THE NECESSITY OF ACTIVE AMERICAN INVOLVEMENT IN GLOBAL COMPETITION LAW

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I. INTRODUCTION[1]

On July 3, 2001, the growing differences in American and European Union (EU) competition law became starkly apparent. On that day, the European Commission (the Commission) refused to approve a merger between two American companies - General Electric (GE) and Honeywell.[2] Another event occurred that day, but was largely ignored by the popular press. IMS Health, also an American corporation, was forced to license its data-collection scheme for pharmaceutical sales to its competitors in Germany.[3] These two decisions embody the difficulties facing today's international business people as they attempt transactions to streamline and expand their corporate operations.

A company may face many direct and indirect costs in complying with the laws of multiple jurisdictions.[4] Compliance may require basic notification of a proposed merger to a foreign authority, or it could mean having to meet conditions imposed by that authority. Often, business people are simply uncertain about what authorities may require for compliance, and this uncertainty costs businesses time and money that might have been spent on other opportunities, for "in international antitrust, the slowest boat sets the speed of the convoy."[5]

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[2] European Commission, *The Commission Prohibits GE's Acquisition of Honeywell*, IP/01/939, July 3, 2001, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/939—0—AGED&lg=EN&display=.

[3] European Commission, *Commission Imposes Interim Measures on IMS Health in Germany*, IP/01/941, July 3, 2001, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/941—0—AGED&lg=EN&display= [hereinafter *Interim Measures*].

[4] *See generally* Joseph P. Griffin, *What Business People Want From a World Antitrust Code*, 34 NEW ENG. L. REV. 39 (1999).

[5] Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 FLETCHER F. WORLD AFF. 59, 61 (2002).

One solution to this uncertainty is a global competition authority that provides a single solution for businesses seeking to validate an action. Such a global standard would lower transaction costs for business, reduce the uncertainties of the current process, and restrict the ability for countries to play politics with individual antitrust decisions. However, forming a global authority is not without problems. Every potential partner in this new authority would have issues surrounding its formation and subsequent operation, as well as questions concerning which standards would be used in the decision-making, and who would have the authority to apply those standards.

The concerns that arise in the formation of a *sui generis* organization suggest that intermediate steps may be necessary in order for the US to defend its jurisprudence against the rising tide of foreign intervention. One such step is direct foreign action on the part of US trade and antitrust agencies. Each year, the US allocates billions of dollars in overseas loans and aid – frequently without imposing major conditions on acceptance of the funds. Such foreign assistance could be used as a vehicle to transfer American preferences on antitrust jurisprudence, thereby modeling foreign antitrust laws on an American standard.

Nations with developed antitrust law may also be tied into a single standard through bilateral or regional agreements with Washington. Taking steps to include substantive law and a framework for decision making in these agreements could neutralize antitrust uncertainties, and perhaps provide a basis for deeper cooperation in the future. Nevertheless, current agreements call for little more than cooperation on information gathering.[6]

While the US has been highly supportive of these basic bilateral agreements, there is an American reluctance over being

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[6] *See* Agreement Between The Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.U., *available at* http://www.usdoj.gov/atr/public/international/docs/ec.htm (In Article IX of the agreement, it is specifically stated that "nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities. . .") [hereinafter "U.S.-E.U. Agreement"].

completely involved in international organizations. There is a legitimate fear of relinquishing too much sovereign power.[7] This stance on international involvement is manageable in foreign affairs, as it can be supported by the US's military status. However, in the case of antitrust law, such a disengaged stance is potentially harmful for American business as America does not dispatch troops outside of its borders for the purpose of securing a merger. A full and complete involvement now in charting the course for international competition law is necessary to protect the expansion of American business abroad.

Beginning with the Sherman Antitrust Act of 1890 – the first significant implementation of an antitrust policy by any nation[8] – US antitrust law has evolved to meet many challenges. As nations around the world appear to be harmonizing on a standard similar to the EU model,[9] it is important that the US take an active role in preserving its well-developed jurisprudence. While many EU decisions have paralleled those in the US,[10] the fundamental philosophies supporting US and EU antitrust law remain different,[11] and steps should be taken to minimize the potential costs of these differences.

By promoting the development of bilateral and regional agreements, the US can take an active role in defending its industries from unnecessary foreign pressures. Active American involvement could also lead to global agreements based on American preferences - the best long-term scenario for American business. While the end result of further integration cannot be predicted, the consequences of American disengagement in this international arena are easily foreseeable.

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[7] *See generally* Cal Thomas, *U.S. Out of U.N. Now?*, TRIBUNE MEDIA SERV., Mar. 13, 2003.

[8] Milton Handler et al., *Trade Regulation* 21 (4th ed. 1997) (Canada passed a narrow and seldom-invoked law in 1889).

[9] *See generally* Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model*, 15 EMORY INT'L L. REV. 467 (2001).

[10] Laura D. Tyson, *The New Laws of Nations*, N.Y. TIMES, July 14, 2001, at A15.

[11] *See* William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, Before the George Mason University Symposium in Washington D.C. (Nov. 9, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9536.htm [hereinafter *Conglomerate Mergers*].

II. The Proliferation of Jurisdictions and the Resultant Concerns

A. Transaction Costs Will Increase With Multiple Standards

Over 100 jurisdictions have some form of antitrust law.[12] The US has been developing its jurisprudence since 1890, with the second real standard coming from the European Community in 1962.[13] However, antitrust law is still in its infancy. For the most part, laws in other nations were enacted after the fall of the Soviet Union, and many other nations are currently in the process of drafting their first such laws.[14] Convergence of standards through bilateral agreements or a global governing body would decrease, if not eliminate, many of the fears that corporations have with multiple jurisdictions, while also reducing the actual costs necessary to get acceptance for a transaction.

As corporations continue expansion overseas, the current status of international competition law requires that each target national market be addressed individually. Prior to the widespread enactment of antitrust laws worldwide, corporations had many foreign concerns.[15] But most regulators did not have the jurisprudence to ask for wholesale reorganization of a company or to block purely extraterritorial business decisions on the basis of future harms to their own domestic competition.

This current standard of individual national review is likely quite satisfactory to many nations, particularly smaller ones. Individual review allows direct control over the national economy, and grants a great deal of power to politicians and their antitrust

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[12] Lipsky, *supra* note 5, at 61.

[13] *Id*. at 60.

[14] Chairman Robert Pitofsky, *Competition Policy in a Global Economy – Today and Tomorrow*, Remarks at The European Institute's Eighth Annual Transatlantic Seminar on Trade and Investment (Nov. 4, 1998), *available at* http://www.ftc.gov/speeches/pitofsky/global.htm.

[15] Some examples of regulations imposed on foreign firms include currency controls, required employment of local labor, and required amounts of re-investment in the local economy.

decision-making bodies.[16] However, continued expansion of these individual antitrust regimes has the potential to restrict international investment. While governments exercise their increasing antitrust powers, the business community has four increasing concerns.[17]

First, business people want consistency in governmental decision-making.[18] With multiple nations able to take individual jurisdiction over a company and its practices, the probability that the same result will be reached in several nations becomes unlikely. A company might find itself under fire in five different jurisdictions, all of which may arrive at different recommendations to cure the antitrust problem. Business leaders are generally averse to making wholesale changes to their corporate structure, particularly to pacify regulators. Inconsistency across jurisdictions will hold these corporate leaders hostage in their desire to expand. As multiple jurisdictions attempt to exercise power, companies will be less likely to invest for an expansion that may never occur.

Second, business people fear that foreign regulators may limit their operations in order to further that foreign nation's domestic industrial policy.[19] This may include regulators making decisions with the overarching goal of protecting a domestic industry from competition, or favoring one foreign firm over another. Normal antitrust rules are thus distorted to accomplish a government's alternate goals.[20] [21]

Third, decision makers need fast responses from regulators on the acceptability of a proposed transaction.[22] But government agencies operate on a different schedule than international business. When dealing with one or two established jurisdictions,

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[16] Debra A. Valentine, *Changes in Competition Policy and Law at the Global Level*, Remarks at the Economic Development Institute of the World Bank First International Training Program – Competition Policy (Dec. 13, 1998), *available at* http://www.ftc.gov/speeches/other/dvchangesincompetitionpolicy.htm.

[17] Griffin, *supra* note 4.

[18] *Id*.

[19] *Id*. at 40.

[20] *Id*. at 41.

[21] This fear is not the same as worry over pure political motivation in the exercise of antitrust law, which is a more opaque problem and discussed later in the article.

[22] Griffin, *supra* note 4, at 41.

waiting for an answer might not be much of a worry. But when dealing with multiple jurisdictions – some of which have newly minted and untested antitrust regulations – it is difficult predict the length of time needed to reach a final decision.

Finally, business people are less willing to submit technical data to numerous competition authorities for fear of industrial espionage.[23] Spying by national authorities in order to help domestic industry is a reality,[24] and there is good reason to fear that secrets meant only for an antitrust committee will find their way to other places. Industrial espionage would thus become the ultimate transaction cost for a multinational corporation.

In addition to these four concerns, pure domestic politics adds additional uncertainty to the world of international business. It is possible that one nation, displeased with another nation for whatever reason, could choose to express its aggression upon a pending antitrust case or merger deal. Unfortunately, the potential for such an action is difficult to calculate, as the possibility of occurrence is not based on economics, but upon other perceived benefits government leaders believe they may reap from scuttling a deal.

For example, in the months prior to the GE/Honeywell merger denial, the Commission's harsh negotiations with GE over concessions had brought the scorn of the US government.[25] President Bush commented on the situation, and GE management sought political assistance.[26] [27] [28] In the months following

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[23] *Id*. at 42. *See also* Mike Consol, *The Secret Agents of Fortune*, BUS. J., Sept. 9, 1998.

[24] Levon Sevunts, *Foreign intelligence agencies busy in our businesses CSIS warns*, THE MONTREAL GAZETTE, July 23, 2000 ("The French intelligence agency DGSE is said to have bugged the first-class cabins of Air France jets to eavesdrop on traveling foreign business executives.").

[25] Steven Komarow, *GE/Honeywell End Likely Today: EC Action Signals Stronger Scrutiny of Future Deals*, USA TODAY, July 3, 2001, at B6.

[26] President George W. Bush, Press Conference of President Bush and President of the Republic of Poland, Aleksander Kwasniewski (June 15, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010615-4.html.

[27] Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME, July 8, 2001, *available at* http://www.time.com/time/business/article/0,8599,166732,00.html.

[28] Dan Ackman, *EU Tells GE No Go*, FORBES, June 6, 2001, *available at* http://www.forbes.com/2001/06/15/0615topGE.html.

denial of the merger, some theorized that the Commission's decision was politically motivated,[29] and the Department of Justice took steps to delegitimize the result reached.[30] The GE/Honeywell merger was a transaction that began in the business world and ended in the political realm, benefiting the stature of European regulators who were able to block the final deal of GE's retiring CEO.[31]

B. EU Interventionism and Unstable Jurisprudence Creates Unnecessary Risks for Business

The US and the EU have historically come to many of the same conclusions in antitrust matters.[32] They have also signed bilateral cooperation agreements, which facilitate the sharing of information on companies under investigation, and also assist in the execution of certain cross-border procedures.[33] But these agreements hide the fact that the two regimes follow different theories when it comes to enforcement, and the recent willingness of the EU to intervene may be a sign of things to come.

American antitrust law is rooted in the idea that the public should be protected from a market failure.[34] Such a theory favors the promotion of market efficiency and competition, rather than simply ensuring that firms have a perpetual competitor. The Department of Justice (DOJ) and the Federal Trade Commission (FTC) – the US' two primary antitrust enforcement agencies –

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[29] Tyson, *supra* note 10, at A15.

[30] *See Conglomerate Mergers*, *supra* note 11.

[31] Ackman, *supra* note 28.

[32] Tyson, *supra* note 10, at A15.

[33] U.S.-E.U. Agreement, *supra* note 6. *See also* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, June 4, 1998, U.S.-E.U., *available at* http://www.ftc.gov/bc/us-ec-pc.htm.

[34] *Conglomerate Mergers*, *supra* note 11, at 5-6 (citing *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 891-92 (1993) ("The purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from the failure of the market."); Lawrence H. Summers, *Competition Policy in the New Economy*, 69 Antitrust L.J. 353, 358 (2001) ("[T]he goal is efficiency, not competition. The ultimate goal is that there be efficiency.")).

will not be found doing long-term projections of a market in order to find a reason to preserve the life of a competitor.

The American regulatory approach is one of reservation, as regulators have little confidence in their ability to divine the long-term structure of a market.[35] In contrast, the European approach is biased against the exit of a competitor and tends to preserve the market's status quo, even if integration would immediately enhance the marketplace for consumers.[36] This difference of analysis between the US and EU leads to differing antitrust decisions, even when both sides are presented with the same data. Such was the dilemma in the GE/Honeywell decision. In one of its major forays into extraterritoriality, the Commission blocked the merger between two US firms on several grounds.

In the analysis of GE's market share of large jet engines, the US reached the decision that GE's market share was only "weakly indicative of competitive conditions in the market," and found GE's future prospects to be diminishing.[37] This was one of the reasons US authorities approved the deal. Across the Atlantic, the Commission saw GE's large market share as evidence of dominance on its own accord, and did not consider the actual dynamics of the market for aircraft engines.[38] The EU thus arrived at a different result with the same information.

In addition to this worry over engine market share, the Commission was concerned about business entities that GE could use to enhance Honeywell's market position.[39] GE Capital Aviation Services (GECAS) is one part of what the EU called GE's "toolkit for dominance."[40] The power of such a buyer in the marketplace, the Commission argued, would lead to bundling of GE and Honeywell systems and the eventual edging of other competitors from the marketplace.[41] The Commission reached

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[35] *Id*. at 6.

[36] Pejman Yousefzadeh, *Goodwill Begets Goodwill*, TECH CENTRAL STATION, May 2, 2002, *available at* http://www.techcentralstation.com/050202B.html.

[37] *Conglomerate Mergers*, *supra* note 11, at 11.

[38] *Id*.

[39] *Id.*

[40] *Id*. at 13. (GECAS – a division of GE – purchases aircraft that it then leases to commercial airlines and other businesses. GECAS has a GE-only procurement policy.)

[41] *Id.*

this finding despite the fact that GECAS currently accounts for less than ten percent of aircraft purchases – a number far below any standard that suggests exclusion of others from the market.[42]

The second part of the EU-designated "toolkit of dominance" was GE Capital, which the Commission argued "offers GE businesses enormous financial means, enabling it to take more risk in product development than its rivals."[43] This strong financial position was seen, in itself, as a negative by European regulators despite the fact that ready access to financing does not guarantee success in the marketplace.[44] Each of these European views would hold despite intense American pressure on the Commission to reconsider the case.

The opposing results came from the same basic set of facts and figures used by American antitrust authorities. Differences in analysis, based on a difference in enforcement philosophy, could make divergent outcomes like the GE/Honeywell decision more than just a one-time affair. Regardless of the intricate analysis of why each side made opposing decisions, the final outcome is a perfect demonstration of a different regulatory standard causing problems for business. Another example came on the very same day of the GE/Honeywell decision with the Commission's decision in the IMS Health case.

IMS Health is an American company that specializes in the reporting of pharmaceutical data to drug manufacturers and distributors.[45] Their subsidiary in Germany devised a means of dividing sales in that nation by postcode, grouped into 1,860 territories now known as the "1,860 brick structure."[46] This method of cataloging sales was developed by IMS in conjunction with various pharmaceutical representatives who had invested considerable resources in ensuring that their needs were met by the new structure.[47]

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] IMS Health, *About Us*, *available at* http://www.imshealth.com/ims/portal/front/indexC/0,2478,6599_1825,00.htm.

[46] *IMS Health v. Commission of the European Communities*, 2001 E.C.R. II-3193 (CFI), ¶¶ 6-7.

[47] 2002/165/EC: Commission Decision of 3 July 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty, Case COMP D3/38.044, *NDC Health/IMS*

No problems resulted from use of this new structure until an American and a German company, NDC and AzyX, respectively, attempted to provide sales data in a format other than the 1,860 brick structure.[48] After finding no interest in different methods, NDC and AzyX used their own versions of the 1,860 structure to report data.[49] IMS filed suit, and a German court ruled against NDC and AzyX, leading the two companies to ask IMS to license the technology.[50] IMS refused, and the stage was set for government involvement in the matter.

Alleging abuse of a dominant market position, NDC and AzyX asked the Commission to intervene.[51] The Commission obliged, and applied the "essential facilities doctrine"[52] to the IMS data structure.[53] By finding that IMS' refusal to license their technology would eliminate competition and could not be objectively justified, the Commission ordered IMS to license the technology to its competitors.[54]

The Commission has found itself under increasing scrutiny as it pushes the limits of existing doctrines.[55] The extent to which the Commission and other European authorities will find it in their benefit to invalidate intellectual property protections is an issue that deserves increasing consideration.

The IMS case was a stretch of the essential facilities doctrine in order to reach a result based on the idea that other companies

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Health: Interim measures, Official Journal L 059, 28/02/2002, P. 0018-0049, ¶¶ 79-80, 83.

[48] *Id.* at ¶¶ 20-21 (NDC and AzyX had initially tried using a brick structure, only with different numbers of bricks as compared to IMS Health's version. NDC and AzyX soon found that no company was willing to accept it in any other form than 1,860.).

[49] *Id.* at ¶¶ 28-29.

[50] *Interim Measures*, *supra* note 3.

[51] *Id.*

[52] *See* Richard Whish, Competition Law 621, 622 (4th ed. 2001) (The essential facilities doctrine requires an upstream and a downstream market. But in this case, the supply of pharmaceutical data to manufacturers is the only market at issue.).

[53] *Interim Measures*, *supra* note 3.

[54] *IMS Health*, *supra* note 46, ¶ 181.

[55] *See generally* Christopher Stothers, *The End of Exclusivity? Abuse of Intellectual Property Rights in the E.U.*, E.I.P.R. 2002, 24(2) 86 (an analysis of the Commission's view of what constitutes abuse of a dominant position).

have a right to compete. But IMS had invested in the development of an industry standard, and a reasonable view of the matter is that refusal to license the standard was simply a protection of the company's investment. One purpose of intellectual property law is to promote such investment by granting a company a temporary "monopoly" over the fruits of its innovation. When that concept is disregarded, future investment in the development of new technology is threatened.

Since the July 3, 2001 decision, the case has continued in both the European and German courts. Most recently, the European Advocate General, Antonio Tizzano, has issued an opinion on the matter in response to queries from the German court.[56] In the opinion, the Advocate General stated that there will be cases where refusal to grant a license will constitute a dominant abuse.[57] However, intervention will be limited to cases where the abused company seeks to produce a product with different characteristics than the dominant company's product, and also intends to meet different consumer needs.[58] The product must also be intended for a different market than the market currently served by the dominant company.[59]

IMS' attorneys have stated that the Advocate General's opinion supports their position, which is that NDC only wanted use of the 1,860 brick structure to compete in the same market for pharmaceutical data.[60] If this is found to be the case, the rules

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[56] Antonio Tizzano, *Conclusions de L'Avocat Général, IMS Health GmbH & Co. contre NDC Health GmbH & Co.*, Affaire C-418/01, Oct. 2, 2003.

[57] *Id.* at Conclusion.

[58] *Id.* ("L'utilisation du bien immatériel est indispensable pour opérer sur un marché dérivé, avec pour conséquence que, par ce refus, le titulaire du droit finirait par éliminer toute concurrence sur ledit marché. Cela est cependant soumis à la condition que l'entreprise qui demande la licence ne veuille pas se limiter en substance à reproduire les biens ou services déjà offerts sur le marché dérivé par le titulaire du droit de propriété intellectuelle, mais ait l'intention de produire des biens ou services présentant des caractéristiques différentes qui, tout en venant en concurrence avec ceux du titulaire du droit, répondent à des besoins particuliers des consommateurs qui ne sont pas satisfaits par les biens ou services existants.").

[59] *Id.*

[60] Press Release, IMS Health, European Court of Justice (ECJ) Advocate General's Opinion Vindicates IMS in Intellectual Property Dispute (Oct. 2, 2003), *available at* http://biz.yahoo.com/bw/031002/25588_1.html.

for intervention do not apply, and the European courts will once again reverse the Commission in its application of the law.[61]

As the Advocate General attempts to shape the law surrounding this case, one must understand that a firm's risk analysis can be disturbed not just by an activist enforcement body, but also by constant changes of competition policy and procedure. Indications are that such changes may be in the works at the Commission.[62]

On October 25, 2002, the BBC reported that the European Competition Commissioner, Mario Monti, had announced an overhaul of the department's working methods.[63] This initiative came in response to several reversals of Commission decisions by the Court of First Instance (CFI), which accused the Commissioner of "producing shoddy work, shot through with 'obvious errors, omissions, and contradictions.'"[64] Mr. Monti has suggested changes to his "highly confrontational approach," in the hopes of correcting what some have seen as major decisions made with too little time and deliberation.[65]

Following these reversals by the CFI, on November 7, 2002, Mr. Monti delivered a speech in which he outlined certain changes that would be made in the area of merger control.[66] Some proposed changes include a review of the time frame applied to merger analysis, and an enhancement of the ability for parties to defend their points of view.[67] While these measures indicate that the Commission is moving in a more-reasoned direction in competition policy, the Commission's state of flux is an additional variable of analysis for firms seeking to do business in Europe.

Uncertainty about future enforcement decisions may deter corporate investment. But common principles on enforcement

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[61] BBC News, *Brussels Proposes Major Merger Reform* (Oct. 25, 2002), *available at* http://news.bbc.co.uk/2/hi/business/2360051.stm.

[62] *Id.*

[63] *Id*.

[64] *Id*.

[65] *Id.*

[66] Commissioner Mario Monti, *Merger Control in the European Union: a Radical Reform* (Nov. 7, 2002), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/545—0—RAPID&lg=EN&display=.

[67] *Id*.

can be established through the development of agreements and international organizations. For American business, the eventual goals of federal antitrust authorities must be broader than simple cooperation. The goals must include convergence around the well-developed body of American jurisprudence.

C. Global Political Disputes and Instability Present Increasing Challenges

Political decisions weigh heavily on companies and markets. Analysts for major corporations and brokerage firms follow the decisions of the United Nations and the US Congress just as they do economic data. But while economic data can be modeled and forecasted, it is often much more difficult to predict the actions of political bodies subject to vicissitudes and popular pressures.

Political leaders seeking to assert global power may use competition laws to enhance their stature. Until standards can be stabilized through substantive agreements or a global enforcement mechanism, political risk will continue to be a reality. The diplomatic issues presented by the recent war in Iraq provide an example of this political risk.

After an effort by the US and Great Britain to restart Iraqi disarmament, the UN Security Council passed Resolution 1441 on November 8, 2002.[68] This came after intense debate between many nations regarding the best way to pursue weapons inspections and subsequent disarmament.[69] Following the passage of the resolution, inspections ran their course, often disrupted by non-cooperation on the part of Iraqi representatives assigned to shadow the inspectors.[70] Inspector-led disarmament of the Saddam Hussein regime ended on March 20, 2003, when the US-led campaign against Iraq began.[71]

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[68] S.C. Res 1441, U.N. SCOR, 47th Sess., 4644th mtg., U.N. Doc S/RES/1441 (2002).

[69] PBS Newshour, *Iraq Says "Yes"* (Nov. 13, 2002), *available at* http://www.pbs.org/newshour/extra/features/july-dec02/resolution.html.

[70] CNN News, *Inspectors Say Iraq Equipment Missing* (Dec. 2, 2002), *available at* http://www.cnn.com/2002/WORLD/meast/12/02/sproject.irq.inspectors/.

[71] FOX News, *U.S. Launches 'Decapitation' Strike Against Iraq; Saddam Personally Targeted* (Mar. 20, 2003), *available at* http://www.foxnews.com/story/0,2933,81607,00.html.

These debates over Iraq have clouded the reality that Americans and Europeans share somewhat common aspirations.[72] Western nations in vehement disagreement in the UN Security Council still favor democracy and free societies.[73] But political arguments have the potential to spin out of control, and evidence suggests serious foundational cracks forming in traditional alliances.[74] The world's two largest economic blocs – the US and the EU – are increasingly differentiated on defense and economic policy, and commentators have even begun to suggest that the divisions may only get worse.[75]

It has become clear in recent months that major players in the EU view themselves as a counter to American power.[76] The changing nature of the world economy threatens European advancement, particularly when combined with the effects of population stagnation.[77] A Europe that sees itself declining in influence may use whatever remaining strengths it has left to assert dominance.

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[72] *See generally* Philip H. Gordon, *Bridging the Atlantic Divide*, N.Y. TIMES, Mar. 6, 2003, *available at* http://www.nytimes.com/cfr/international/20030101faessay10223_philip_h_gordon.html.

[73] *Id.*

[74] *Id*.

[75] Robert Kagan, *Power and Weakness*, POLICY REVIEW, June/July 2002, *available at* http://www.policyreview.org/JUN02/kagan.html (given that the United States is unlikely to reduce its power and that Europe is unlikely to increase more than marginally its own power or the will to use what power it has, the future seems certain to be one of increased transatlantic tension.).

[76] CNN News, *Chirac Lashes Out at "New Europe"* (Feb. 18, 2003), *available at* http://www.cnn.com/2003/WORLD/europe/02/18/sprj.irq.chirac (referring to Eastern Europe's position on the Iraq war, French President Chirac stated that, "These countries have been not very well behaved and rather reckless of the danger of aligning themselves too rapidly with the American position."); *See also* BBC News, *Schroeder Sees Powerful EU* (Apr. 3, 2003), *available at* http://news.bbc.co.uk/2/hi/europe/2912613.stm.

[77] William Hague, *The Resentments of Old Europe*, THE SPECTATOR, Mar. 15, 2003, *available at* http://www.spectator.co.uk/article.php3?table=old&section=current&issue=2003-10-18&id=2883 (In reference to the Iraq debate, Hague writes, "What the present crisis underlines is that Western Europe is losing its influence. In the coming decades, the greatest growth of manufacturing will be in China, the fastest growth of population in the Middle East and India, and the strongest enterprise culture and greatest military power will remain in America. The sound we can hear from Paris and Berlin is not the march of ever closer union, but the rage of ever closer impotence.").

Unfortunately for non-European businesses, an area where European power remains effective is in competition law. With antitrust authorities operating on their own accord in a world increasingly divided, predictions on antitrust decisions become much more difficult to make. By harnessing antitrust policy in negotiated agreements that include substantive law, global business can continue on a path of relative certainty despite political processes that would otherwise disrupt the flow of commerce.

These substantive agreements would perhaps be a solution most acceptable to both the US and the EU – the world's two major players in antitrust. Since the Second World War, Europeans have taken an increasingly commercial outlook on the world, using economic ties to bind nations together.[78] Americans have viewed the Europeans as an "albatross" to progress.[79] A broad standard between the two economic blocs, eventually including the rest of the world, could remove much uncertainty from international mergers and expansion. Economic ties would be furthered; the "albatross" could be lifted.

D. Barriers Broken Down by the GATT and WTO Should Not Be Recreated in Other Forms

Since the beginning of the General Agreements on Tariffs and Trade (GATT) in 1948, participants in the GATT and World Trade Organization (WTO) trade rounds have sought to reduce tariffs worldwide, and have been generally successful in doing so.[80] As formal tariff rates decline, nations interested in protecting domestic industry can use non-tariff barriers[81] (NTBs) to accomplish the same goal as higher tariff rates. Along with these NTBs, governments could overly enforce or actively ignore certain competition laws, and such usage could subsequently threaten the progress made in the lowering of tariffs.

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[78] Kagan, *supra* note 75.

[79] *Id.*

[80] Ricky W. Griffin & Michael W. Pustay, International Business: A Managerial Perspective 245 (2d ed. 1999).

[81] *Id.* at 218 (non-tariff barriers include mechanisms such as quotas placed on foreign goods, overbearing technical standards imposed on imports, and strict rules for declaration and payment of duties at customs.).

Competition law can be used as a tool to actively limit access to a domestic market, or can be loosely enforced in order to condone a domestic monopoly, thereby deterring new entrants.[82] Both situations counteract the progress made in world trade liberalization. It has been suggested that trade law and competition law are no longer distinct areas of jurisprudence, and that competition law must now be considered an essential part of world trade.[83] If this is the case, there needs to be better global cooperation to counteract unreasonable protective actions by national competition authorities.

While it may appear that competition laws could be rightly addressed in the forum of the WTO, the WTO is unlikely to follow through with such a daunting task. An attempt was made in 1996 to consider the implications of competition law on trade with the creation of the Working Group on Interaction Between Trade and Competition Policy (WGTCP). However, the WTO does not have the resources or expertise on competition law to fashion a global standard.[84]

A *sui generis* common approach to competition law can solve these problems, just as the GATT and WTO have commonly addressed issues relating to tariffs and other barriers to trade. Forming a single standard at the present time is an impossibility, but this does not preclude the creation of global fora for the purposes of discussion on procedural and substantive convergence. Several new attempts at cooperation are promising, but all lack enthusiastic involvement from the participants.

III. Moving Towards Broader Standards

A. Current Attempts: The Right Direction, But Only Talk

Regulators have realized the need for cooperation in antitrust policy, as many understand that the existing model of antitrust enforcement is questionable in its long-term viability.[85] As

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[82] *See* Foster, *supra* note 9, at 481.

[83] *Id*.

[84] *See* discussion *infra* Part III.A.

[85] Lipsky, *supra* note 5, at 65.

the number of independent jurisdictions for antitrust investigation grows, the opportunities for a single state to put the brakes on world economic growth also increase.[86] It is promising that several attempts have been made to coordinate international antitrust enforcement, but the solutions currently on the table are merely the first steps in a long line of measures necessary to arrive at a single standard.

Several nations have already transacted to arrive at bilateral antitrust agreements, which call for cooperation on the sharing of information and expertise. The most notable agreement has been the US/EU agreement of 1991, which addresses those issues, as well as principles of notification and the avoidance of conflicts.[87] This agreement is generally seen as a success, and was followed by the US' International Antitrust Enforcement Assistance Act (IAEAA) of 1994, which gave the FTC and DOJ the power to enter into assistance agreements with other antitrust agencies of foreign countries.[88] The US has since done so with several nations, including Australia and Israel.[89]

These agreements acknowledge the fact that a global economy needs global cooperation in antitrust enforcement. However, a significant problem with current bilateral agreements is that the key word remains only "cooperation." While signatories to bilateral agreements may be willing to share data, there is no coordination of the substantive laws applied to that data. The potential still remains for different jurisdictions to come to different conclusions over the same information.

Positive comity is another bright aspect of international cooperation, but like bilateral agreements, does little to converge at a common substantive law. Positive comity is the practice

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[86] *Id*. at 64, 65.

[87] *See* U.S.-E.U. Agreement, *supra* note 6.

[88] International Antitrust Enforcement Assistance Act, 15 U.S.C. §§ 6201-6212 (1998)

[89] Press Release, United States Embassy-Israel, US, Israeli Officials Sign Antitrust Agreement (Mar. 15, 1999), *available at* http://www.usembassy-israel.org.il/publish/press/justice/archive/1999/march/jd1316.htm; Press Release, U.S. Federal Trade Commission, First International Antitrust Assistance Agreement Under New Law Announced by FTC and DOJ (Apr. 17, 1997), *available at* http://www.ftc.gov/opa/1997/04/iaeaa.htm.

whereby one nation's antitrust authorities, suspecting their national market is being harmed by a company's practices abroad, can contact that jurisdiction's antitrust authorities and ask them to investigate.[90] The 1991 US/EU agreement discussed positive comity,[91] and in 1998, the relationship was formalized in a separate pledge.[92] This practice of referral helps in developing trust between different enforcement agencies, but the problem remains that one nation may not have the same legal issues with a company as another nation does. The difference in substantive law once again proves a hurdle to common results. Thus, more comprehensive solutions are necessary.

Antitrust authorities have taken some logical steps in fostering convergence, both by using the framework of existing international organizations, and by creating a *sui generis* institution. However, it remains to be seen whether the capabilities and stated goals of these organizations provide for anything more than discussions and white papers.

The first organization deserving mention is the WTO's WGTCP. It was created at the WTO's 1996 Ministerial Conference in Singapore, and began work the following year.[93] Members of the WTO realized that business could impair free trade through predatory practices, just as government could distort trade through tariffs.[94] As the WTO's stated goal is to "ensure that trade flows as smoothly, predictably and freely as possible,"[95] it seemed natural that this organization would eventually challenge barriers to trade other than tariffs.

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[90] Merit E. Janow, *Remarks at the ABA Conference on the World Trade Organization*, Georgetown University Law Center (Jan. 21, 2000), *available at* http://www.law.georgetown.edu/journals/lpib/symp00/documents/janow.pdf.

[91] U.S.-E.U. Agreement, *supra* note 6.

[92] Press Release, Federal Trade Commission, United States and European Communities Sign Agreement on "Positive Comity" in Antitrust Enforcement (June 4, 1998), *available at* http://www.ftc.gov/opa/1998/06/positive.htm.

[93] United States Trade Representative, *1999 USTR Annual Report* (Mar. 2000), *available at* http://www.ustr.gov/wto/99ustrrpt/ustr99_wgtcp.htm

[94] *See generally* Center for International Development at Harvard University, *Competition Policy Summary*, *available at* http://www.cid.harvard.edu/cidtrade/issues/competition.html.

[95] World Trade Organization, *The WTO in Brief*, *available at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm.

While the WGTCP shows promise on discussing competition issues that could jeopardize free trade, it does not appear that any major steps will be taken in substantive convergence. The 1999 US Trade Representative's annual report clearly acknowledges that the WGTCP's practices are merely "educative," and are "not intended to prejudge whether, at some point in the future, negotiations would be initiated to establish multilateral disciplines."[96]

Recent scholarship suggests that the very nature of the WTO may make it an improper forum to consider the global implications of competition law.[97] The WTO remains a trade forum by practice, not a forum on competition policy. Since its original implementation as GATT, the WTO's goal has been to further the free flow of goods at the national level.[98] The organization's foray into competition policy may now cause confusion when anti-competitive practices of private businesses are scrutinized.[99] For all of these reasons, the WGTCP's formation is unlikely to produce the results necessary to begin the process of convergence.

The Organization for Economic Cooperation and Development (OECD) has also attempted to foster similar discussions. With the creation of the committee on Competition Law and Policy (CLP), the OECD has taken on an advisory role to member governments on how to best implement new competition regulations.[100] However, the OECD has shortcomings that marginalize its ability to foster cooperation.

The OECD does not have the same distinct mission or focus of global fora like the WTO for several reasons. The OECD exists as a general advisor, providing research and information to member governments, and then providing a forum for discussion and cooperation on issues of economic concern.[101] But it is

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[96] United States Trade Representative, *supra* note 93.

[97] Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 Am. J. Int'l. L. 478, 487-94 (2000).

[98] World Trade Organization, *supra* note 95.

[99] Tarullo, *supra* note 97, at 484.

[100] Organization for Economic Co-operation and Development (OECD), *About Competition Law and Policy*, *available at* http://www.oecd.org/about/0,2337,en_2649_34685_1_1_1_1_1,00.html.

[101] *See* Tarullo, *supra* note 97, at 495.

"more a decentralized mélange of functions and activities than a cohesive international organization."[102] Its nature is thus more likely to foster friendships among regulators from different countries than it is to ever devise and enforce competition policy.[103] It simply does not have the authority to take major actions on its own.[104]

Assuming the OECD did have such a power, it would probably be unsuccessful in promulgating global rules. The OECD has only thirty members, most of which are developed nations.[105] Such a membership will tend to have discussions focusing on the concerns of the developed world, limiting the ability of such a forum to become truly global.[106] Consequently, any decisions made under this limited membership would likely be viewed with skepticism by non-member nations looking for guidance in developing their own jurisprudence.

All of these issues make the OECD an excellent starting point for discussion, but make the creation of a global competition forum within its hierarchy an impracticality. Nations recognizing these problems took a major step in 2001 by creating the International Competition Network (ICN), perhaps the best hope in the near-term for initiating dialogue on global approaches to competition law.

Founded on October 25, 2001, the ICN was established to "provide antitrust agencies from developed and developing countries a stronger and broader network for addressing practical competition enforcement and policy issues."[107] That same day, the DOJ issued a press release lauding the ICN's mission,

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[102] *Id*. at 494.

[103] *Id*. at 495-96.

[104] *Id*. at 498.

[105] OECD, *Ratification of the Convention on the OECD: OECD Member Countries*, available at http://www.oecd.org/document/58/0,2340,en_2649_34483_1889402_1_1_1_1,00.html.

[106] Joel I. Klein, *Time for a Global Competition Initiative?*, Remarks before the EC Merger Control 10th Anniversary Conference, Brussels, Belgium (Sept. 14, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/6486.htm.

[107] Press Release, International Competition Network, Antitrust Authorities Launch the International Competition Network (Oct. 25, 2001), *available at* http://www.internationalcompetitionnetwork.org/news/oct252001.html.

and expressing hope for its future.[108] Perhaps the best available expression of the expectations of this new forum were delivered by William Kolasky of the DOJ just one week before the ICN's first annual conference in September, 2002.[109]

Kolasky stated that the goals of the ICN are two-fold: first, to provide support for nations currently developing their antitrust law, and second, to promote greater convergence among the world's authorities.[110] Put bluntly by Kolasky's boss, Charles James, the ICN was created to be "all antitrust, all the time."[111] This "virtual network" of antitrust authorities, organized around working groups without a permanent supporting bureaucracy, has already initiated work on developing general principles for merger review.[112] There is also an obvious interest in the ICN's mission, with a determination in its membership unseen in other attempts at cooperation. Starting with 14 nations as a "steering committee," its ranks have quickly swelled to over 70 member authorities in just two years.[113] [114]

The fact that so many nations have joined the organization is a testament to the ICN's potential for filling a necessary void in world cooperation. Additionally, there is hope that American authorities are coming to realize the importance of success in this international venture. A recent speech by the Assistant Attorney General for Antitrust at the DOJ affirmed the department's "continued commitment to this extraordinary project."[115]

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[108] Press Release, U.S. Department of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/9400.pdf.

[109] William J. Kolasky, *The International Competition Network: Guiding Principles for Merger Review*, Remarks before the International Bar Association Sixth Annual Competition Conference, Fiesole, Italy (Sept. 20, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200234.pdf [hereinafter *International Competition Network*].

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Press Release, International Competition Network, International Competition Network First Annual Conference, *available at* http://www.internationalcompetitionnetwork.org/backgrounder2002.html.

[115] R. Hewitt Pate, *The DOJ International Antitrust Program – Maintaining Momentum*, Remarks Before the American Bar Association Section of Antitrust Law

Of each international attempt to advance cooperation on antitrust law, the ICN's future is most promising. The forum's "virtual" operation gives it flexibility by not having to deal with formal bureaucratic procedures.[116] However, if substantive cooperation on antitrust law is an eventual goal, nations will most likely need a supporting organization with a permanent staff to properly take on such a challenge. The ICN is off to a promising start, but its current organizational form may need additional development to effectively address the concerns of governments and international businesses.

B. America Must Lead on Convergence, or Business Will Bear the Costs

International organizations are a subject of displeasure for many Americans. Most recently, commentators and Congressmen have gone to great lengths to make the U.N. the target of their polemics.[117] Prior to these recent criticisms, the International Criminal Court (ICC) was also roundly denounced.[118] Such opinions represent a fundamental difference in world views that temper American involvement in the international arena.[119]

The US is able to manage this disengagement from some world bodies, as non-participation in select groups will do little to harm American interests. In some cases, the simple act of attending a certain conference could do American policy a disservice.[120] The ICC, despite its *cause célèbre* status among many

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2003 Forum on International Competition Law (Feb. 6, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/200736.htm.

[116] *Id.*

[117] Cheryl K. Chumley, *Conservatives Voice Misgivings Over U.N. Membership*, Wash. Times, Mar. 9, 2003.

[118] *From the Editors: Rome's New Empire*, 14 Azure: Ideas For the Jewish Nation (2003), *available at* http://www.shalem.org.il/azure/14-editors.htm.

[119] *Id.* ("On one side are those countries willing to cede significant aspects of their sovereignty by placing themselves under a world legal framework dominated by Germany, France, Belgium, and the Scandinavian states; on the other are those nations, led by the United States, that continue to see sovereignty as the principal bulwark for national freedom and international stability.").

[120] Michael Elliott, *The Racism Conference: The Disgrace in Durban*, Time, Sept. 9, 2001 (The US was noticeably absent from the U.N. Conference Against Racism held in Durban, South Africa in September, 2001. The US had made a conscious decision to not attend based on what it believed would be the anti-Western focus

nations, is an organization in which the US is actively and successfully managing its disengagement.[121]

Additionally, direct international involvement presents problems for the US, as current forms of international governance do not ingratiate American policy-makers to further international participation. To America's UN delegation, Libya's chairing of the UN's Commission on Human Rights was simply an affront to common decency.[122] Organizations like the UN and the ICC provide fodder for 'anti-internationalism's growing intellectual following' in America.[123] But in discussions and conferences with direct implications for American business, America must be involved from the start. While disengagement can often be the proper policy, in this instance it is harmful to American interests.

The EU has already made its own efforts in promulgating competition laws.[124] But if the US remains too cautious, it may squander a chance at shaping international policies on business in its favor. A powerful historical comparison can be made to Great Britain's relationship with the EU.

With respect to European economic integration over the past half-century, Britain has been characterized as the sideline player, waiting to see the results of integration and deciding to join in when the results were favorable.[125] Each time, Britain has sacrificed negotiating power by choosing to join only after major decisions had been made.[126] British results with Europe directly parallel potential results between the US and the world community on this issue of competition.

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of the forum. "The real shock of Durban is not that the U.S. and Israel chose to leave; it is that the delegations of other democracies stayed.").

[121] *See* BBC News, *US Blocks Aid Over ICC Row* (July 3, 2003), *available at* http://news.bbc.co.uk/2/hi/americas/3035296.stm.

[122] *See* BBC News, *Libya Takes Human Rights Role*, (Jan. 20, 2003), *available at* http://news.bbc.co.uk/2/hi/africa/2672029.stm.

[123] Peter J. Spiro, *The New Sovereigntists; American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov./Dec. 2000, at 9.

[124] Foster, *supra* note 9.

[125] *See* Joseph M. Moschella, Britain in Europe: 50 Years of Exclusion for the Better? (May 10, 2000) (unpublished manuscript, on file with author).

[126] *Id.* (when the European Coal and Steel Community was formed in 1952, the British were shut out of the common market for not agreeing in principle on cooperation before attempting to negotiate concessions).

For the world's largest national economy, it is essential to be at the head of any global effort to harmonize antitrust law, for there is much to defend. Unless the US is the clear leader in developing this effort, American policy-makers will worry about America's interests being marginalized by cooperation, and will not give international cooperation on competition law the attention that it deserves. America must be the leader – not just a member – of a group of competition authorities working towards convergence.

IV. Conclusions on a Complex Problem

Global cooperation on competition is not always a zero-sum game, and small successes have been accomplished. Current regional regimes and bilateral agreements on antitrust issues have been generally successful.[127] Bilateral agreements between the US and EU have accomplished their stated goals.[128]

But perhaps the initial successes have been due to the lack of substance in the agreements. Until such agreements start to cover broad pieces of substantive law, it is difficult to predict the success of future negotiations. Today's agreements, however, are the first logical step in arriving at a future standard that businesses can count on and that governments will respect.

Some suggest that coordination on antitrust issues will never get much past the stage of these agreements.[129] Bilateral agreements have the potential to provide many of the same benefits of a global standard, such as lowering the risk of a company being dragged through an acrimonious legal process in a foreign jurisdiction. But enacting such agreements does not solve the problems of still having to deal with multiple jurisdictions.

Through negotiations of bilateral agreements, there is hope that antitrust authorities will strengthen their relationships with one another to a point where multilateral convergence can be legitimately discussed. A standard may eventually evolve from

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[127] William Sugden, *Global Antitrust and the Evolution of an International Standard*, 35 Vand. J. Transnat'l L. 1004, 1005 (2002).

[128] *International Competition Network*, *supra* note 109.

[129] Joel Klein & Robert Pitofsky, Press Conference on the occasion of the International Bar Association 10th Anniversary Merger Control Conference (Sept. 18, 2000), *available at* http://www.useu.be/issues/klein0918.html ("I not only think it's difficult, I think it's impossible.").

the incrementalism of bilateral agreements, or there may be an epiphany after several successful attempts at cooperation. Either way, with the constant growth of international economic activity, it will be necessary to relieve the great weight of antitrust uncertainty from the shoulders of international businesses. For the sake of American business, American competition authorities must be at the forefront of the efforts.

America's competition jurisprudence is the product of over 100 years of democratic debate. The people of the US, through a republican government, have determined the nature of corporate regulation.[130] If America is to remain fully involved in the global economy, active measures must be taken to ensure that the laws arrived at through years of deliberation are not co-opted by international organizations and nations seeking to reduce the stature of American capitalism.

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[130] Marc C. Anderson, *A Tougher Row to Hoe: The European Union's Ascension as a Global Superpower Analyzed Through the American Experience*, 29 SYRACUSE J. INT'L. L. & COM. 83, 111-12 (2001) (in contrast to the American model, the Commission of the EU is widely accused of a "democratic deficit").