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FOR PUBLIC POLICY RESEARCH

THE NEW ANTITRUST PARADOX:  
POLICY PROLIFERATION IN THE GLOBAL ECONOMY

PANEL IV: NEUTRAL RULES OR HARMONIZATION?

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12:15 p.m.

Wohlstetter Conference Center  
Twelfth Floor, AEI  
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Washington, D.C. 20036

ANDREW GUZMAN: I am going to try two prongs in my response to Professors Trebilcock and Iacobucci. One is the idea that the best defense is a good offense. The other is that they actually do not disagree with me at all. The first one is this notion that national treatment is a sort of pablumesque prescription we can all celebrate. Then their extraterritoriality principle is a more difficult thing, although the difficulty has been underplayed.

First, national treatment is a key issue, on which you will have real trouble reaching an agreement. We are not on the cusp of agreeing on national treatment. National treatment without this extraterritoriality aspect that they describe leaves a lot of things unresolved, including, among others, all the cases they talk about in the context of this extraterritoriality example. The problem is that this requires a fairly profound consensus on the fundamentals of antitrust, fundamentals that go not only to the fact that different countries have different priorities with respect to antitrust in an autarchic world, but also go to all the things I have been talking about.

There are two versions of their extraterritoriality proposal. One turns on consumer welfare and the other turns on total welfare. As defined by economists, those are different things. If it turns on consumer welfare, then you have bought into the powerful view of antitrust, one that is probably not supported by economic theory of the first cut, and may or may not be supported by most countries. On the other hand, if you focus on total welfare, it is not clear that you get at very many of these problems. It becomes jurisdictional open season on almost any transactions. Why would you want to exercise jurisdiction if there is no impact on domestic welfare? In some sense, their remedy on any extraterritoriality rule is quite strong. Like all of these other things it's going to provoke objections and it will be very hard to reach.

Their extraterritoriality rule is also devilishly difficult to apply in practice. While I do not pretend to have an alternative, I am suggesting that what we have here is not a relatively straightforward solution that solves a very high percentage of our problem. What we have is a proposal for substantive reform that is going to be difficult to reach.

That brings me to the "they are really just agreeing with me take." International cooperation on antitrust is going to be devilishly hard to get. If it is to be reached it has to be done at the WTO, as we can pay off countries there. If developing countries do not want it, we can do something truly crazy, like give them access to our agricultural markets. What a fabulous world that would be. It's going to be hard to do. There is no doubt about that.

PARTICIPANT: Michael [Trebilcock], you suggest a confining of antitrust remedies to damages in cross-border merger cases. How would you address the problem of supra-optimal damages that would over-deter, over-compensate, and over-punish across a range of jurisdictions?

EDWARD IACOBUCCI: There are a couple of responses. First, there is national treatment, which goes some way to saying that you are not just ratcheting up these damages for the purposes of extracting rents. This is what you do to your domestic producers as well. Some might say that treble damages are excessive, but it would not be a violation of national treatment for the U.S. to impose them. That is one response.

The other response is that this is not that novel. We have super-national cartel; there is this risk as well, right? It is novel because we do not normally think about mergers and damages, but this risk of over deterrence exists in the cartel context already. Different jurisdictions impose damages on super-national cartels. It is not quite as radical a proposal as it might appear at first glance.

HON. DIANE WOOD One of the problems with extraterritorial enforcement is that when you are trying to pursue a cartel located outside your country, it is very hard to get the evidence. We lost cases when I was at the Department of Justice because of this problem, a problem that will continue to exist forever.

For your national treatment and extraterritoriality principles to work, an obligation on the part of all countries to pass judicial assistance laws in the area of cartel enforcement, such that their local mechanisms for obtaining evidence would be available to the enforcers of antitrust laws, must be added. Otherwise you could decide how narrowly you want to target it. You could decide that it is only for the inbound. You could put whatever restrictions you want on it, but it never has a chance until you also add something about information and the obtaining of evidence.

MICHAEL TREBILCOCK: This is a fair point, although it is not quite as simple as you imply. In the hypothetical example we gave with Japan, Japan has no anti-cartel laws at all. There is a cartel, based in Japan, exporting into the U.S. that the U.S. would like to prosecute. Why on earth would they agree to provide judicial assistance to sanction conduct that they regard at home as noncriminal conduct? The idea that you are going to get all the WTO members to agree to this kind of commitment is fanciful. That is why we have to live with a steady proliferation of these bilateral cooperation agreements. The U.S. has these agreements with Europe and Canada and Australia now. They are not perfect, but the world is not quite as bereft of response to the problem as you were implying.

Andrew has come to characterize our proposal as otherworldly. Actually, we are describing the situation that more or less exists now. The national treatment principle is already in place under the GATT. It has already been argued in one competition case, *Kodak-Fuji*. The limited inbound extraterritoriality principle already exists. The so-called "effects doctrine" exists in Europe and exists here. We are suggesting embellishments and a more systematic application to the two principles already in place. I do not think there is anything otherworldly about our proposal.

ANDREW GUZMAN: The only thing that is constant in the world of trade is that everything they do will never happen until it is done, the TRIPS agreement, the dispute settlement agreement, the whole WTO. Pessimism does not have to reign when you are talking about trade.

MICHAEL TREBILCOCK: None of these are unworldly or otherworldly because only one WTO member really cares politically about this, the EU. The rest of it is up to whatever country's competition policy people feel like negotiating under. No one else will be paying

attention. At the end, as Professor Guzman pointed out, it will all be blessed and everyone will say, "God, when did we do that?"

PARTICIPANT: To add one point, I am not sure that Article 3 applies to antitrust authorities. There is no national treatment requirement under Article 20 of GATT, the exception which includes enforcement of competition laws.

PARTICIPANT: Given NAFTA and the relationships that now exist among the United States, Canada and Mexico, at what point would you suggest that there should be a harmonization of the antitrust laws to conform to that trade relationship or to allow cooperation? I am not saying that the enforcement of any harmonized antitrust laws should take place in an arbitration panel proceeding, but perhaps either under the WTO or some other type of judicial process.

EDWARD IACOBUCCI: I am not sure that harmonized antitrust is a prerequisite to a customs union.

PARTICIPANT: Would you then have your antitrust laws also conform to, or in some respects meet that relationship?

EDWARD IACOBUCCI: It is just not obvious to me that there is such a point. In the same way that would have been regulation of genetically modified foods, again, assuming national treatment, what about regulation of other health and safety issues or road transportation safety issues? Any myriad of things can exist with free trade. It is not obvious to us that you need to harmonize these areas.

MICHAEL TREBILCOCK: In the back of your mind is the European Union. They have harmonized competition laws, because they started with six developed countries. We have not considered the different implications for a regional trading bloc of the Americas, one where there will be two developed countries and 35 developing countries. The notion of harmonizing all kinds of domestic laws within that kind of regional trading block is fanciful. The notion that the competition law that is appropriate for the U.S. is appropriate for Antigua or Ecuador is misguided.

AUDREY WINTER (The Office of the U.S. Trade Representative, Asia Pacific Office): Panelists have mentioned NAFTA and FTAA and some of the other agreements, the discussions of which are interesting to me. I am curious, though, because it seems like no one ever talks about some of the basic issues. We are all in the stratosphere talking about what will never happen. I always look to those of you who are out in the private sector or in academia for advice on what may actually happen. One of the things being talked about is the extent to which a framework, not detailed disciplining rules, should be adopted. Just look at NAFTA. There are real obligations. It requires a competition law. Signatories must have a domestic enforcement agency, a domestic judicial review in place so as to ensure that domestic competitive markets exist, and have those procedural obligations subject to dispute settlement.

No one ever says to us, should those obligations, procedural though they may be, and enforceable though they could be through dispute settlement, exist? You then get to the

subsidiary questions of transparency, due process, core principles, and everything else that is substantive to antitrust.

It seems to be a lot of psycho-babble about some things that are never going to happen. There are specific issues, possible today, that people are not really talking about in detail. These are issues that are not being discussed, that basic input is not being given to. Many of the governments negotiating some of these agreements would seek any appropriate input on these topics.

MICHAEL TREBILCOCK: At the risk of engaging in further psycho-babble, we should be realistic about what NAFTA provides with Chapter 15; that every country must have a competition law. Big deal. It only requires a competition law, any competition law, as long as it's got that label, and moreover, this is non-justiciable. That is Chapter 15. That is harmless. I do not object to that. Mexico passed a competition law. I have no idea what is in it, whether it is enforced, and in any event, it is not subject to disputes. Do you want to go beyond that? I think then we are into the domain of issues we are talking about here.

RICHARD EPSTEIN: I am going to just take issue with that. Once you tell somebody they have to enact a competition law, there is a kind of a moral compulsion to have a discourse over what a competition law is. You will start to look elsewhere to see what is required. In effect all of these obligations that are not enforceable actually influence conduct. We see all of that with respect to prosecutorial discussion and otherwise. In complex institutional frameworks, legal enforceability is not the test of effectiveness. The test of effectiveness is influence and example, and I do not know exactly how far these things will move, but that is essentially a kind of a subtle prod towards harmonization. I would not call it harmless. I would call it a modest, although uncertain benefit.

WOLFGANG KERBER: I have two questions for Michael Trebilcock. First, I very much like the idea that we solve problems in a decent run system of competition laws. They are very simple rules. I wonder, though, would you have national treatment for nondiscrimination of domestic and foreign producers? What would be your argument for not also having nondiscrimination between domestic and foreign consumers? For example, the United States policy would also have to assess anticompetitive effects on foreign consumers. What would be your argument against that?

Also, you defend diversity. It is true that harmonization leads to elimination of competitive politics and that is an important point, but I would be interested whether you also see a kind of trade-off between competition among firms on one side and competition among jurisdictions, governments, on the other side? That is a bit of follow-up to the question from Oliver Budzinski. In Europe we have the very popular argument that, in order to have an undistorted competition among firms, we need to have harmonization of regulations and of competition policy. Then, though, you have no more competition among competition policies, and no more regulatory diversity. I would be interested in what your position is on that.

MICHAEL TREBILCOCK: This question of what you need for undistorted competition, I wonder, why it starts and stops with competition? Why not environmental law, labor law,

subsidy policies, and everything else that can shape competitive conditions? Why are we singling out competition law for special harmonization attention? I have not heard the case for this over any of a number of other domestic policy demands.

Your first point is that we should have a national treatment principle that applies not only to discrimination between foreign and domestic producers but between foreign and domestic consumers as well. That is not the way the trade principle is presently formulated. In earlier iterations of the paper we actually tentatively proposed a similar principle. I think Ed [Iacobucci] may be more open to this than me, though. I am not as open to it because I want to separate the domains of trade law and competition law. Trade law focuses on foreign producer access to markets. That is why the national treatment principle is not accidentally focused on discrimination between producers as a matter of trade law.

The discrimination against foreign consumers is really a minor issue in the sense that I would allow countries of destination, whose consumer welfare is impacted adversely by foreign conduct, to take extraterritorial action whether or not the foreign country is discriminating. In the example I used, Japan had no cartel laws at all. It was not that they were discriminating by having an export cartel exemption. They had no cartel laws at all, so there was no discrimination. I would still permit the U.S. to take action in that case.

In that sense I am not sure that, on the inbound side, it matters to me whether or not there is a national treatment principle that applies to consumers.

EDWARD IACOBUCCI: To expand on the second question, we are not necessarily motivated by the notion of competition between jurisdictions fighting over attracting firms. It is not a perfect map with other models of regulatory competition like corporate law. In fact, sometimes we want to preserve independence so that you can carve out independent courses that may be best suited to your circumstances.

Canada, for example, has an explicit deficiencies defense. That might be motivated by the size of its market and the size of the average markets within it. Those two things may just be best suited to the economic circumstances of the state. It is not necessarily that one is better than the other; it is just that there is a better match. Our motivation is not strictly to promote experimentation and innovation—it is also that competition policy, in some circumstances, should be contextualized.

RICHARD EPSTEIN: The argument in one sentence is nondiscrimination rules are applied by virtual effect. You do not think there is a single optimum substantive standard.

CLAUDE BARFIELD (AEI): A question about the extent to which you can use national treatment. It seems to me that we already have competition policy. It is not just a negative national treatment. It is a positive obligation as well. For instance, there is an injunction against uncompetitive cross-subsidization. You are really going to be looking at competing regulatory systems where you will be asked to decide upon questions that go far beyond just discrimination.

Would you recommend that we actually rescind the reference paper in the telecommunications agreement because it is a competition policy paper? Also, you dismissed questions related to an independent regulatory review. I can see a panel in the appellate body being asked to judge whether or not a particular institution in a particular country was truly independent. Given what I see as the increasing tendency of the panels of the appellate body to take the bit by the teeth, they will answer or try to answer those questions. This will take us far beyond discrimination and national treatment.

EDWARD IACOBUCCI: What's the specific thrust of the second question?

CLAUDE BARFIELD: As you want the WTO only concerned with nondiscrimination, should we rescind the reference paper in the telecommunications agreement? That seems to me to go fairly far beyond your argument. Also, and we could argue about this because we have not had too many cases yet, when you get to cases in the services area it will not be a question of discrimination. It is going to be a question of judging competing regulatory systems and those panels will try to answer those questions.

MICHAEL TREBILCOCK: As the trade lawyer of the two, let me take a shot at that. In the services agreement, the national treatment commitments only relate to commitments that each country has scheduled. There is a huge leeway for voluntary opt-in. You do not have to schedule any commitments at all. This is not a single undertaking. This is with other schedule commitments or not. Similarly, with the reference paper in telecom, countries don't have to sign on. The basic telecom agreement has 60 or 70 signatories. Half the members of the WTO are not signatories. This reflects a substantial diversity of domestic policy making.

CLAUDE BARFIELD: The issue is not whether you have signed on to it, but rather if you have signed onto it, are you just signing up to national treatment? What is in the reference agreement when you sign it? I would argue that you signed up to something far beyond national treatment, because there are positive obligations as well. I gave the example of uncompetitive cross-subsidization, though we don't know what that is. In domestic jurisdictions you have fought over that question. The Germans have been trying to get a German telecom, Deutsche Telecom, for over a decade on that very issue. This is far beyond your point.

MICHAEL TREBILCOCK: I concede that, but the fact that it is a voluntary opt-in just makes this a kind of grand regional agreement. I am not opposed to bilateral or regional agreements if countries want to negotiate them. What I *am* opposed to is the WTO, as a condition of membership, insisting that all 146 members sign on to a common set of commitments, as is the case with TRIPS. You yourself have been highly skeptical of the ability of panels on the appellate body to adjudicate issues of exactly the kind you have described.

FRED SMITH (Competitive Enterprise Institute): I am going to go to Andrew's point that Professors Trebilcock and Iacobucci actually agree with, because it seems to me you have signed on to an agenda with a slippery slope. All of you explicitly argued that harmonization, and in some sense cooperative behavior, would lead to a more rational global regulatory regime. Yet we have heard of the risk that it also provides a wonderful way to cartelize bureaucracies around the world and lead us into a highly over-regulated state. In fact, looking at the history of the

attempts to move in this direction, including the shift from GATT to WTO, where we did create an appellate board mechanism, the EU, which seems to be nothing more than an attempt to maximize the regulation of every part of the world, and TRIPS, which is certainly a situation where we imposed a massive regulatory regime on countries, each has actually been counterproductive to the groups who were pushing it. You have the bureaucracies of the world that clearly would like to see a maximization of their regulatory authority. You have the NGO movement, which at the moment are pro-government organizations, not nongovernmental organizations. Then you have powerful economic interests in most countries of the world that have been pushing aggressively toward suppressing competition via regulation. Are you calling for just a maximum amount of bureaucrats of the world to unite? You have nothing to lose except competition.

RICHARD EPSTEIN: Andrew, you are the world's cartelizer.

ANDREW GUZMAN: I do not see a bogeyman just because you crossed international borders. Absolutely the trend since the Second World War has been, and rightly so, towards more international cooperation because things have grown more international. Basic theories of federalism say that you should be moving regulation to a higher level as you get activities that generate more spillover. That is rudimentary and has to be true.

Now, there are costs to those movements. There is no question about that. The question is always: Is the cost of the next step larger or smaller than the benefit? On antitrust we are awfully close to the starting line. It does not seem that we are teetering on the edge of some abyss where there is going to be regulation run amok at the international level. There might be regulation run amok at the domestic level as it impacts international activity, though.

Overlapping jurisdictions do lend themselves to more bureaucracy and more legal regulation, which may not be a good thing. It strikes me, though, that there is nothing especially horrible about thinking about issues in a cross-border way or thinking about ways to cooperate across borders. God knows the WTO is not perfect, but by and large it seems that the GATT-WTO has done more good than harm.