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Introduction: Competition Without Borders: Antitrust Law and the Challenge of Globalization

Susan Beth Farmer

Symposium

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The papers published in this symposium issue were originally presented at the meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools (AALS), at the AALS annual conference, held on January 4, 2003, in Washington, D.C. The audience for this annual conference is those academics who research, teach, and write in the area of antitrust and competition law, both at American law schools and those abroad. The papers that follow discuss the interface between various antitrust enforcement regimes worldwide, the potential for conflicting standards, the appropriate limitations of extraterritorial antitrust enforcement, and effective strategies for consultation and harmonization of competition laws. This

* Professor of Law, Pennsylvania State University, Dickinson School of Law. B.A., Wellesley College, J.D., Vanderbilt Law School. I would like to thank Professors Jon Baker, American University Washington College of Law and current chair of the AALS Section on Antitrust and Economic Regulation, Keith Hylton, Boston University School of Law, Mark Lemley, University of California Berkeley, Christopher Leslie, University of Chicago-Kent Law School, and Barbara Ann White, University of Baltimore Law School, who, as members of the Section Council, advised, consulted, and assisted in planning and presenting the Section's programs and other activities this year.

topic is particularly timely in light of important developments in international competition law, including the inconsistent analysis and conclusions reached by the United States and the European Union antitrust enforcement agencies on the proposed merger between GE and Honeywell[1] and the founding of the International Competition Network, a virtual organization formed to increase cooperation among competition enforcement agencies and to draft and disseminate benchmark standards and best practices.[2]

The theme of the four-day conference was "Legal Education Engages the World,"[3] a particularly timely and important subject for scholars and teachers of antitrust law. Increasing competition in global markets raises important new issues for antitrust scholars. The debates over substantive harmonization, multiple enforcement regimes including supra-national agencies, and the exercise of jurisdiction over transnational business disputes present fundamental questions for antitrust policy seeking to further competition, to promote public interest, and to provide predictability for firms competing in global markets. The overall theme of the AALS program was an examination of the

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1. JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 92-93 (3d ed. 1995).

2. Press Release, International Competition Network, Antitrust Authorities Launch the "International Competition Network" (Oct. 25, 2001), *available at* http://www.internationalcompetitionnetwork.org.

3. The AALS program sought to discuss and illuminate three important issues:

> First, what should American law students be learning about other legal systems, and about amalgams of national systems, such as the European Union? How will we qualify ourselves to teach this information? What will be the impact on our students of the remarkable changes in legal education now taking place in many parts of the world?
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> Second, how should and does the expanding influence of international organizations affect law teachers and lawyers? Will our students be ready to practice before the international forums that have been gaining increased importance? Will they be ready for practice before the WTO, the World Bank, the IMF, the international courts, and a multitude of other transnational organizations? Will they understand the regulatory and taxation issues raised by their clients' multinational activities? What is our role in preparing them for this work?
>
> Third, how will globalization affect human rights? Will it mean greater liberation or greater oppression for the Third World? Will the economic shifts we are now seeing encourage or hinder the development of democratic institutions? Will ethnic and gender discrimination be heightened or ameliorated? How will people's everyday lives change as the world economy becomes increasingly transparent and as trade barriers diminish? What role will lawyers have in contributing to greater human dignity and happiness in this changing environment?

Dale A. Whitman, Ass'n of Am. Law Sch., *2003 Annual Meeting Theme: Legal Education Engages the World, at* http://www.aals.org/am2003/theme.html (last visited Apr. 24, 2003).

comparative issues in competition law in three separate aspects: the application of United States antitrust law to conduct occurring outside the territorial boundaries of the United States, antitrust analysis of vertical restraints of trade under European Union competition law, and the harmonization of competition laws.

The speakers and commentators whose articles appear in this symposium examine several aspects of international and comparative antitrust law.

Professor Bruce Carolan's[4] new article, *The Perils of Harmonization: Refusal To Supply Spare Parts, Article 82 of the European Community Treaty, and Abuse of a Dominant Position*, highlights the potential disagreement between United States and European Union competition analysis concerning vertical restraints of trade.[5] Professor Carolan uses two European Union cases involving vertical restraints of trade as a vehicle to point out key differences between United States and European Union competition law, thus highlighting the need for law students, practitioners, and businesses to understand the competition rules of multiple jurisdictions. Properly defining the market is recognized as the first, critical step in merger and monopolization analysis, but, as Professor Carolan shows, it is also important in cases alleging concerted practices including vertical restraints of trade.[6] Even though the enabling statutes, sections 1 and 2 of the Sherman Act and Articles 81 and 82 of the European Community Treaty, appear superficially similar, differences in interpretation can be determinative of particular cases and can create entirely different rules of legality and illegality.[7] Market definition analysis, Professor Carolan argues, is one of the areas in which the European Union diverges in important ways from the United States. Since, as he describes, the individual competition laws of the European Member States tend toward

4. Professor Carolan, Head of the Department of Legal Studies of the Dublin Institute of Technology, is a prolific scholar and lecturer in competition and international trade law, has taught at the University College, Dublin, the University College, Cork, and the University of East London, and is a tutor at the Law Society of Ireland. He has served as a visiting professor at the University of Florida and the Center of Comparative and International Law at the University of Tulsa Law School. He holds degrees in law and economics from the United States and an LL.M. European Law with distinction, from University College, Dublin. He is a past president of the Irish Association of Law Teachers, a member of the United Kingdom Society of Public Teachers of Law executive committee, and a founding member of the discussion group in Law as Literature of the Modern Language Association.

5. *See* Bruce Carolan, *The Perils of Harmonization: Refusal To Supply Spare Parts, Article 82 of the European Community Treaty, and Abuse of a Dominant Position*, 107 DICK. L. REV. 733 (2003).

6. *Id.*

7. *Id.*

harmonization with European Union analysis, it is critical for firms doing business in Europe to appreciate the legal implications of the distinctions.[8]

Professor Salil K. Mehra's[9] chosen topic is the Foreign Trade Antitrust Improvements Act (FTAIA), section 6a of the Sherman Act,[10] a section widely criticized as among the most complex and least explicable in the antitrust canon. His new article, *"A" is for Anachronism: The FTAIA Meets the World Trading System*, updates and expands Professor Mehra's recent work on extraterritorial antitrust enforcement in private litigation and jurisdiction under the FTAIA.[11] He carefully dissects the small and conflicting body of caselaw applying the FTAIA in search of a consistent reading and, finding none, recommends that courts interpreting the FTAIA consider carefully the policy that they wish to further through its application. The policy considerations with which Professor Mehra deals are critical as more business is conducted transnationally, and, increasingly, globally, as the number of states with

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8. *Id.*

9. Professor Mehra, Assistant Professor of Law at Temple University School of Law, teaches antitrust, business associations, and contracts, and specializes in antitrust law and Japanese law. Professor Mehra's articles on antitrust have appeared in the *University of Chicago Law Review* and the *Duke Journal of Comparative & International Law*, and he was a panelist at the *University of Chicago Legal Forum*'s Fall 1999 symposium on Antitrust in the Information Age. He earned a A.B., *magna cum laude*, Harvard University, an M.A. in Japanese Studies, University of California at Berkeley, and a J.D., with honors, from the University of Chicago, where he was a member of the *University of Chicago Law Review* and Order of the Coif. He clerked for Chief Judge Juan R. Torruella, First Circuit Court of Appeals, has worked at the United States Justice Department Antitrust Division and a New York law firm, and has completed the New York City Marathon.

10. This deceptively short section of the Sherman Act provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
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> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a (2001).

11. *See* Salil K. Mehra, *"A" is for Anachronism: The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763 (2003).

competition laws increases,[12] and as consumers and firms injured by anticompetitive practices seek redress in the courts of various states. The FTAIA opens United States courts, and authorizes application of United States antitrust laws and remedies, to review and potentially to punish some conduct occurring entirely offshore.[13] The statute provides that the United States antitrust laws are applicable to non-import trade or commerce only if it has a "direct, substantial, and reasonably foreseeable effect" on specified commerce[14] *and* that effect "gives rise to *a* claim under" the United States antitrust laws.[15] The conflicting circuits have disagreed whether such claim must be the one brought by the party in the case or whether it is sufficient that there is *any* such antitrust claim.[16] The FTAIA cases and their conflicting interpretations—continuing to be offered by courts literally to the writing of Professor Mehra's article—offer rich opportunities to unpack the underlying policy considerations inextricably linked to the interpretation of a single word in the statute.

Finally, Professor Sharon E. Foster[17] provides commentary on the papers from the perspective of a scholar studying competition law in the United Kingdom while teaching at an American law school. Her article on competition law, *Untangeling the Web of International Competition Law*, adopts a contrarian stance, recognizing that, as the European Union expands,[18] the competition laws of the member states will conform to

12. "Approximately 80 WTO member countries, including some 50 developing and transition countries, have adopted competition laws, also known as 'antitrust' or 'antimonopoly' laws." Briefing Notes, WTO, Trade and Competition Policy: Working Group Set Up by Singapore Ministerial (Oct. 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm. More than seventy governmental competition enforcement agencies, responsible for application of their state's competition laws, are members of the International Competition Network, created in New York on October 25, 2001. *See* Press Release, International Competition Network, *supra* note 2.

13. *See* Mehra, *supra* note 11.

14. 15 U.S.C. § 6a(1). The commerce required to be affected is specifically defined in subsections (A) and (B) of 15 U.S.C. § 6a(1). *See id.*

15. *Id.* § 6a(2) (emphasis added).

16. *See* Mehra, *supra* note 11.

17. Professor Foster, Research Assistant Professor of Legal Writing at the University of Arkansas-Fayetteville, teaches international business transactions, appellate advocacy, and legal research and writing. Her recent research and scholarship focuses on international law. Previously, she taught at Loyola Law School, Los Angeles, and practiced in Los Angeles, California, with a focus on construction law and international law. A graduate of the University of California, Los Angeles, she received a J.D. from Loyola Law School and an LL.M. from the University of Edinburgh, where she is currently engaged in pursuing a Ph.D.

18. Ten new member states have been approved and will join the nineteen-member European Union this year. *See* Romano Prodi, President of the European Commission, Speech at the Ceremony of the Signing of the Treaty of Accession (Apr. 16, 2003), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/03/203|0|RAPID&lg=EN&display=.

European Union competition principles.[19] To the extent that European Union and United States antitrust law diverges, she predicts that the laws of the expanding member states will also diverge.[20]

These speakers and commentators combine academic theory with expertise gained from advisory roles, government service, and practice, and they raise timely and cutting-edge questions in light of the recent action of the European Commission disapproving the proposed GE and Honeywell merger, cases pending in various federal circuits on United States jurisdiction in private antitrust litigation, efforts to harmonize antitrust law and procedures, substantive conflict, and the intersection between international trade and antitrust law. These papers discuss from varying perspectives the increasingly important issues surrounding global competition and multi-national antitrust enforcement and leave the reader with provocative questions as more antitrust laws proliferate, global competition increases, and the potential for damaging conflict or productive engagement remains. Future articles promise to add content to theory, to elaborate on methodology, and to guide scholars and courts in the application of substantive standards to balance the economic and competitive benefits and harms of global competition and enforcement.

The theme that emerges from the articles that follow is the rapid pace of antitrust law development worldwide and the interdependent nature of competition enforcement. Enforcement agencies increasingly communicate and cooperate to the extent practicable on cases and investigations occurring simultaneously within their jurisdictions. The potential for damaging conflicts discussed in these articles concerns the development of inconsistent substantive standards and the over- (or under-) expansive application of the laws of a particular state to conduct occurring outside its territory and causing no antitrust injury to the citizens of that state. Finally, however, despite conflicts in discrete

19. Sharon E. Foster, *Untangeling the Web of International Competition Law*, 107 DICK. L. REV. 775 (2003).

20. *See id.* Although, in general, European Union and United States antitrust laws are interpreted consistently, there have been notable differences, including the divergence on whether the proposed merger between GE and Honeywell threatened competition. *See* JACKSON ET AL., *supra* note 1, at 92-93. Similarly, section 2 of the Sherman Act prohibits monopolization, *see* 15 U.S.C. §§ 1-7, while Article 82 of the European Community Treaty prohibits abuses of dominant positions, *see* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 82, O.J. (C 340) 3, 208 [hereinafter EC TREATY]. While United States monopoly law requires possession of high market shares to constitute monopolization, abuse of a dominant position may be found at relatively lower market shares and the standards for "abuse" include a more receptive view towards abusive behavior such as allegations of predatory pricing, for example. *Compare* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), *and* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), *with* Case C-62/86, AKZO Chemie BV v. Commission, 1991 E.C.R. I-3359, [1993] 5 C.M.L.R. 215 (1991).

doctrines or individual cases, there is a general trend toward harmonization around certain core principles that promote consumer welfare.[21] These papers illuminate some of the pressing issues facing scholars, courts, and policy-makers in international antitrust law and offer thoughtful conclusions and recommendations for competition law development.

21. *See, e.g.*, Carolan, *supra* note 5.

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