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THE ROLE OF AMERICAN ANTITRUST LAWS IN TODAY'S COMPETITIVE GLOBAL MARKETPLACE

Burton D. Garland, Jr. and Reuven R. Levary*

I. INTRODUCTION

American antitrust laws have made a significant contribution to the performance of the United States economy, and until recently, have served this country well. American antitrust laws were originally enacted during the Industrial Revolution (beginning in the late 1800's) when their primary function was to protect consumers from the effects of monopoly, oligopoly, and cartel behavior. Without such laws, firms possessing such characteristics were able to control the price and quantity of available goods. Additionally, these laws sought to protect the labor force from monopolists and oligopolists.

Thus, the two primary goals of American antitrust laws are the promotion of competitive conduct and consumer welfare.¹ These goals are achieved through allocating and using resources efficiently, developing new and improved technology, and introducing new production, distribution, and organizational techniques in order to allocate economic resources to their most beneficial uses.²

Historically, American antitrust law has sought to promote competitive conduct and consumer welfare by protecting trade and commerce from unlawful restraints, price discrimination, price fixing, and monopolistic or oligopolistic behavior. The Sherman Antitrust Act, the first American antitrust law, was based on the constitutional right granted to Congress to regulate interstate commerce. Specifically, the Act regulated trusts by prohibiting any industrial combination in restraint of trade or commerce. Nevertheless, this Act has never been vigorously enforced because it failed to adequately define the terms "trust," "combination," and "restraints."

In 1914, in an effort to strengthen the Sherman Antitrust Act, Congress passed the Clayton Antitrust Act. This Act prohibited corporate practices such as price discrimination, interlocking directorates, tying contracts, and stock ownership in competitive firms. In the late 1930's, there was a dramatic resurgence in antitrust action. However, these antitrust laws, which are now

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¹ Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, n.6 (1994).

² *Id.*

quite old, were developed in an era where foreign competition was, for the most part, nonexistent.

Antitrust laws "were created to regulate a domestic market in which foreign goods played a comparatively minor role."³ Today, in contrast, the United States market is filled with foreign produced goods, and participants in the United States market frequently compete on a global scale. American corporations, once dominant in the global marketplace, now face strong competition from huge multinational corporations based in Europe and the Pacific-Rim.⁴ This situation is vastly different from the period between 1945 and 1970, when the United States was the world's dominant technological leader.⁵ Many observers predict that the level of international competition will continue to expand upon entering the twenty-first century.⁶

There are numerous reasons for this increased level of global competition. Such factors as the "improvement in transportation and communication, the demolition of many tariff and non-tariff barriers, an evolving commonality of consumer consumption patterns," and the emergence of "trade blocks have transformed the system of balkanized local markets into a global arena."⁷ The North American Free Trade Agreement (NAFTA) and the latest General Agreement on Tariffs and Trade (GATT) will undoubtedly accelerate this trend, as will the evolving European Economic Community (EEC).

The internationalization of markets has changed the process of competition and has made the fundamental assumptions, upon which antitrust laws have been based, obsolete. The antitrust laws which served this country well during the Industrial Revolution are now impeding American competitiveness in the global marketplace. As a result, a critical evaluation of United States antitrust laws and their effect on the ability of American companies to compete in the global marketplace is warranted.

³ See generally, David J. Gerber, *Symposium on Antitrust Law and the Internationalization of Markets: Forward: Antitrust and the Challenge of Internationalization*, 64 CHI.-KENT L. REV. 689 (1988).

⁴ Robert A. Katzman, *The Attenuation of Antitrust*, 2 BROOKINGS REV. 23, 26 (1984).

⁵ See Thomas M. Jorde and David J. Teece, *Innovation, Cooperation And Antitrust: Balancing Competition and Cooperation*, 4 HIGH TECH. L.J. 1, 33 (1989).

⁶ Michael N. Sohn, *Failing and Flailing Firms: Merger Analysis in a Time of Recession, Changing Technology and International Competition*, 795 PLI/CROP 147, 149-50 (1992).

⁷ See A. Paul Victor, *Antitrust and International Competitiveness in the 1990's*, 58 ANTITRUST L.J. 515 (1989).

II. NATURE AND SCOPE OF AMERICAN ANTITRUST LAWS

In order to properly analyze the effect of United States antitrust laws on the ability of American companies to compete in the global marketplace, a brief overview of the nature and scope of the principal substantive antitrust laws is required. American antitrust laws were originally enacted to prevent both monopolies and oligopolies from forming, and to eliminate anti-competitive conduct in situations where natural monopolies and oligopolies exist. In other words, these laws seek to prevent conduct which has the effect of eliminating economic competition, actual or potential, among business firms.⁸ There are basically four ways in which such competition may be eliminated.⁹

First, competition may be eliminated as a necessary consequence of mergers, acquisitions, and joint ventures which involve the complete integration of two or more previously independent firms.¹⁰ Current case law recognizes that either a positive effect, a negative effect, or no effect on the overall level of competition in the relevant markets may occur as the result of a merger.¹¹

Second, the elimination of competition may also be a logical consequence of a limited joint venture.¹² Frequently, joint ventures are formed for the purpose of conducting research and development which may also eliminate some or all competition.¹³ Furthermore, a parent corporation may covenant not to compete directly with its joint venture, or a joint venture's parent company may covenant not to compete with other parent companies of the joint venture.¹⁴

Third, competition may be eliminated as a consequence of cartel activity.¹⁵ Cartel activity results when many leading firms in a particular industry coordinate their economic activity through price-fixing, output limitation,

⁸ *Global Competition: The New Reality*, 1985 Report of the President's Commission on Industrial Competitiveness.

⁹ Ronald W. Davis, *Antitrust, the Trade Deficit, and U.S. International Competitiveness: A Time for Rethinking*, 18 N.Y.U. J. INT'L L. & POL. 1235, 1251 (1986).

¹⁰ *Id.*

¹¹ *Id.* at 1242.

¹² *Id.*

¹³ Davis, *supra* note 9, at 1251.

¹⁴ *Id.*

¹⁵ *Id.*

customer allocation, or market allocation with the principal objective of achieving higher-than-competitive profit levels.¹⁶

Fourth, competition may be eliminated as a result of predatory pricing or of monopolistic and oligopolistic conduct.¹⁷ In this case, in order to adversely affect smaller and less powerful competitors by driving them out of the market, the dominant firm or firms in an industry, who have substantial market power, covenant to reduce and fix prices at levels which the smaller competitors cannot match.

III. INTERNATIONALIZATION OF MARKETS AND COMPETITION

The internationalization of markets has had a dramatic impact on the United States. There are four primary aspects of the internationalization process: the increasing demand for foreign goods by American consumers; the decisions of foreign competitors to meet those demands; the characteristics required of firms engaged in international competition; and the increased importance of government antitrust policies.¹⁸

A. *Satisfaction of Domestic Demand by Foreign Corporations*

To the American consumer, this internationalization of markets is, for the most part, marked by an increase in imported goods available for sale.¹⁹ These may be "sourcing decisions" by domestic firms (e.g., the decision by a United States automotive manufacturer to produce components in Brazil).²⁰ "[It] may also be decisions by foreign firms either to produce for the United States market or purchase for resale in that market."²¹ The variety and quantity of foreign goods in the American market continues to increase, regardless of the decisions being made.

¹⁶ *Id.*

¹⁷ *Id.* at 1252.

¹⁸ See Gerber, *supra* note 3 at 689.

¹⁹ See *Economic Report of the President Transmitted to Congress*, 24 WEEKLY COMP. PRESS DOC. 224 (Feb. 19, 1988) (Explaining statistics concerning imports from 1978 to 1987, categorized by country).

²⁰ See *Chrysler Move in Brazil*, N.Y. TIMES, Mar. 7, 1986, at D2.

²¹ See *supra* note 17.

B. *Competitive Decision Making*

Another factor of international competition is the increased importance of competitive decision making. Competitive decision making has led to the increased presence of imported goods in marketplaces within the United States. These decisions are influenced by the economic, political, and legal factors of the nations in which those foreign firms are based.²² As of late, foreign competitors are satisfying the increased demands of domestic consumers with little regard for sovereign national boundaries.²³

Firms that choose to enter the American market must maintain a degree of sensitivity to the different political, cultural, and economic nuances of America.²⁴ These international firms have developed the ability to bring these elements into their competitive decision making process.²⁵ As a result, many of these firms (e.g., Honda, B.M.W., and Sony) have enjoyed dramatic success in the American marketplace.

C. *Economies of Scale*

American antitrust laws restrict American companies from achieving the size necessary to compete with their unrestricted foreign competitors. Many critics of antitrust believe that firms must achieve aggrandize to achieve a level of efficiency sufficient for international competition.²⁶ Professor Joseph L. Bower of the Harvard Business School believes that if American corporations are to survive global competition they “[n]eed the low operating costs of large scale operations and the resources for continual development.”²⁷ These resources provide firms with the ability to rapidly shift production from one country to another in response to the dynamic global market.

²² See, e.g., EMILIO PAGOULATOS & ROBERT SORENSEN, *Industrial Policy and Firm Behavior in an International Context*, in WESTERN ECONOMIES IN TRANSITION 305 (J. Levenson & J. Wheeler eds. 1980); Lester Thurow, *Revitalizing American Industry: Managing in a Competitive World Economy*, 27 CAL. MGMT. REV. 9 (1984).

²³ See Gerber, *supra* note 3 at 689.

²⁴ See *supra* note 3.

²⁵ ROBERT REICH, *THE NEXT AMERICAN FRONTIER*, (New York Times Book Co., 1983).

²⁶ See, e.g., Janus A.K. Ordovery, *Transitional Antitrust and Economics*, In *Antitrust and Trade Policy in International Trade* 233, 234-35 (Fordham Corp. Law Institute 1985).

²⁷ Joseph L. Bower, *Revising Antitrust Laws: The Case For Building More IBM's*, N.Y. TIMES, Feb. 16, 1986 § 3.

D. Increased Importance of Government Antitrust Policies

Under international law, all nations are sovereign, such that all nations have the power to make treaties and agreements with other nations, as well as impose tariffs, taxes, and regulate trade at its borders. Thus, the governments of countries in which foreign firms seek to compete have a great deal of influence over those firms.

In contrast, the United States, for the most part, has an open border policy.²⁸ This policy allows inexpensive, well made foreign goods into the domestic marketplace. At the same time, the United States has antitrust laws that prohibit its own American corporate entities from developing many of the characteristics necessary to successfully compete with international firms. Those laws prevent these firms from being able to achieve sufficient economies of scale necessary to compete in the global marketplace.²⁹ This illustrates the importance of governmental influence over international competition.

IV. THE DIMINISHING NEED FOR ANTITRUST LAWS

The prevailing view among proponents of strict antitrust laws is that in noncompetitive markets, incentives to achieve efficiency and to invest in technology furthering research and development will diminish as a result of monopolistic or oligopolistic behavior.³⁰ Judge Learned Hand, in an antitrust monopoly case almost fifty years ago, propounded:

[P]ossession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.³¹

²⁸ *Id.*

²⁹ Ira M. Millstein, *Essay: The Impact of the Antitrust Laws on America's Ability to Restructure Its Industries and Proposals for Change*, 47 U. PITT. L. REV. 713, (1986).

³⁰ Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L. J. 195 (1992).

³¹ *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

Judge Hand's eloquent analysis, which was part of an opinion rendered in 1945 when the American market was basically devoid of foreign competition, applies only to noncompetitive markets. As a result, although the possibility exists that anti-competitive conduct may result from eliminating or reworking the antitrust laws, in most market situations, monopolistic or oligopolistic conduct does not occur. Moreover, in today's competitive global environment, monopolistic or oligopolistic conduct does not pose a significant threat to competition.

As a result, United States antitrust laws, in their current form, have become obsolete. Professor Lester C. Thurow believes that "the time has come to recognize that the techniques of the nineteenth century are not applicable in getting ready for the twenty-first century."³² Professor Thurow goes on to comment:

No one knows why dinosaurs became extinct, but it was probably some change in the environment combined with an animal that had become too large and too highly specialized. The dinosaur was also famous for having very little brain to body weight and did not change its habits easily. Antitrust suffers from all of these problems.³³

In the past couple of decades, a massive change in the economic environment has occurred. The United States has never had to face competitors that are its financial and technological equals. Even some of American largest corporations have teetered on the brink of financial ruin in the face of this increased level of international competition.³⁴ The American automobile industry is a prime example of this situation.³⁵

Since its inception, the American automobile industry has remained one of the most concentrated of all major United States industries.³⁶ In the post-World War II era, the "Big Three," General Motors, Ford, and Chrysler have generally accounted for a minimum of ninety percent of the United States

³² Lester Thurow, *A New Era of Competition*, NEWSWEEK, Jan. 18, 1982 at 63.

³³ *Id.*

³⁴ Ronald W. Davis, *Antitrust, the Trade Deficit, and U.S. International Competitiveness: A Time for Rethinking*, 18 N.Y.U. J. INT'L L. & POL. 1235, 1241 (1986).

³⁵ *Id.*

³⁶ See Walter Adams & James W. Brock, *Joint Ventures, Antitrust, and Transnational Cartelization*, 11 J. INT'L L. BUS. 433, 456 (1991).

automobile production.³⁷ Until recently, they controlled an approximately equal share of United States Automobile sales.³⁸

The late Malcolm Forbes observed that the American automobile industry was a one-sided oligopoly, with Ford and Chrysler surviving, but on G.M.'s terms.³⁹ In Thurow's words:

Predictably, the industry exhibited the unmistakable traits of oligopolistic mutual interdependence and competitive forbearance: prices that were uniformly rigid except in the upward direction, price competition nonexistent, production inefficiency and bureaucratic red tape rampant, and technological progress moribund.⁴⁰

The introduction of foreign competition in the 1970's, particularly the Japanese automobiles which were innovative and fuel-efficient, disrupted this noncompetitive arrangement.⁴¹ The industry's initial response to this new foreign competition was to join with organized labor to lobby government for the imposition of "voluntary" import quotas.⁴² Thus, rather than adjust to foreign competition, the domestic oligopoly sought to restrict them from the American market.⁴³ The industry created political pressure which resulted in "voluntary" quotas which imposed quantitative restrictions on Japanese imports.⁴⁴

Despite the imposition of these "voluntary" quotas, the United States' auto industry has gone through (and perhaps is finally nearing the end of) an industry-wide shakedown. The quotas allowed the American car manufacturers to enjoy temporary success while their Japanese counterparts methodically chipped away at the American car manufacturers market share. At least one antitrust critic has commented that "even if General Motors were the only domestic automobile manufacturer, it would still be in a competitive fight for its life."⁴⁵ In a world of global markets and ever increasing trade,

³⁷ *Id.*

³⁸ *Id.*

³⁹ Jerry Flint, *Best Car Wins*, FORBES, Jan 27, 1986, at 73, 75-76.

⁴⁰ ADAMS & BROCK, *THE AUTOMOBILE INDUSTRY IN THE STRUCTURE OF AMERICAN INDUSTRY* 1 (W. Adams 7th ed. 1986) (discussing the structure of the U.S. auto industry).

⁴¹ *Abolish the Antitrust Laws*, DUN'S REV., Feb. 1981, at 72 (Interviewing top economist Lester Thurow).

⁴² *Id.*

⁴³ See ORDOVER *supra* note 26.

⁴⁴ See ADAMS & BROCK, *supra* note 40.

⁴⁵ See ABOLISH THE ANTITRUST LAWS, *supra* note 41, at 72.

restraints such as quotas, tariffs, and other import restraints, whether voluntary or not, are only temporary remedies which may provide some relief, but are not permanent solutions.⁴⁶

V. OBSOLESCENCE OF THE FUNDAMENTAL ASSUMPTIONS OF ANTITRUST LAW

Concepts that successfully achieved particular goals in a domestic context are less effective in achieving their goals in an international context.⁴⁷ Antitrust concepts assume particular relationships between cause and effect. International competition, however, alters these causal relationships, and hence, also alters the outcomes resulting from the application of these legal concepts.⁴⁸

Specifically, in merger cases, current antitrust law requires courts to measure economic power of the merged entity.⁴⁹ Courts must determine economic power in relation to the entity's supply potential and size of the market in which the merged entity will operate. Assessing the supply potential and defining markets is extremely difficult, even in purely domestic market contexts.⁵⁰

The internationalization of competition increases the difficulties inherent in determining market size and power. The fundamental causal relationships between supply potential and market definition to anti-competitive behavior is markedly different in an international context than in a purely domestic context. Regardless, American courts will find that mergers of any kind are illegal if they have a sufficiently high probability of creating anti-competitive effects within the United States.⁵¹

⁴⁶ See BOWER, *supra* note 28.

⁴⁷ See Gerber, *supra* note 3, at 689.

⁴⁸ *Id.*

⁴⁹ See, e.g., Robert J. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CA. L. REV. 3 (1984); White, *Antitrust and Merger Policy: A Review and Critique*, 1 J. ECON. PRESP., 13, 14-16 (1987).

⁵⁰ *Id.*

⁵¹ See, e.g., U.S. Dep't. of Just., Antitrust Div., *Antitrust Guide for Int'l Operations* (1977), reprinted in 799 ANTITRUST & TRADE REG. REP. (BNA) E-1, E-3 to E-6 (Feb. 1, 1977).

A. *Antitrust Law and Organizational Size*

A view that has emerged over the last two decades is that if American firms are to successfully compete in world markets, "they must be free to restructure their operations to take advantage of opportunities to increase their efficiency and respond rapidly to changing market conditions and technology."⁵² As a result, these critics argue that American companies must be allowed to increase their organizational size in order to have any chance of successfully competing in the international marketplace. Nevertheless, as it stands now, many "American industries now compete in global markets but are shackled by outmoded, unduly restrictive antitrust laws"⁵³ prohibiting them from attaining the requisite size and efficiency to successfully compete against huge multinational and government backed foreign firms.

B. *Antitrust Law and Supply Potential*

Another problem with current antitrust analysis is the issue of supply potential.⁵⁴ When corporations compete either exclusively or predominately in a limited geographic area, such as that created by national boundaries, the issue of supply potential tends to be relatively unproblematic because competing firms cannot rapidly and conveniently shift the supply of its products.⁵⁵ In order to rapidly shift supply to meet changing demand, these firms would either have to invest in new production facilities or retool existing facilities.

Firms competing on an international scale, however, may be able to alter their supply of product to fill increasing demand in a particular geographic area merely by shifting the flow of existing production.⁵⁶ In other words, shifting supply would not entail the building of new production facilities or the retooling of old ones. "The ease with which product flows can be manipulated thus increases the difficulty of defining markets, assessing the power of firms within those markets, and adjudging the influence of potential

⁵² Statement by Attorney General Edwin Meese III accompanying Administration's Antitrust Reform Package 1 (Feb. 19, 1986).

⁵³ MERGER MODERNIZATION ACT OF 1986, 132 CONG. REC. 22 (1986); See H.R. 4247, 99th Cong., 2d Sess. (1986).

⁵⁴ See Gerber, *supra* note 47.

⁵⁵ *Id.*

⁵⁶ *Id.*

foreign competition on domestic competitive relationships.”⁵⁷ As a result, a concept that works, at best, tolerably well in a domestic market, functions even less well in an international context.

C. *Antitrust Law and Market Definition*

American courts have for some time recognized that a particular merger may have a positive effect in a large and broadly defined market while at the same time injuring competition in a narrowly defined market. Under current antitrust analysis, the courts look to see how much domestic market share is controlled by one firm.⁵⁸ However, what seems large relative to the United States is not large when considered in the context of the world economy.⁵⁹ This is even more problematic when it is recognized that the foreign firms are often government owned, backed by state banking, or controlled by larger combines.⁶⁰

Nevertheless, current case law instructs courts to disregard any productive efficiencies that might result from a merger and to consider only the likely effects of the merger on domestic competition. Specifically, if a merger results in increased market power in the United States, a court, in an antitrust action, may not consider, as a possible justification or defense to the merger, the likelihood that the merged entity will be better able to compete in the global economy.⁶¹ It is irrelevant whether the firm could achieve the necessary economies to successfully compete in the global market. Even if the merger allows for the gain of sales from foreign rivals with consequent benefit to the United States, and the corporation in particular, American courts may not allow this information to influence its decisions.⁶²

This illustrates the antiquated thinking inherent in current antitrust law. The current antitrust thinking, which ignores world markets and whose inherent belief that American companies are big enough and strong enough to succeed on their own, no longer holds true. This jurisprudence, which prohibits courts from considering the enhanced competitiveness in international markets as a possible defense in the case of mergers producing inconsequential anti-competitive effect in the United States, is badly outdated.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Davis, *supra* note 9 at 1241.

⁶¹ *Id.* at 1240.

⁶² *Id.* at 1261.

Today, the survival of many American corporations, and even whole industries, may depend on the ability to succeed in the international marketplace.

For instance, Boeing Corporation and McDonnell Douglas have witnessed sales and market share of the passenger aircraft industry disappear to the government backed European Airbus Corporation. Due to government support, Airbus is able to let its customers finance their purchases over extended time periods, thereby reducing the amount of current capital needed to purchase new aircraft. American companies like McDonnell-Douglas and Boeing have lost out on sales because of their inability to match Airbus' attractive financing. As a result, situations such as this have led many political leaders to call for the restructuring of American antitrust laws.⁶³

VI. THE FUTURE OF AMERICAN ANTITRUST LAW IN THE GLOBAL MARKETPLACE

Previously, ensuring the success of American businesses in the international marketplace had not been the goal of American antitrust law. Now, however, many argue that the internationalization of markets requires larger and more cooperative domestic firms in order to meet foreign competition.⁶⁴

Former Commerce Secretary Malcolm Baldrige believes that the circumstances which originally brought about the antitrust laws, in particular the Clayton act, "really no longer exist," and that "with global markets as competitive as they are now, any barriers to United States companies' ability to compete should be examined very seriously."⁶⁵ Baldrige and many other influential political figures believe that by changing antitrust laws, United States companies would have substantially more latitude to merge and take advantage of economies of scale.⁶⁶ Baldrige observed:

[T]he United States' most conspicuous failure to identify and remove economically counter-productive laws is in the area of antitrust. It is not just that some parts of those laws are irrelevant today; it is in the

⁶³ *Baldrige Proposes Repeal of Antitrust Language, Omer Japan Trip is Canceled*, INT'L. TRADE REP. (BNA) Vol.2, at 284 (Feb. 27, 1985).

⁶⁴ See ORDOVER, *supra* note 26.

⁶⁵ See *Baldrige Proposes Repeal of Antitrust Language, Omer Japan Trip is Canceled*, *supra* note 63.

⁶⁶ *Id.* at 284.

fact that those laws place additional and unnecessary burdens on the ability of United States firms to compete.⁶⁷

Baldrige and other critics have demanded a reassessment of the entire American antitrust structure, and its underlying rationale, to determine the cost those laws impose on the American economy in the international marketplace.⁶⁸

Critics suggest, "antitrust laws should permit or even encourage firms to acquire the characteristics thought to be necessary for success in this competitive environment."⁶⁹ To accomplish this, courts must weigh established antitrust goals against the need to protect and enhance the international competitiveness of domestic firms.

Therefore, it must be determined how, if at all, courts should consider international competitiveness when applying the antitrust laws.⁷⁰ Currently, antitrust law prevents judges from basing their decisions on goals such as international competitiveness or production efficiency. These goals, it is believed, are unrelated to the established goals of the antitrust laws.⁷¹

In addition, United States antitrust laws suffer from a perceived vagueness of the very goals of antitrust law.⁷² In fact, many believe that the antitrust laws provide little guidance for decision making.⁷³ This perception has been center stage during the last decade and a half.⁷⁴

During that time, a controversy has developed between two opposing schools of thought on antitrust goals.⁷⁵ One group believes the purpose of antitrust laws is to limit the concentration of economic power, ensure economic opportunities for small competitors, and promote consumer welfare.

⁶⁷ ABA Antitrust Section Examines Deregulation, Enforcement Shifts, 49 ANTITRUST & TRADE REG. REP. (BNA) 156, 160 (1985).

⁶⁸ See Baldrige Proposes Repeal of Antitrust Language, *Olmer Japan Trip is Canceled*, *supra* note 63.

⁶⁹ See, Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 951, 953, (1987).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Gerber, *supra* note 3 at 689.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ For discussion, see e.g., Elanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917 (1987); Elanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987); Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817 (1987); Donald F. Turner, *The Durability, Relevance, and Future of American Policy*, 75 CAL. L. REV. 797 (1987).

The other group argues that economic efficiency, "as defined by neoclassical economic theory, is the only legitimate goal of antitrust law."⁷⁶

This controversy concerning the goals of antitrust adversely impacts antitrust analysis in the context of international competition. What has resulted is an increased receptiveness to antitrust theories, and the recognition that something needs to be done to current antitrust law. Unfortunately, the result often has been an unstructured weakening of antitrust law rather than a careful evaluation of the impact of internationalization on antitrust law.⁷⁷ A structured analysis of the impact of the internationalization of competition on antitrust goals may answer the question of whether antitrust laws should be rewritten or possibly even eliminated altogether.

A careful analysis of current antitrust law and the impact of internationalization calls for clarification of the goals sought to be achieved by antitrust law. Such clarification would end the controversy which undermines confidence in the antitrust laws. Since no system of legal norms can function effectively without reasonably clear objectives, "internationalization of markets, which has changed the operating environment of antitrust laws, requires that the objectives of antitrust law be made explicit."⁷⁸

VII. CONCLUSION

There is a prevailing view among many economists, antitrust attorneys, and business and legal scholars that the internationalization process reduces or even eliminates the need for antitrust law. They argue that internationalization generates competitive influences on conduct that has an effect roughly equivalent to, or greater than, the effect sought to be achieved by the imposition of antitrust laws. International competition creates competitive pressures on firms operating in the United States market. As a result, incentives to engage in anti-competitive behavior diminishes with the increasing internationalization of markets.

Control of production facilities in many countries is believed to be necessary for success in the global market. However, frequently, American antitrust laws stand in the way of American companies achieving the necessary size required to compete successfully in the world marketplace. In

⁷⁶ See Gerber, *supra* note 3 at 694.

⁷⁷ *Id.*

⁷⁸ *Id.*

effect “[American] antitrust laws have strait jacketed United States manufacturers in international trade.”⁷⁹

In this age of global competition, the need to restrict the size of domestic firms has disappeared. It no longer makes sense to impede American firms with antitrust laws, when they must operate in an international competitive environment.⁸⁰ Today, firms must be able to achieve the economies of scale thought to be necessary for effective international competition.

The internationalization of competition thus has far-reaching implications regarding the effectiveness of antitrust laws in achieving antitrust goals. This impact requires the re-evaluation of the basic characteristics of the United States antitrust law system. That system was developed in a competitive context that was basically devoid of foreign competition. Now, however, the environment in which the antitrust system must function has been, and continues to be, fundamentally altered by the internationalization of competition. Consequently, current antitrust laws and thinking must be evaluated in light of the ever-increasing internationalization of markets to determine whether they can achieve the goals for which they were originally created.

A critical evaluation of the current system may reveal that the current concepts of market definition and market power are obsolete, and hence, ineffective. On the other hand, the critical evaluation may show that concepts of economic power should play an even greater role in United States antitrust law than they play today.

Regardless of the outcome, antitrust law, in its current form, impedes the ability of American corporations to successfully compete in the global marketplace. Whether there needs to be more effective regulation or no regulation at all remains unclear. However, what is clear is that the state of current antitrust law demands a critical reassessment in the context of international competition.

⁷⁹ *To Establish a Commission on the International Application of Antitrust Laws: Hearings Before the Senate Committee on Governmental Affairs*, 96th Cong., 1st Sess. 12 (1980) (statement of Sen. Mathias).

⁸⁰ *The Joint Venture: Panel Discussion*, 53 ANTITRUST L.J. 97, 98 (1984).

