“The U.S. Unilateral Hypothesis”

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Presented at
Anti-Trust and Globalization Conference
Centro nazionale di prevenzione e difesa sociale
Courmayeur Mont Blanc
September 19, 2003
Introduction

I am honored to participate in this prestigious convocation on globalization and antitrust, occurring only days after the WTO Ministerial Conference in Cancun. The topic that was assigned to me, “The U.S. Unilateral Hypothesis,” is immediately intriguing. Why “hypothesis?” I wonder, first of all. Surely we are not talking about a conjecture that is to be tested for its relationship to scientific truth, or even “a tentative assumption made in order to draw out and test its logical or empirical consequences.”¹ Rather, unilateralism is an approach, a strategy, perhaps a policy. We are not working here, I stress, on science, but rather on the combination of politics, law, and economics that might best be characterized as political economy. Nevertheless, trying to stay close to the assigned title, I will set forth and explain six hypotheses about U.S. antitrust policy that will help us determine whether it is rightly described as unilateral.

I. Hypothesis: U.S. international antitrust policy is not necessarily part of or driven by more general U.S. foreign policy.

It might be assumed that U.S. international antitrust is integrated into and therefore necessarily reflects U.S. foreign policy. It is true that the President appoints both the Assistant Attorney General for Antitrust and the Chairman of the Federal Trade Commission.² This assures that the outlook of the agency heads will be consistent with that of the President at some general level, probably reflecting a philosophical attitude toward big business or government regulation. But it does not follow that antitrust is part of or driven by foreign policy. Foreign policy itself has various components, including

¹ Webster’s [not so very] New Collegiate Dictionary (Merriam 1976), 565.
²The FTC has five commissioners appointed by the President to terms of seven years, so some may have been appointed by a previous President. No more than three can be of the same party as the President. The FTC’s structure gives disproportionate power to the Chairman, who is always appointed by the incumbent President. See generally Albert A. Foer, “The Politics of Antitrust in the United States: Public Choice and Public Choices,” 62 U. Pitt. L. Rev. 475 (2001).
military policy, diplomatic policy, and economic policy; and economic policy has various components including trade, investment, and competition. There are several reasons why antitrust is, as a general matter, not directly locked into foreign policy.

First, the President almost always has other things on his mind. In the hierarchy of matters that a President must deal with, antitrust usually ranks very low. Thus, except in the rare instance when antitrust becomes politically salient, it operates relatively free of White House oversight or intervention. *(It will be interesting to observe whether the White House chooses to use the anticipated European decision in its Microsoft case to castigate the E.U. for attacking an important American company or, much to be preferred, simply says nothing while the Antitrust Division patiently explains that it is a different case from the American Microsoft case and that the outcome of a long and professional investigation should be respected.)*

Second, foreign policy and economic policy matters are not closely coordinated at the Congressional level. A variety of committees are influential in their separate realms. This assures antitrust a certain amount of freedom from foreign policy intervention.

Third, since the days before World War II, US antitrust enforcers “generally have welcomed isolation from the national economic policy process.”3 They have said repeatedly that antitrust enforcement is nonpolitical and must be enforced without political interference. Policy interaction, they believe, invites interference with objective professionalism. This is more than a self-enhancing mantra; it is a genuine part of the culture of antitrust enforcement in the U.S.

There is generally no involvement of the State Department or the White House in cases. With respect even to policy that goes beyond specific cases, there is a gap between antitrust and other parts of government. To give you the flavor of antitrust’s isolation

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from other policy agencies, the Department of Justice is not even represented on the President’s Economic Policy Council. The foreign policy area in which one would anticipate the greatest degree of overlap would be between antitrust and trade. But, “The intersection of US trade and antitrust law and policy, both in the executive branch and in Congress, is almost nonexistent.”

I will accept, for purposes of this paper, that current U.S. foreign policy may properly be described as unilateralist. It does not necessarily follow, however, that U.S. international antitrust policy is unilateralist.

II. Hypothesis: U.S. Antitrust Combines Elements of Unilateralism, Bilateralism, Regionalism, and Multilateralism.

The three principal ways in which the U.S. might engage with other countries are isolation, unilateralism, and multilateralism. At various times, each of these approaches has been dominant, but there is no reason why a mixture of approaches can’t be followed at any one time. Consider trade policy, which Princeton University’s Robert Gilpin describes as “multitrack,” combining multilateral, unilateral, and regional elements. 

4 Id., 372. This is reflected in American occupational sociology. Trade attorney Alan Wm. Wolff describes the situation in these terms: “Those of us engaged in either the field of antitrust or trade are in fact deeply beholden to each other. However, to this we give little thought or weight. In fact the opposite is the case. The feelings running between the two fields, to the extent there are any, hover somewhere between disappointment and reproach.” “The (Notionally) Bridgeable Chasm,” 47 N.Y.L.S.L.Rev. 167-168 (2003).

5 See Robert Kagan, Of Paradise and Power, America and Europe in the New World Order (Knopf 2003) 8: “As for the United States, there is nothing timeless about the present heavy reliance on force as a tool of international relations, nor about the tilt toward unilateralism and away from a devotion to international law.” Two recent books that describe and forcefully criticize the U.S. movement toward unilateralism are Joseph S. Nye, Jr., The Paradox of American Power (Oxford Univ. Press 2002), and Charles A. Kupchan, The End of the American Era (Knopf 2002).

6 See Robert Gilpin, The Challenge of Global Capitalism (Princeton University Press 2000) 232: “The late 1970s and early 1980s had witnessed a surge of protectionist measures, the most important of which was the 1981 imposition of ‘voluntary export restraints’ on Japanese automobile exports to the United States. Whereas these protectionist reactions to imports did not significantly affect America’s overall commitment to multilateral trade liberalization, the new trade policy of the Reagan Administration did signal a major shift in America’s dedication to a liberal trade regime. This new trade policy, which would be pursued more vigorously by the Bush Administration (1989-1993) and still more aggressively by the Clinton Administration, has been given a number of labels: aggressive unilateralism, GATT-plus, results-oriented,
submit that “multitrack” also describes U.S. international antitrust policy better than the false dichotomy of unilateral and multilateral.

The U.S. negotiated a number of bilateral agreements\(^7\) that set a framework for daily cooperation with many of the nations that have major antitrust programs. These agreements provide primarily for notification, consultation, and (in more recent agreements) technical cooperation and positive comity.\(^8\) While bilateral agreements have not necessarily eliminated all problems of extraterritoriality,\(^9\) there’s a general sense that they are useful in generating routine coordination and cooperation.\(^10\)

Agreements provide a framework for coordination and cooperation on specific investigations.\(^11\) For example, in international mergers, it is not unusual for multiple interested nations to obtain waiver letters from the parties to permit sharing of

\(^7\) See Annex 1-C of Final Report, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (U.S. Department of Justice 2000). Under U.S. law, all of the bilateral agreements are so-called Executive Agreements, formal and binding, but not ratified by the U.S. Senate and thus do not override any inconsistent provisions of U.S. law.

\(^8\) Positive comity means that each party agrees to give serious consideration to requests by the other party to take appropriate antitrust enforcement action against anticompetitive conduct within the requested party’s jurisdiction that adversely affects the requesting party’s important interests. As of early 2000, there had been only one case of a formal positive comity referral.

\(^9\) Rosenthal & Nicolaides, note 3 supra, 374: “Neither side in any bilateral understanding negotiated to date has been willing to defer, as a matter of principle, to the primacy of the jurisdiction of the other.”

\(^10\) See, e.g., Simon J. Evenett, Alexander Lehmann, and Benn Steil, “Antitrust Policy in an Evolving Global Marketplace,” in Simon J. Evenett, Alexander Lehmann, and Benn Steil (eds.), Antitrust Goes Global: What Future for Transatlantic Cooperation? (Royal Institute of International Affairs and Brookings Institution Press, 2000). “Unlike progress at the WTO, bilateral cooperation has rapidly expanded and deepened...Occasional confrontations, such as in the 1997 merger of Boeing and McDonnell Douglas, have been much publicized but...they are the exception rather than the rule.” 18-19.

information provided to one government.\textsuperscript{12} Nor is it unusual for government case
handlers to have uninhibited weekly trans-national conference calls regarding the analysis
of a case or the remedy phase, even where the exchange of confidential information may
be quite limited. \textsuperscript{13}

Bilateralism is an important part of U.S. international antitrust and it contributes to
both coordination and cooperation among the nations.

Let us turn to multilateralism by first making the point that \textit{this is not a term whose meaning is necessarily obvious}. I take it as encompassing more than the idea that all
nations should adhere to the same body of law. In the years since World War II, the U.S.
has supported many universal as well as regional multilateral initiatives, including not
only European integration, but increased harmonization with its own neighbors, Canada
and Mexico. With the North American Free Trade Agreement (NAFTA) in place, the
U.S. is now a leader in the creation of a Free Trade Area of the Americas (FTAA), to
bring about hemispheric free trade by 2005. U.S. antitrust enforcers are helping negotiate
FTAA competition rules in which each country will have to have a competition law, to

\textsuperscript{12} In 1994 Congress passed the International Antitrust Enforcement Assistance Act (IAEAA), Pub. L. No.
103-438, 108 Stat. 4597, 15 U.S.C. 6200-6212, authorizing the U.S. to enter agreements to facilitate the
exchange of confidential information with foreign governments during the course of civil or criminal
antitrust investigations. Only one such agreement currently exists, with Australia.

\textsuperscript{13} There seems no reason to object to the following balanced evaluation of U.S. bilateralism by the
International Competition Policy Advisory Committee (ICPAC), Final Annex at C-8, note 7 supra, in early
2000:

In sum, bilateral antitrust cooperation agreements appear to be an important instrument for fostering
cooperation between U.S. and foreign competition authorities. In some instances this is resulting in
cooperation on specific enforcement matters, while more generally these instruments are being used to
depthen contacts and communications, which over time appear to be useful and necessary building blocks to
still greater cooperation. Nevertheless, in many respects, at present the bilateral agreements still remain
limited instruments. Because they do not alter existing law or otherwise expand the powers of antitrust
authorities, they do not expand possibilities for the sharing of confidential or privileged information
without the provider’s consent, including statutorily protected information, commercially sensitive or
privileged information, or nonpublic investigatory information. They may not provide a mechanism for
resolving disputes that continue after the end of consultations. Further, the agreements do not implicate
substantive law nor seek to reach any formal procedural harmonization between the signatory jurisdictions.
enforce it, and to cooperate with other members. There will be no dispute resolution mechanism, however.

Antitrust regionalism can reduce or perhaps eliminate the incompatibility between trade policy and antitrust.\textsuperscript{14} Although in fact the U.S. refused to put antidumping laws on the table in the Canada-U.S. FTA and NAFTA negotiations,\textsuperscript{15} regionalism nonetheless holds great potential, e.g. for joint task forces to review merger cases, price-fixing cartels, and monopolies. There is no reason to expect, however, that the U.S. or its hemispheric partners are prepared to leap in the foreseeable future toward any form of formal harmonization.

Thus, regionalism is an important part of U.S. international antitrust policy that contributes to consensual convergence as well as cooperation and coordination among a subset of the world’s nations.

And the U.S. is a leader in the current promising initiative toward convergence, the International Competition Network (“ICN”). The ICN was initially proposed by an advisory committee established by the Clinton Administration. Its Final Report in early 2000 proposed what it called “the Global Competition Initiative,” envisioned as an inclusive, non-bureaucratic organization to “foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and common culture.”\textsuperscript{16} Both Democrat and Republican Administrations have devoted significant

\textsuperscript{14} See Gary Hufbauer, “Antitrust and Antidumping: Forever Separate Tables?” \textit{N.Y.U.L.S. L. Rev.} 141 (2002): “The argument for a unified regime is straightforward. Within federal states, such as Australia, Brazil, Canada, Germany, India and the United States, there are no special remedies for anticompetitive behavior with respect to shipments that cross interstate borders. Within customs unions and free trade areas (FTA’s), therefore, why should the legal regime allow special remedies for shipments that cross international borders? Isn’t the whole idea to create a single market without discrimination between sources of supply?” 141.

\textsuperscript{15} \textit{Id.}, 142.

\textsuperscript{16} \textit{Final Report}, note 7 \textit{supra} at 301. The Final Report is a repository of great value for anyone interested in international competition policy.
resources at the highest levels to the implementation of what is now called the ICN and they appear to be quite pleased with the progress that has been made.\footnote{See Eleanor M. Fox, “A Report on the First Annual Conference of the International Competition Network,” available at http://www.antitrustinstitute.org/recent2/229.pdf; and Albert A. Foer, “A Report on the International Competition Network,” http://www.antitrustinstitute.org/recent2/212.cfm. In his first testimony to a Congressional oversight committee in July, 2003, the new head of the Antitrust Division stressed the continuing U.S. commitment to the International Competition Network:}

The U.S. has also been for many years an active participant in the O.E.C.D.’s efforts to promote a multilateral antitrust agenda. Thus, the U.S. has been a leader in multilateral antitrust initiatives. Its approach deserves to be described as “multitrack.” One could even call it “multilateral” except that this word has come to be identified with the one particularistic projection of multilateralism that U.S. policy consistently rejects: formal harmonization.

\textbf{III. Hypothesis: A multitrack international antitrust strategy that fosters convergence is not inconsistent with a long-term goal of harmonization.}

Robert Gilpin, not speaking specifically about antitrust, posits three possible solutions to problems engendered by national differences: convergence, harmonization, or mutual recognition:

The convergence position requires patience, as it posits that national systems will converge through the operation of markets in which, over time, economic forces
will cause nations to modify their economic structures and business practices.
Harmonization, on the other hand, is based on international negotiations and reciprocity leading to elimination of national differences…Still a third way to deal with national differences is by application of the principle of mutual recognition, in which nations agree to honor one another’s economic and business practices.18

Although the U.S. has been a leader with respect to creating conditions conducive to convergence as well as in a variety of alternative ways of engaging with other nations in antitrust matters, the U.S. has steadfastly opposed global institutions of mandatory convergence, which is to say, harmonization. This is one of two reasons that have frequently been presented for concluding that the U.S. approach to cross-national antitrust issues is unilateralist.

The first argument rests on the fact that the U.S. has traditionally taken a broad view of the reach of its laws to deal with activities that occur abroad but which affect the U.S.19 The so-called effects doctrine grew at a time when the U.S. was the nation with the most active antitrust agenda and it placed a higher value on competition than many other nations. Cartels, for example, were either supported or accepted in many other countries. Over time, things have changed. First, as other countries objected to the U.S. reach, the effects doctrine became modified by a greater concern for issues of comity,20 and cooperative methods of operating were often worked out in bilateral agreements. Second, as other countries themselves became more antitrust-positive, the ability to cooperate and

19 See Spencer Weber Waller, “National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law,” 18 Cardozo L. Rev. 1111 (1996): “The United States has offered two distinct visions of antitrust enforcement as part of a conscious opposition to the creation of international antitrust rules or true international enforcement. The United States first embarked on a fifty-year strategy premised on the extraterritorial application of its antitrust laws. Only recently has the United States de-emphasized this aspect of government policy and sought instead to embrace international cooperation as an alternative to either aggressive unilateral enforcement or the true internationalization of antitrust law.”
20 See, e.g. Merit E. Janow, “Transatlantic Cooperation on Competition Policy,” in Simon J. Eventtt, et. al., note 10 supra., 29-56, saying that the early record suggests that positive comity is an important doctrine and that it can go some way in ameliorating tensions associated with extraterritorial enforcement and in facilitating enforcement cooperation.
at least to understand one another’s perspective grew. Taking these developments together, we can say that the initial concern about U.S. unilateralism via the “effects doctrine” has been substantially reduced.²¹

The second observation remains more serious. This is that the U.S. has rather consistently opposed efforts to create a single international antitrust regime.

Article 46 of the Havana Charter (1948) would have set up an international competition policy regime under the proposed International Trade Organization; but it wasn’t ratified, notably because (having been introduced by the U.S. executive branch) it was opposed by the US Congress. Its narrower rules with respect to tariffs, dumping and trade-distorting subsidies became the basis of GATT. In 1953, a committee of the UN produced a United Nations Draft Convention on restrictive practices that proposed mechanisms to challenge practices affecting international trade that “restrain competition, limit access to markets or foster monopolistic control.” There was strong opposition to it from the US business community and the US chose not to ratify it. Other attempts to formulate a multilateral competition initiative have continued under a variety of formal (such as UN and OECD) and informal auspices, but none has led to an agreement accepted by the community of nations.²² The U.S. position has consistently been “the most reluctant harmonizer on the international scene.”²³

The issue of current concern, of course, is whether the World Trade Organization’s mission should be expanded to include competition policy. The consistent position of the Department of Justice was reiterated last year by Edward T. Hand, Chief


²² See F.M. Scherer, Competition Policies for an Integrated World Economy (Brookings Institution, 1994): pp. 38-41. The 1980 UN UNCTAD code was accepted by the community of nations in the sense that it was unanimously passed by the General Assembly with even the US voting for it. But, it is merely voluntary and only a handful of LDCs have ever taken it seriously. The OECD guidelines have been passed by that body but it is a more limited membership and again voluntary.

²³ Waller, note 19 supra, 1119-20.
of the Foreign Commerce Section, at an American Antitrust Institute conference on trade and antitrust.  

“We are committed to carrying out the Doha mandate,” Mr. Hand said, “and we await the decision of ministers in Cancun [Sept. 9-14, 2003].” He then went on to quote former Assistant Attorney General Charles James:

No one seriously believes that the world is ready for a global antitrust code enforced by a global antitrust agency, nor has there been nearly enough convergence to justify the imposition of dispute settlement-based antitrust disciplines in trade agreements, in the WTO or elsewhere. The risks of sterile conflict and politicization of antitrust enforcement remain too great.

The “No one seriously believes” language was classical Jamesian exaggeration and indicative of a certain arrogance that has sometimes undermined American credibility. But, in fact, at least five reasons have been put forth by Americans opposed to lodging antitrust within the WTO. The James quote mentions the most important reason: that the nations of the world, including many that have only recently adopted antitrust laws, are not close to a consensus on most substantive competition rules. I will elaborate later, but the point is that a great deal of energy can be wasted by a premature effort at codification, and this could undercut the resources available for more immediate efforts to expand international antitrust law enforcement.

Another concern is that a code is likely to reflect the lowest common denominator. Ironically, the traditional U.S. position was that the U.S. has the strongest antitrust laws and the most aggressive enforcement, and does not want an international code to diminish its brand of relatively aggressive antitrust. Today, one suspects there may be a somewhat different consideration. The European Commission today appears to hold a broader view of the role of antitrust than the current U.S. view, being less


25 Id.

influenced by the Chicago School of neoclassical economics. The U.S. may fear that codification will subject the U.S. to this more populist type of antitrust regime. I believe that this is what James was referring to in his statement about codification leading to politicization.

Additional concerns are that a code would be rigid and static, unable to adapt quickly to a rapidly changing global market or to future developments in competition policy; that it could distort the pro-consumer, efficiency-based philosophy that dominates U.S. antitrust; and that a code would subject the U.S. (not to mention other sovereign nations) to the whims of a majoritarian organization in which some members may be interested in advancing non-competition goals through competition channels and dispute resolutions.

I suggest, first, that there is no inconsistency between seeking convergence today and some form of harmonization tomorrow; and second, on the other hand, that the reasons I have just cited are good and sufficient reasons for hesitating to make the leap from convergence to harmonization at this time. However, I would like to offer two additional hypotheses that may throw light on the U.S. position.

**IV. Hypothesis:** Because the U.S. has long and generally positive experience with an antitrust system that is characterized by diversity, it does not place a high priority on uniformity.

The U.S. has been in the antitrust business, at the federal level, since 1890. Since 1914, there have been two agencies sharing federal antitrust enforcement. In addition, each of the states has its own antitrust laws, and the states have been increasingly active as antitrust enforcers since around 1980. Finally, the U.S., unlike many nations, has

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robust private causes of action (with treble damages, to encourage “private attorneys general” to bring cases) that may result in monetary and injunctive remedies. It is estimated that there are ten times as many private cases as there are federal cases.\(^2\)

Does the system work perfectly in the absence of unity? No, but U.S. enforcers and legal counselors are familiar with a common law process that moves fitfully and workably in an evolving direction.\(^2\) In other words, U.S. experience shows that disharmony does not necessarily work against vigorous antitrust enforcement.\(^3\) It is likely that this experience influences U.S. policy with respect to the priority that should be given to efforts to seek harmonization of international antitrust.

In most instances where a single universal law is sought, this is because of a perceived race to the bottom that must be avoided. I think, domestically, of how the states in the U.S. have competed on the basis of their weak corporation laws and sad tax subsidies to attract corporations into their borders. In antitrust, though, there may be a race to the top, where the strongest unit of enforcement sets the standard for all those companies that can fall within its jurisdiction. This gives individual nations or regional jurisdictions, not just the U.S., significant leverage in the competition policy arena that might be sacrificed to a universal law that must pass muster with all.\(^4\)

\(^2\) Ernest Gellhorn and William E. Kovacic, *Antitrust Law and Economics* (West Group, 4th ed. 1994) 462. There is now reason to believe that the ratio of private to public cases is actually much greater than 10:1.

\(^2\) Spencer Weber Waller has argued that the U.S. “is reacting at a fundamental level to the vigorous advocacy of a code, or civil law, approach in the field of competition law that historically arose in the United States as a court-centered common law tradition.” He suggests that “we already live in a world with certain identifiable international competition rules constituting international law.” Thus it might be theoretically possible to create an international dispute resolution mechanism without first codifying international antitrust law. See note 26 supra, at 165, 167, 172.

\(^3\) FTC Chairman Timothy J. Muris has emphasized the role of differences, not only in theories of harm and law, but of evaluating factual evidence, that account for disagreements in antitrust enforcement. While elaborating on differences between the E.U. and the U.S., he stresses that in the overall picture of antitrust enforcement these differences are relatively small. “Merger Enforcement in a World of Multiple Arbiters,” remarks to the Brookings Institution, Washington, DC, Dec. 21, 2001, \url{http://www.ftc.gov/speeches/muris/brookings.pdf}. Also see Kevin J. O’Connor, “Federalist Lessons for International Antitrust Convergence,” 70 Antitrust L.J. 413 (2002).

\(^4\) FTC Chairman Muris refers to this phenomenon as domination by the “most restrictive ruling.” He sees this as potentially leading to over-regulation, as it did in a study he co-authored involving the regulation of advertising by multiple jurisdictions, but he believes that international cooperation can reduce its relevance,
V. Hypothesis: Because the U.S. has long experience with domestic conflict over the goals and appropriate methodologies for antitrust, it does not think that efforts to impose uniformity are likely to succeed.

But how much can we realistically expect by way of harmonization? At the current time, there are important differences of approach toward antitrust, both within the U.S. and internationally. These differences reflect larger controversies about the role of economics (and whose economics?) in global policy. Again, it is useful to turn to Robert Gilpin:

Economics and political economy differ significantly in their view of the role of the market in economic affairs and of the relationship of the market to other aspects of society. Whereas neoclassical economists believe that the market is autonomous, self-regulating, and governed by its own laws, almost all political economists assume that markets are embedded in larger sociopolitical structures that determine to a considerable extent the role and functioning of markets in social and political affairs and that the social, political, and cultural environment significantly influences the purpose of economic activities and determines the boundaries within which markets necessarily must function.32

Joseph Stiglitz describes similar battle lines in Globalization and Its Discontents, focusing on the policies of the International Monetary Fund. He uses slightly different terms: “the Washington Consensus” which he equates with “market fundamentalism” at least in the merger field. Id. While I recognize that this race to the top can lead to over-regulation, I also see it as a failsafe for under-regulation, which may be an even greater concern when we are dealing with multinational corporations that are sometimes larger than nations. In the U.S., it is commonly believed that when the Reagan Administration cut back on antitrust’s federal role, the states jumped into the vacuum as aggressive law enforcers. Whether this is good or bad depends on one’s particular philosophy of antitrust.

32 Robert Gilpin, note 18 supra, 74-75.
versus a more comprehensive approach to development that takes more into account than one school particular of economics.\textsuperscript{33}

This very same battle plays out in the American antitrust community, where there are four general approaches to antitrust analysis. At one end is the libertarian approach that prefers a market system with virtually no government interference. This laissez faire view is often represented on the editorial page (although not in the news columns) of the Wall Street Journal; it has little use for antitrust.

A second view is that of the neoclassicists, the Chicago School. They start with the assumption that markets rarely fail, unless government is putting its heavy thumb on the scale of competition, and like the libertarians, they are not very confident about government’s ability to improve upon the market. To the Chicago School, the sole purpose of antitrust is to promote economic efficiency. Nevertheless, they see antitrust as necessary, primarily useful to protect against horizontal collusion and mergers to monopoly, as well as to advocate for market solutions within the governmental arena.

In juxtaposition to the Chicago School is the Post-Chicago School. As described by economists John Kwoka and Lawrence White, Post-Chicago economics is not yet a unified alternative paradigm, “but it has gained acceptance as an intellectually rigorous alternative approach to antitrust.”\textsuperscript{34} The Post-Chicago approach (which has a rich heritage that predates the current Chicago School) is more fact-based and takes into account such factors as information imperfections, sunk costs, reputation effects, and strategic behavior that have improved our understanding of many matters, including predatory pricing, vertical restraints, tying and bundling, and raising rivals’ costs. Some antitrust experts who consider themselves Post-Chicago also talk about limitations inherent in a focus on efficiency (static efficiency and dynamic efficiency are two different animals, for


instance) and the importance of other historic purposes of antitrust, such as innovation, consumer choice, and distributional equity.

Finally, there is a populist school of antitrust that thoroughly distrusts economics and sees in antitrust a tool for achieving a society of smaller units of production. Neither the libertarians nor the populists play a significant role in modern American antitrust, but the differences between the Chicago School and the Post-Chicago approach are real and have their parallels throughout the antitrust world.

A recent review of trans-Atlantic cooperation by the Brookings Institution and the Royal Institute of International Affairs reveals some of these differences as manifested in U.S.-E.U. relations. To summarize, in the field of merger enforcement, despite “significant procedural differences between the two systems,” one article concluded that “the substantive standards applied by EC and U.S. antitrust agencies for reviewing horizontal mergers are increasingly converging.” It is noteworthy, however, that one of the authors, William Kolasky, subsequently became the voice of the Department of Justice in criticizing the E.U.’s decision in the G.E./Honeywell merger, emphasizing the substantive differences between the U.S. approach, which approved the merger, and E.U. approach, which stopped it.

Until very recently, in anticartel enforcement, there appeared to be little formal cooperation, which was somewhat surprising because there is a general level of agreement on substantive law. The differences in the way vertical arrangements are reviewed, on the other hand, “may be sufficient to cause bilateral enforcement

35 Evenett et al, note 10 supra.

36 James S. Venit and William J. Kolasky, “Substantive Convergence and Procedural Dissonance,” in Evenett et al., note 10 supra. Since this study, the E.C. has made reforms that reduce some of the procedural differences.


38 Spencer Weber Waller, “Anticartel Cooperation,” in Evenett et al., note 10 supra. 98.
cooperation between the two jurisdictions to break down.” As summarized by Philip Marsden, “European competition policy is satisfied that an arrangement should be prohibited upon proof that it may significantly restrict one or more competitors’ ability to access or expand its operations in a market; U.S. antitrust law goes a step further, requiring proof that such harm is also likely to lessen competition substantially.” The collection does not take on the substantial differences that exist between U.S. attitudes toward monopoly and monopolization and the European concept of “abuse of dominant position.”

Such differences are inherent in a world political system rooted in sovereign nations. As Gilpin says,

> Despite the increasing significance of the market and economic globalization, economic outcomes are determined not only by economic forces but also by governments and their policies. Yet national societies differ fundamentally in the degree to which their governments play a meaningful role in the economy and in the ways in which they attempt to manage their economies.

The antitrust tradition that attempts to prevent collusive business practices and concentration of corporate power is the essence of competition policy in the United States, and it facilitates entry into the American economy by foreign firms. Japan and South Korean competition policies, on the other hand, not

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39 Philip Marsden, “The Divide on Verticals,” in Evenett et al., note 10 supra, 117: “[T]he gap is based on fundamentally different philosophical approaches to economic freedom.” Marsden is not convinced that the E.U.’s new Competition Rules for Distribution (May 24, 2000) significantly narrow the gap. Others may disagree.

40 Id., 118.


42 Gilpin, note 18 supra, 147.
only tolerate but actually encourage concentration of corporate power in the form of the keiretsu and the chaebol. Although both these institutions are troubled at the opening of the twenty-first century, it is unlikely that they will be dismantled in the name of increased openness and competition.43

Moreover, as Douglas Rosenthal and Phedon Nicolaides have explained,44 the obstacles facing harmonization are much deeper than differences in antitrust enforcement between nations. This is not what impedes open markets. “Rather, low-visibility resistance to competition outside the scope of antitrust law and policy, particularly expressed in [trade, investment, intellectual property, regulatory, and industrial policies] often is an impediment.”45

Many aspects of antitrust policy are simply not so amenable to consensus. The fact is that there are legitimate differences of opinion, within and between nations, that reflect far more than theoretical arguments among economists. No one country can afford to be smug about its own antitrust positions because such positions may indeed have only transitory staying power—even within that country.

VI. **Hypothesis: Common Ground Short of Harmonization Should Be Attainable in the Near Term.**

The recent Cancun Ministerial Conference of the WTO fell apart over the question of agricultural subsidies and did not get to substantive proposals about competition policy. Nevertheless, I am pleased to see the direction taken by the Working Group charged with preparing for Cancun.46 While earlier speculation had

43 *Id.*, 193.

44 Rosenthal & Nicolaides, note 3 *supra*, 355.

45 *Id.*, 357.

focused on the dual ideas of harmonization through some form of code and a central
dispute resolution process, it appears that the Working Group has had little interest in
harmonization, “if by harmonization is meant an insistence on uniform approaches to
competition law and policy at the national level.”47 The idea that “one size does not
fit all” seems to have been widely accepted by the Working Group and the focus has
turned to seeking broad commitment to transparency, non-discrimination, procedural
fairness; provisions on hard-core cartels; modalities for voluntary cooperation; and
long-run support for the strengthening of competition institutions in developing
countries through capacity building activities. The idea of a central enforcement
agency apparently is not now under serious discussion. For the most part, it would be
left to individual nations to define the details of their national legislation. A key issue
around which a consensus had not developed was the role of the WTO Dispute
Resolution Understanding in a possible multilateral framework on competition policy.

It appears that advocates of multilateralism within the WTO context have backed
away from what might be called an ultimate degree of harmonization, in favor of
voluntary methods of facilitating convergence, international cooperation, and
institution building, that is, the creation of a “culture of competition.” This makes
good sense to me.

I will note, however, that the American Bar Association’s Sections of Antitrust
Law and International Law and Practice jointly submitted Comments to the United
States Trade Representative urging great caution in Cancun. The comments suggest
that even the limited multilateral framework as I have described it is fraught with risk
that it will lead to mandatory adoption of anti-cartel laws with some form of sanctions
for non-compliance. Perhaps their main concern is that most WTO countries are still

47 Id. We may be moving toward a convergence of “harmonization” and “convergence”, terms that some
commentators (and I in this paper) have distinguished. See Harry First, “Theories of Harmonization: A
First argues against “forcing premature harmonization of antitrust systems through international
agreement,” saying the better approach “would be to maintain competition among antitrust systems.” Id.,
18.
lacking the necessary underlying institutions to make a universal anti-cartel program work, but they also seemed to view Cancun as the camel’s nose under the tent, the first steps on a slippery slope leading to harmonization, centralized law enforcement, and centralized dispute resolution, none of which is acceptable to them.

The U.S. government position seems to be contained in a communication to the WTO Working Group on the Interaction Between Trade and Competition Policy, in which the U.S. proposed peer review in the WTO competition context. That paper described

the benefits of a peer review system, drawing on experience in other competition fora in which it has been successfully employed. These benefits include facilitating learning through sharing experiences and expertise, contributing to capacity building, promoting transparency, promoting convergence, encouraging problem-solving, and promoting international cooperation… Peer review can be an effective and important tool in enhancing national competition regimes, and by helping disseminate the culture of competition to all Members, can benefit the world trading system as well.

VII. Where I Come Out

I have offered a series of six hypotheses about the U.S. approach to international antitrust, which I believe to be true. First, U.S. antitrust should be viewed as separate from the rest of U.S. foreign policy. Second, it would be wrong to say that U.S. antitrust is unilateral, although it is certainly not multilateral, if multilateral requires commitment to early and extreme harmonization. A better description would be “multitrack,” reflecting a simultaneous combination of unilateral, bilateral, regional, and multilateral approaches. Third, a multitrack approach that seeks to facilitate convergence is not necessarily inconsistent with eventual harmonization. Fourth, the U.S. approach is likely influenced by U.S. experience indicating that substantive harmonization is not necessary for effective antitrust law enforcement. Fifth, the U.S. approach is realistically reflective
of the great distance that still must be traveled to arrive at a level of convergence from which the great leap to harmonization might be made. And sixth, common ground short of harmonization should be feasible in the near term. Let us drop our references to unilateralism, on the one hand, and lower our eyes from the extreme versions of harmonization that we can imagine, on the other. There is a great deal of voluntary multilateral progress that is both needed and possible in the near term and this is where we should try to focus our collective energy.