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# Public Choice Theory and the International Harmonization of Competition Policy

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BY SPENCER WEBER WALLER*

The role of a commentator is to attempt to show the excellence and essential unity of the papers of a panel, offer at most a couple of mild critiques, and yet provide at least one original tidbit to the contributions of the distinguished presenters. It is a pleasure to attempt these tasks in connection with the stimulating articles offered by Judge Wood, Professor Fox, and Dean Kunzlik.

## I. Different takes on prospects for harmonization

Each author has addressed a different aspect of the continuing debate about the desirability and feasibility of the continued harmonization of competition law. Each reaches different conclusions but shares many basic themes.

Professor Fox continues her sophisticated and impassioned advocacy of some form of true international competition law.[1] In her article

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[1] *See e.g.*, Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON L. 665 (1999); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997); Eleanor M.

for the Sullivan conference, she analyzes questions of inbound restraints, outboard commerce (basically export cartels), and restraints in world markets, such as anticompetitive mergers of firms operating in world markets.[2] For each issue, she asks the important question of whether the present "solutions," namely extraterritoriality and cooperation, are either legitimate or sufficient or whether more cosmopolitan global solutions are required. She concludes that antitrust issues related to inbound restraints are the least problematic and the most capable of being addressed by national competition law through a combination of extraterritoriality and cooperation.[3] Nonetheless, she sees important gaps relating to the ability of lesser developed countries to effectively detect, investigate, and punish global antitrust wrongdoers; problems for all countries in finding evidence located outside their borders; and nagging issues of industrial policy where nations seek to benefit from conduct that imposes costs on their trading partners.[4]

Professor Fox is somewhat less sanguine about the ability of national competition law using the existing tools of extraterritoriality and cooperation to address either the question of export cartels or market access. She concludes: "[N]ational competition enforcement is not sufficient for control of export cartels, and national competition enforcement is not legitimate or sufficient to pry open closed foreign markets or otherwise prevent restraints on foreign soil principally affecting the home nations's internal market."[5]

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Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 11–12 (1995); Eleanor M. Fox, *Antitrust, Trade and the Twenty-First Century—Rounding the Circle*, 48 REC. ASS'N BAR CITY N.Y. 535 (1993); Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221.

[2] Eleanor M. Fox, *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Coopertation?*, in this issue of *The Antitrust Bulletin.*

[3] *Id.* § II.

[4] *Id.* § III.

[5] *Id.* § IV.

She concludes by examining the problem of global mergers and global firms with a truly dominant position in one or more markets. Here the problem is not gaps but "overlaps" as multijurisdictional merger review and multiple investigations of Microsoft and IBM in the past illustrate. The deepest questions of legitimacy occur when the EU blocks a merger of United States companies that the United States has approved or vice versa.[6] To deal with all of these issues, Professor Fox proposes a combination of continued dialog within organizations such as the International Competition Network as well as the creation of a World Competition Restatement Project, and a potential role for the World Trade Organization.[7]

In contrast, Judge Diane Wood continues her focus on what has worked in the past to better empower national competition authorities to address international competition issues.[8] She argues that continued reliance on extraterritoriality and cooperation is both feasible and desirable in lieu of quixotic searches for global codes of competition law or new international organizations with sweeping powers.[9] Judge Wood surveys the development of an international consensus that some forms of extraterritoriality are legitimate and a growing degree of "soft" harmonization through the auspices of the Organization for Economic Cooperation and Development (OECD) and through bilateral agreements.[10]

She concludes that "Despite the modest character of the soft competition agreements, their track record is rather impressive if the definition of success is the strengthening of sound competition laws

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6 *Id.* § V.

7 *Id.* § II. *See* Fox, *Millennium Round*, *supra* note 1.

8 *See e.g.*, Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289 (1995); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277. *See also* Diane P. Wood, International Standards for Competition Law: An Idea Whose Time Has Not Come, Paper Presented at Graduate Institute of International Studies, Geneva (June 19, 1996).

9 Diane P. Wood, *Soft Harmonization Among Competition Laws: Track Record and Prospects*, in this issue of *The Antitrust Bulletin*.

10 *Id.* § I.

and their enforcement around the world."[11] Even here, "This has not happened overnight, and no one should expect that further gains in the effort to develop a global consensus on competition law should occur in the wink of an eye. But it has happened because, at each step of the way, countries were persuaded that this was in the best interests of their citizens and their economies."[12] She urges us to stay the course and continue working toward a consensus on the substantive content of antitrust, focus on the procedural mechanism to minimize disruptions from multiple enforcement agencies, and improve legal tools for enforcement cooperation.[13]

Associate Dean Peter Kunzlik addresses a seemingly different aspect of harmonization. In his article he focuses on aspects of antitrust enforcement that European competition systems have borrowed from the United States.[14] He notes how Ireland borrowed both the criminalization of competition law and the creation of a leniency policy from the United States as it was also bringing the substantive provisions of its laws into closer harmony with that of the European Union's competition rules.[15] He sees a similar process at work in the United Kingdom as well.[16] Kunzlik finds great significance in these developments both within these nations, within the European Union more generally, and holding forth the promise of greater cooperation and perhaps even extradition in national enforcement actions against international cartels and their leaders.[17]

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[11] *Id.* § II.

[12] *Id.*

[13] *Id.* § III.

[14] Peter F. Kunzlik, *Globalization and Hybridization in Antitrust Enforcement: European "Borrowings" From the U.S. Approach*, in this issue of *The Antitrust Bulletin.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

## II. Tying these themes together through public choice theory

Where then lies the essential unities of these seemingly diverse approaches? One way to begin to tie together the insights of each of the authors is to apply the teachings of public choice theory to how, where, and why harmonization of competition law and policy has succeeded or failed.

Public choice analysis rests on the fundamental proposition that people behave in political arenas in much the same manner as they behave in economic markets. As one commentator describes it:

> The model of public choice insists that the same rational, self-interest-seeking motives that animates human action in ordinary markets be applied to decision making in the public sector as well. The assumption that all individuals, in or out of government, pursue their own self-interests is the fundamental tenet of public choice. Just as consumers want to maximize their utility and firms want to maximize their profits, public policy makers want to maximize their welfare.[18]

In the public choice model, government actors are producers of laws and regulations. Interest groups and individual voters are consumers of such laws and regulations. Law producers seek to maximize their interests by behaving in such a way that promotes their long-term retention in office and their overall influence. Bureaucratic interests act in such a way to aggrandize their power and influence. Consumers of laws and regulations respond by maximizing their self-interest by bestowing votes, donations, influence, and needed information on those producers who best serve their needs. In most circumstances, smaller groups of more intensively affected parties will be better able to influence such markets than broader more diffuse interest groups whose information and organizational costs may be prohibitive, relative to the expected gain of lobbying.

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[18] William F. Shugart II, *Public-Choice Theory and Antitrust Policy, in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE 7–8 (Fred S. McChesney & William F. Shugart II eds., 1995). DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

Relatively little has been written applying public choice theory to antitrust enforcement and virtually nothing applied to questions of international harmonization.[19] Nonetheless, the insights it can offer are quite helpful.

In essence, public choice offers an intuitively obvious way to think about harmonization in the competition law area. Harmonization has succeeded where it has increased the power, prestige, and durability of national competition authorities and failed where the proposal would diminish rather than enhance the stature of national competition authorities.[20]

The evolution of extraterritorial jurisdiction in competition cases from a highly contested United States practice to a nearly universal norm can easily be explained in these terms. The United States has seen the need for some forms of extraterritoriality since the 1920s[21] and used more robust forms of extraterritoriality since the *Alcoa* decision in 1945.[22] The 1990s produced a new phenomenon with cartel enforcement being predominately focused on large international cartels with relatively minimal U.S. corporate participation.[23] In the public choice world, such cases produce the best of all possible worlds: massive publicity, record breaking fines and jail terms,

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[19] *See* Shugart, *supra* note 18; PUBLIC CHOICE AND PUBLIC REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION (Robert J. Mackey et al. eds. 1987); Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1426–30 (1998).

[20] Note that this perspective is quite similar to the aspects of interest group and bureaucratic politics models from political science and international relations theory. *See* GRAHAM ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971). For an application of these models to questions of international harmonization of competition law *see* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997).

[21] United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

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

[23] *See* Scott Hammond, *From Hollywood to Hong Kong—Criminal Antitrust Enforcement Is Coming to a City Near You*, 14 LOY. CONSUMER L. REV. 567 (2002).

legitimate justifications for larger budgets, bigger staffs, and relative prestige virtually without political cost since the vast majority of the corporate and individual defendants are from outside the U.S. and lack significant voice or influence within our system.

Extraterritoriality, however, brings with it a different set of difficulties. Jurisdiction without evidence is a meaningless exercise. Governmental and private plaintiffs in the United States have long felt the frustration of losing (or choosing not to pursue) cases for this reason. One particularly embarrassing moment for the United States Government was its cartel prosecution of General Electric in the industrial diamonds market where the case was dismissed at the close of the Government's case-in-chief following the recantation of a key witness and a failure to obtain admissible corroborating evidence located outside the United States.[24]

In response, the United States began to negotiate a variety of bilateral cooperation agreements, mutual legal assistance treaties governing joint criminal enforcement, and one agreement pursuant to the International Antitrust Enforcement Assistance Act allowing full exchange of otherwise confidential civil and criminal information in competition matters.[25] The United States further bolstered its investigatory powers in competition cases (both domestic and international) by instituting formal amnesty and leniency policies creating incentives for individuals and corporations to defect from cartels and provide cooperation and direct evidence for the government in return for outright immunity or significantly reduced criminal liability for fines and/or imprisonment.

The more interesting question is why other nations, particularly lesser developed nations, have emulated these developments. For most nations, extraterritoriality may not always be effective, but it is a costless exercise in free riding. If the smaller, or lesser developed, jurisdiction could somehow on its own learn of unlawful activity that was previously unknown, obtain the relevant evidence, prove the

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[24] *See* United States v. General Electric Co., 869 F. Supp. 1285 (S.D. Ohio 1994).

[25] *See generally* Waller, *supra* note 20.

violation, and enforce the penalties (because the foreign corporation has operations, assets, or personnel within the jurisdiction) all the better. More likely, it would simply wait (by choice or necessity) until more powerful enforcement agencies have taken action and then use commonly accepted principles of extraterritoriality to extract an additional penalty that accrues to its own agency or, at worst, the national treasury. Such a strategy may be duplicative, but it is hardly illegitimate, and may add a bit to the overall deterrent effect for future corporate actors.

Most nations' competition enforcers benefit from extraterritoriality and cooperation in specific enforcement matters *even* when their own nationals are targeted by sister competition agencies. Except in the relatively rare case of the pure export cartel, extraterritorial enforcement by foreign competition authorities helps reveal and punish conduct that is also being carried out within national borders. An aggressive United States, European Union, Canadian, Australian or other investigation complete with private litigation, guilty pleas, etc. can lay out a public record that an understaffed and underfunded agency can use back home to obtain some relief against powerful firms and individuals otherwise able to prevent or defeat a de novo investigation by the fledgling agency.

Even if the cartel preys solely on foreigners, the national competition authority normally will have little interest in protecting its own nationals on industrial policy or other grounds from the reach of sister authorities. Competition authorities typically enjoy a fair degree of formal and real autonomy and independence from the political branches of the government. Regardless of their organizational structure, the competition agencies almost never have responsibility for the industrial policy or trade agenda behind the anticompetitive conduct aimed abroad. To the extent that these competition authorities are staffed with people imbued in the culture of competition, they would tend to oppose such policies within their own government and at a minimum have no ideological interest in protecting their nationals from the reach of another nation's competition statutes.

The political costs are higher when the domestic competition agency is being asked to actively assist a foreign authority investigating a domestic national. Here, the competition authority

being asked for assistance cannot hide behind the passive virtues of merely letting a sister authority do its job under accepted principles of extraterritoriality. Instead, it is being asked to expend precious resources to help the eventual imposition of foreign penalties against its own citizens, oftentimes when the targets have violated only foreign and not domestic law. Not surprisingly, the number of publicly known instances of "positive comity" assistance can be counted on one hand and have never occurred in hard-core cartel cases.[26]

Leniency programs have spread among various enforcement regimes because they too work to enhance the power of national enforcement for any given jurisdiction. However, if adopted too widely they work to undermine the very incentives that make them desirable in the first place.

The amnesty and leniency program adopted by the United States[27] is the living embodiment of the prisoners' dilemma from game theory.[28] It handsomely rewards the first cartel member to defect (other than the ringleader) and provide the government with information and assistance regarding a previously undetected antitrust violation. Similar programs have sprung up in the European Union, Canada, the United Kingdom, and Ireland. Other jurisdictions have adopted or considered them. Given the variety of programs in this area, it may be fairer to say that such programs have proliferated, rather than to describe the phenomenon in terms of harmonization.

While extremely effective in any one jurisdiction, a multiplicity of amnesty programs makes it much harder for any given defendant to defect from an ongoing cartel. Coordinating the timing and disclosures for four or more jurisdictions may make it less likely to defect anywhere than in a world with either a single such program or a

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[26] See JAMES R. ATWOOD, KINGMAN BREWSTER & SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 14.6 (3d ed. 1997 & Supp.).

[27] *See generally* Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798 (2001).

[28] Jonathan B. Baker, *New Horizons in Cartel Detection*, 69 GEO. WASH. L. REV. 824, 827 (2001).

truly harmonized set of programs. Under the present jumbled system, liability may be avoided in one key jurisdiction at the risk of exposing oneself to nearly certain criminal and civil liability in a host of other jurisdictions with serious penalties. Thus, I would expect, as predicted by Dean Kunzlik, that national enforcers will come together in a serious effort to harmonize their amnesty and leniency programs as much as possible for the mutual increase in their power and prestige.

Public choice theory, or its less sophisticated cousin pure self-interest, also suggest the limits to harmonization and the areas where it is least likely to succeed. The numerous unsuccessful attempts to harmonize the substance of international competition law or to draft true international competition law has been summarized by Judge Wood in this symposium,[29] and told in greater detail by others.[30] The story of why it has failed is much harder to tell. While beyond the scope of this short comment, the creation of true international competition law *diminishes* rather than enhances national enforcement authority, raises complex bureaucratic rivalries in the United States over who will speak for the United States on competition-related trade issues, raises equally complex issues as to how benefits or concessions on competition issues will be traded for benefits and concessions in other trade areas if a competition code is negotiated in the World Trade Organization framework,[31] and raises the specter of the United States (or some other competition authority) being told it most do something or must refrain from doing something. All these public choice perspectives plus good-faith differences about what is good competition policy and how disputes over that policy should be resolved suggest that even the loosest international constraints on national discretion are far off on the horizon regardless of their desirability.

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[29] Wood, *supra* note 9, § I.

[30] *See, e.g.*, KEVIN KENNEDY, COMPETITION LAW AND THE WORLD TRADE ORGANIZATION: THE LIMITS OF MULTILATERALISM(2001).

[31] *Cf.* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998) (arguing international antitrust code possible only in multi-issue WTO negotiating round allowing tradeoff between competition and other trade issues).

One final small example adds to a view of harmonization proceeding the farthest and fastest when it helps, rather than hinders, the power of both the most significant national enforcement authorities and the smaller less powerful agencies around the world. In October 2001, the creation of the International Competition Network ("ICN") was announced with much fanfare. The ICN web site describes its mission :

> The International Competition Network (ICN) will provide antitrust agencies from developed and developing countries with a more focused network for addressing practical antitrust enforcement and policy issues of common concern. It will facilitate procedural and substantive convergence in antitrust enforcement through a results-oriented agenda and informal, project driven organization.
>
> ICN will help bring international antitrust enforcement into the 21st century. By enhancing convergence and cooperation, ICN will promote more efficient, effective antitrust enforcement worldwide. Consistency in enforcement policy and elimination of unnecessary or duplicative procedural burdens stands to benefit consumers and businesses around the globe.[32]

While few will argue with the value of the ICN, it is important to note that the ICN is a network of *governmental* enforcement authorities helping each other to do their jobs more effectively. The public, rather than private, nature of the ICN was a carefully chosen decision in the wake of an intense struggle of such private groups as the International Chamber of Commerce, the American Bar Association, and the International Bar Association to be the focal point for further harmonization efforts. While the ICN uses a variety of private sector advisers, only the government authorities make the decisions. Moreover, it was a new "virtual" organization, a "network" of like-minded competition authorities from the developed and developing world, rather than utilizing existing more general purpose international organizations such as the Organization of Economic Cooperation and Development and the United Nations Conference on Trade and Development which had been the center of past efforts at antitrust harmonization as part of a broader agenda.

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[32] At http://www.internationalcompetitionnetwork.org/.

## III. Conclusion

Self-interest is a powerful organizing principle of both public and private actors in markets, including political arenas not normally thought prone to such forces. Public choice theory has its defenders and critics as a general critique of American law and government but gives us great insight into the kinds of questions dealt with in the Sullivan conference and the issues raised by the distinguished speakers.

Professor Fox has given us a vision of what is needed. Judge Wood has given us a vision of what may be possible and Dean Kunzlik has explored the reasons for, and consequences of, borrowing certain enforcement practices from other jurisdictions. Public choice theory is one way to tie these themes together and set forth a roadmap of where we will see greater harmonization and where we will not.