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Untangling the Web of International Competition Law

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I. Introduction

Commentary comes easier than craftsmanship.[1] This commentary is made easier by the craftsmanship of the papers and remarks presented by Professors Salil K. Mehra,[2] Bruce Carolan,[3] and William E. Kovacic[4] at the Association of American Law Schools recent annual conference in Washington, D.C., titled "Legal Education Engages the World." Far from an exercise in academic curiosity regarding some esoteric field of legal study, these papers establish the necessity of including international law in the law school curriculum. Some commentators have stated that globalization is not inevitable.[5] One may extrapolate from such comments that the inclusion of international law in the legal curriculum is not necessary. However, as these papers from the speakers on the panel discussing "Competition Without Borders: Antitrust Law and the Challenge of Globalization" stress, some globalization has already occurred. Absent a significant repeal of international agreements by the United States, which I believe is unlikely, the ability of American law students to "issue spot" international law problems is now a fundamental aspect of a well-rounded legal education.

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1. "Criticism comes easier than craftsmanship." JOHN BARTLETT, FAMILIAR QUOTATIONS 83 (Emily Morison Beck ed., 15th ed. 1980) (quoting PLINY THE ELDER, NATURAL HISTORY (E.H. Warmington ed., H. Rackham trans., Harvard Univ. Press 8th prtg. 1992) (n.d.) (quoting Zeuxis, Greek painter from approximately 400 B.C.)).

2. Assistant Professor, Temple University, Beasley School of Law.

3. Head of Department of Legal Studies, Dublin Institute of Technology.

4. Professor of Law at George Washington University, currently serving as General Counsel of the Federal Trade Commission.

5. *E.g.*, Robert Weisman, Address at the Legal Education Engages the World Conference (Jan. 3, 2003).

The paper presented by Professor Salil K. Mehra, titled *"A" Is for Anachronism: The FTAIA Meets the World Trading System*,[6] discusses the difficulties that some American courts have when interpreting a federal statute that addresses competition law[7] with an international dimension. Should courts attempt to interpret these statutes with the standard tools of "plain language"[8] and legislative intent?[9] What if the plain language is unclear and the legislative intent is ambiguous? What if courts are interpreting the statute in a contorted fashion in order to avoid jurisdiction over a case with complex international dimensions? Some may desire this latter result; however, it runs the risks of spillover to interpretation of purely domestic statutes, of faulty analysis, of increased speculation as to the rules by which people must legally operate, and, hence, of increased business risks. Rather than create a tangled web of interpretation as Professor Mehra suggests that courts[10] have done with the Federal Trade Antitrust Improvements Act ("FTAIA"),[11] it is suggested that counsel argue and courts consider certain international principles in crafting a solution when interpreting statutes with international dimensions.

The paper presented by Professor Bruce Carolan, titled *The Perils of Harmonization: Refusal To Supply Spare Parts, Article 82 of the European Community Treaty, and Abuse of a Dominant Position*,[12] presents a thoughtful analysis of two European Union cases[13] in which the European Union competition authorities[14] determined that the

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

7. In the international context, antitrust law is usually referred to as competition law. *See id.*

8. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

9. *Id.*

10. Kruman v. Christie's Int'l Plc, 284 F.3d 384 (2d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (U.S. Sept. 3, 2002) (No. 02-340); Den Norske Stats Oljesel Skap AS v. Heeremac VOF, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom.* Statoil ASA v. HeereMac v.o.f., 534 U.S. 1127 (2002).

11. 15 U.S.C. §§ 6a, 45a (1994).

12. 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).

13. Case 22/73, Hugin Kassaregister AB v. Commission, 1979 E.C.R. 1869, [1979] 3 C.M.L.R. 345 (1979) (E.C.J.); Commission Decision 500-87, Brass Band Instruments Ltd. v. Boosey & Hawkes Plc, 1987 O.J. (L 286) 36 (E.C.) [hereinafter Commission Decision, *Brass Band*].

14. The European Commission conducts similar reviews with respect to competition (antitrust) issues as the United States Department of Justice and Federal Trade Commission. Regarding the European Commission's duties, see European Union, *Citizen's Guide to Competition Policy—Antitrust and Cartels, at* http://europa.eu.int/comm/competition/citizen/citizen_antitrust.html (last visited Apr. 21,

manufacturer of a product that did not hold a majority of the market share for that product and, hence, was not in a dominant position with respect to the market for the primary product may be deemed to hold a dominant position in a sub-market for after-sales parts and service.[15] As Professor Carolan explains, this may affect small American businesses that do business in European Union countries.[16] Additionally, such a decision may have ramifications with respect to the possibility of a multilateral treaty addressing competition law issues if such a treaty looks to European Union law as a model. With the conclusion of the recent Doha Development Agenda of the World Trade Organization, where the international community, including the United States,[17] agreed to consider a multilateral agreement on competition law, such a possibility is likely.

Finally, the presentation by Professor William E. Kovacic, currently serving as General Counsel for the Federal Trade Commission, provided helpful insight into the process of crafting a potential convergence agreement of competition laws based, in part, upon his personal experience in dealing with competition authorities in the European Union and the United States.[18] Although I agree with the institutional prerequisites for success suggested by Professor Kovacic, including peer review and comparative analysis of the competition laws already in place,[19] I believe that the issue with which we must be concerned is harmonization of competition laws based upon the European Union model rather than convergence or standardization of competition laws.

2003); regarding the United States Department of Justice's duties, see Antitrust Div., U.S. Dep't of Justice, *Overview: Antitrust Division*, *at* http://www.usdoj.gov/atr/overview.html (last visited Apr. 21, 2003); and, regarding the Federal Trade Commission's duties, see Joseph J. Simons, U.S. Fed. Trade Comm'n, *Mission Statement: Bureau of Competition*, *at* http://www.ftc.gov/bc/mission.htm (last modified May 14, 2002).

15. *See Hugin*, 1979 E.C.R. 1869, [1979] 3 C.M.L.R. 345; Commission Decision, *Brass Band*, *supra* note 13.

16. Carolan, *supra* note 12.

17. WTO, Ministerial Declaration: Ministerial Conference Fourth Session Doha, WT/MIN(01)/DEC/1 20 paras. 23-25 (Nov. 14, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

18. William E. Kovacic, Address at the Annual Conference of the Section on Antitrust and Economic Regulation of the Association of American Law Schools (Jan. 4, 2003).

19. *Id.*

II. Interpreting Domestic Statutes with International Dimensions: Oh What a Tangled Web We Weave[20]

As Professor Mehra points out, increasing global trade and increasing competition law jurisdiction overlap has generated an increase of cases involving foreign trade.[21] Inevitably, the increase in global trade has increased situations in which courts are called upon to decide whether it is proper to assert jurisdiction in circumstances in which some or all of the alleged antitrust conduct occurred on foreign soil. While the principle of comity has been used in the past to minimize the extraterritorial application of domestic laws,[22] in the United States and elsewhere competition laws have been given extraterritorial application when conduct directed at a foreign market or occurring in a foreign market causes an effect in the domestic market.[23] Accordingly, a body of caselaw addressing competition law issues with an international dimension is emerging.

Professor Mehra brings to light the reluctance with which some courts handle competition law cases in his discussion of *Den Norske Stats Oljeselskap AS v. Heeremac VOF*[24] and its interpretation of the FTAIA to limit jurisdiction.[25] At the opposite end of the spectrum, he addresses an overbroad approach in the *Kruman v. Christie's International PLC*[26] case, in which the court interpreted the FTAIA diametrically differently from the *Den Norske* court in order to assert jurisdiction.[27] While these conflicting opinions may ultimately be resolved,[28] the fact that there is an increase in cases with an international dimension emphasizes the point that a well-rounded legal education must include international law. With a basic understanding of international legal principles, the legal community will be better able to serve clients and educate the courts.

In the *Den Norske* case, the court interpreted the "gives rise to a claim" language in the FTAIA to mean that the "FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs . . . where the

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20. BARTLETT, *supra* note 1, at 431 (quoting SIR WALTER SCOTT, THE LAY OF THE LAST MINSTREL (William J. Rolfe ed., Fredonia Books 2002) (1805)).

21. Mehra, *supra* note 6.

22. Hilton v. Guyot, 159 U.S. 113 (1895).

23. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); Osakeyhtiö v. Commission, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901 (1988) (E.C.J.).

24. 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom.* Statoil ASA v. HeereMac v.o.f., 534 U.S. 1127 (2002).

25. 15 U.S.C. § 6a (1994).

26. 284 F.3d 384 (2d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (U.S. Sept. 3, 2002) (No. 02-340).

27. *Id.*

28. *Id.*

situs of the injury is overseas and that injury arises from the effects in a non-domestic market."[29] Professor Mehra asserts that this rule may be limited to foreigners and, as so limited, could conflict with treaties such as the World Trade Organization agreements.[30]

In contrast, the court in *Kruman* interpreted the same language of the FTAIA to mean that "[t]he 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it must only violate the substantive provisions of the Sherman Act."[31] Accordingly, this interpretation of the FTAIA states that the "gives rise to a claim" language means that the effect on domestic commerce does not have to be tied to the plaintiff's claim.[32]

Although these conflicting opinions will likely be resolved,[33] they illustrate how the courts are struggling with cases that contain an international dimension. This struggle, according to Professor Mehra, creates tension with the world trading regime.[34] One possible solution to this problem is for courts to consider opinions of courts in foreign jurisdictions and common principles of international law.

The manner in which courts in foreign jurisdictions address this problem is acceptable persuasive authority,[35] may provide useful insight, and would be consistent with basic principles of comity. Further, this would assist the process of convergence and relieve some of the tensions in the world trading regime. Additionally, through this process there may emerge more uniformity in judicial decisions regarding these issues, thus reducing uncertainty and business risks. Finally, consideration of international legal principles, such as the concept of national treatment for foreigners, would further these goals and promote reciprocity for American plaintiffs seeking redress in foreign courts.

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29. *Den Norske*, 241 F.3d at 428.

30. Salil K. Mehra, Address at the Annual Conference of the Section on Antitrust and Economic Regulation of the Association of American Law Schools (Jan. 4, 2003); *see also* Marrakesh Agreement Establishing the World Trade Organization, Apr. 14, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement.

31. *Kruman*, 284 F.3d at 400.

32. Mehra, *supra* note 6.

33. *See Kruman*, 284 F.3d 384.

34. Mehra, *supra* note 6.

35. Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001).

III. The Relevance of European Union Law for United States Attorneys: He Who Controls the Area Controls the Law[36]

Professor Carolan's article[37] analyzes two European Union cases, *Case 22/78, Hugin Kassaregister AB v. Commission*[38] and *Brass Band Instruments Ltd. v. Boosey & Hawkes Plc*,[39] to emphasize two points: (1) it is no longer sufficient for United States law students simply to be aware of United States federal and state law, and (2) there is a trend towards convergence of competition laws that may ultimately result in a supra-national law that reflects the competition laws of the European Union.[40]

In *Hugin* the European Commission argued that a company may occupy a dominant position[41] in a sub-market[42] for its product even though it does not occupy a dominant position for the product in question. The Court of Justice for the European Communities found that Hugin did occupy a dominant position but avoided the critical question of whether Hugin abused its position by holding that the conduct did not affect trade between Member States.[43] In *Brass Band* the European Commission again successfully argued a dominant position in a sub-market but ultimately lost the case before the European Commission on the issue of abuse of a dominant position.[44]

There are two points made by Professor Carolan with respect to these cases that I believe are critical to the general topic "Legal Education Engages the World." The first is that American corporations, and, hence, American attorneys, are increasingly faced with legal issues that are the subject of foreign laws.[45] The second is that there is a push for harmonization of antitrust laws in the form of a multilateral agreement, as has been discussed at the Doha Development Agenda of the World Trade Organization, and it is distinctly possible that such an agreement will be modeled after European Union law rather than United States law.[46]

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36. "He who controls the area controls the religion." BARTLETT, *supra* note 1, at 133 (quoting anonymous).

37. Carolan, *supra* note 12.

38. 1979 E.C.R. 1869, [1979] 3 C.M.L.R. 345 (1979) (E.C.J.).

39. Commission Decision, *Brass Band*, *supra* note 13.

40. *See* Carolan, *supra* note 12.

41. Similar to a violation of section 2 of the Sherman Act, 15 U.S.C. §§ 1-7 (2001). *See* Carolan, *supra* note 12.

42. In *Hugin* the sub-market was spare parts. 1979 E.C.R. at 1914-17, [1979] 3 C.M.L.R. at 370-72.

43. Carolan, *supra* note 12.

44. *Id.*

45. *See id.*

46. *See id.*

As to the first point, increasing international trade has already established that American corporations are subject to and constrained by foreign competition laws such as those in the European Union. One example of this was the recent decision by the European Commission to disallow the merger of GE and Honeywell even though United States competition law authorities had approved the merger.[47] As long as American corporations are doing business on foreign soil, they will be subject to foreign antitrust laws. Accordingly, it has become increasingly important for law schools in the United States to include in their curriculum international and comparative law courses.[48] The *Hugin* and *Brass Band* cases are just two examples of the need to understand the European Union approach to the sub-market issue.

As to the second point, the possibility of a multilateral treaty dealing with antitrust issues has been bantered about for many years.[49] Although many commentators have stated in the recent past that such a possibility is remote for the foreseeable future, if it will occur at all,[50] Professor Carolan believes that a form of convergence on the multilateral level is a distinct possibility, especially given the recent discussions at Doha.[51] I agree with his underlying concept, but believe that the term "convergence" is perhaps an understatement. The term "convergence" is a movement towards the standardization of laws.[52] Professor Carolan's belief that a multilateral treaty on competition law issues influenced by European Union law seems to me to indicate harmonization that is a supra-national or multilateral body of law.[53] As for the possibility of harmonization of competition laws based upon European Union law, I would agree with Professor Carolan that the seeds are in place for such an occurrence.[54]

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47. *See* William J. Kolasky, Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels, Address at the George Mason University Symposium (Nov. 9, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9536.pdf.

48. Carolan, *supra* note 12.

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

50. *See* Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based upon the European Union Model*, 15 EMORY INT'L L.R. 467, 468 n.5 (2001).

51. Carolan, *supra* note 12.

52. Daniel Steiner, *The International Convergence of Competition Laws*, 24 MANITOBA L.J. 577, 578 (1997).

53. *Id.* at 579.

54. Foster, *supra* note 50, at 467.

IV. A Few Hints To Crafting a Multilateral Agreement: First and Foremost, Get Other Countries To Adopt Your Laws[55]

Professor Kovacic's presentation stressed the importance of the process to achieve some form of multilateral agreement regarding competition law issues.[56] While I do not disagree with the process outlined, my concern is that the United States still seems focused on convergence while the European Union is focused on harmonization based upon its model.[57] As discussed above, the terms "convergence" and "harmonization" are distinct. If we ignore this distinction, we reduce our input into the development of international law. There is the distinct possibility that a multilateral agreement harmonizing competition law may be significantly influenced by European Union law.[58] Even if no multilateral agreement is achieved on competition law issues, customary international law or a general principle of international law based upon the European Union model may emerge.[59]

With respect to a multilateral agreement on competition laws based upon the European Union model, the great success that the European Union has had over the past decade in inducing countries to adopt antitrust laws based upon the European Union model has only added strength to the European Union position that a multilateral treaty should be significantly influenced by European Union law.[60] Yet, even if a multilateral treaty on competition law issues is doomed to the same fate as the Havana Charter,[61] the possibility of customary international law or a general principle of international law on competition law issues based upon the European Union model does exist.

Customary international law has two elements: (1) behavior of states, and (2) the belief by states that they are bound to behave in a certain manner due to *opinio juris*.[62] These two elements may be discerned from many sources, including multilateral agreements such as the Set of Multilaterally Agreed Equitable Principles and Rules for the

55. "A few hints as to literary craftsmanship may be useful to budding historians. First and foremost, *get writing!*" BARTLETT, *supra* note 1, at 800 (quoting Samuel Eliot Morison).

56. Kovacic, *supra* note 18.

57. *Id.*; *see also* Foster, *supra* note 50, at 487, 498-99.

58. Carolan, *supra* note 12.

59. Foster, *supra* note 50, at 515-17.

60. Carolan, *supra* note 12; Foster, *supra* note 50, at 475.

61. *See generally* Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275 (2000) (discussing failure of the Havana Charter).

62. Asylum (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20); Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); MALCOLM SHAW, INTERNATIONAL LAW 57-58 (4th ed. 1997).

Control of Restrictive Business Practices (RBP),[63] which is based upon European Union law,[64] and treaties, such as the Central and Eastern European countries agreements with the European Union to harmonize their laws, including competition laws.[65] Accordingly, the risk of customary competition law being based upon European Union law is real.[66]

As for general principles, a critical element here is that the general principle exists in the municipal law of most legal systems.[67] Professor Kovacic stated that there are over ninety countries that now have some sort of competition laws on the books.[68] If this trend continues, and most of these laws reflect the European Union model, an argument can certainly be made that a general principle of international law is the European Union model of competition law.

V. Conclusion

The law and legal education must come to John Donne's realization—it is not an island entire unto itself.[69] It is a piece of humanity; a part of the global main. Domestic laws are affected by international laws. International laws reflect influential domestic legal norms. We must understand this process and educate law students to become the legal craftspeople of the future. The papers and presentations discussed in this article underscore the necessity for legal education to embrace the world. If we fail to recognize this, the United States's ability to influence international law will diminish.

63. Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Conference on Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10 (1980).

64. Steiner, *supra* note 52, at 604; *see also* SHAW, *supra* note 62, at 58-65.

65. Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781 (2000); *see also* Foster, *supra* note 50, at 475.

66. Foster, *supra* note 50, at 516-17.

67. SHAW, *supra* note 62, at 79-82.

68. Kovacic, *supra* note 18.

69. BARTLETT, *supra* note 1, at 254 (quoting JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS (Anthony Raspa ed., Oxford Univ. Press 1987) (1624)).

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