

AMERICAN ENTERPRISE INSTITUTE
FOR PUBLIC POLICY RESEARCH
THE NEW ANTITRUST PARADOX:
POLICY PROLIFERATION IN THE GLOBAL ECONOMY

PANEL V: INTERNATIONAL HARMONIZATION
OR COMPETITION?

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12:15 p.m.

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ANDREW GUZMAN: Among the things you say is that you are concerned about internationalization—let me use that word, though it was not the word you used—bringing high agency costs from international bureaucrats. While you were talking, I was asking myself, “Who are these international bureaucrats?” Then as you proceeded I thought, “He must mean the appellate body of the WTO, because they are the only ones I can think of.”

But then you come around and you actually say the appellate body might be the right place to do something, to lay out some contours on this nondiscrimination Article III rule, at least if negotiations do not get there. At least that is what I took you to be saying.

It is true that if the proposal were to come forward to establish some comprehensive antitrust rule complete with a bureaucratic structure outside of the appellate body there would be something to criticize. The question is who would not be criticizing. But in the current context, with what everybody has in mind, these bureaucrats or eight of the ICN would strike me as neither international nor particularly powerful on the international level. I am wondering who these bureaucrats are and in what context do you think they would be relevant or powerful?

JOHN MCGINNIS: By clarification, I certainly do not want to be understood to suggest that the appellate body should interpret Article III to put in some additional rules that may be appropriate for antitrust. That is not at all the burden of my talk.

What I was actually suggesting was that you might want to have a package put in international antitrust that looks something like the technical barrier to trade precisely because I believe that the appellate body needs to be disciplined by very clear rules. I am quite concerned about the appellate body being a kind of international bureaucracy that can become out of control.

That said, I think it is now unlikely because the appellate body does not offer too many substantive rules. I think it is disciplined by having an antidiscrimination law through which it puts forward procedural tests that do not require it to make substantive decisions about what kind of antitrust law we should have, what kind of environmental law we should have, and so on.

With respect to substantial harmonization, I am a little uncertain because it has not yet happened. What would begin to happen is that you would have to have international bureaucrats involved in formulating these rules and formulating whatever the core standards are. It worries me that those core standards, even if they are labeled "core," may actually start to look pretty interventionist for the kinds of reasons I suggested.

Moreover, I do not necessarily see in substantive antitrust law a huge difference between rule formulation in something like a substantive package of the rules and rule application. The difference is not large because when we come to questions like the rule of reason we are making extremely substantive judgments

I cannot necessarily point to the people I am worried about now, but in my view going down that route is going to inevitably empower people internationally in a way that they are not empowered under the WTO regime today.

ALDEN ABBOTT (FTC): Professor Kerber, I believe in Category 3 you were perhaps distinguishing between industrial policies whose strict antitrust enforcement and industrial policies achieve a sort of national champion policy, such as implicit subsidies. Your chart, though, suggested that a scale economy and the resultant reductions in cost would somehow be inconsistent with strict antitrust enforcement. Perhaps, that underscores the thinking of American antitrust laws decades ago that there was something bad or troublesome about major efficiencies being achieved.

One needs to be very careful about categorizing particular behavior in deciding whether it is appropriately dealt with by strict antitrust or not. I am just raising this characterization issue, and, of course, there may be differences among jurisdictions as to whether you put particular types of behavior, such as unilaterally efficient behavior, in a particular box as representing strict enforcement or nonenforcement aimed at the promoting a national champion.

WOLFGANG KERBER: What we meant to articulate was something like an international competitiveness defense. It is not really an efficiency defense in the traditional sense. What we have in mind is a case when a merger (or something else causing competitive concerns) is allowed on the grounds that for national markets, it is a problem, but in international markets it is not because there, we have efficiencies with a scale effect.

Let me give you another example found in our paper. In Germany, we had the merger of two large firms in the gas market, Ruhrgas and E.ON, creating a near monopoly in that market. The gas market is still a national market. (America also passed liberalized regulations in the last few years, but the market has international laws.) The German Federal Cartel Office, therefore, blocked the merger because the traditional market share of the two companies was about 95 percent. We can safely call this a market dominant position.

The German Ministry of Economic Affairs has the ability to overrule the Federal Cartel Office and they started to argue that while it is true that there is a near monopoly in the German gas market, this market will internationalize in the coming years. Then on these international markets to come we will gain efficiencies, so we have to temporarily accept the national restriction of competition just to get these efficiencies.

It can also be the case where it is not a temporary problem but a problem of markets which are very close to one another with one more national and one more international. Here you accept the monopolization of the national market to gain these effects on the international markets.

OLIVER BUDZINSKI: In Europe, industrial policy is a different concept from that in the United States. It is marked by an old discussion between the French and Germans about industrial policy versus competition policy, and industrial policy in Europe has always had the structure of state interventionism. It was a sector of policy in which the state was advised to foster certain forms in the case of national champions. State interventionism was the background of the European concept of industrial policies.

RICHARD EPSTEIN: I would like to take a stab at figuring out why I do not like the Hayekian view in this particular context though I am, in general, an admirer of Hayek. The case in which

Hayek seems to work best in the case of the merchant. You have a bunch of guys trying to sell goods to a bunch of other guys. They trade back and forth with each other at a very high volume, and they have to figure out whether to deliver the goods before they take the money or to take the money before they deliver the goods. After long experience they decide on the sequence of performance. There is a kind of a slow and orderly evolutionary adaptation of rules in order to deal with the contract.

When it comes to the organization of public institutions, the most troublesome fact to this Hayekian provision is that the most successful versions of this are the exact opposite. It is still the United States Constitution which was drawn wholly out of somebody's head, put down in accordance with the general theory, done without experimentation, done without any kind of practice. It is an overstatement, but not by all that much.

When you look at the way in which designs go locally you see lots of competition. Somehow or other at the institutional level, though, you do not learn anything. That is, I do not believe in the assumption that we have a radical ignorance about the desirability of institutions when I see every nation in the world introducing strong union laws, strong minimum wage laws, ridiculous safety laws and so forth. I do not want to see any experiments. I want to shoot them all in some sense, because I think that the basic theory is strong enough, both on the public choice side and on the allocation of efficiency side, to be able to denounce these things without having any further experimentation as to how they are going.

Let me just give you a couple of examples in American law. Certainly, local zoning law is ultimately imitative and comparative in some sense. What happens is that each of these devils figures out the worst ways to restrict new entry into various kinds of markets. In fact, one of the things that we know, to our great regret, is that the single strongest local barrier with respect to economic competition is often a zoning practice of one sort or another or which has been legitimized.

When you get into the trade area, we talk about the WTO and various kinds of labor regulations. The American situation, and I would bet it is the same in Germany, Britain, and everywhere else, is that you have alliances between corrupt unions and their employers in which they have some monopoly position. Together they work to keep out competitors from overseas.

What I see is the exact opposite argument. What one has to do is to commit oneself, at the institutional level, to very strong theories about the dominance of competition. I think people know what the ideal institutional arrangements are. The only question they are trying to answer is how to achieve them in light of the public choice situation there. I am certainly in favor of having education, but I think it is instructive that education by example is not the way it was done.

I think what Kovacic says is very different, importantly so. He says, "I want conferences. I want German LOM students coming to the United States. I want people going to trade fairs. I want talking." I am curious as to where that fits into your model and whether or not the Hayekian situation in this case is in fact something which we ought not to accept by virtue of the fact that we know enough by theory to indicate that lots of what we observe by way of constant

refinement and elaboration turn out to be local institutions with highly protectionist instincts and practices.

OLIVER BUDZINSKI: If you think about fatalism and decentralization at all, that is a fundamental question. If you think that we know what the best policies are and what the best institutions are then we should centralize. I accept that, but the other question is, do we really have that knowledge, and do others accept it? That is the problem.

RICHARD EPSTEIN: The answer is no.

OLIVER BUDZINSKI: Everybody may be convinced that he or she has the right answers. I understand that, but it is not the case. We have different answers and it may be—this was a very good example from Professor McGinnis—that our position is not in the majority. Then we are grateful that we have a system of federalism where we can be in the minority and still experiment with our policy ideas. We can try out our answers and show others that they flourish and thrive. Therefore, the most important problem is whether we really have the knowledge and also the power with which that knowledge might be implemented.

I find very interesting the discussion within the United States about federalism, that those who argue against federalism and U.S. antitrust are those who dominate the U.S. federal antitrust authorities. Those in the minority positions use the state level.

You can also turn it around and propose that we should also be a bit more cautious about our own knowledge of what the right thing is. And, therefore, I think federalism is a good way of implementing long-term systems for acquiring new knowledge.

RICHARD EPSTEIN: To follow that, John said something similar about the Chicago school, that the thought was to try this in America and then maybe it will spread all over the world. The standard account is that a bunch of Chicago boys ran into Washington, which is the most centralized place. The other place they got a hold of was the Federal Judiciary, and then they turned the world upside down. That's how we got Chicago school of antitrust law. We did not try it out in Illinois first.

OLIVER BUDZINSKI: I am not entirely familiar with the stories of the victories in the United States, but looking forward I think it is really a two-step process. There is no doubt that what Professor Kovacic said is correct. It is very important to have this scientific dispersion of knowledge.

On the other hand, if there is a problem of agency costs, which I believe there is, it is also important to have a structure of built-in conflict that brings to people's attention what their agents are doing. That is an advantage of a decentralized system. It is a particular advantage if you believe there is some scientific body of knowledge that will come to bear and movable constraint agents still have to be brought to the attention of other elites and the public.

RICHARD EPSTEIN: Let me give a couple of examples of where the theory versus the experience works. First, historically, with respect to the development of the intercontinental

transportation system in the United States. Federalism in this case was simply a blockade. You would get local restrictions on entry and exit going in and out of the various states. The way in which we overcame this was with a few judges at dissent who perceived the power of the nondiscrimination principle in the same way in which Trebilcock and Iacobucci put it forward, and they rammed it down the Constitution. Otherwise, if this had been done through local experimentation, the United States would look like the Rhine River at the height of the Middle Ages with a toll bridge at every state line.

The second example is the question of exit rights under federalism. Now, in your model, there is no precondition about exit rights. In the United States we have developed the following dreadful technique: you have a company doing business in your state, you regulate that firm through an insurance company so it is running a loss every year, and it would like to pull out. There is no federal exit right in the United States. What they do is simply put up a barrier and say, "You can leave if you pay us today all the money that you will lose tomorrow." That is the condition that you have to fulfill in order to get out. Now, we will just throw this barrier up. I have no doubt as to what is wrong with this and as a lawyer I tried very hard to get some federal constitutional relief, so that federalism can actually work on a competitive model. So, when somebody wants to experiment with no exit options, do you really want to wait for them to run out of things to block? Or are you willing to say that if the Firemen's Fund wants to leave New Jersey without paying them \$100 billion, quite literally, because of the peculiar policies they have on rate regulation, that they should be able to go, and the United States Constitution will protect them?

Make no mistake about it, I am a judicial activist because I think if we wait for you guys to go along, we will reinvent the worst vulcanized situations that we have had. For the most part, any libertarian intervention that the Court has ever taken from the beginning of time has been fine. Whenever they go wrong, it is because they have deferred to legislative power in cases like *Plessy v. Ferguson*. *Lochner* and the Dormant Commerce Clause form a coherent conceptual frame—one we ought to keep, as it works well. I think, in effect, that I am watching three Cassandras at play.

The history that we have had in this country is that we succeed under federalism because we have not followed the model that you have described. The central overrides have come in at, more or less, the right moments. The only reason we have been saved as a nation is because there were some smart people who made the right decisions at the right time that this decentralized stuff would not get you there.

WOLFGANG KERBER: We do not want to defend the present system here in the United States. I also would not defend the present system in Germany or in the European Union. What we want to propose is that competitive federalism is possible and that is only one application of competitive federalism. I also would not argue that we should decentralize antitrust law. That's not the point.

PARTICIPANT: What about the exit rights?

WOLFGANG KERBER: What we need in any concept of competitive federalism and any concept of regulatory competition are all encompassing rules for the system. Entrance rules and exit rules are very important.

PARTICIPANT: Absolutely, as are nonblockade rules. That is, you cannot run an interstate railroad if each state could stop you at its border.

PARTICIPANT: American law, like European law, has always been schizophrenic when it comes to federalism. We love competition between jurisdictions, but if in order for one state to work effectively it has to cooperate with nine others, there is a holdout problem. So the nondiscrimination rules that let us into a state are, in fact, binding upon them by federal fiat to break down the blockade. It is, essentially, the antiblockade position. Then the key to American federalism is that there are structural presuppositions to competition, which, in fact, have been satisfied with remarkable consistency in this country even by judges who scream judicial deference to legislative action at every possible moment. When he does not like a tax law, Justice Stephens now has to figure out whether it is anticompetitive, and he will then strike it down.

WOLFGANG KERBER: My point is that we should look for an institutional framework that competitive federalism can work within to solve such problems. With our research we want to think about multilevel systems of jurisdictions, or legal rules, that can also be competition rules. We would like to develop a general theory about what are the criteria for centralization and decentralization. We have to trade off problems. I think we should try to optimize that. Many problems should be solved in such a multilevel system.

MICHAEL TREBILCOCK: This is a question for John [McGinnis]. I wonder whether you could further develop your thoughts on the nondiscrimination principle as it applies between foreign and domestic consumers as well as producers.

This is an issue where the two of us have gone back and forth in our thinking. You recall the way we would deal with this, as set out in the paper, is to allow the inbound country to apply its laws with extraterritorial effect against the cartel originating elsewhere, including a cartel that is subject to an export cartel exemption in that same country.

Whether or not there is an export cartel exemption or no cartel laws at all in the country of origin, the country of destination has got to apply its laws extraterritorially.

EDWARD IACOBUCCI: But this attracts a natural reaction from people like Diane Wood. They would argue that of course this sounds fine on paper, but you cannot get the information effectively. Enforce these laws extraterritorially, and that might then lead to an argument that we should at least ban the export cartel exemptions so that the U.S. would then be able to request the country of origin to take action against these export cartel members or to exchange information.

I am ready to be persuaded we are wrong on this.

JOHN MCGINNIS: I am not necessarily opposed to trying to do that. I *am* a little worried about doing that within the WTO. I think ultimately you would have to do it that way, unless you do it with respect to peer review, criticizing people who don't get rid of the export cartels. Let's assume, though, if your proposal was that when people violated this principle, it would be like any other principle for which the WTO would go to dispute resolution. There I have some concerns because the dispute resolution structure puts costs on exporters. Ultimately, it puts costs on exporters and withdraws concessions to attempt to get them to lobby their governments to change matters. That is a substantial cost to them. The exporters really are not benefiting from that. If the exporters are not benefiting from it, it just becomes another cost of doing business in the WTO regime. They will become less enthusiastic about the WTO regime.

They seem to me—and I think you yourself suggested—central to the dynamic of the WTO regime because it is their lobbying against protectionist groups, their willingness to lobby, that will at least somewhat diminish that advantage because they will know that as a portion of the dispute resolution system they are going to pay these different kinds of costs. I am worried about that, because I am generally worried about the WTO regime putting up proposals that may be economically sound, but that do not redound to the benefit of exporters, undermining that basic dynamism.

PARTICIPANT: Where an export cartel exemption is in effect, what you usually have is the cartel saying, "Of course we formed a cartel, it's authorized under our law." That is a case in which there is usually not a problem with the lack of reach, or the lack of personal jurisdiction, or the lack of enforcement. Usually, all of the elements of the conduct are admitted, in fact proclaimed and asserted as a defense. It is a question of what is the comity between the two legal systems.

There are a number of situations that you could cite. The airline reservation case where there was a positive comity request by the U.S. to the European Union is a classic example of the American authorities, with all the powers given under the Hague Convention, sources of comity and foreign discovery, not possibly being able produce the evidence that would have led to a conviction.

You also have the diamond cartels case where the assertion, at least by the Department of Justice, is that the Belgian government more or less affirmatively declined to do anything that would have led to the discovery of the evidence that the U.S. Department of Justice thought would have led to a conviction in a U.S. proceeding.

PARTICIPANT: One footnote on that. In this particular instance you would be hearty exporters. We have not had that many sanctions, but the whole WTO-GATT system ends up sanctioning and hurting exporters. I oppose this way of doing it, but this is what happens when you have sanctions. It is exporters that get hurt.

JOHN MCGINNIS: In most cases, the dispute resolution helps exporters in the sense that you do not have the restrictions of discriminatory regulations. We would predict that protectionist groups would substitute nontariff barriers for tariff barriers. Therefore, it would be rational for exporters to agree, even if they knew that some of them would be hurt by withdrawals of

concessions. They would fear that if they did not have that structure the substitution would hurt them. It still, ultimately, redounds to their benefit in a way that it does not redound to their benefit if we add dispute resolution on matters that help consumers. Not surprisingly, I think the antidumping rules are a bad idea. There may be a lot of provisions of the WTO that are not optimal.

PARTICIPANT: One of the problems in dealing with antitrust and competition policy is that we are looking forward, and we do not know what kind of regime you would have. In that sense, like others here, I would like to see a regime that ended up as nondiscrimination. I agree with you, and I agree with John.

However, my caveat is a basic disagreement with the three panelists' reading of where the WTO is. Since the end of the Uruguay round, the WTO has gone far beyond deciding on questions that relate to nondiscrimination in national treatment. TRIPS is an obvious example, but, as I have said in other contexts, when you get the cases in services you are talking about regulatory issues in which the panel of the appellate body will not be judging. They might, in passing, talk about discrimination, but when you have come this far beyond the border you are really making judgments about regulatory systems that are beyond just that national treatment.

The Fisk case, the tax case, is a case in which the panels and the appellate body got into questions of domestic tax law. What everyone thinks about TRIPS Turtle, there was a nondiscrimination in the sense that the United States lost on a narrow point. But the appellate body went far beyond that, into questions of public international law and what you are actually bound by and not bound by.

My skepticism here is over whether you would be able to limit any new regime just to nondiscrimination. The panel in the appellate body would go far beyond that. They would look to the kinds of things they have been doing since 1995.

PARTICIPANT: It would be hard to go over my complete reading of the WTO rulings, of course. I am not quite as pessimistic as Claude is. I agree that there is some that can be criticized, but I think they are basically doing a pretty good job with Dormant Commerce Clause policing of these rules. We have some historical basis looking at our own Supreme Court. It has done a lot of bad things in my view, but on the whole its Dormant Commerce Clause jurisprudence does not seem to have been crazy.

If we hold it to those kinds of critiques and avoid putting in substantive provisions of the kind you allude to, there is some hope of limiting their actions.