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Antitrust in Today's World Economy

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ANTITRUST IN TODAY'S WORLD ECONOMY

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In discussing the proper role of antitrust in a world economy, it is helpful to distinguish between the U.S. domestic economy (including imports) and U.S. export trade and foreign investment. Both sides of the equation have changed significantly in the last several decades.

Domestically, in 1950 the U.S. economy was largely isolated from foreign competition, primarily as a result of tariffs and U.S. industrial preeminence after World War II. The U.S. was also relatively less dependent on foreign capital, natural resources, and technology. In this cushioned environment, antitrust laws were vigorously enforced to promote domestic competition.[1] There was little resort to trade laws to fight foreign competition, with the limited exception of section 337[2]—used almost exclusively as an additional remedy to block the importation of products infringing U.S. patents. Today this picture is radically different. Through negotiations conducted under the auspices of the General Agreement on Tariffs and Trade ("GATT"),[3] tariffs have been eliminated or substantially reduced for numerous goods. Imports now constitute an important, if not essential, component of the U.S. economy in many sectors. Use of the trade laws to protect against foreign competition has become standard in many industries.

There are other significant changed circumstances. Since 1958, foreign antitrust enforcement has increased substantially, particularly in Western Europe with the development of extensive enforcement regimes in the European Economic Community ("EEC")[4] and the Federal Republic of Germany.[5] There is also the increased role of foreign governments and state-controlled enterprises in international trade. Coincidentally and unrelated to the changed international picture is the revolutionary relaxation in U.S. domestic antitrust enforce-

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1 See 1 B. Hawk, United States, Common Market and International Antitrust Law, ch. 1, at 10-20 (2d ed. 1986).

2 19 U.S.C. § 1337 (1982 & Supp. III 1985).

3 General Agreement on Tariffs and Trade, Oct. 30, 1947, Part V, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

4 See 2 B. Hawk, supra note 1, at chs. 7-13.

5 See generally B5 K. Stockmann & V. Strauch, World Law of Competition (J. von Kalinowski ed. 1987).

ment and rules in the last ten years.[6]

I. U.S. DOMESTIC ECONOMY AND IMPORTS

Two general questions concerning antitrust, as applied to the domestic or import side of the equation, flow from these changed circumstances. First, how should U.S. antitrust analysis reflect this increased foreign competition and the other changed circumstances? Second, what effects on antitrust policy result from the increased resort to trade laws and other "protectionist" measures?

A. *Molding Antitrust Analysis to Reflect Increased Foreign Competition and Other Changed Circumstances*

The U.S. continues to have a national interest in remaining open to imports, and a commitment to the use of the antitrust laws to protect import trade. The so-called "world economy"—or more accurately, the increased interdependence of the U.S. economy and other economies *and* the other international changes noted above—might arguably require changes in antitrust jurisdictional and substantive rules.

Against the background of changed circumstances, debates about antitrust jurisdiction in international trade appear trivial—albeit intellectually interesting and output-enhancing with respect to articles, books, and weekend conferences in English stately homes. At least in view of this conference's focus on the world economy, jurisidiction is a sideshow pertaining mostly to conflicts with foreign governments resulting from the application of U.S. antitrust laws. These conflicts can be better avoided or resolved through bilateral agreements than through unilateral disarming by the U.S. in amending the jurisdictional reach of its antitrust laws. For example, the U.S.-Australian Agreement[7] has done more to avoid and moderate antitrust disputes between the two countries than any comity-based jurisidictional rule created by the courts (for example, the *Timberlane Lumber Co. v. Bank of America* "balancing" test of the Ninth Circuit[8]). More important, the Administration's proposed amendments concerning jurisdiction and venue[9] not only divert attention from more pressing issues

[6] See Hawk, The American (Antitrust) Revolution: Lessons for the EEC?, Eur. Comp. L. Rev. (forthcoming 1988).

[7] Agreement on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10365.

[8] 549 F.2d 597, 612-15 (9th Cir. 1976), on remand, 574 F. Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985).

[9] See Foreign Trade Antitrust Improvements Act of 1987, S. 572, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess., pt. 3 (1987).

and problems but also run some risk of weakening antitrust enforcement with respect to international cartels that harm U.S. national interests and U.S. consumer welfare.

How do the changed international circumstances affect substantive antitrust rules and enforcement policy in domestic commerce? First, increased U.S. dependence on foreign capital, technology, and natural resources places a premium on antitrust protection of the U.S. interest in low-cost efficient foreign supplies. The antitrust implications are: (1) continued strong enforcement against international and foreign cartels that affect U.S. domestic markets, particularly restrictions on imports into the U.S., because foreign antitrust enforcement, including that of the EEC, cannot be relied on to protect the U.S. against international cartels, as EEC enforcement is limited to cartels that harm the EEC; (2) the need for foreign investment into the U.S. requires sensitive application of merger and joint venture rules in order not to inhibit foreign entry and participation in U.S. markets; (3) antitrust rules on patent and know-how transfers must not deter or prevent U.S. access to foreign technology; (4) strict antitrust enforcement against export cartels must continue, despite the uncomfortable "beggar thy neighbor" policy of the U.S. in promoting its own export cartels.[10] A possible solution to mutually harmful export cartels might be for all countries (both the donors and the recipients of export cartels) to permit under their antitrust laws, only efficiency-enhancing export arrangements, on the rationale that both the exporting and importing nation would benefit.[11]

Second, market analysis in antitrust cases must give greater weight and recognition to foreign competition. As Don Baker illustrated, this issue is usually seen most clearly in merger decisions with respect to geographic market definition.[12] But the same issue also arises in connection with section 2 claims, rule of reason cases under section 1, and vertical restraint cases under section 3 of the Clayton Act. All require market analysis and market definition.

Third, the question arises whether the per se rule should give way to the rule of reason in international cases. This misstates the issue and is of diminishing practical importance given the narrowing

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[10] Antitrust law exemptions for certain export cartels and other arrangements among persons engaged in U.S. export trade are contained in the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at 15 U.S.C. §§ 4001-4021 (1982)) and the Webb-Pomerene Act, ch. 50, 40 Stat. 516 (1918) (codified at 15 U.S.C. §§ 61-65 (1982)).

[11] This solution fails to take into account, however, other policy considerations such as employment and development of local industries.

[12] See Baker, The Proper Role for Antitrust in a Not-Yet-Global Economy, 9 Cardozo L. Rev. 1135 (1988).

of the kinds of arrangements subject to the per se prohibition. There are differences, however, when applying the rule of reason to a case involving foreign competition. Factual issues concerning market power and market definition may be more complicated, and courts should not blindly apply precedent developed in a purely domestic context. Additional justifications may exist where there is a foreign supplier.

A net national welfare standard,[13] rather than the domestic consumer welfare standard, might be more appropriate in the international context. In a closed economy, the primary if not exclusive antitrust policy objective is consumer welfare or allocative efficiency. In an economy open to imports and foreign competition, the antitrust policy objective might be a net national welfare standard which aggregates the citizens' consumer surplus *and* the profits of domestic firms earned in their domestic and export operations. The national interest from this point of view is concerned more with the relative terms and conditions of trade than with the volume of exports.[14] A net national welfare standard would have several antitrust policy implications. Export cartels and vertical restraints imposed on foreign resellers that increase profits of U.S. exporters without a tradeoff loss in U.S. consumer welfare (for example, through higher prices or reduced output in U.S. markets) might receive more lenient treatment under a net national welfare standard. Such a standard could well invite retaliation by trading partners, however, and ultimately prove counterproductive.

Fourth, the increasing role of foreign governments and state enterprises in U.S. domestic and international trade has several implications for antitrust policy. Differences in the competitive conditions in U.S. and foreign markets may require changes in traditional substantive rules. For example, predatory pricing tests should differ where the alleged predator is a foreign company. Predation by foreign firms raises different issues. To cite only one example, most of the cost-based rules for predatory pricing by domestic or U.S.-based firms rest on efficiency grounds.[15] Widely differing governmental policies and trading conditions in various countries make it uncertain whether the same efficiency judgments can be made in the case of a foreign

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13 For a discussion of net national welfare standards and recent developments in the international trade literature, see Ordover, Transnational Antitrust and Economics, in 1984 Fordham Corp. L. Inst. 233 (B. Hawk ed. 1985).

14 See 1 B. Hawk, supra note 1, at 2-3.

15 See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983); Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975).

predator. Strategic considerations are probably more important with respect to foreign predation of U.S. firms in U.S. markets.[16] It is unfortunate that the Court, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[17] failed to focus on the differences between foreign and domestic predators and simply relied on literature pessimistic about the likelihood of domestic predation.[18]

The increased frequency and complexity of dealings between private firms and foreign governments require rethinking and perhaps reformulation of the doctrines and defenses applicable in the international antitrust area—foreign government subsidization as an antitrust violation and the antitrust liability of private firms for conduct and agreements encouraged but not compelled by foreign governments.[19]

B. *Trade Laws and Protectionist Measures Affecting Antitrust Policy*

The second general issue on the domestic or the import side concerns the effects on antitrust policy resulting from the increased resort to trade laws and other "protectionist" measures. This question devolves into two further questions: First, how do we resolve the tensions, if not conflicts, between antitrust policy and trade law or protectionist policy? It is well beyond the scope of these brief comments even to begin to discuss this problem. Suffice it to say that more fundamental questions must be addressed before confident conclusions can be drawn about the relationship between antitrust and trade policy. For example, one must first ask questions concerning the U.S. national interest in imports and foreign competition and the role of antitrust in furthering that interest, and whether it is possible to distinguish among U.S. industries and sectors with respect to open or protected competition.

Second, how should the antitrust laws take into account the trade laws? As Harvey Applebaum has discussed this question,[20] I shall simply make several points. First, misuse of the trade laws will be alleged more frequently as an antitrust violation. Second, a greater effort should be made to harmonize antitrust and trade law standards where possible under the statutes—for example, tests for predatory

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16 See 1 B. Hawk, supra note 1, ch. 4, at 340-50.

17 475 U.S. 574 (1986).

18 Id. at 1357-58.

19 See 1 B. Hawk, supra note 1, at ch. 5.

20 See Applebaum, The Coexistence of Antitrust Law and Trade Law with Antitrust Policy, 9 Cardozo L. Rev. 1169 (1988).

pricing and dumping. Third, the trade laws and resort to protectionist measures should be taken into account in the antitrust analysis. Thus, as Don Baker so eloquently argued, merger analysis must reflect the trade laws' and protectionist measures' effects on actual and potential foreign competition.[21] I am not as pessimistic or critical as Don about the Justice Department Merger Guidelines' treatment of foreign competition. I think the Guidelines do provide substantial guidance in a highly complex, fact-specific area.[22] On a lighter side, I must assume that Don is joking when he suggests that political scientists should be expert witnesses in merger litigation on issues of foreign competition and prospective protectionist measures.[23] My assumption that this is not a serious suggestion rests on two grounds. First, I agree that there are political dimensions to the analysis of the effect of imports and foreign competition in defining relevant markets and otherwise assessing the domestic competitive situation. I am less confident, however, that these political factors can either be translated into operable legal rules or even used successfully in the adversarial setting of antitrust litigation. Second, I have no confidence whatsoever that political science can add anything but confusion and obfuscation to the determination or speculation about future changes in trade legislation, enforcement, and litigation.

II. U.S. Export Trade and Investment

Let me turn now to the second side of the equation—U.S. exports and outward investment. Despite occasional cries to the contrary, the issue of the antitrust laws' adverse effect on U.S. exports and foreign investment is no longer viable, if it ever was.[24] The jurisdictional amendments to the Sherman Act in 1982,[25] and the application of permissive substantive rules to joint ventures and vertical restraints make this a largely dead issue or, at the least, make it evident that the antitrust laws are cast as the scapegoat for failures in U.S. export performance.

There are several issues and subjects in the export area that are more important than the adverse-impact canard. First, should foreclosure of other exporters or of export trade be a sufficient condition for liability, or is proof of anticompetitive effects in the U.S. re-

21 See Baker, supra note 12, at 1144.

22 U.S. Dep't of Justice Merger Guidelines, 49 Fed. Reg. 26,827 (1984).

23 See Baker, supra note 12, at 1158.

24 See, e.g., 1 B. Hawk, supra note 1, ch. 1, at 15-20.

25 15 U.S.C. § 6a (1982).

quired?[26] The case law is unclear and it will be useful to have the Justice Department's opinion in the revised international guidelines. Second, foreclosure in export cases should be measured in light of two factors: the share of the industry's export market relative to its U.S. market and the share of the export market preempted or foreclosed by the challenged export arrangement. In many cases, foreclosure should be measured by taking into account all foreign markets available to U.S. exporters. Third, the policy tension between protection of competition and protection of competitors is particularly acute with respect to restrictions in export commerce. Relevant economic theory is far less developed with respect to international trade. For example, a mere increase in export volume may be less beneficial to U.S. net national welfare than the relative terms and conditions of trade. Domestic antitrust standards are not necessarily appropriate. Thus, effects on export volume should not be equated with output effects which are an important consideration in domestic cases under the rule of reason.

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26 See 1 B. Hawk, supra note 1, ch. 3, at 165-71.