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Professor Waller's Un-American Approach to Antitrust

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I. INTRODUCTION

Professor Waller asks an un-American question – what can the United States antitrust program learn from the rest of the world?[1] This question is un-American because we in the United States rarely look to others for advice. Besides, we invented antitrust[2] and we were practically alone in the world in enforcing antitrust for almost a century.[3] Only during the current generation have many other nations had active and vigorous antitrust programs.[4] Moreover, the United States is in the business of exporting our accumulated century of

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1. *See* Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond,* 32 LOY. U. CHI. L. J. 113 (2000).

2. Professor Waller notes that, technically, Canada enacted an antitrust law a year before the United States did. *See* Waller, *supra* note 1, at 114. But Canada's antitrust law was virtually unenforced until the 1980s. *See* W.T. Stanbury, *Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform, in* CANADIAN COMPETITION LAW AND POLICY AT THE CENTENARY 61-148 (R.S. Khemani & W.T. Stanbury eds., 1991). Moreover, several individual states within the United States enacted their own antitrust laws before the Canadian law was passed. *See* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918,* 135 U. PA. L. REV. 495, 498-500 (1987). Professor May demonstrates that several extremely important state antitrust cases were filed before the Canadian antitrust law was passed. *See id.* at 500-01. Thus, the Canadians cannot truly be said to have been in the antitrust business before the United States.

3. Our first national antitrust law was passed in 1890. *See* 15 U.S.C. §§ 1-7 (1994) (commonly referred to as the Sherman Act); *see also* 9 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS & TRADE REGULATION § 200.01, at 200-6 to 200-7 (Frank Fine ed., 2d ed. 2000). By contrast, other nations rarely possessed and enforced their own antitrust laws before 1960. *See* THOMAS C. VINJE ET AL., WORLD ANTITRUST LAW AND PRACTICE §§ 15.1, 25.2, 26.1, 28.1, 29B.1, 29C.1, 33.1, 35.1 (James J. Garrett ed. 1997 & Supp. 1999) (detailing the beginnings of antitrust law in the European Union, United Kingdom, Germany, Italy, Belgium, the Netherlands, Mexico and Japan).

4. *See* VINJE ET AL., *supra* note 3, §§ 15.1, 25.2, 26.1, 28.1, 29B.1, 29C.1, 33.1, 35.1.

antitrust wisdom through a wide variety of methods, and we revel in playing this role.[5] We Americans are generally provincial and unaccustomed to taking advice from the rest of the world in anything, but least of all in the area of antitrust.[6] That is why Professor Waller's suggestion that we do so is un-American.

Still, there are three reasons why Professor Waller is correct and the United States should consider what lessons we could learn from other nations. First, the European Community and other nations now have had roughly a generation of real experience with antitrust.[7] Although their economies are as developed as ours, they have different laws and different enforcement mechanisms.[8] They have had different antitrust experiences and have run "laboratory tests" that we have, perhaps, never run, or have run only during a very different economic era.[9]

Second, other nations have essentially re-thought every antitrust issue from scratch. The Europeans take much less for granted and will ask questions that we may not ask.[10] By contrast, after more than a century of antitrust, we often have an incrementalist mentality.

Third, if we are so smart, why has our antitrust policy changed so radically within the past generation?[11] Contrast Warren Court antitrust policy with Reagan Administration antitrust policy with Clinton Administration antitrust policy and you will see sharp, even radical, swings in policy.[12] We certainly cannot say with a straight face that, with our century of experience, we have got antitrust policy basically right and are now just fiddling with the fourth decimal place.[13] For all

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5. Among the methods that we use to share our accumulated antitrust expertise are conferences, courses, sending people to work with new competition agencies, sending material, and discussing issues over the phone and by e-mail. I confess that I have joined the bandwagon and evangelized the virtues of American antitrust at meetings and conferences in Europe, Latin America, and Asia, and have advised visiting delegations from many nations.

6. *See* Waller, *supra* note 1, at 115.

7. *See* VINJE ET AL., *supra* note 3, §§ 15.1, 25.2, 26.1, 28.1, 29B.1, 29C.1, 33.1, 35.1.

8. *See id.*

9. There might be times, moreover, where we can learn antitrust lessons even from nations without effective antitrust enforcement. *See* Robert H. Lande & Richard O. Zerbe, Jr., *Anticonsumer Effects of Union Mergers: An Antitrust Solution*, 46 DUKE L.J. 197, 227-37 (1996); Robert H. Lande & Richard O. Zerbe, Jr., *More Lessons From Japan: End Industrywide Collective Bargaining?*, 4 ASIAN ECON. J. 28 (1990) (both analyzing the collective bargaining system in Japan as a potential model for the United States).

10. *See* Waller, *supra* note 1, at 115.

11. *See, e.g.*, Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 458-63 (1988).

12. *See id.* at 438-44.

13. For example, there is much debate over whether the current Microsoft case represents sound policy. Commentators in the United States are sharply divided. *See, e.g.*, Waller, *supra*

of these reasons, Professor Waller is correct and we should start to look to foreign antitrust experiences for guidance.

The tremendous difficulty with examining the antitrust laws of other nations is one that Professor Waller highlights. Antitrust systems have to be made with due regard for the history, culture, politics, and institutions of the affected nations.[14] Just as other nations must hesitate before adopting our suggestions, so too must we hesitate before adopting advice based upon their experiences. With this in mind I will comment upon many of the issues that Professor Waller raised.

II. THE NEED TO CONTROL PUBLIC ECONOMIC POWER

Professor Waller observes that in the United States we have such high regard for federalism and local authority that we have decided that the antitrust laws were not intended to apply to the conduct of a state or subsidiary unit unless there is some affirmative reason to believe that this presumption is incorrect.[15] We elevate this concern so much that we have even constitutionalized it.[16] As Professor Waller notes, we interpret this immunity from antitrust scrutiny quite broadly.[17]

Professor Waller observes that the European Union utilizes a much narrower "state action" exemption, in most cases forbidding member nations from taking any measure contrary to the Treaty of Rome.[18] He also cites other nations with a similarly broad reach to their antitrust laws and a similarly narrow "state action" exception.[19]

Professor Waller convincingly cites a wide range of authority for the proposition that governmental units often engage in significantly anticompetitive rent-seeking behavior.[20]

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note 1, at 118.

14. *See id.* at 114-15. I made this point as a routine matter when I gave lectures on lessons that might be learned from United States antitrust experience in Peru, Venezuela and Japan. On every occasion I was congratulated for not showing the arrogance of previous United States speakers who evangelized United States antitrust law without due regard for local conditions.

15. *See* Parker v. Brown, 317 U.S. 341 (1943) (holding that the marketing plan adopted for the 1940 raisin crop under the California Agricultural Prorate Act was not a violation of the federal Sherman Act, the Agricultural Marketing Agreement Act of 1937, or the Commerce Clause of the Constitution); Waller, *supra* note 1, at 118-19.

16. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that the Eleventh Amendment prohibits Congress from authorizing suits enacted under the Indian Gaming Regulatory Act by Native American tribes against states that do not consent to be sued).

17. *See* Waller, *supra* note 1, at 120.

18. *See id.* at 121-22.

19. *See id.* at 123-24.

20. *See id.* at 120-21.

He also points out how the United States' unusually broad "state action" doctrine is likely to handicap it in a variety of international trade negotiations involving the World Trade Organization, the North American Free Trade Agreement, etc.[21]

Professor Waller, therefore, believes that we should adopt a "state action" doctrine closer to the European approach, one that is in certain respects the opposite from the one we currently employ.[22] Professor Waller asserts that the United States should start with a presumption that antitrust laws apply to anticompetitive conduct unless we are relatively sure that Congress intended to exempt it.[23] Although he is certainly not the first commentator to call for a cutback on the United States' very expansive "state action" doctrine,[24] Professor Waller is one of the first to use other nations' experience with a very different approach to this issue to persuasively support the argument that the United States' approach is unwise.[25] At a minimum, he advocates that we affirmatively debate and decide this issue, rather than just passively accept this judicially created doctrine.[26]

There is an irony that, from an antitrust perspective, states within the United States have more autonomy and power than do nations within the European Union.[27] States here have more power both to immunize allegedly anticompetitive activity, and also to challenge it.[28] I share Professor Waller's concern about the likelihood that the United States' current approach results in widespread anticompetitive behavior and handicaps our negotiating position in a variety of international contexts.[29] I accept his belief that we should change our approach, and I also accept his proposed solution.[30]

I have questions, however, concerning how Professor Waller's suggestion could ever be implemented. There is a maxim that it is

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21. *See id.* at 124-25.

22. *See id.* at 126-27.

23. *See id.* at 126.

24. Nor does he claim to be. Waller cites others who have advocated this same position. *See id.*

25. *See id.* at 114, 126-27 (discussing the work of other scholars). Waller also provides a number of additional arguments as to why the current United States' "state action" doctrine is unwise. *See id.* at 115-16.

26. *See id.* at 127.

27. *See id.* at 118-20 (discussing autonomy of U.S. states); *id.* at 120-22 (discussing EU nations).

28. *See id.* at 118-20.

29. *See id.* at 118-19 (discussing anticompetitive behavior); *id.* at 124-25 (discussing handicapping in international contexts).

30. *See id.* at 126-27.

harder to take something away than never to get it in the first place. Now that our states enjoy this autonomy, how can we get them to relinquish something they regard as their right?[31]

Professor Waller provides two new arguments that might move our nation closer to his ideal.[32] The first is his argument which points out that France, Germany and Italy gave up much more autonomy than did the states within the United States.[33] The second is his documentation demonstrating that not doing so will increasingly disadvantage the United States in a variety of international areas.[34]

Another possibility is to devise ways whereby our states can temporarily give up some of their autonomy in a voluntary, non-binding manner. After some experience, the states might be willing to relinquish this power more formally and permanently.

The merger area could provide an example where this possibility could work. In the United States, any state can challenge any corporate merger.[35] If IBM, Microsoft, and AT&T attempted to merge, for example, any state could challenge the merger even if federal enforcers thought that the merger was benign or pro-consumer.[36] It is even possible that such a challenge could be without merit, yet the delays and uncertainty caused by the challenge could scuttle a transaction that the federal enforcers believed was in the public interest.[37]

By contrast, if an analogous merger happened in Europe it would be reviewed by the European Union, but not by the individual member states.[38] Because I believe that the issue of whether such a merger would be good for our country should be a national one, in this respect the European system is superior to ours. The difficulty, however, is the

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31. Many state antitrust enforcers remember the vacuum created by the virtual non-enforcement of antitrust by the federal enforcers during the Reagan Administration. The state enforcers are reluctant to give up any of their enforcement power in part because of their fear that an era of virtual non-enforcement could return.

32. *See* Waller, *supra* note 1, at 126-27.

33. *See id.* at 118-19, 121-22.

34. *See id.* at 124-25.

35. The only limitation is that the challenged merger must affect commerce within that state. This is not much of a limitation. *See* Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance,* 35 N.Y. L. SCH. L. REV. 1047, 1049-52, 1061-62 (1990) (discussing the balance between state and federal merger enforcement, and proposing guidelines that would allocate merger enforcement between state and federal enforcers).

36. *See id.* at 1061-62 (discussing how critics oppose the relative ease with which state attorneys general can challenge corporate mergers).

37. *See id.* at 1061-62, 1065.

38. The nation states in the European Union can only review a large merger under relatively unusual circumstances. *See id.* at 1075 (discussing three exceptions under which individual member nations can challenge mergers).

political issue of how we could move our system closer to the European model.

One way to move towards the ideal would be for federal and state antitrust enforcers in the United States to agree upon a voluntary division of merger authority.[39] Mergers with a truly national dimension - like the one hypothesized above - would be handled by federal enforcers. Mergers that were relatively small or that primarily affected a particular state could be left to the appropriate state antitrust enforcers. Such division of authority could be modeled after the European solution to this issue[40] and could, indeed, be a productive emulation of the European antitrust model.

III. ANTITRUST AS REGULATION

Professor Waller correctly observes that in the United States antitrust and economic regulation are viewed as being very different.[41] He demonstrates that in reality, however, the two systems are not as different as we generally believe.[42] He shows that in the United States the notion of antitrust as a one-time, "yes or no," market intervention has increasingly been replaced by a form of antitrust that is closer to traditional forms of economic regulation.[43] While no one would ever mistake the Federal Trade Commission for the Federal Communications Commission, the Federal Trade Commission has, as Professor Waller has shown, certainly moved in that agency's direction in recent years.[44] He also demonstrates that most other nations, by contrast, view antitrust as a subset of the field of economic regulation, and as a form of light regulation.[45]

Why the continued, even vehement insistence by much if not most of the United States antitrust community that antitrust is not a form of

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39. *See id.* at 1072-91 (proposing a solution to responsibility for merger enforcement by designating areas of federal responsibility, state responsibility and shared responsibility).

40. *See id.* at 1074-81 (discussing the benefits and problems associated with adopting the European model in the United States).

41. *See* Waller, *supra* note 1, at 127.

42. *See id.*

43. *See id.* Professor Waller develops this argument in more detail in Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement,* 77 OR. L. REV. 1383 (1998).

44. In one important respect the Federal Trade Commission might be about to take a step back. Chairman Pitofsky believes that the Commission should play a smaller role in restructuring mergers. *See* Robert Pitofsky, The Nature and Limits of Restructuring in Merger Review, Remarks at the Cutting Edge Antitrust Conference (Feb. 17, 2000) *available at* <http://www.ftc.gov/speeches/pitofsky/restruct.html>.

45. *See* Waller, *supra* note 1, at 128.

regulation? I offer three possible reasons. The first is theoretical. Antitrust has, as an essential part of its foundation, the concept of market failure.[46] The "big picture" reason for the existence of the antitrust laws is the belief that the market usually will work optimally, but that sometimes a cartel or large merger will prevent it from doing so. Under these very limited circumstances a one time or, increasingly, a slightly more complicated intervention is necessary.[47] By contrast, traditional economic regulation starts from the opposite presumption: there are certain industries for which market forces essentially cannot work, so we must use regulation to mimic the workings of the free market as best as we can.[48] These differing initial theoretical underpinnings affect how the antitrust profession views itself no matter how carefully Professor Waller points out how much the fields have converged over the years.

Second, antitrust started as being quite different from other forms of regulation. Professor Waller has shown how antirust and other regulation forms have evolved towards one another over the years.[49] Most of his examples, however, are taken from the current generation.[50] Antitrust in 1980, and certainly in 1960, was much closer to law enforcement than it is now. Yet, when practitioners think "what is antitrust?" they inevitably invoke memories of antitrust's past, the majority of which was much less regulatory than antitrust's present.

A final explanation is ideological. During the Reagan Administration virtually all government regulation was sharply denounced.[51] "Regulation" was a dirty word, and regulators were, at best, a necessary evil and, at worst, lazy leeches stealing from the taxpayers.[52] People in the antitrust community tried to find protection, or "cover," by denying that they were engaged in economic regulation. The antitrust community[53] tried to say, in effect: "we are not regulators; if anything,

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46. *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 722-34 (1997).

47. *See id.* at 716-20.

48. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 377-97 (5th ed. 1998).

49. *See* Waller, *supra* note 1, at 127.

50. *See* POSNER, *supra* note 48, at 377-97; Waller, *supra* note 43, at 1397-1400, 1401-08, 1409-17, 1423-25.

51. Recall President Reagan's statement that, "government is not the solution to our problem; government is the problem." Ronald Reagan, First Inaugural Address (Jan. 20, 1981) *available at* <http://bcn.boulder.co.us/government/national/speeches/inau4.html>.

52. Ironically, the high priority that conservatives have for business certainty and for limits on the discretion of government officials may have helped to increase the role of formal guidelines and other relatively regulatory devices in antitrust.

53. I was employed at the Federal Trade Commission from 1978 to 1984.

we are deregulators; we believe in the wonders of free markets, and only intervene on rare occasions, and then, only to help the market work." Even today, when certain people call antitrust a form of regulation I, perhaps incorrectly, view that as a possible attack on the legitimacy of the entire antitrust field.[54]

Suppose, however, that the United States did regard antitrust as another light form of regulation. This view would have the advantage of being more accurate. But could it make any other difference?

It is possible that the perception of antitrust as a form of light regulation could make it easier for the United States to engage in worthwhile economic deregulation. For example, when the airlines were deregulated[55] proponents of deregulation commonly pointed out that regulation would not be eliminated entirely - it would instead be replaced with antitrust law so that if the airlines formed a cartel or tried to engage in anticompetitive mergers, antitrust enforcement (instead of direct regulation) would protect consumers.[56] If antitrust were portrayed as just another form of regulation, then the proponents of the next target of deregulation - electricity, for example - could say that they were not abolishing regulation, they were only replacing one form of regulation with another. Perhaps this would be another way to sell deregulation efforts.

Let me now combine Professor Waller's first two main ideas in a concrete area. The United States has a very broad antitrust exemption for our insurance industry.[57] This exemption is the product of both a statute that largely leaves insurance regulation to the states[58] and our expansive "state action" doctrine.[59] The insurance industry argues that

54. For example, Professor Waller notes that Professor Fred McChesney, a leading conservative/libertarian critic of antitrust enforcement, has called antitrust just another form of regulation. *See* Waller, *supra* note 43, at 1386. When Professor McChesney lumps antitrust together with other forms of economic regulation, he certainly is not doing so in order to compliment the basic idea of having antitrust laws or antitrust enforcement. Other scholars that Waller cites, however, are much more supportive of antitrust, and their use of the comparison would not have an ideological aspect to it. *See id.* at 1386 n.9.

55. *See* Airline Deregulation Act of 1978, 49 U.S.C. §§ 40101-40120 (1994), *amended by* Pub. L. No. 106-181, Title III, § 301, Title VII, § 702(a), 114 Stat. 115, 155 (current version at 49 U.S.C.A. §§ 40101-40124 (West 1997 & Supp. 2000)).

56. *See* Stephen G. Breyer, *Antitrust, Deregulation and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1007-09 (1987).

57. *See* 9 EARL W. KINTER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW 34, 179-80 (1989).

58. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1994).

59. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231-33 (1979) (defining the scope of the insurance industry exemption); Jeffrey D. Schwartz, Comment, *The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry*, 48 AM. U.

all kinds of calamities will befall it, the insured, and our economy if the industry were subjected to normal antitrust scrutiny instead of the existing system of state-by-state regulation.[60]

Scholars might do well to follow Professor Waller's lead and find developed economies where the insurance industry is subject, not to regulation, but to an antitrust regime that is similar to the one that we have in the United States. This would be an excellent way to test whether the calamities that the insurance industry has predicted would actually come to pass in the United States if we ever deregulated this industry and subjected it to normal antitrust scrutiny.

I am proposing, in other words, something similar to the suggestion Professor Waller makes in Section IV of his paper.[61] In this section he suggests analyzing the experience of other nations in the antidumping area for ideas on how we might modify our own antidumping regime.[62] I share his lack of love for our dumping laws and his hope that the study of foreign approaches in this area will give us ideas for ways to cut back antidumping enforcement in a manner that might be politically saleable. This is another wonderful example of how the United States could learn much from a comparative approach to law.

IV. WILL THE HIGHEST COMMON DENOMINATOR RULE?

Professor Waller notes that the recent proliferation of antitrust regimes could lead to a situation where the highest common denominator rules.[63] Multinational firms increasingly will have to conform their practices to dozens of different antitrust regimes and might, out of risk aversion, simplicity, or inflexibility, conform their practices to the most stringent laws.[64] Large multinational mergers could potentially be blocked, in whole or in part, by any of these enforcers.[65]

L. REV. 1449, 1457-59 (1999) (defining and detailing the origin of the "state action" doctrine).

60. *See* Alan M. Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 83-90 (1983) (discussing the history of the McCarran-Ferguson Act and the insurance industry's rationale for requesting an antitrust exception).

61. *See* Waller, *supra* note 1, at 134-36.

62. *See id.*

63. *See id.*

64. *See* William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 404 (1997); Robert H. Lande, *Creating Competition Policy For Transition Economies,* 23 BROOK. J. INT'L L. 339, 339-40 (1997).

65. *See* Eleanor M. Fox, *Extraterritoriality and Merger Law: Can All Nations Rule the World?*, December 1999 ANTITRUST REPORT at 2.

Professor Waller concludes that to the extent this occurs, it could be desirable.[66] Some nations' enforcers would likely challenge an anticompetitive merger, joint venture, or cartel even if other nations' enforcement agencies were understaffed, stupid, or corrupt. Whether this is desirable, however, depends in part upon one's ideology. If you are a conservative then this possibility of a trend toward the highest common denominator is highly undesirable. If you regard virtually every merger or joint venture as benign or desirable, you want as few regimes that would potentially challenge them as possible.[67] You would want the opposite of the situation that Waller foresees - a lowest common denominator approach where the most lenient standard would control. You might even feel the same way about cartels. If you believe the enforcers of most countries were likely to be corrupt, even widespread anti-cartel enforcement would do more harm than good.[68] Antitrust enforcement against cartels would just represent additional occasions for graft by the enforcers and judges, but would not benefit the public.[69]

By contrast, if you believe that strong antitrust enforcement usually is desirable, you probably would regard Professor Waller's prediction, to the extent it occurs, as welcome. Foreign cartels, for example, can escape antitrust prosecution in a variety of ways, including the act of state doctrine (OPEC's method)[70] or by operating in such a manner that they do not do business in countries with unfavorable antitrust laws (De

66. *See* Waller, *supra* note 1, at 134-35.

67. For an example of scholars with very conservative, anti-interventionist views in this area, see A. E. Rodriguez & Malcolm B. Coate, *Competition Policy in Transition Economies: The Role of Competition Advocacy,* 23 BROOK. J. INT'L. LAW 365 (1997).

68. *See id.* at 394-400 (suggesting that much antitrust enforcement is rent-seeking behavior).

69. These enforcement actions would just transfer rents from cartel members to the corrupt enforcers and judges. These transfers would not benefit the public and could serve to further erode societal respect for the rule of law.

70. *See* International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981). In *OPEC*, the International Association of Machinist and Aerospace Workers argued that OPEC violated United States antitrust law through fixing the price of oil and petroleum derived products. *See id.* at 1355. The court held that the activities of OPEC were immune from suit under the act of state doctrine. *See id.* at 1361-62. In defining this doctrine the court stated, "[t]he act of state doctrine declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *Id.* at 1358.

However, the Supreme Court in *Kirkpatrick Co. v. Environmental Tectonics Corp.* limited the application of the act of state doctrine. *See* 493 U.S. 400 (1990). In *Kirkpatrick*, the Court held that the act of state doctrine does not apply where a foreign government may merely be embarrassed about the outcome of litigation. *See id.* at 409. The Court stated, "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.*

Beers does not do business in the United States).[71] So, clever cartels often can act with impunity. This is especially true because large multinational companies often can be flexible on a nation-by-nation basis. They can retain local counsel and avoid each nation's antitrust laws on a country-by-country basis.

I largely agree with Professor Waller's prediction. Since I am generally in favor of vigorous antitrust enforcement I agree with his point that much good could arise if the highest common denominator rules. Conservatives also should agree with his prediction, even if they do not like its implications.

V. CONCLUSION

Professor Waller's admonition that the United States should analyze the experience of other nations in the antitrust area is a sound one. Over time the United States antitrust community increasingly will come to regard the individuals and institutions involved in the antitrust efforts of the European Union and other countries as our equals rather than as our younger siblings or children. As this happens I hope that we will follow Professor Waller's advice more than we do currently. For all these reasons I am delighted that Professor Waller has engaged in this un-American approach to antitrust.

71. *See* Dale J. Montpelier, Comment, *Diamonds Are Forever? Implications of United States' Antitrust Laws on International Trade and the De Beers Diamond Cartel*, 24 CAL. W. INT'L. L. J. 277, 299 (1994) (discussing the corporate structure and sales practices of De Beers and the Department of Justice's attempts to enforce United States antitrust law extraterritorially).

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