way. They were not particularly convinced that going after the *keiretsu*, or the other kinds of practices that may have seemed to be possible violations of the law was desirable. Things have turned around quite a bit since SII and other similar revisits of the law that have taken place in Japan. Enforcement has been increasing significantly. In other countries that have adopted antitrust laws, it has been adopted more enthusiastically.

There is also an issue of the political legitimacy, and here I *do* worry very much about who is finally going to decide that a particular cartel has violated the laws, bearing in mind, that in the United States you are talking about criminal law enforcement. You are talking about somebody spending a couple of years of his life in jail, if it is an individual, and you are talking about firms being criminally disbarred from serving as government contractors and paying very large fines. International review of criminal law enforcement is a pretty big step

to take. Even if you assumed it was not criminal, you would still have the question of international oversight of very particular decisions: international oversight of, let us say, the Federal Trade Commission's decision to allow the General Motors/Toyota joint venture to go forward; international oversight, potentially, of both the European and the American decision to require Microsoft to open up its operating systems, and not to charge on a per processor basis, but instead to charge original equipment manufacturers of computers only for computers that actually had the Microsoft operating system on it. Maybe that was a terrible thing to do, who knows? Somebody would have to look at the record that we had to know whether it was a good or a bad thing, and if those people themselves are not politically accountable, it is a very delicate matter.

There are a couple of things that people do not like to talk about very much, but they are worth exploring. What lies behind this push? One of the things that continues to lie behind the push for internationalization has been a sense that there is still too much unilateral action, particularly by the United States, but perhaps by other countries increasingly as well. Unilateral action, when you really mean something like 301, the *In re World Arrangements Oil Cartel* case, or the Uranium cartel case, undoubtedly raises diplomatic tensions. The record is very clear that this has happened. And there is no question about the historical existence of a problem. The question that I ask myself is, "What's the cure for this?" I think that the cure, if we look carefully, has been underway now for many years, and, with one addition, would be just about finished. The cure has really been to do the same thing that our Securities and Exchange Commission did, which is to back off and say wait a minute. Rather than trying to barge around the world, unilaterally enforcing our law, unilaterally trying to grab evidence in other countries, pushing remedies on people that they do not want, let us try *cooperating* with other authorities. Let us try working with other people to the extent they have laws that are the same.

And lo and behold, it turns out that there are a *great* number of commonalities among the laws. To move from unilateral orientation of mind to a cooperative orientation of mind, changes the entire picture, because just to say it is national enforcement does not mean it is unilateral enforcement. National enforcement with the assistance of and cooperation of other national authorities is something which has happened for many years. No one talked about extraterritorial jurisdiction when the Department of Justice and the Canadian Bureau of

Competition Policy jointly prosecuted the fax paper cartel. This was a joint prosecution under the authority of a treaty, so in terms of legal basis, everything was fine. It involved joint interviews with officials from each authority, a joint database, joint analysis, and each side deciding what steps should be taken. The U.S. authorities took care of our market, and the Canadians handled the Canadian market. There are various differences that flow from the differences between the two laws, but on the whole and by and large, it was an *extremely* successful effort at addressing a problem that was affecting both of our markets.

The same was true with Microsoft, where we had the advantage of dealing with only a single firm, and the possibilities of bargaining are very good when it is a single firm. In cartel cases, it will be difficult to convince the cartel members to give their permission to allow the authorities to jointly investigate them. So, we need better legal measures like the treaty that we have with Canada. But when you have that possibility of cooperation, no issues of extraterritoriality are likely to arise. Instead, the authorities will work things out, if one side thinks that it ought to do more and the other side objects. The conversation can take place in a concrete setting. The conversation can take place with full awareness of the relevant facts. I am certain that that is a strategy that would work in the overwhelming majority of cases.

Even when we have agreements with countries that *do not* permit the sharing of confidential information, such as our 1982 agreement with Australia, our former 1984 agreement with the Canadians with respect to civil cases, our new 1995 agreement with the Canadians, and our 1976 agreement with Germany, "soft" cooperation tends to reduce the incidence of jurisdictional disputes. Our agreement with the Europeans, now reinstated, is another case in point. The cooperative presumption exists there, and we have not had extraterritorial problems that have been insurmountable. There have been a few glitches I can think of, but on the whole, they have all been worked out. So, from the international relations point of view given the particularized nature of every competition case, it is not useful to worry about international cooperation when each case that is going to come up is going to involve particular other countries. Indeed this has happened as well, in spite of all the sound and fury that sometimes gets the press' attention with respect to our relationship with the Japanese Fair Trade Commission, the U.S. authorities have now had eighteen years of very harmonious bilateral consultations with that agency. Judicial assistance tools are available under the laws of many countries

that are sometimes used. Where they are available, they can work effectively, in a manner targeted for the needs of the case at hand.

My last comment about this—aside from a plug for everyone to sign up with the United States for the new bilateral information-sharing antitrust mutual assistance agreements that the Department of Justice and the Federal Trade Commission are now authorized to conclude—is before we reach the international stage let us see how well we can do at the level of transnational cooperation. We are still going to need to do this anyway, even if there is an international code. So, why do we not try this one out and see if this maybe does solve most of the problems without creating yet another layer of bureaucracy.

Finally let me make one comment on export cartels. This is my private unconventional idea, which I do not really suggest entirely seriously. I am not so worried about export cartels. This is because consumer welfare underlies antitrust law, and I think that the optimal enforcer for any competition case is the country whose consumers are harmed by the particular practice in question. Very often, that will be the same country as the country where the doers of the harm are located. Sometimes it will be foreign companies who are inflicting harm on domestic consumers.

Sometimes in Europe it will be U.S. companies who are inflicting harm on European consumers. If those U.S. companies, as was the case in the wood pulp cartel, happen to have a Webb-Pomerene exemption from U.S. antitrust law, it seems to me that all U.S. law says is they are not really *doing* anything in the United States that is hurting the U.S. market. The 1975 antitrust international guidelines underscore that a Webb-Pomerene exemption does not mean you have immunity under foreign law. The U.S. authorities have no power to grant any such immunity. In light of that fact, my notion has been, that if you were going to do anything, what you should do in those cases is stand ready to provide assistance under the appropriate legal authorizations to the foreign authorities so that their consumers can be protected. You could then leave all the export cartel exemptions in place, if you made it very clear that those kinds of arrangements are undertaken at the firms' own risk. And, if they are in fact violating the law of the country into which they are sending their exports, they had better watch out, because they are not going to get a sympathetic hearing on any side. This will also help to separate true export cartels from legitimate joint ventures. Webb-Pomerene Associations frequently are nothing more than joint ventures. Just because a couple of companies have gotten together to create a joint selling arrange-

ment by no means proves that they actually have “cartelized.” Maybe they are just sharing facilities and creating some sort of efficient arrangement. So the mere existence of one of these export associations normally is not enough to know whether they are creating any kind of competitive problem or not in the other market.

The bottom line is that competition is important. It is something that needs to be fostered and encouraged in as many places as possible. But this process has to unfold from the ground up. The way to do that is to have effective national laws that are consumer-oriented, and to allow the national authorities to work with each other.

