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Antitrust at the Global Level

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The University of Chicago is a place that prides itself on contrarianism: think the unconventional; imagine the impossible; take the game of playing devil's advocate to new heights. This is therefore the perfect place to take a fresh look at an issue on which one has long had firm views. After years of arguing that international antitrust rules are either utterly impractical[1] or downright dangerous,[2] I propose to don another hat and to imagine what the rules of a new global antitrust regime ought to be.

There are a number of good reasons for doing this. First, antitrust or competition law is with us to stay at the global level: proselytizing on the part of the United States,[3] coupled with the self-interest that has led countless nations to adopt or strengthen market-based economies in the last fifteen years, has resulted in a world in which more than one hundred countries now have national antitrust laws. Those laws, to the extent that they regulate the actions of firms operating on an international scale, have just as much potential for conflict as banking laws, tax laws, securities laws, tort laws, or any other body of law one can name. Second, the topic is timely. On June 14, 2004, the Supreme Court handed down its decision in *F. Hoffmann-LaRoche, Ltd v Empagran S.A.*,[4] which addressed the extent to which the Sherman Act reaches foreign-based anticompetitive conduct that causes only foreign injury. In the course of its discussion, the Court expressed some skepticism about the extent to which the antitrust laws of the various nations have really converged, and it observed that thinking about

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1 See, for example, Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U Chi Legal F 277, 287–88 (recounting an ABA study that disclaimed the desirability of a worldwide antitrust code on four grounds, including the impossibility of agreement on standards and the difficulties of enforcement).

2 See, for example, Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 Chi J Intl L 391, 404–07 (2002) (arguing that the development of international antitrust law should proceed slowly).

3 See Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880–1990* 256–68 (Cambridge 1992) (describing how the U.S. government pressured Britain to adopt antitrust legislation after the Second World War).

4 124 S Ct 2359 (2004) (finding that federal antitrust laws did not apply when price-fixing conduct adversely affected foreign consumers independent of any harm to American consumers).

appropriate remedies still differs "dramatically."[5] Third, even though competition law may not be on the front burner for the World Trade Organization (WTO), the topic of competition policy has not disappeared either. Rather than stay on the sidelines while global rules are developed—either openly in the WTO, subtly through the independent International Competition Network,[6] or elsewhere—it is desirable to engage the debate more directly.

Most efforts that have been undertaken in this respect have paid close attention to political realities.[7] They ask which solutions are practical and which stand a chance of adoption. For WTO negotiators and government officials, this approach has obvious merit. But there is also a place for a more detached and academic inquiry. This Essay takes a look at the kind of rules that would be best for the system, based purely on their intrinsic soundness.

Part I examines the ideal scope for international antitrust rules. Part II focuses on the particular substantive and procedural provisions that an international antitrust code should have. Finally, Part III concludes by pointing out that any sound code ought to be restricted to the bare essentials of competition laws and must commit each signatory country to sound, economically based rules.

I. SCOPE OF PROPOSED RULES

Any set of international competition rules would logically treat the issue of coverage. There is a need to define which business arrangements, transactions, or agreements would be governed by the international regime, and which would remain under purely domestic rules. Logically, this requires definitions and a description of the scope of the agreement.

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5 Id at 2368 ("[E]ven where nations agree about primary conduct, say price-fixing, they disagree dramatically about appropriate remedies.").

6 The International Competition Network (ICN) is a voluntary international body whose membership is open to any national or multinational competition authority entrusted with the enforcement of antitrust laws. Although the ICN is oriented toward convergence, it is without rulemaking authority; rather, best practices are achieved through unilateral, bilateral, or multilateral arrangements. See International Competition Network, *About the ICN*, online at http://www.internationalcompetitionnetwork.org/aboutus.html (visited Nov 22, 2004).

7 See, for example, Wood, 1992 U Chi Legal F at 278 (cited in note 1) (calling a "supranational procedural or substantive regime . . . an impossible dream"); International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* ch 5 at 264–69 (2000), online at http://www.usdoj.gov/atr/icpac/finalreport.htm (visited Nov 22, 2004) (analyzing U.S. trade and competition policy and making policy recommendations with an eye to possible reactions from U.S. industry, U.S. labor, and other countries); Eleanor M. Fox, *International Antitrust and the Doha*, 43 Va J Intl L 911, 927 (2003) (recognizing that a "strong form" global antitrust regime is "neither practical nor acceptable to the world").

In crafting any such provision, the drafters would not be operating on a blank slate. Models exist in other areas of the law for drawing the line between international and domestic rules. Two such models can be found in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[8] (New York Convention), adopted in the United States in chapter 2 of the Federal Arbitration Act,[9] and in the United Nations Convention on Contracts for the International Sale of Goods[10] (CISG), which is also in force in the United States.[11] In both of these areas, an international regime sits side by side with a domestic regime covering the same subject matter.

The New York Convention sets forth the following area of applicability in Article I.1:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.[12]

It thus offers a model for a definition of what it takes for something to be "foreign" rather than domestic—a line that would be just as important to draw in any document addressed solely to international competition issues.

The CISG is another multilateral treaty designed to treat the special problems of international commerce. When it applies, it normally supplants state law rather than federal law, but from the international standpoint that difference is unimportant. The CISG addresses the scope of its application in Article 1(1), where it says:

> This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.[13]

8 21 UST 2517, 330 UN Treaty Ser 3 (1958).

9 Pub L No 91-368, 84 Stat 692 (1970), codified at 9 USC § 201 et seq (2000).

10 United Nations Convention on Contracts for the International Sale of Goods, reprinted in 19 Intl Legal Matters 668, 671 (1980) (suggesting an alternative to the New York Convention).

11 U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods, 52 Fed Reg 6262 (1987).

12 New York Convention, 330 UN Treaty Ser at 38 (cited in note 8).

13 CISG Art 1(1), reprinted in 19 Intl Legal Matters at 672 (cited in note 10).

This model may be more useful than that of the New York Convention, because it applies to ongoing business relationships rather than to a single, definable document such as an arbitral award.

Before leaving this topic, it is important finally to take account of the Foreign Trade Antitrust Improvements Act[14] (FTAIA), which addresses the question of when the U.S. antitrust laws reach transactions with some international element—that is, those that are somehow "in foreign commerce." Although the problem of the international reach of the antitrust laws addressed by the FTAIA is not quite the same as the one that this Essay addresses, the FTAIA itself does not apply unless the case involves foreign commerce. It therefore requires one to draw a distinction between international and domestic cases, as the following language demonstrates:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—(1) such conduct has a direct, substantial, and reasonably foreseeable effect [on domestic trade or commerce], or on import trade or import commerce with foreign nations; or [on export commerce of a U.S. exporter]; and (2) such effect gives rise to [an antitrust claim].[15]

Note, however, that this statute has nothing to say about cases involving import commerce. Any international set of antitrust rules would presumably apply both to import cases and to export cases from signatory countries.

II. SUBSTANTIVE AND PROCEDURAL RULES

Once coverage is established, the next step is to craft the rules or principles themselves. In one way or another, efforts to create such rules have been underway for nearly sixty years.[16] But these efforts became more energetic in the early 1990s, when a group of scholars operating under the auspices of the Max Planck Institute offered a full-blown draft code for general discussion.[17] Reactions to that effort were mixed.[18] More recently, a formal working group within the WTO

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14 15 USC § 6a (2000).

15 Id.

16 See Wood, 1992 U Chi Legal F at 281 (cited in note 1).

17 See International Antitrust Code Working Group, *Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement* (July 10, 1993), reprinted in 65 Antitrust & Trade Reg Rep (BNA) S-1, No 1628 (Special Supp Aug 19, 1993).

18 For a negative discussion of this effort, see Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 Minn J Global Trade 1, 4–5 (1997) (arguing that the draft code identifies prohibited behavior through "conceptual rather than economic approaches" and is too vague). For the views of one of the drafters, see Ernst-

has tried to reach consensus on draft rules suitable for WTO adoption, somehow, and somewhere.[19] The results of the group's efforts appear in the Doha Ministerial Declaration ¶ 25,[20] which proposes that competition rules in the member states should be required to follow six governing principles:

- Transparency
- Nondiscrimination
- Procedural fairness
- Prohibition of hard-core cartels
- Modalities for voluntary cooperation
- Institutional building in developing countries

The failure of the 2003 WTO meeting in Cancun, which might have added these issues to the active agenda of that organization, has left this project in doubt.[21] But, to borrow a phrase, it may be gone temporarily but it has not been forgotten. It will return because enough people are convinced of the soundness of the proposition that a global free trade regime needs complementary global competition rules so that free trade will not be undermined by private restraints that isolate national markets.[22]

Returning to the Doha list, however, three distinct topics can be identified:

- Background rules
- Substantive antitrust rules
- Procedural mechanisms

Ulrich Petersmann, *International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO*, 72 Chi Kent L Rev 545, 565–74 (1996).

19 See World Trade Organization, Doha Ministerial Declaration ¶¶ 23–25, WTO Doc WT/MIN(01)/DEC/1 (2001), online at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (visited Nov 22, 2004) (calling for further work on the topic of competition policy to be undertaken by the Working Group on the Interaction Between Trade and Competition Policy).

20 Id.

21 See Paul Blustein, *Walkout Shadows Free Trade's Future; WTO Meeting, Stymied by Accusations, Seen as Sign of Globalization's Limits*, Wash Post A13 (Sept 16, 2003) (blaming disagreements on antitrust laws and cross-border investment, in addition to agricultural policy, for the walkout that ended the global trade negotiations).

22 See, for example, Andrew Guzman, *The Case for International Antitrust*, 22 Berkeley J Intl L 355, 357 (2004) (arguing that international trade can "distort policy decisions in antitrust"). One can certainly debate whether that idea—which is also said to underlie the commitment of the European Union to strong competition rules—is sound or not, but it remains true that much of the political force behind global competition rules rests on this assumption.

Before addressing the question of whether each and every Doha topic ought to be reflected in global competition rules, it is useful to begin by taking a look at these three points.

A. Background Rules

Background rules sound like an innocuous idea, but it is still necessary to ask whether there are any such rules that are typically not found in the 100-odd domestic antitrust laws that exist in the world that are good candidates for an international antitrust agreement. One perennial candidate for such a rule is the principle of nondiscrimination, well known to students of the General Agreement on Tariffs and Trade (GATT) and the WTO. In that setting, the word nondiscrimination calls to mind two related rules: the most-favored-nation commitment, which obliges members not to pick and choose among their fellow signatories, but instead to treat all of them alike;[23] and the national treatment commitment, which obliges members to treat persons from fellow members just as well as they treat their own nationals.[24] At least within the U.S. antitrust laws, one does not find a similar rule forbidding companies from engaging in nationality-based discrimination. If Megafirm decides, on its own, to purchase only from suppliers in the United States, nothing in the antitrust laws will prevent it from doing so. On the other hand, when the Department of Justice (DOJ) or the Federal Trade Commission (FTC) takes action, those agencies do not discriminate on the basis of the nationality of the targeted person or company unless some other law expressly calls for some form of differential treatment.[25]

A realist would argue that it is worth including a nondiscrimination principle for the simple reason that many countries either explicitly or implicitly still reserve the right to prefer their domestic industries.[26] On the whole, these are developing countries, not countries like the members of the Organisation for Economic Co-operation and Development. The WTO discussions themselves have acknowledged that any agreement concluded under the WTO's auspices would need

23 See GATT, Art I, reprinted in John H. Jackson, William J. Davey, and Alan O. Sykes, Jr., *2002 Documents Supplement to Legal Problems of International Economic Relations* 15, 17–18 (West 4th ed 2002) (setting out the obligations of the most-favored-nation commitment).

24 GATT, Art III at 20–21 (cited in note 23) (setting out the national treatment commitment).

25 Some such laws do still exist, although their numbers are decreasing. See, for example, 47 USC § 310 (2000) (restricting broadcast licenses on the basis of nationality). See generally Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much Is Enough?*, 9 Am U J Intl L & Policy 417 (1994).

26 See Eleanor M. Fox, *Global Markets, National Law, and the Regulation of Business: A View from the Top*, 75 St John's L Rev 383, 392 (2001).

to provide for special treatment for developing countries.[27] Whether this is a good idea or a bad idea is obviously debatable. What is not debatable, however, is the question of whether it is consistent with a robust nondiscrimination principle: it is not.

My suggestion would be to leave out of the international antitrust code any rules that are not particular to antitrust. This would include not only the nondiscrimination norm, which is broadly applicable to every area touched by the WTO, but also the call for "transparency" of laws, regulations, and official decisions. The term transparency is frequently used in international circles. It means, roughly, that all laws, regulations, and administrative decisions should be publicly available; agencies should explain the reasons behind their actions; and the limits on administrative discretion should be testable and publicly defined. As with nondiscrimination, all of those are good things in principle, but the need for them is certainly not confined to antitrust. Nor is the call for procedural fairness, or for a noncorrupt and independent judiciary, or for access to legal services. In the interest of simplicity, all those topics can and should be addressed elsewhere.

B. Content of Agreement

The heart of any agreement is obviously the substantive antitrust rules it contains. Logically, one might start with the key definitions, move on to rules of conduct, and end with any exceptions that ought to be recognized.

1. Definitions.

The number of terms that require definition is surprisingly small, and the number of key principles that an agreement would need to reflect is even smaller.

Here are my candidates for terms that usefully could be defined in this type of agreement. As this Symposium makes clear, reasonable people can disagree on the meaning of each term, but for present purposes the assumption is that common ground can be reached at least within the United States, and with any luck, globally. Rather than attempt that definitional exercise here, this Essay merely lists the terms for which a common understanding would be important:

- Acquisition
- Cartel

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27 See World Trade Organization, Doha Ministerial Declaration ¶ 44 (cited in note 19) (agreeing to review and strengthen "all special and differential treatment provisions").

- Concerted action
- Exclusionary practice
- Exclusive dealing
- Horizontal restraints
- Joint venture
- Market power
- Merger
- Monopoly
- Person
- Price discrimination
- Refusal to deal
- Resale price maintenance
- Tying arrangements
- Vertical restraints

Once these terms are defined, the stage is set for a general statement of purpose. The greatest value in such a statement is in its ability to focus both enforcers of the law (public or private) and judicial tribunals on what is relevant.

2. Purpose.

Many foreign laws contain broad statements of purpose that (literally construed) appear to place the entire weight of economic success, social equity, and international status on the back of the competition law.[28] Perhaps at one time the U.S. antitrust laws also carried this burden. But for the last thirty years or so, there has been a broad consensus in the United States that antitrust is the body of law targeted at business practices that harm economic welfare—practices that lead to overcharges, underpayments, or anticompetitive exclusion from markets that will in turn lead to higher prices, lower quality, less innovation, or other undesirable results. The model antitrust code should state that this is the sole purpose of competition law. If other objectives such as promoting local employment, preserving small business, or ensuring fair business practices were included, the law would lose important predictability, and it would be quite difficult to reconcile these objectives at the international level. With respect to a side debate that has been going on for many years—namely, whether the

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28 See Wood, 3 Chi J Intl L at 393–94 (cited in note 2) (showing that different countries have different goals for their competition laws).

"welfare" to be protected is only consumer welfare, or whether it ought to be viewed as total welfare, there is no reason not to adopt a total welfare standard, as long as that standard is understood to include a high degree of skepticism for business claims that higher prices will "really" help consumers in the end.[29]

3. Substantive rules.

Now, for the central prohibitions. Only three broad situations must be addressed: first, concerted practices that do not lead to permanent integration; second, single-firm conduct; and finally, mergers and acquisitions (that is, agreements permanently to unite all or part of two or more firms or their assets). For historical reasons, the U.S. antitrust laws only roughly reflect these three subjects. Section 1 of the Sherman Act refers redundantly to "contracts, combinations, and conspiracies" in restraint of trade;[30] § 2 covers not only single-firm monopolization and attempts to monopolize, but also "conspiracy" to monopolize;[31] and § 2 and § 3 of the Clayton Act also cover part of the "concerted action" ground.[32] Perhaps the Antitrust Modernization Commission, established under authority recently granted by Congress,[33] will be willing to recommend radical restructuring of the U.S. laws in this area, to eliminate redundancies that currently exist between the Clayton Act and the Sherman Act, and even to look again at the triply redundant public enforcement structure that empowers two different federal agencies as well as all of the state attorneys general. Others in the past have taken on this task, and it has proven exceptionally difficult. Even if the Commission chooses to recommend improvements that do not require an extensive legislative overhaul, however, that does not mean that even the United States would want an international document to replicate the internal structure of U.S. law.

Instead, the international prohibitions ought to be divided into the three broad groups defined here: concerted action, single-firm behavior, and mergers and acquisitions. Within the concerted action group, one can identify three distinct sets of issues: those involving horizontal competitors (or producers of substitute goods or services), those involving vertical arrangements (or complementary products or

29 See Richard A. Posner, *Antitrust Law* 23–28 (Chicago 2d ed 2001). See also Oliver Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am Econ Rev 18 (1968).

30 15 USC § 1 (2000).

31 15 USC § 2 (2000).

32 15 USC §§ 13–14 (2000).

33 See 21st Century Department of Justice Appropriations Authorization Act, Pub L No 107-273, 116 Stat 1758, 1856 (2002), codified at 15 USC § 1 note.

services), and those involving licenses of intellectual property. Only the first could involve a cartel, and thus only the first would justify what is now called a "per se" prohibition.[34] This kind of agreement would be an opportunity to avoid that phrase, however, which might help avoid misunderstandings.

a) Horizontal restraints. If a cartel (as defined in the agreement) is found,[35] then illegality should result whether or not its members collectively possess market power. Here there is a need to decide whether to prohibit the agreement alone, or only those agreements that are implemented somehow, through actual price-fixing, bid-rigging, market divisions, or other anticompetitive acts. In keeping with U.S. law on the subject,[36] it would be best to prohibit the agreement itself, recognizing that proof of the agreement will often involve proof of the overt acts.

For all the reasons so richly illustrated by U.S. antitrust history on the subject of oligopoly,[37] it is not worth trying to bring within this code concerted practices that fall short of agreement. If one were to do anything useful in this area, it would be to show how certain kinds of economic evidence give rise to a plausible inference of intent to act in a coordinated fashion interdependently. Beyond that, any effort to reach oligopoly directly runs too great a risk of turning into a theory against shared monopoly or collective dominance (as it is called in Europe). Those theories were singularly unsuccessful in the United States because they straddled the rules governing collective and individual behavior and risked an intrusive, public utility–style regulation of single-firm conduct.

As for noncartel horizontal concerted practices, the rule can be as simple as the one stated in *Valley Liquors, Inc v Renfield Importers, Ltd*[38] more than twenty years ago by Judge Posner: if the firms collec-

34 See *Northern Pacific Railway Co v United States*, 356 US 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

35 Finding a cartel would involve the familiar characterization process we know from *Broadcast Music, Inc v Columbia Broadcasting Systems, Inc*, 441 US 1, 8 (1979).

36 See *Summit Health, Ltd v Pinhas*, 500 US 322, 330 (1990) ("[T]he essence of any violation of [the Sherman Act] is the illegal agreement itself.").

37 See *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993) (holding that oligopolistic price coordination need not violate antitrust laws). See also William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L Rev 1105, 1140–44 (1989) (arguing that antitrust enforcement is justified by political and social, if not economic, concerns); Lee Goldman, *Oligopoly Policy and the* Ethyl Corp. *Case*, 65 Or L Rev 73, 73 (1986) ("[O]ligopoly pricing do[es] not have to be the result of actual agreement.").

38 678 F2d 742 (7th Cir 1982).

tively have market power, and they are taking actions that will harm economic welfare, as we have defined it, then they have violated the law.[39] Embedded in this test is the idea that some practices will indeed harm welfare, while others will be either neutral or positively procompetitive (usually because they either lead to efficiencies or they have some reasonable prospect of doing so). This is the best way to take efficiencies into account, as part of the original understanding of the practice, rather than by adopting an efficiencies defense that will excuse otherwise anticompetitive behavior. The prohibited practices would include both practices that harm consumers or suppliers of the group and practices that are unlawfully exclusionary (another defined term, by hypothesis).

It should not be necessary to have a separate section addressing joint ventures, although it might be helpful to note that joint ventures are a subset of the broad area of competitor collaborations (an idea already reflected in the United States in government guidelines for collaborations among competitors).[40] If the term "exclusionary practice" has already been defined adequately, it should be equally unnecessary to identify separately things like tying arrangements or group refusals to deal.

b) Vertical restraints. With respect to vertical restraints, U.S. law sometimes appears to have a stricter standard for inferring agreement than it uses for cartels or other horizontal agreements,[41] but sometimes it does not. In any case, the party seeking to show an agreement must show conduct inconsistent with the hypothesis of independent action, as *Monsanto Co v Spray-Rite Service Corp*[42] and *Matsushita Electric Industrial Co v Zenith Radio Corp*[43] make clear for vertical arrangements and horizontal arrangements respectively. There does not seem to be anything so extraordinary about vertical agreements in the international context that would require special treatment in the global code. Whether or not U.S. law ultimately retains the

39 See id at 745 (holding that market power and consumer harm are necessary to finding an antitrust violation).

40 See Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), online at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (visited Nov 22, 2004).

41 See *Arizona v Maricopa County Medical Society*, 457 US 332, 348 n 18 (1982) ("[H]orizontal restraints are generally less defensible than vertical restraints.").

42 465 US 752, 764 (1984) (noting that "something more than evidence of complaints is needed").

43 475 US 574, 588 (1986) (holding that plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiffs]").

Dr. Miles rule domestically,[44] the better part of valor internationally is to throw in the towel and to create a uniform, rule-of-reason-based rule of liability for vertical restraints. It is hard enough to figure out price or price levels within a single market; when one introduces the complexities of international pricing, currency fluctuations, difficulties of monitoring foreign dealers, and the like, the game is not worth the candle.

This move may be exceedingly unpopular with members of the trade community who have long urged an international antitrust code. Their agenda has been to secure access to foreign markets for U.S. companies, and they are convinced that vertical restraints in general, and vertical price restraints in particular, have been used to exclude American companies. Exclusive dealing arrangements that exist on a countrywide basis, such as was allegedly the case in Japan in industries like flat glass and autos, can exclude foreign companies just as effectively as tariffs by foreclosing access to available distribution outlets. To take a U.S.-based approach on vertical restraints, and to adopt a rule under which such restraints will be condemned in international transactions only upon affirmative proof of an anticompetitive effect, will disappoint those whose focus is on market access. Indeed, many of them have urged that in international transactions, individual firms should be required to deal with suppliers and customers on a basis that does not discriminate on the ground of nationality. Such a rule would be in serious tension with the *Colgate* doctrine.[45] Obviously, the United States has other laws that address nationality-based discrimination,[46] and the fact that the antitrust laws might not contain such a rule says nothing about the way other laws might operate.

c) Single-firm market power. The initial question for this topic is what to call it. In the United States, § 2 of the Sherman Act speaks of monopolization, attempts to monopolize, and conspiracies to monopolize. In many other countries, the term "monopoly" appears nowhere in the law, and instead single-firm market power is addressed

44 See *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373, 408 (1911) (establishing a rule of per se illegality for vertical price-fixing arrangements, also known as minimum resale price maintenance). But see Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U Chi L Rev 6 (1981); Posner, *Antitrust Law* at 182–83 (cited in note 29) (advocating per se legality).

45 See *United States v Colgate & Co*, 250 US 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.").

46 See, for example, 42 USC § 1981 (2000) (banning nationality-based discrimination in employment).

under the rubric of abuse of a dominant position.[47] Numerous important questions must be answered, including where to place the threshold level of power; how to administer a rule of legality that uses a sliding scale of market power, if there is to be one; and how to distinguish between, on the one hand, legitimate efforts to compete that may be undertaken even by a monopolist or dominant firm and, on the other hand, illegitimate efforts to secure or entrench market power.

d) Mergers and acquisitions. In this area, it would be hard to improve on the horizontal merger guidelines in place since 1992 in the United States.[48] The international agreement should codify the "significant lessening of competition" test,[49] rather than the (now modified) European dominance test.[50] Moreover, the guidelines usefully identify two different types of competitive harm that might result from a merger or acquisition: harms from coordinated behavior by the remaining firms in the market, and harms from the unilateral action of the merged firm.[51] The two-year time period used as a rule of thumb in the guidelines for predictions of likely competitive harm is also realistic:[52] not many people have a crystal ball that will enable them to see likely competitive harms five or ten years in the future. In one respect, however, the U.S. system does not offer the best model because it never definitively approves a merger. The international agreement should use something like the European system of ex ante approvals, under which a transaction receives definitive clearance at the end of the specified review period, rather than something like the U.S. system, under which the responsible agency merely refrains from suing at the end of the review period. Under the U.S. system, there is always a risk that another party may sue to challenge the merger[53] or that any plaintiff will challenge a merger or acquisition many years after its

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47 See Treaty Establishing the European Community, 298 UN Treaty Ser 11, 48 (1957) (prohibiting any action to "take improper advantage of a dominant position in the [market]").

48 U.S. Department of Justice and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 57 Fed Reg 41552.

49 See *Minneapolis & St. Louis Railway Co v United States*, 361 US 173, 188 (1959) ("[T]he important thing is not whether there is possibility of competition, but whether there is probability of existing or potential competition being diminished or strangled.") (internal quotation marks omitted).

50 See Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 Am U Intl L Rev 769, 796 (2004) ("Analysis by the Commission has traditionally focused substantive review through the 'dominance' test, usually taken to ban mergers creating a market share of forty percent or more.").

51 *1992 Horizontal Merger Guidelines*, 57 Fed Reg at 41558–61 (cited in note 48) (explaining the two types of harms that a merger or acquisition could cause).

52 Id at 41561–62.

53 See, for example, *California v American Stores Co*, 495 US 271 (1990) (permitting the state of California to challenge an acquisition even after the FTC settled with the parties and obtained a consent decree).

consummation on the grounds that it now appears to have had anti-competitive effects.[54] For the mergers that were permitted and turn out to be anticompetitive, the remedy must lie in either the single-firm part of the law or the concerted action part, if any such harm can be proven.

C. Exceptions

Many international efforts have foundered here. It is tempting not to recognize any. This would mean, for example, that there would be no exception for state action from a subordinate unit of government,[55] no exception for authorized cartels,[56] and no exception for lobbying.[57] But such an absolutist approach is not desirable, at least with respect to what we would call *Noerr-Pennington* activity.[58] If firms can persuade their governments to pass anticompetitive laws or regulations, that is their prerogative in a democratic society. And if such laws exist, they inevitably will modify the basic competition prohibitions. Perhaps the best way to protect competition is to adopt a "clear statement" rule for this kind of legislation:[59] no (new) law will be deemed impliedly to repeal the competition code, and only a clear statement indicating intent to displace competition will suffice. Laws of lower governmental units, however, even if they are states in the United States, or provinces in Canada, or cantons in Switzerland, should not suffice. *Parker v Brown*[60] can be jettisoned for international transactions in the interest of global competitive harmony. The drafters should also eliminate the ability of trade authorities to structure world markets in a way that mimics cartel behavior, with price undertakings that substitute for antidumping remedies, or some modern equivalent of the old voluntary restraint agreements.

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54 This is known as the "time of the suit" doctrine, which was endorsed by the Supreme Court in *United States v E.I. DuPont de Nemours & Co*, 353 US 586, 607 (1957) (evaluating a 1949 challenge to DuPont's 1917–1919 acquisition of a 23 percent interest in General Motors in light of competitive conditions at the time of the suit).

55 See *United States Postal Service v Flamingo Industries*, 540 US 736 (2004) (holding that the Postal Service, as part of the U.S. government, is not subject to antitrust liability).

56 See id at 747 (noting the Postal Service's "state-conferred monopoly on mail delivery").

57 See *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127, 135 (1961) ("[N]o violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."); *United Mine Workers of America v Pennington*, 381 US 657, 670 (1965) ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

58 See *Noerr*, 365 US 127; *Pennington*, 381 US 657.

59 See, for example, *Dellmuth v Muth*, 491 US 223 (1989) (holding that Congress may abrogate state immunity only by making its intention to do so unmistakably clear in the language of the statute).

60 317 US 341 (1943) (holding that the Sherman Act does not apply to state actions).

D. Procedural Rules

Finally, there is the all-important topic of procedure. It is well known that the United States is the only country with an exquisitely well-developed private right of action in antitrust cases. It is also the case that no one has ever seriously complained about an overall lack of enforcement of U.S. antitrust laws. If the DOJ is not interested in a case, the FTC might be. If neither one is, then a state attorney general might do something, and if all else fails, there will almost certainly be a private plaintiff with antitrust injury and standing to sue for any bona fide antitrust problem. Recalling again that a significant amount of the momentum behind the call for international antitrust rules came from those who argued that international markets are distorted when antitrust is enforced strongly in certain markets and ignored in others, it seems that ensuring that every country provides for private rights of action is the simplest solution to the problem. If a U.S. firm thinks that anticompetitive collective action is keeping it out of Country A, then let it bring a lawsuit in the courts of Country A.

Although the United States has been committed to treble damages,[61] at least in cartel cases where the complaint is of overcharges or underpayments, it is fair to say that the rest of the world is nowhere close to accepting this remedy. Perhaps this one note of practicality should influence the agreement, and it ought to require only a private right of action in which the successful plaintiff is guaranteed to recover actual damages, prejudgment interest, and attorneys' fees. Treble damages would continue to be available at any nation's option.

Other procedural details would also have to be addressed, including topics like statutes of limitations, availability of injunctive relief, private rights of action in merger cases, and the designation of a single responsible agency in each signatory country for any discovery coordination that might be needed. Indeed, this last point is one that should not be overlooked, because effective prosecution of international cartels must often take place with close cooperation among the agencies of several countries. In keeping with the goals of the International Antitrust Enforcement Assistance Act of 1994,[62] such information sharing should be authorized and encouraged in the code, subject of course to strict protections for the collection and handling of confidential business information.

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61 15 USC § 15 (2000) (providing for treble damages in private antitrust suits).

62 15 USC § 6201 et seq (2000) (facilitating obtaining foreign antitrust evidence).

CONCLUSION

So there we have it: an international antitrust code to be administered by the national authorities and courts of each signatory country that strips down competition law to its bare essentials and commits each country to a sound, economically-based set of rules. The only remaining question is whether any international body ought to have supervisory control over the individual national decisions. My answer would be no, for all the reasons why I have opposed the creation of a WTO antitrust code. There is no such body for the Warsaw Convention, or for the CISG, or for the New York Convention, or for myriad other successful multilateral conventions. Conflicts do arise from time to time, of course, but it seems unlikely that they will be resolved any more effectively under an institution's umbrella than they already are on an ad hoc basis. After some initial tension over the GE-Honeywell merger, which was blocked by the EU after it was permitted in the United States,[63] feathers settled again and everyone learned from the disagreements. There is simply not enough evidence of intractable problems to justify the creation of dispute resolution machinery of this kind. If and when such evidence arises, this point can be revisited.

In the final analysis, one must still wonder whether the effort it would take to achieve international consensus on all these points would be worth it. The alternative would be to urge countries to incorporate in their domestic laws the most important principles and to live with the differences that remain. Global convergence on competition law has come a long way since the years after the Second World War when the United States appeared to be the only country with a vigorous antitrust culture. That process is likely to continue, even if not at the pace some would prefer. The purpose of this Essay is to suggest which rules would be worth working for, if the world became serious about pursuing a global competition agenda. Even granting the consensus that exists at the level of broad principle, the details would indeed be devilish.

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63 See Anita Raghavan and Bob Davis, *Uncle Sam and Mr. Monti: Tale of Two Trustbusters*, Wall St J A11 (June 15, 2001) (describing the differing views among antitrust authorities in the U.S. and the EU of the GE-Honeywell merger).