# Discussion Paper

Discussion Paper No. 96-18

# International Trade and Competition Policy

Frederic M. Scherer

W 636 (96.18)

13. AUG. 1996 Weltwirtschaft

W 636 (96.18)

ZEW

Zentrum für Europäische Wirtschaftsforschung GmbH

Industrial Economics and International Management Series

693925

# International Trade and Competition Policy*

by
F. M. Scherer

*Harvard University*

May 1996

**Abstract**

With the completion of the Uruguay Round of international trade negotiations, attention turns to plausible next steps. One question on the agenda of possibilities is the adoption of competition policies that complement or substitute for the remedies traditionally used to deal with international trade distortions. This paper examines three cases -- industrial diamonds, potash from Saskatchewan, and cement from Greece -- in which international trade policy and competition policy objectives came into direct conflict. Existing institions were unable to resolve the conflicts on a timely basis. A proposed augmentation of the World Trade Organization's functions to deal with such cases is considered.

* Paper presented at a conference on Competition Policies For an Integrated World Economy, Oslo, Norway, June 13, 1996.

# 1 Introduction

Since the ratification of the GATT agreement in 1947-48 and the several rounds of tariff reductions that followed it, there has been a remarkable expansion of international trade. Foreign direct investment has grown even more rapidly, letting business enterprises have an immediate competitive presence not only in their home territories but also in numerous other nations' markets. The 1995 Treaty of Marrakech, finalizing the Uruguay Round of international trade negotiations, extended the compass of GATT to agriculture, some service industries, intellectual property, and significant facets of foreign direct investment.

After the Uruguay Round negotiations were concluded at Geneva in December 1993, attention turned to unfinished items on the agenda for deeper integration of the world's economies. Four have gained pride of place: environmental protection rules, labor standards, continuing liberalization of trade in services, and competition policy. This paper explores the rationale for measures to harmonize and/or integrate competition policies across national boundaries.[1]

The principal function of competition policy is to keep markets open and undistorted by monopolistic practices, thereby satisfying three more fundamental goals: fostering an allocation of resources that best satisfies consumer demands, sustaining pressure on business enterprises to run a taut ship and innovate, and permitting market participants to pursue the opportunities that maximize their individual productive and creative potential.

# 2 Monopolistic Distortions of International Trade

The exercise of monopoly power that spills over across national boundaries can distort international trade in numerous ways. Buyer cartels and vertical restraints that constrict distribution channels against imported goods have effects directly analogous to the import tariffs which repeated GATT rounds have sought to dismantle.[2] Seller cartels and the exercise of unilateral monopoly power in international trade introduce distortions essentially equivalent to those associated with export tariffs. Here one encounteres an interesting asymmetry. Import tariffs have been imposed almost ubiquitously upon international trade, whereas export tariffs are rare. This asymmetry is probably explained by the relative ease with which cartelization can be substituted

---

[1] There is of course a vast literature on this subject to which justice cannot be done here. This paper is based loosely on my own contribution, Competition Policies for an Integrated World Economy (Washington: Brookings Institution, 1994).

[2] On the latter, see my "Retail Distribution Channel Barriers to International Trade," forthcoming in the proceedings of a November 1995 Columbia University School of Law conference on The Multilateral Trade Regime in the 21st Century.

for export tariffs as an instrument of national policy and by the skill of monopolistic interest groups in persuading legislators to let cartel rents be captured by the cartel members, whose efforts can be said to create the rents, rather than by the general public fisc. When monopolies and cartels extend their reach across multiple nations, their discriminatory pricing and the re-exportation restrictions they impose upon middlemen can frustrate arbitrage and prevent the law of one price from operating. A firm or group of jointly-acting oligopolists with monopoly power in the home market but facing competition abroad has incentives to dump the output from surplus capacity in foreign markets -- a traditional bugaboo of international trade policy.

The responses authorized under GATT to dumping that injures target nation industries engender further conflicts between competition policy and international trade policy. A common remedy for dumping (and also in export subsidy cases) is to negotiate with the offending exporters a voluntary restraint agreement (VRA), under which the exporters agree to raise their prices and/or reduce their export volume. Raising prices and restricting output are the classic behavioral traits of monopolists. When multiple sellers consent to such export restraints, they must find some way to divide up shares of their reduced output and to prevent chiseling from agreed-upon prices -- in other words, to form what amounts to an export cartel. Or if the firms do not assume these collective responsibilities, the government of the exporting nation must step in as de facto cartel master.[3]

## 3 The Internationalization of Competition Policy

As international trade and investment have grown, so also has the acceptance by the world's nations of active competition policies, national and (to a much more limited degree) international.

At the end of World War II a half century ago, only one nation -- the United States -- had a pro-competition policy that was enforced assiduously. A few nations such as Canada and Australia had competition laws analogous to those of the United States, but they were scarcely enforced. Other nations had laws that generally permitted cartels but subjected them to weak regulatory oversight in the hope of inhibiting abuses. The first strengthened postwar competition laws were imposed upon defeated Germany and Japan by the occupying powers. In Japan, this forced move in a new and unfamiliar direction engendered a reaction that left the Japanese Fair Trade Commission unpopular and largely ineffective during the first two decades of its existence. A similar reaction might have been expected in Germany, but one of

3 On the important and controversial case of dynamic random access memory chips (DRAMs), see Kenneth Flamm, Mismanaged Trade? Strategic Policy and the Semiconductor Industry (Washington: Brookings, 1996). Many other examples exist. On the European experience, see Patrick A. Messerlin, "The EC Antidumping Regulations: A First Economic Appraisal," Weltwirtschaftliches Archiv, vol. 125 (1989), pp. 563-587.

history's accidents intervened. Prominent in the first democratically elected German government were members of the liberal Freiburg School, who believed passionately in free market processes, in part as an antidote to the traditions of government control and business-government collaboration that had supported fascism under Hitler. As a result, a fairly tough anti-cartel law was passed in 1957 and enforced with great seriousness, if not always with adequate resources, by the newly-organized Bundeskartellamt. England, which had long pursued a laissez faire policy toward cartels, feared that monopolistic price-raising could interfere with achieving full employment after the war. In 1948 it established a Monopolies and Restrictive Practices Commission to perform investigative and advisory functions. In 1956 a Restrictive Practices Court with the power to prohibit cartels was created. To the surprise of many, its first decisions took a rather strong anti-cartel line.

An even more important step occurred with the formation of the European Common Market. As tariff barriers were reduced within the Common market, anti-dumping mechanisms were phased out beginning in 1970. But to ensure that trade among Common Market member nations was not distorted, an active competition policy was considered necessary. As an EC commissioner stated in the 1961 debate over a draft regulation implementing a competition policy:[4]

> It is ... beyond dispute -- and the authors of the Treaty [of Rome] were fully aware of this -- that it would be useless to bring down the trade barriers between the member states if the governments or private industry were to remain free through economic or fiscal legislation, through subsidies or cartel-like restrictions on competition, virtually to undo the opening of the markets and to prevent, or at least unduly to delay, the action needed to adapt them to the Common Market.

To guard against this danger, the Treaty of Rome included strong language declaring inconsistent with the common market inter-firm agreements and concerted practices likely to affect trade between member states. Also prohibited were abuses of dominant market positions affecting trade between member states. After the slow start that seems typical of virtually all new competition laws, enforcement became increasingly vigorous. Formal mechanisms for restraining large competition-impeding mergers within the Common Market were added in 1990. As time passed, all Common Market member nations (excepting Luxembourg) and affiliated European Free Trade Association member nations have seen fit to pass their own internal competition laws.

---

[4] Speech by Hans von der Groeben, quoted in U.S. Senate, Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, Hearings, Antitrust Developments in the European Common Market (USGPO: 1963), p. 96.

These developments have been widely emulated, and as a result, most nations within the industrialized and rapidly industrializing world and many fragments of the former Soviet Union have adopted pro-competition laws, which have been enforced with widely varying consistency, competence, and enthusiasm.

In addition to the harmonization of policies achieved within the European Community, the compass of competition policy has been extended across national borders in several ways.

Perhaps most important thus far, individual nations have reached out to attack under their domestic competition laws restrictive practices (such as export and import cartels) pursued by foreign-based business enterprises whose effects spilled over national boundaries, especially when the perpetrating firms had local branch offices from which evidence could be subpoenaed and assets that could be seized in payment of fines and other penalties. These exercises of "extraterritorial jurisdiction," led initially by the United States, have triggered angry defensive reactions from some nations within which the target enterprises resided. Nevertheless, they appear to have gained increasing acceptance as a policy instrument following a successful European Community prosecution against an international wood pulp cartel[5] and a similar case against a Japanese cartel by Canada,[6] which had previously protested vigorously a U.S. action against a cartel exporting uranium yellowcake to the United States from its Canadian base.[7]

To mitigate the hostility that extraterritorial cases can provoke and to increase the effectiveness of domestic competition policies toward international business activities, individual nations and trading blocs have negotiated agreements to cooperate in the mutual pursuit of competition policy actions. One of the first was between the United States and West Germany, initiated in 1976. Since then cooperation agreements have been signed inter alia between the United States and Australia (1982), the United States and Canada (1984), France and Germany (1987), Australia and New Zealand (1990), and the United States and the European Community (1991). The EC-US agreement calls for information exchanges, mutual

[5] A. Åhlström Osakeyhtiö et al. v. Commission of the European Communities, 1988 E.C.R. 5193 (1988).

[6] See "Canadian Court Fines Japanese Firm $900,000 for Anticompetitive Conspiracy," Antitrust and Trade Regulation Report, November 25, 1993, pp. 691-692.

[7] The Canadian cartel was in effect a restriction against a restriction, since U.S. law prohibited the sale within the United States of uranium imported to the United States from Canada for enrichment (a process on which the United States had a dominant free world position). Thus, the enriched Canadian uranium had to be re-exported.

assistance in enforcement actions, and the exercise of comity in potential enforcement action conflicts without obliging cooperation when the interests of the parties diverge.

Over the past half century there have been sporadic attempts, thus far unsuccessful, to harmonize and perhaps to enforce competition policies on a world-wide plane. The first significant effort was embodied in the draft Havana Charter treaty of 1948, which would have made a new International Trade Organization (ITO) responsible for promulgating tariff reductions, arbitrating international trade disputes, and fostering adherence to international competition policy rules. On the competition policy dimension, the Havana Charter stipulated that:8

> Each Member shall take appropriate measures and shall cooperate with the [ITO] to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives [of the Charter].

The Havana Charter treaty was not ratified -- in no small measure because the U. S. Congress viewed it as too great an infringement on American sovereignty. Its provisions for tariff reduction and a mechanism for adjudicating dumping and subsidy disputes in international trade were carved out and embodied in the GATT system. Several subsequent efforts to adopt multinational competition policy codes and institutions to enforce them have met with equally little success. However, proposals continue to be brought forward -- one by myself,9 and another of which is described in Professor Immenga's contribution to the conference proceedings.

Is the time now ripe for bolder steps toward the world-wide harmonization of competition policies and the creation of institutions to adjudicate cross-border competition policy disputes? With the continuing growth of international trade and investment and completion of the Uruguay Round, competition policy moves toward the top of the agenda of still-unsettled but important issues. But objections remain on at least three counts. For one, although there has been considerable convergence of national competition policies, huge differences remain between nations in both the substance and philosophical foundations of national laws. These differences might be seen as a positive reason for harmonization. But if harmonization is attempted, the differences testify, the task will not be an easy one. Second, some participants in the debate, including the U.S. antitrust enforcement agencies, argue that the progress

---

[8] U.S. Department of State, Havana Charter for an Inter-national Trade Organization, March 24, 1948.

[9] Competition Policies for an Integrated World Economy, Chapter 5.

made toward harmonization through the exercise of extraterritorial jurisdiction and bilateral cooperation treaties is sufficient to solve the most pressing problems. Third, unwillingness to cede national sovereignty to supra-national organizations in matters as important as conduct codes for business enterprise is a serious and perhaps insuperable obstacle. The sovereignty issue is particularly sensitive in the United States, both because the United States is jealous of its leading role in world affairs, and because the real or perceived impact of foreign competition on the wages and welfare of many American workers, especially less-skilled workers, has evoked much anxiety.

Having only one vote and at best a faint voice to cry out in the wilderness, I can do nothing about the reluctance of nations, including my own, to accept possible infringements on their sovereignty. I therefore devote the remainder of this paper to questioning the second argument against multinational measures: that existing extraterritorial enforcement efforts, leavened through bilateral cooperation agreements, suffice to eliminate the most important monopoly distortions to international trade. I advance my argument through three case studies of important recent cases in which existing institutions failed: the industrial diamond case, the Canadian potash case, and the European cement case.

## 4 Industrial Diamond Price-Setting

The international diamond cartel, orchestrated by the De Beers - Oppenheimer organizations, has been one of the most durable and successful cartels in world history.[10] Despite new entry by Russian, Indian, and Australian producers, the cartel has maintained remarkable control over the prices of jewel-grade diamonds. Its influence on the price of industrial-grade diamonds has been less complete, in part because attempting to control the sales of lower-quality stones could overstrain even the substantial financial resources of the De Beers group, and partly because synthetic diamonds -- produced using a process pioneered by General Electric -- compete with natural stones.

During the 1990s, General Electric and De Beers together controlled 80 to 90 percent of the world's industrial diamond supply. In December 1991, with a recession affecting much of the world economy, putting downward pressure on industrial diamond prices, General Electric announced synthetic diamond price increases of

---

[10] See Stefan Kanter, The Last Empire: De Beers, Diamonds and the World (New York: Farrar, Straus & Giroux, 1993); Edward J. Epstein, The Rise and Fall of Diamonds (New York: Simon & Schuster, 1982); David E. Koskoff, The Diamond World (New York: Harper & Row, 1981); Godehard Lenzen, Prokuktions- und Handelsgeschichte des Diamanten (Berlin: Duncker & Humblot, 1966) (English translation, London: Praeger, 1970); and Debra Spar, "The International Diamond Cartel," John F. Kennedy School of Government case study C15-89-878.0, Harvard University (1989).

approximately 12 percent. The price adjustments were essentially followed by De Beers in February 1992. In November of 1991 Edward Russell, the manager of General Electric's synthetic diamond production unit in Ohio, was fired. He claimed in a law suit that he was dismissed for complaining to General Electric's top management that members of the General Electric diamond sales organization were violating the U.S. antitrust laws through meetings with, and the transmission of advance pricing information to, De Beers representatives in Europe. General Electric asserted in reply that it had fired Russell because of his poor performance, even though, the evidence showed, it had awarded Russell a substantial salary increase shortly before the firing.[11]

Evidence in a U.S. government antitrust suit against General Electric revealed that General Electric employees had in fact discussed the stabilization of prices with officials of De Beers affiliates in Europe and had provided information on contemplated price increases to them.12 There were, however, two serious weaknesses in the government's case.

First, the key person on the De Beers side of the communi-cations was a French citizen, Philippe Liotier. However, M. Liotier's connection with De Beers was, to say the least, organizationally complex.13 Liotier held several jobs. He was managing director of the Diamant Boart, a diamond purchase and sales intermediary, which was owned by an organization whose board of directors (on which Liotier also served) had three De Beers members, and which shared ownership 50-50 with De Beers in UHPU (Ultra High Pressure Units), the company manufacturing synthetic diamonds in Europe for De Beers. In another of his directorships, Liotier reported to Viscount Etienne Davignon (previously commissioner of the European Community for industrial policy), who sat on the board of still another De Beers affiliate.14 The question on which the U.S. Antitrust Division's case foundered was whether, in his communications with General Electric over prices and impending price changes, Liotier was serving as representative of the Diamant Boart, a buyer of industrial diamonds from General Electric and De Beers, or as a representative of the De Beers interests as sellers of industrial diamonds. If he represented buyer interests only, the

---

[11] "For GE, A Time Bomb In Ohio?" Business Week, February 14, 1994, p. 30.

[12] U. S. v. General Electric Co. et al., CCH 1994-2 Trade Cases, para. 70,806 (December 1994).

[13] For an chart showing some of the complex interrelation-ships among De Beers affiliates, see "The Oppenheimer Empire," The Economist, July 1, 1989, p. 60.

[14] Davignon participated with Liotier in a meeting with General Electric employees on February 12, 1991, at which a General Electric executive suggested to Davignon that GE's European sales head and Liotier could work together to help "stabilize prices."

discussions were not subject to antitrust prosecution; but if he represented seller interests, they violated the law.

The U.S. government's second problem was that three individuals who could have been representing De Beers interests in the discussions with General Electric personnel were European citizens who could not be compelled to provide testimony on the nature and intent of their representations. Belgian authorities cooperated with the United States in searching the premises of the Diamant Boart in Brussels for relevant documents in November 1993, but the evidence produced in this way was inconclusive. An American citizen who worked for Diamant Boart was subpoenaed during a trip to the United States for grand jury testimony. He testified again as a witness for General Electric, but the two sets of testimony were contradictory and therefore given little weight by the trial court. Without live testimony from the other individuals linked to De Beers, the Antitrust Division could not prove that those individuals were orchestrating a horizontal price-fixing scheme and not merely securing information useful to diamond buying organizations. Therefore, the government's case was dismissed.

Discussing the government's defeat in what it had proclaimed to be a major extraterritorial antitrust initiative, U.S. Attorney General Janet Reno acknowledged that the government suffered from "some difficulties in obtaining documents."15 She added, however, that only a few weeks earlier President Clinton had signed into law the International Antitrust Enforcement Assistance Act of 1994, which would permit U.S. antitrust agencies to share confidential information with competition policy authorities overseas.16 The new law, Attorney General Reno predicted in her commentary on the General Electric case, would help in the development of evidence for similar future cases.

Here a note of skepticism must be injected. Foreign competition policy authorities are likely to cooperate in the provision of evidence only when it is in their interest to do so. The De Beers organization, like many multinational enterprises, has affiliates in many nations. Its operations are relatively footloose. It has chosen to locate key subsidiaries in nations with a demonstrated willingness to tolerate its cartel activities. It is known for its alacrity in punishing diamond cutters who fail to exhibit the expected degree of cooperation with the cartel, providing to them only diamonds of

---

[15] "General Electric Is Exonerated of Industrial Diamond Price Fixing," Antitrust & Trade Regulation Report, vol. 67 (December 15, 1994), p. 696. See also U.S. Department of Justice, Antitrust Division, Opening Markets and Protecting Competition for America's Business and Consumers, March 27, 1996, p. 3.

[16] "Clinton Signs Bill To Help Enforcers Obtain Foreign-Located Antitrust Evidence," Antitrust & Trade Regulation Report, vol. 67, November 10, 1994, pp. 568-569. The Congressional committee reports on that bill can be found in the same journal, October 13, 1994, pp. 448-453.

inferior quality, or sometimes, no supplies at all.17 Would one national cartel authority assist another nation's authority in a competition policy case when the subject enterprise threatens to withdraw its production and employment from the first nation, or to deprive independent producers in the first nation of needed raw materials or components? In my opinion, cooperation is unlikely. Courage in such matters is almost as scarce as gem-quality diamonds.

## 5 Canadian Potash

Potassium is an essential nutrient for plant growth. Its application as a fertilizer component is particularly important in the cultivation of high-yielding corn, soybean, and wheat varieties. Among the naturally occurring mineral salts and oxides of potassium (generically called potash) that can be applied as fertilizers, the most common is potassium chloride, which is extracted from sedimentary deposits laid down ages ago when oceans receded from the earth's surface and also from high-salt lakes such as the Dead Sea and America's Great Salt Lake.

The Canadian province Saskatchewan is the OPEC of world potash markets. Its vast sedimentary deposits of potassium chloride comprise nearly half of known and extractible world reserves, and in recent years, it has originated roughly a fourth of total world potash supplies.18 Russia has reserves almost as large as those of Saskatchewan, but as in crude oil, the inefficiency of its mines and transportation network allows it to export a disproportionately small fraction of its production potential. Within Saskatchewan during the late 1980s, six companies produced nearly all of the province's output. The largest of these was the Potash Corporation of Saskatchewan (PCS), an enterprise owned by the government of Saskatchewan. The other leading producers were privately owned. An export cartel, Canpotex, brokered sales and set prices for potash exported to parts of the world (especially Asia) other than the United States. Because of U.S. antitrust laws, Canpotex did not participate in marketing potash to U.S. customers.

During the mid 1980s, PCS sought to increase its share of a stagnant North American potash market, thereby utilizing its substantial excess capacity and employing additional Saskatchewan workers, by cutting prices to selected U.S. customers.

---

[17] See Spar, "International Diamond Cartel (B)," pp. 2-5.

[18] See e.g. Bruce W. Wilkinson, "The Saskatchewan Potash Industry and the 1987 US Antidumping Action," Canadian Public Policy, vol. 15 (February 1989), pp. 145-161; Valerie J. Picketts, Andrew Schmitz, and Troy Schmitz, "Rent Seeking: The Potash Dispute between Canada and the United States," American Journal of Agricultural Economics, vol. 73 (May 1991), pp. 255-265; and David G. Haglund and Alex von Bredow, U.S. Trade Barriers and Canadian Minerals: Copper, Potash and Uranium (Kingston, Ontario: Centre for Resource Studies, 1990), Chapter 3.

Other members of the Saskatchewan oligopoly responded in kind, leading to a price war and losses of more than $100 million (Canadian) by PCS in 1986. The sharp reduction in prices spread to the potash producers of New Mexico, who mined severely depleted reserves at high cost to supply 10 percent of U.S. potash requirements. On February 10, 1987, two New Mexico companies filed a petition with the U.S. Department of Commerce accusing the Saskatchewan industry of dumping potash in the United States. While the Department of Commerce was collecting data to ascertain the extent to which prices were below "fair market value," the U.S. International Trade Commission ruled preliminarily on March 23, 1987, that U.S. potash producers had been materially injured by Canadian imports.

At about the same time, the government of Saskatchewan fired the top management of PCS and installed new leaders hired away from a privately owned potash producer. The new management was given explicit instructions to cease its price-cutting and to restore PCS to profitability, among other things to enhance the province's severance tax revenues and to secure a higher sale price in the planned future privatization of PCS. PCS began to assert its traditional price leadership upward from the $29-35 range in which prices had hovered during 1986. See Figure 1, which traces average f.o.b. mine list prices per short ton of granular potash (in U.S. dollars) for shipments from Saskatchewan to North American customers.[19] Year markers are placed at the beginning of each year. The first vertical dotted line marks the filing of a dumping action against Saskatchewan producers and the second vertical line the ITC's preliminary injury determination.

On August 21, 1987, the U.S. International Trade Admin-istration announced preliminary dumping margins against the leading Saskatchewan producers ranging from 9 to 85 percent, including a 52 percent margin for PCS and a weighted industry average margin of 37 percent. The decision is marked by the third vertical dotted line in Figure 1. Industry members would be required to post bonds on all future sales in the amount of their preliminarily assessed dumping margins. PCS had tried to reduce its ultimate dumping margin liability by leading a substantial price increase in June. Two weeks after the preliminary dumping margins were announced, it added a further $35 per ton surcharge to its prices to cover the bonds that would have to be posted, accompanying its announcement with a statement that the increase would be rescinded if dumping margins did not have to be paid. Other producers followed its lead, and potash prices soared. See again Figure 1.

---

[19] The data are drawn from weekly surveys published in the Green Markets trade newsletter and compiled in an expert report by Andrew M. Rosenfield, submitted September 18, 1995, in the Potash Antitrust Litigation. Actual average transaction prices are often lower than list prices. In 1986, for example, off-list discounts were as high as $10-15 per ton.

In addition to the impending imposition of substantial dumping duties, the Canadian producers were subjected to another constraint. Spurred by the threat of substantial duties on potash exported to the United States, the Saskatchewan parliament passed in September 1987 a new law authorizing prorationing of individual provincial potash producers' output if circumstances were deemed by the lieutenant governor to warrant such a step. Thus, a stand-by cartel mechanism compelled by state action, and consequently exempt from U.S. antitrust prohibitions, was put in place. The Saskatch-ewan government was in a position to act swiftly if potash producers' net (after-duty) price and profit realizations deteriorated.

In the closing days of December, the Saskatchewan potash producers negotiated with the U.S. government a "suspension agreement" under which each firm committed itself for five years to sell potash in the United States at prices undercutting its calculated fair market value by no more than a small fraction. The agreement was validated on January 8, 1988 (fourth dotted vertical line). Three days later PCS announced that it would rebate the previous $35 surcharge, at the same time setting a new f.o.b. list price of $85 (U.S.) per ton. Others followed suit, although there was considerable discounting of actual transaction prices below the list prices recorded in Figure 1. The discounting tended to increase as the potash producers gradually grew more confident that the dumping duty threat had abated.

During 1993 law firms claiming to represent thousands of U.S. farm supply cooperatives and other dealers that purchased potash and distributed it to farmers, either in pure form or blended with other fertilizers, filed in federal courts diverse complaints alleging that the price increases of 1987 were effected conspiratorially in violation of the Sherman Antitrust Act, and seeking substantial treble damages.20 In August of 1993, 12 such suits brought by various collections of plaintiff groups were consolidated into a single class action suit before the U.S. federal district court in Minneapolis. At the time this paper was written, the responsible judge was weighing pending summary judgment motions.

As a participant in the proceedings, I have attempted to report the historical facts with as little embellishment as possible. Now I add my interpretation, to be taken with the appropriate grain of potassium (not sodium) chloride. Although the change in PCS management would probably have led to a cessation of the price war, it seems almost certain that prices would not have been raised along the steep trajectory shown in Figure 1 had there been no anti-dumping action by the United States government. Given Saskatchewan's powerful position as the dominant source of potash to the United States and the dependence of the government on revenue from price-

---

[20] Potash Antitrust Litigation, MDL Docket No. 981, U.S. District Court for the District of Minnesota, Third Division. The author has served and continues to serve as consultant and expert witness for Kalium Chemicals, a leading Saskatchewan potash producer.

dependent potash severance taxes, state-induced price increases would have been in the provincial government's interest even without anti-dumping threats from the United States. But the anti-dumping action was clearly a precipitating impetus, leading the government of Saskatchewan to take legislaltive action that it had not seen fit to take during the preceding 18 years.[21] As such, it represents a serious failure of harmonization between international trade policies and international competition policies, left unresolved inter alia by a subsequent free trade agreement between the United States and Canada. The treble damages suit by potash merchants is a further case of failed policy coordination. A better resolution of such conflicts is critically needed.

## 6 European Community Cement and "the Greek Problem"

On November 30, 1994, the European Community Commission levied against 42 portland cement producers and their trade associations the largest collection of fines, totalling ECU 248 million, ever assessed under Article 85 of the Treaty of Rome.[22] The Commission's decision, which is being appealed before EC judicial authorities, concluded that cement producers had engaged in numerous collusive understandings aimed at limiting cement shipments across national borders within the Community. Many of the arrangements castigated in the EC decision cannot detain us here. I focus on one facet of the allegations, involving the so-called "Greek problem."

During the 1970s Greek cement producers added seven million tons of annual cement-making capacity, nearly doubling their combined capacity, largely to serve the exploding demand for construction materials from Middle Eastern oil-producing nations enriched by the increase in oil prices from $3 to $34 per barrel between 1973 and 1981. As oil prices subsequently eroded and then collapsed in 1985 and 1986, the Middle Eastern demand for cement fell sharply. Greek producers were left with capacity to produce 16.2 million metric tons of cement per year, far in excess of domestic consumption (6.1 million tons). Cement prices in Greece (kept down in part by government price controls and subsidies) were much lower than in other EC nations. See Figure 2. Important EC markets could be reached easily by water transportation from production sites on the sea coast of Greece. The Greek producers began positioning themselves to ship substantial quantities of cement to Italy, France,

---

[21] In 1969 the Saskatchewan government implemented output quotas and floor price controls in response to depressed market conditions, but that action was declared to be unconstitutional by the Canadian High Court. The 1987 law was carefully drafted to take advantage of subsequent changes in the Canadian constitution and to avoid provisions rendering the 1969 actions vulnerable to judicial rebuke.

[22] Commission Decision under Cases IV/33.126 and 33.322, reported in the Official Journal of the European Communities, vol. 37 (30 December 1994). The discussion here draws heavily upon that document.

and (especially) the United Kingdom, where prices were held at high levels under the umbrella of a cartel that had escaped censure by Britain's Restrictive Trade Practices Court.

Other European cement producers were alarmed over the threat of rapidly rising Greek penetration into their home markets. At a series of meetings during mid-1986, representatives of the leading British, French, German, Italian, Spanish, and (non-EC) Swiss companies discussed a portfolio of "carrot" and "stick" actions to deal with countries "who disrupt by exporting surplus tonnage."23 Most of the "stick" measures, such as penalizing customers who purchased Greek cement, counterattacking with exports to Greece, triggering price wars in remaining Greek export markets, and boycotting shipping companies that transported Greek cement, proved to be infeasible. However, a proposed "carrot" measure -- purchasing excess cement from the Greek producers and channelling it to markets outside the European Community -- was implemented. Northern European enterprises entered into bilateral arrangements with the principal Greek producers to purchase substantial amounts of cement from them, disposing of it in ways that caused minimal disruption to the buyers' home markets. Whether these purchases, which resembled the "dancing partner" arrangements orchestrated by U.S. petroleum refiners during the 1930s,24 were carried out individually, or as part of a concerted scheme, will probably be contested in appeals before the European Court of Justice. It is also unclear whether a quid pro quo for the purchases was an agreement by Greek producers to restrain the export of additional cement into Northern Europe and Italy. What is clear is that the purchases and their disposal were discussed by the multi-company "European Task Force" and were effected by leading producers. Some of the cement acquired in this way was resold through the buyers' normal distribution networks within the Community and some was exported to Egypt, West Africa, the Bahamas, and Canada. The "first priority" target, however, was said at a June 1986 meeting to be the United States,25 and beginning in July of 1986, the first of numerous substantial shipments moved from Greece through a Northern European middleman to the United States. Deliveries of Greek cement in the United States rose steadily from zero in 1984 to a peak of 2.27 million short tons in 1988 before declining, first gradually and then sharply.26

---

[23] Commission Decision, p. 57 (quoting a paper, "Collective Response to Problems Posed by Destabilizing Cement Industry," drafted at a June 3-5, 1986, meeting in Zurich).

[24] United States v. Socony-Vacuum Oil Co. et al., 310 U.S. 150 (1940).

[25] Commission Decision, p. 70.

[26] "Cement Imports, by Country of Origin," Construction Review, October 1990, p. viii.



Bibliothek des Instituts für Weltwirtschaft Kiel

As the first Greek shipments arrived, the United States was experiencing booming demand for cement, causing domestic mills to operate at virtually full capacity while leaving a growing gap to be filled by imports (which rose from 10.3 percent of U.S. consumption in 1984 to 18.7 percent in 1987).27 Thus, the additional cement from Greece helped alleviate a tight market situation. Its entry into the U.S. market was facilitated by the fact that in 1986, 53 percent of all U.S. cement-making capacity was owned by foreign firms -- most of it by firms that were meeting to discuss the Greek problem in Europe.28 The U.K.'s Blue Circle group, Ciments Francais and Lafarge of France, Holderbank of Switzerland, and Heidelberger of Germany all owned substantial cement mills near the U.S. eastern seaboard and were therefore in a position to work the imports from Greece into their normal distribution systems. The first purchases of Greek cement were at f.o.b. prices in the range of $27-29 per metric ton. Since the dollar was trading at near parity to the ECU at the time, and since (subsidized) Greek home prices were approximately ECU 36 per ton (see Figure 2), the origin prices were at dumping levels. The Greek imports induced a reduction of U.S. prices, but not enough to trigger the second criterion for actionable dumping under GATT -- material injury.29 Plants located in eastern Pennsylvania, Maryland, and on the Hudson River reallocated their shipments away from coastal cities and toward the west, while coastal locations were served to an increasing extent through Greek imports. Thus, international trade with third-party nations was very clearly affected by arrangements implemented to reduce competition within the European Community. Whether, given the tight market situation in the United States, trade can be said to have been distorted is debatable. The most one can say is that if the Greek producers had tried to sell an equivalent amount of cement in the United States without moving it through the friendly hands of Northern European dancing partners, they almost surely would have had to do so at lower, more disruptive, prices. And at lower prices, more Greek cement would have displaced cement from the highest-cost U.S. mills.

Between 1985 and 1991, annual cement consumption in twelve member nations of the European Community grew by nearly 30 percent.30 In the United States, the

---

[27] For comparative consumption, capacity, and output data, see Michele D'Ercole and Claudio Fortuna, "Industrial Restructuring, Regulation and Competition: the Cement Sector in the Triad," paper presented at a conference on Economic and Corporate Restructuring in Maastricht, September 1995.

[28] See Bruce T. Allen, "Foreign Owners and American Cement: Old Cartel Hands, or New Kids on the Block?" Review of Industrial Organization, vol. 8 (December 1993), pp. 697-716.

[29] Average f.o.b. mill cement prices in the United States were approximately ECU 50 per metric ton in 1986, ECU 46 per metric ton in 1987, and ECU 45 per ton in 1988. U.S. Bureau of the Census, Statistical Abstract of the United States: 1991, pp. 694-695.

[30] D'Ercole and Fortuna, "Industrial Restructuring," Figure 1.

1989-91 recession reduced cement demand appreciably. The U.S. international trade authorities ruled in 1990 that Mexican producers had been dumping their cement in the United States. In early 1991, Japanese producers, whose domestic cartel sustained very high prices while keeping out most imports,31 were found to have been dumping in the United States, and dumping margins of 48 to 85 percent were assessed.32 It is unclear what relative weights the growth of European demand, the temporary slump in U.S. demand, the prosecution of anti-dumping cases against Mexican and Japanese sources, and the initiation of EC competition policy proceedings against cement makers in November 1991, carried in the decline of Greek exports to the U.S. East Coast. Since the sharpest drop occurred during 1990 and 1991, the EC action seems an improbable cause.

To the extent that the dancing partner arrangement affected the flow of Greek cement to the United States (as well as Egypt, Canada, West Africa, and the Bahamas), one may assume that the EC's competition action thwarted its continuation. During the several years when the arrangement was active, however, one can conclude again that arguably anti-competitive activities in one competition policy jurisdiction spilled over to affect international trade flows within another jurisdiction. The same conclusion holds a fortiori with respect to the cartel-induced dumping of cement from Japan into the United States and other nations. To the best of my knowledge, the U.S. antitrust enforcers were unaware of these influences on their home market, or at least, they took no enforcement actions against them. It is doubtful whether the European Community would have acted against its domestic producers had their conduct not distorted competition within the Community.33 Since the arrangement probably permitted Greek cement to move to the United States at prices higher than those that would have been sustainable had Greek producers acted independently, and since it reduced the risk of anti-dumping countermeasures by the United States, the EC authorities might rationally have ignored a similar export cartel whose motivation was less visibly the frustration of intra-EC competition. Here too, therefore, we find a significant lacuna in the integration of international trade and competition policies.

---

[31] For an analysis of how the Japanese cement cartel works, see Mark Tilton, Restrained Trade: Cartels in Japan's Basic Materials Industries (Ithaca: Cornell University Press, 1996), Chapter 4.

[32] See "ITC Clears Way for Duties on Cement from Japan," Journal of Commerce, April 25, 1991, p. 4A.

[33] In its November 1994 decision, p. 120, the European Community Commission stated that "The concerted practice relating to the channelling of production surpluses for export is also restrictive of competition. Through such practice, members of the WCC waived pursuit of an autonomous commercial policy, setting up a system of solidarity and monitoring aimed at preventing incursions by competitors on respective national markets within the Community."

## 7 Conclusion

That such gaps exist, and that they are important, is the broader moral of this paper. Coordination of price changes between General Electric and De Beers affiliates arguably permitted a counter-cyclical price increase for industrial diamonds sold in world markets. Under existing institutions, the U.S. antitrust authorities were powerless to obtain the information they needed to determine what actually happened. Clumsy anti-dumping actions by the U.S. government forced price increases by Saskatchewan potash producers and induced the Saskatchewan government to pass a standby cartelization law with long-term consequences for the supply of fertilizer and hence the supply of basic grain products. Until the European Community authorities intervened to enhance competition within their home jurisdiction, coordinated producer measures to alleviate "the Greek problem" affected the supply of Portland cement into the United States and other nations. It was left to U.S. trade authorities to act against Japanese dumping that stemmed from ineffective enforcement of the Japanese anti-monopoly law toward cement producers and their distributors within the Japanese home market. Surely, there is room for improvement.

Whether improvement will come through more aggressive uni-lateral enforcement actions (unsuccessful in the diamond case), better bilateral cooperation (unsuccessful in all of the cases reviewed here), or (more radical) measures to move toward multilateral coordination of competition policies remains to be debated and determined.

In my monograph, Competition Policy for an Integrated World Economy, I advanced a modest proposal for a transition to multi-lateral coordination under the auspices of the World Trade Organization. Recognizing the reticence of nations to surrender their sovereignty and the other difficult problems that would attend such a change, modesty is essential. If progress is to occur, some important limitations must be clearly recognized.34

For one, there remain enormous differences across nations in the substance of national competition policies. Any multilateral accord will have to be on some limited subset of core principles governing only transactions with significant implications for international trade and/or investment. The most likely candidates are export and import cartels, serious abuses of dominant positions in the world market, and merger approval procedures.

Second, even in these core areas, many nations will be unwilling to go all the way to a flat prohibition. Brazil is unlikely to surrender its (usually unsuccessful) right to

[34] This section is drawn with minor revisions from my paper, "Competition Policy Convergence: Where Next?" to be delivered at a conference of the Austrian Economic Association in Vienna June 20.

orchestrate an international coffee cartel, Saudi Arabia and other oil-producing nations their participation (however dispirited of late) in OPEC, Canada its right to restrain exports of potash, Russia its cooperation with the De Beers diamond syndicate, and the United States the dominance of Boeing in large turbojet airliner markets. Thus, exceptions will be necessary. Under my proposal, each nation would be allowed three four-digit SITC industry exceptions from an otherwise general ban on export cartels. As experience is gained, the number of exemptions might be progressively reduced to two and then one per nation.

Third, it must be recognized that historically, a consid-erable time interval passed before national competition policy enforcement agencies learned how to do their work effectively. Seven years elapsed between passage of the U.S. Sherman Act and the first Supreme Court prohibition of a price-fixing ring; twelve years between the Treaty of Rome and the first imposition of fines against European Community cartels; eleven years between the creation of the U.K. Monopolies and Restrictive Practices Commission and the first prohibition of a cartel by the Restrictive Practices Court; and 20 years between the post-occupation amendment of Japan's Anti-Monopoly Law and a Fair Trade Commission attack on illegal cartels, including the Commission's first criminal price-fixing indictment.[35] Before serious enforcement can proceed, much learning must occur, and political support must be built. Therefore, I propose that an international body with competition policy responsibilities begin by confining its activities to investigation and the publication of informative reports on alleged border-spanning restrictive practices. Only in the seventh year of its existence would I have the agency assume actual enforcement responsibilities.

Finally, even after a considerable shakedown period, an international competition policy agency would have to tread warily, according considerable respect to national sovereignty. It would use the good offices of national competition authorities to support its investigations, and it would entrust national authorities with implementing recommended corrective actions. Only in cases of national intransigence would conventional WTO enforcement sanctions be set in motion.

This, to repeat, is a modest proposal. Despite that, it may be more than the community of nations is willing to swallow. Yet the time when such measures must be considered seriously has arrived. I offer it in that spirit to help focus the debate.

---

[35] Tilton, Restrained Trade, pp. 33-35.

Figure 1
Movement of Saskatchewan Potash Prices, 1986-1993

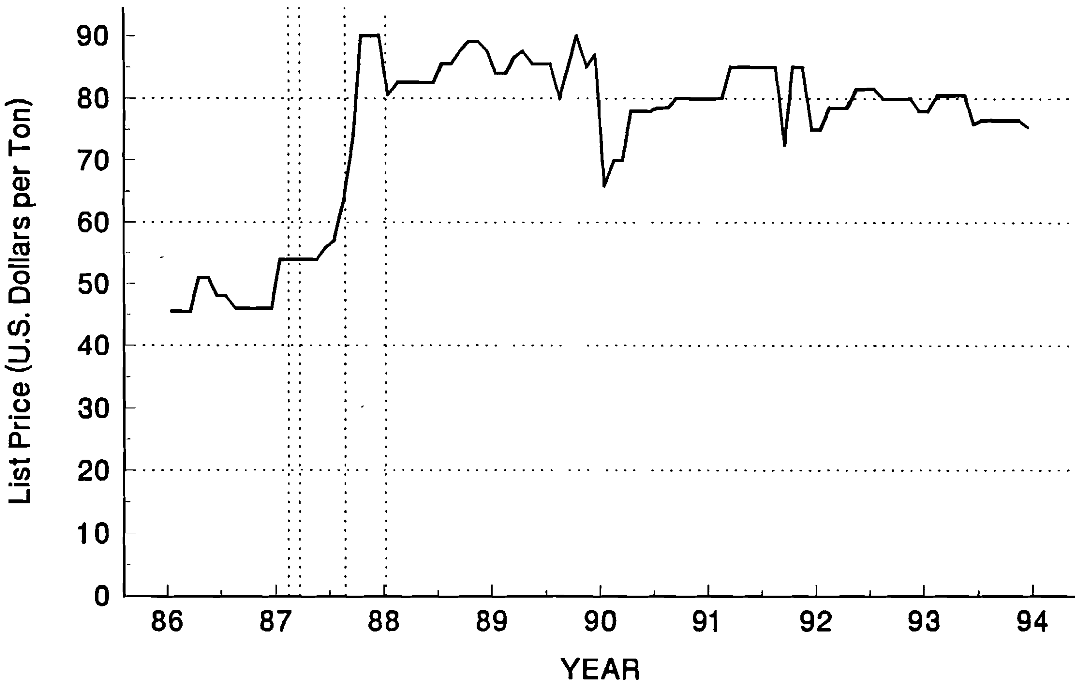

Figure 2
Cement Price Differences Among Six E.C. Nations, 1983-91