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INTERNATIONAL LAW AND FEDERALISM: WHAT IS THE REACH OF REGULATION?

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When many of us think about international law, our first impulse might be to imagine a theoretical body of precepts and propositions, honored only in the breach, that has little to do with “the real world.” Visions of musty rooms, earnest professors, and tomes written in French may also come to mind. My personal view is that there is much more to traditional public international law than this unfavorable stereotype suggests, but that is not what I would like to discuss in this paper. Instead, my topic is one of more pressing importance: at what level of government will antitrust law reside from this point forward? This formulation may take a few liberties with the topic of this panel, which concerns international law and federalism and asks what the *reach* of regulation is, but the only sense I could make of the first part of the topic—international law and federalism—was to interpret it as a question about the international equivalent of our internal federalism debate: namely, should antitrust regulation (whatever that may mean) occur at the national level or at some “higher” level, either regional or global? This question about the reach of regulation could be either positive or normative: it could ask how far, beyond any one country’s physical territory, economic regulation can reach as a practical matter, or it could ask about the optimal degree of so-called extraterritoriality. I will focus on the second of these two possibilities, and I hope to show how the answer to that question helps to answer the first one.

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I. INTERNATIONAL LAW AND FEDERALISM

With the exception of the period immediately following World War II, when the leading Western nations created a new world economic order that eventually included the General Agreement on Tariffs and Trade ("GATT"), the International Monetary Fund, and the World Bank, there has never been a time when "world" antitrust law—or competition law, as almost every other country in the world calls this field—was more actively on the table as a serious topic of negotiation. In the late 1940s, the drafters of the unsuccessful Havana Charter included "restrictive business practices" as one of the areas that would fall under the jurisdiction of the proposed International Trade Organization ("ITO").¹ But, in no small part because of opposition that developed within the United States, the Havana Charter never went into effect, we never had an ITO, and the chance for world competition law was lost.

The drafters of the Havana Charter thought it only logical to include rules about restrictive business practices in their master document.² In part, undoubtedly, this was for political reasons. People had not forgotten the power of the pre-war German cartels, or the role they played in supporting the Nazi empire.³ In part, these rules reflected the broader American effort to export laws and secure democracy in the face of the growing threat from the Cold War.⁴ There were also economic reasons, or so the drafters would have argued. Thanks to the trade agreements reached in 1947, the ruinously high tariffs of the Smoot-Hawley era started to come down appreciably.⁵ The hope was that this agreement would assure better access to

1. See *Havana Charter for an International Trade Organization*, at 86-91, U.N. Doc. E/C.2/78 (1948) [hereinafter *Havana Charter*].

2. See *id.*

3. See, e.g., CORWIN D. EDWARDS ET AL., A CARTEL POLICY FOR THE UNITED NATIONS (1945) (reviewing the cartel problem and arguing for an international policy against them).

4. For example, President Roosevelt's Secretary of State, Cordell Hull, stated that "[a] world in economic chaos would be forever a breeding ground for trouble and war." JOHN LEWIS GADDIS, *THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1941-1947* 18 (1972) (quoting 2 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL 1681* (1948)).

5. The Smoot-Hawley tariff bill of 1930 provoked the United States' major trading partners into imposing retaliatory tariffs. See generally JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

foreign markets for the exporters of each GATT signatory. But that promise of access would be empty if restrictive, private anticompetitive practices reared up and continued to prevent foreign penetration of markets, or if foreign capital could not flow readily from one country to another. For that reason, the Havana Charter included rules on investment and on competition.⁶ I will have more to say about this alleged "market access" rationale for international competition rules, but for now it is enough to note that the idea has been around since the late 1940s.

Another idea also lay behind the proposed globalization of antitrust rules, and it was one that referred back to the genesis of American law in this field. It was appealingly simple: to the extent that business practices occur at a global level, the rules that regulate them must be imposed and enforced at the same global level. In other words, if there is an international cartel in aluminum, oil, ocean shipping, or lead, national regulators will be unable to take effective steps to stop it, at least without engaging in the kinds of extraterritorial regulation that raises everyone's hackles. Only one country had either the inclination or the ability to get away with that. The United States, people claimed, saw the same thing in the latter part of the nineteenth century, when the big trusts were able to move around from state to state and evade the efforts of state authorities to prevent their abusive practices. Standard Oil is the classic example of this tactic, but other trusts were doing the same thing.⁷ Only when regulatory power shifted "up" to the level of the national market, with the passage of the Sherman Act⁸ in 1890, did antitrust law gain some bite for the new economic environment.

But we all know that emulation is the sincerest form of flattery. Perhaps we should have been worried that there was hardly a stampede from the rest of the world in the wake of the Sherman Act to copy our example. True, the Canadians beat us by one year in passing the first version of their own

6. See *Havana Charter*, *supra* note 1, at 86-91.

7. See generally WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTI-TRUST ACT* (1965).

8. 15 U.S.C. §§ 1-7 (1994).

competition law in 1889,⁹ but they would now be the first to admit that the 1889 law was more notable for what it did not accomplish than for what it did. English law concerning monopolies and restrictive practices had become almost defunct by this time. Not until after World War II was there a real glimmer of interest in antitrust from its natural constituents: other market-oriented, developed Western countries. Interestingly, the first sign of change came not in national law but in an international instrument: the European Coal and Steel Treaty, which entered into force on July 25, 1952, with France, Germany, Italy, Belgium, The Netherlands, and Luxembourg as its signatories.¹⁰ Articles 65 and 66 of that treaty respectively prohibited anticompetitive agreements and abuses of a dominant position in the coal and steel sector.¹¹ The language of those articles, with only slight changes—except with respect to mergers—reappears and has become more familiar as Articles 85 and 86 of the Treaty of Rome, which established the European Common Market.¹² Now, we usually refer to this coalition as the European Union (“EU”), although purists maintain that the Economic Community is not a synonym for the Union.¹³ Another important change is that the Union has expanded to fifteen Member States. But the reasons why these competition articles appeared in both treaties, and

9. See Combines Investigation Act, R.S., ch. 314. In 1986, the Combines Investigation Act was replaced by the Competition Act of 1986, S.C., ch. 26 (1986) (Can.), which has put Canada in the forefront of jurisdictions with strong competition rules. See also Calvin S. Goldman, Q.C. & John D. Bodrug, *Antitrust Law and Innovation: Limits on Joint Research & Development and Inter-Company Communication in Canada*, 21 CAN.-U.S. L.J. 127 (1995) (discussing the contours of Canadian antitrust law).

10. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 298 U.N.T.S. 140.

11. *Id.* at arts. 65-66.

12. See Treaty Establishing the European Economic Community, Jan. 1, 1958, arts. 85-86, 298 U.N.T.S. 11. As a result of the entry into force of the Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340), almost all the Treaty articles have been renumbered. Article 85 is now Article 81, and Article 86 is now Article 82. The “Consolidated” version of the Treaty Establishing the European Economic Community is also codified at O.J. (C 340) 1 (1997).

13. Since the entry into force of the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992), (hereinafter “Maastricht Treaty”), there have been three “pillars” that make up the Union: the first concerns economic union and carries forward the treaty provisions for the old European Economic Community or Common Market; the second concerns a Common Foreign and Security Policy (Title V, Maastricht Treaty); and the third concerns Cooperation in the Fields of Justice and Home Affairs (Title VI, Maastricht Treaty).

why competition law has been such an important part of EU law from the beginning, merit consideration.

Some people thought that these agreements signaled the first steps toward a United States of Europe. Naturally, for this type of deep political and economic integration, the transition would require a European-level set of rules for private economic behavior (including competition). The United States was certainly a cheerleader, if not more, for this way of thinking.¹⁴ The most commonly articulated reason for the inclusion of competition rules in the European treaties paralleled the rationale advanced for the Havana Charter: because the Community would dismantle all trade barriers between Member States, it had to make sure that private restraints would not remain and thwart the treaty's goal of market-integration.¹⁵ Some people also argued that cartels and "dominant firms" were also inefficient, and admittedly, that rationale for the competition rules has grown in prominence and importance over the years.¹⁶

To make sure their Common Market worked, the Europeans also ceded significant national powers to the Community institutions. They created a court, the European Court of Justice ("ECJ"), with the final say over matters of Community law.¹⁷ Included within the treaties, as interpreted by the ECJ, was the equivalent of a supremacy clause, under which national laws inconsistent with Community law had to give way.¹⁸ Furthermore, they provided a way for Community legislation, passed by either the Council or the Commission, to have "direct effect" on citizens of the Member States without the need for mediating legislation at the national level.¹⁹ Finally,

14. Recall that General MacArthur had just "given" U.S.-style antitrust laws to the Japanese and that the Americans were "encouraging" the Germans to take much the same step.

15. *See, e.g.*, CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 105 (1949).

16. *See generally* JACKSON, *supra* note 5.

17. *See generally* L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (4th ed. 1994) (describing the history, development, and practice of the ECJ).

18. The supremacy of European Community law has been asserted consistently by the European Court of Justice. *See, e.g.*, Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585 (holding that in any area where the Community has acted, Member States may not act inconsistently with that position).

19. *See* Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der*

they granted powerful direct enforcement tools to the Commission, which in the antitrust field can conduct "dawn raids" on companies, demand production of evidence, impose hefty fines, and otherwise ensure that the law is followed.²⁰ I mention all this because today there is a common assumption among many that the need for, and success of, European competition law provides support for the contention that the world community should create world competition rules within the WTO. While the latter is an issue that reasonable people can debate, they should do so without any illusions that anything like the European system would enforce such rules. We must ask whether it is possible to separate the structural aspects of European competition law from its content.

While the Europeans were perfecting their supranational system of competition law, other countries around the world were busy passing their own national laws in this area or in some instances—like the Canadian example I already mentioned—substantially revising and strengthening existing laws.²¹ Today, out of some 130 members of the WTO, approximately 80 countries have a competition law.²² If we see the glass as half empty instead of half full, we might respond that 80 is still less than half of the 185 member countries of the United Nations and not quite two-thirds of the WTO's membership. Still, especially if we consider the economic weight of those countries with competition laws in comparison to those without, an overwhelming volume of world commerce now occurs against a backdrop of either enforced domestic antitrust law or domestic antitrust law that is on the books.

Belastingen, 1963 E.C.R. 1 (ruling that Treaty provisions could have direct effect and that individuals could invoke them before national courts). See also Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 307 (1999).

20. See Council Regulation 62/204 of 21 February 1962 First Regulation Implementing Articles 85 and 86 of the Treaty, 1959-62 O.J. SPEC. ED. 86. See generally LENNART RITTER ET AL., *EEC COMPETITION LAW: A PRACTITIONER'S GUIDE* (1991).

21. See THOMAS H. REYNOLDS & ARTURO A. FLORES, *FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTION OF THE WORLD* (1991) (listing and summarizing major national antitrust and trade regulation (unfair competition) laws).

22. The number is vague because it depends somewhat on how the term "competition law" is defined. The great majority of those 80 laws, however, address subjects like cartels, monopolies, and mergers, and thus are recognizable to anyone as members of the antitrust family.

In the meantime, just as in Europe, the hopes of the original GATT drafters have largely been realized. Tariffs, and even more importantly, nontariff barriers to trade, have plummeted, beginning with the Kennedy Round of multilateral negotiations, accelerating through the Tokyo Round, and finally reaching very ambitious levels in the Uruguay Round.²³ In January 1995, the ITO, renamed the WTO, became the institutional home of the world trading system. The ink was hardly dry on the Uruguay Round agreements and the WTO charter, however, when people began looking to the next frontier. Apparently, it was not enough to implement an ambitious agenda such as devising a more rational approach to the international trade in agriculture, services, government procurement, and other "easy" issues. Instead, three other subjects emerged to dominate the discussion: the environment, workers' rights, and competition.

I have not followed the first two topics closely, but I can attest that competition certainly has staying power. About two years ago, the WTO authorized the formation of a working group to study the desirability of multilateral competition rules. Chaired by Frédéric Jenny,²⁴ the working group enjoyed strong support from the European Union, which issued a formal paper calling for multilateral competition rules (a pet project of former EC Commissioner Sir Leon Brittan).²⁵ The subject will come up again at the WTO's ministerial meetings in Seattle near the end of this year, and the Europeans are expected to push for the formation of a negotiating group. They, at least, have answered the question implicit in the title "international law and federalism" in favor of an international version of competition regulation at the federal level. They point to the factors I mentioned previously—the experience of the United States in the nineteenth century, their own

23. See General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 13.

24. Frédéric Jenny is also the vice-chairman of the French Conseil de la Concurrence (Competition Council), chair of the Organization for Economic Cooperation and Development's Committee on Competition Law and Policy, and a American-educated economist.

25. See Towards an International Framework of Competition Rules, COM(96)296 final (June 18, 1996) <<http://europa.eu.int/comm/dg04/tracomp1.htm>>.

experience as they developed as perfect a common market as they could achieve, and the indisputable fact that international economic activity is everywhere—and urge that these factors mean that international rules are essential for competition law.²⁶ It is simply illogical, they argue, to leave antitrust law “down” at the national level, where it is doomed to be ineffective.²⁷

I take issue with that view. I do so both for reasons that might be dismissed as “merely” practical and for other reasons that are more principled. I will highlight some thoughts from each set of concerns with the hope of providing a basis for further discussion.

A. *Practical Reasons for Keeping Competition Rules out of the WTO*

First, significant definitional problems would plague any attempt to internationalize “competition” or “antitrust” law, as those terms mean different things to different people. They have even meant different things to us in the United States at different times over the last 110 years. Which version would we be agreeing to at the WTO level? Would broad, fuzzy principles that could finesse these definitional differences force us to abide by regulations that we believe to be antithetical to free market principles?

Second, the laws of most countries do not follow U.S. antitrust law but instead emulate the European model of competition law. The European approach, not surprisingly, prevails in the EU as a whole—in almost all of the fifteen Member States and in every other European country that aspires to become a full-fledged member of the EU. In fact, part of the price of admission to the EU is the acceptance of the *acquis communautaire* for competition law. In many ways, the European model is fine, especially as it has been used to assist market integration in the Community,²⁸ but it is far more regulatory than the U.S. version of antitrust, especially when it

26. See generally Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277 (1992) (discussing this point in greater depth).

27. See generally Joel Davidow, *The Seeking of a World Competition Code: Quixotic Quest?*, in *COMPETITION IN INTERNATIONAL BUSINESS* 361 (Oscar Schachter & Robert Hellawell eds., 1981).

28. See Wood, *supra* note 26, at 290-93.

comes to single firm conduct.²⁹

Third, the most important element in the political agenda behind world competition rules is a desire to assure "market access" to each country's internal market for foreign firms. Consider, however, the variety of practices that private firms, undeterred by any form of government regulation, might engage in that would effectively deny market access. They would include vertical restraints: exclusive dealing arrangements, tying arrangements, customer restrictions, and the like. The *Kodak-Fuji* dispute over access to the Japanese market is an excellent example.³⁰ I will agree, for the sake of argument, that any rule designed to force Fuji to open its distribution channels to Kodak might improve Kodak's access to the Japanese market. I will not agree, however, that such a rule necessarily would be consistent with the present state of U.S. antitrust law concerning vertical restraints. Under U.S. law, non-price restraints are condemned only if the firms using them have significant power in a relevant market. The efficiency-enhancing possibilities of many vertical restraints are recognized by the courts.³¹ It is possible that U.S. law might have adopted an ill-considered rule for that area, and thus mere inconsistency may not be a reason to reject change. On the other hand, if one thinks, as I do, that the *Colgate* rule³² basically gets it right, then one should be worried about a strong market access rule that would require domestic firms to deal with foreign firms on a nondiscriminatory basis.

Finally, monitoring systems for international competition rules will be difficult, if not impossible, to create. Most people who propose such rules now advocate broad principles that

29. *See id.*

30. *See* Report of the Panel, Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (Mar. 31, 1998) (rejecting U.S. claims that Fuji, in league with Japan's Ministry of International Trade and Industry, engaged in anticompetitive practices limiting access of Kodak film and print paper to the Japanese market).

31. *See, e.g.,* NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998); Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir. 1987).

32. *See generally* Ernest H. Schopler, Annotation, *Refusals to Deal as Violations of the Federal Antitrust Laws* (15 U.S.C.A. §§ 1, 2, 13), 41 A.L.R. FED. 175 (1979) ("Under the *Colgate* rule a trader is not guilty of a Sherman Act violation if he merely suggests resale prices and declines further dealings with all who fail to observe "them . . .").

will set criteria that all WTO members must meet—something along the lines of the Trade Related Aspects of Intellectual Property (“TRIPs”) agreement.³³ They also note that the United States, Canada, Europe (both the EU and individual European countries), Japan, Australia, Mexico, and many other countries already have laws on the books that meet any rules that would be negotiated. The real problem has been ensuring that rules on paper are enforced in practice. How will the WTO do that? Suppose, for example, that a third country takes issue with the settlement Intel reportedly reached with the Federal Trade Commission (a settlement about which I know virtually nothing and about which I am not expressing a substantive opinion). By many definitions, Intel has significant market power. How would a WTO panel decide whether the FTC should have accepted the settlement? Are we willing to give the WTO subpoena power, or will it supervise antitrust cases on the basis of some kind of agreed record? Who would be authorized to agree to the record? No one has offered satisfactory answers to these questions, and that is reason enough at this stage to reject the idea of negotiating a framework for competition policy within the WTO.

B. Theoretical Reasons for Keeping Competition Rules out of the WTO

The following objections to the internationalization of competition law are theoretical in nature. They assume, for the sake of argument, that everyone is willing to agree on sound principles of competition law, that ideas of market access and internationalizing the Robinson-Patman Act are abandoned, and that some answer to the monitoring problem can be reached.³⁴ Even in this perfect world, do we need or want international competition regulation?

33. See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGAY ROUND vol. 31; 33 I.L.M. 81 (1994).

34. That answer might be to forego monitoring, except to the extent that each country’s laws could be reviewed for adequacy under the WTO’s standards. This form of monitoring would be of little consequence concerning core antitrust laws, but it could help significantly if we broaden the inquiry to include the competitive consequences of different regulatory regimes.

First, the burden of proof should lie with those who advocate international rules for the same reasons that the need for federal versus state regulation in the United States must be justified and the same reasons expressed in the European doctrine of subsidiarity.³⁵ That is, if the job can be done at a more democratically accountable level, a level that is better able to fine-tune the system to local needs and easier to change as new learning occurs, it should be done at that level.

Second, it is not enough to emphasize that commerce is international to make the case for international competition rules. We do not have international taxation rules, international rules governing securities exchanges, or international labor codes.³⁶ Given that the ratio of trade to GDP world-wide is somewhere near 25 percent, the question should be how best to devise a system that will respond to that 25 percent, or 33 percent, or 50 percent, assuming continued substantial growth as well as the balance of domestic economic activity. International rules provide one option, but coordinated enforcement of domestic law is another possibility. Such coordination is what we do with most areas of criminal law as well as securities law.³⁷ The burden is on those who argue for the internationalization of competition rules to show why coordinated enforcement of domestic laws would not work in the context of competition law.

Third, the externalities created by differences in competition laws around the world may not be serious enough to warrant the internationalization of the law in this field. Do state-tolerated export cartels inflict such significant economic damage on countries receiving those goods that they could not address the damage under their own antitrust laws sufficiently

35. "Subsidiarity" refers to the principle that all regulation should take place at the most local levels of government, unless there is a justification for doing otherwise. See Diane P. Wood, 1996 *Kormendy Lecture Series: Regulation in the Single Global Market: From Anarchy to World Federalism?*, 23 OHIO N.U. L. REV. 297, 305 (1996).

36. At least not at the moment, that is. Labor codes constitute another area of potential WTO interest.

37. For example, this kind of cooperation is often needed in criminal law enforcement activities related to organized crime and the drug trade. See Frank S. Shyn, *Internationalization of the Commodities Market: Convergence of Regulatory Activity*, 9 AM. U. J. INT'L L. & POL'Y 597 (1994) (discussing international coordination in the securities industry); see also Lisa A. Barbot, Comment, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161 (1995).

to protect their own consumers? Is there really a problem with unfair treatment in the enforcement of antitrust laws—that is, would United States authorities treat a merger between two United States companies differently from a merger between a Brazilian company and a United States company? Answers to such questions are needed before any massive efforts at internationalization begin.

Finally, are antitrust laws really being used as cynical tools of national industrial policy rather than as a means of ensuring that economically inefficient transactions are prevented? Does this explain why the FTC gave the green light to the Boeing-McDonnell Douglas merger?³⁸ If so, then maybe antitrust law deserves to be categorized with other protectionist, nontariff barriers. In my experience, however, this scenario has not materialized with respect to U.S. antitrust law because of the professionalism of the federal enforcement agencies and because politically independent federal judges possess the final decisionmaking power.

In sum, I believe that more investigation must be made into both the degree and nature of the harm currently inflicted by the diversity of antitrust laws around the world. Furthermore, more attention must be paid to the question whether these problems would be solved by adopting international principles. Although a strong case can be made for international harmonization of various regulatory regimes (such as the rules for the telecommunications industry, where state action continues to be a concern), I believe that it has not been made for the quite different proposition that we need consistent international rules to regulate private business behavior.

II. THE REACH OF ANTITRUST REGULATION

I will say much less about this aspect of the panel's topic because much has already been written.³⁹ Once upon a time,

38. See *In re Boeing Company/McDonnell Douglas Corp.*, FTC, file no. 971-0051 (July 1, 1997) (statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III & Christine A. Varney) (approving the Boeing-McDonnell Douglas merger).

39. See SPENCER WEBER WALLER, 2 ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 21.1-34 (3d ed. 1997) (providing a helpful introduction to this vast literature).

one could have stated that the United States advocated "extraterritorial" antitrust regulation, though other countries abhorred it. Today, the situation is different. Currently, most major antitrust agencies around the world agree that they have jurisdiction to combat any practices, anywhere in the world, that have a direct, substantial, and reasonably foreseeable effect on their domestic markets.⁴⁰ Some refer to practices that are being "implemented" within their own markets; some refer to practices that target their domestic markets. The terminology does not matter. The key point is that this level of agreement on the proper scope of national regulation could, if it were acknowledged everywhere, resolve most competitive problems of an international scope by using exclusively national mechanisms.

Here, in a nutshell, is how I see things working out. First, everyone would agree that national jurisdiction covers both persons and transactions that are physically within the country's boundaries as well as transactions that occur outside their boundaries that have an intended effect within their countries. Second, countries would agree—on a reciprocal basis, if necessary—to assist one another in gathering evidence of suspected antitrust violations. This approach might be complicated, however, by the facts that a few countries use private actions extensively, several others recognize them but do not use them much, and most countries have created a monopoly of antitrust enforcement in their government agency. If assistance occurred only in government-to-government cases, there would be a certain imbalance for the countries that use private actions. Nonetheless, that would be an important start, and it is one that the United States tried to foster when Congress passed the International Antitrust Enforcement Assistance Act in 1994.⁴¹ Third, countries would

40. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

41. Pub. L. No. 103-438, § 2, 108 Stat. 4597 (codified at 15 U.S.C. §§ 6201- 6212 (1994)). Under the Act, the Antitrust Division of the Department of Justice and the FTC will be allowed to cooperate with foreign antitrust authorities to obtain investigative information. Prior to the Act, such disclosures violated the confidentiality provisions in the Antitrust Civil Process Act, the FTC Act and grand jury secrecy rules. See generally Antitrust: Clinton Signs Bill to Help Enforcers Obtain Foreign-Located Antitrust Evidence, Daily Rep. for Executives (BNA) (Nov. 3, 1994.) (announcing passage and

agree that mere permission to engage in practices like export cartels would afford no immunity from another country's competition laws if the "cartel" has some market power in the recipient country. Many of these exporting associations are better described as joint ventures, and many have no power in the various markets in which they operate. Thus, much of the debate concerning export cartel exemptions from antitrust law focuses on a red herring.

Initially, these agreements would be bilateral, but they could, if the partners agree, expand over time to a regional or multilateral level. The agreements would need no oversight or supervision by WTO bureaucracy. They would have the advantage of allowing countries to choose their dancing partners with care while avoiding both extravagant promises of cooperation and gold seals of approval for competition law regimes that are incompatible with their own.

In this way, the reach of regulation plays an important role with respect to the issue of federalism with which we began. It can help solve the problem of effective regulation of international transactions without binding us to a new world-wide antitrust bureaucracy. For the practical reasons I described, it is clearly the most desirable route. Unless someone makes a compelling empirical case to the contrary, I believe it is also the best route in the long run. As Karl Meesen once stated, there is no reason to feel threatened by the competition of competition laws.⁴² Finally, we must all hope that if the WTO chooses to establish a negotiating group on this topic at the end of this year, serious scholars around the world will explore this important question in detail and deliver us from the worst excesses of World Federalism.

outlining provisions of Act).

42. See Karl M. Meessen, *An International Antitrust Challenge: Competition of Competition Laws*, 10 J. INT'L L. BUS. 17 (1989).