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Comparitive Competition Law as a Form of Empiricism

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COMPARATIVE COMPETITION LAW AS A FORM OF EMPIRICISM

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This short essay makes a plea for a comparative approach to the formulation of competition policy as an important type of empiricism. The United States is no longer alone, or even unusual, in having a robust form of competition policy. Competition law has enjoyed unparalleled growth throughout the world over the past twenty years. Virtually every western developed nation has created a sophisticated legal system capable of dealing with restrictive agreements, abuses of market power, as well as the notification and regulation of mergers and acquisitions that pose the threat of lessening competition. Recently, the Deputy Chief of the Foreign Commerce Section of the Antitrust Division informed me that the Section maintains a file of more than fifty antitrust laws from around the world.[1] The articles in this symposium further document the spread of competition law to parts of the world once deemed impossibly remote for tourists, let alone competition lawyers.

The United States is out of step with the rest of the world's competition community in two important ways. At a time when the rest of the world looks to competition law for its transformative and normative potential, the United States remains locked into a narrow vision geared largely to the reflexive application of various competing microeconomic theories. While in many ways United States antitrust has reached an impasse without any visible solution,[2] it is the rest of the

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1. A useful but dated survey of the principal competition law systems can be found in WORLD LAW OF COMPETITION (Julian O. von Kalinowski ed., 1987). Obtaining up-to-date copies of relevant competition statutes, regulations, and guidelines is currently an expensive and time consuming effort and requires persistent contact with embassies, consulates, on-line sources, and law libraries to compile a reasonably complete collection. An ongoing project of the Antitrust Section of the American Bar Association will be to compile and update these laws in a single publication.

2. *See* Gary Minda, *Antitrust at Century's End*, 48 SMU L. REV. 1749, 1752-

world that looks to antitrust for answers to the fundamental questions about how to control economic power in their society, the role and limits of markets and economic activity in a democracy, and the political role and consequences of antitrust rules.

The countries emerging from decades of central planning look to antitrust law, and competition policy more broadly, as part of the overall adoption of a new legal regime to govern emerging democratic markets and political institutions.[3] Other countries have turned toward antitrust as a form of "light regulation" in connection with ongoing privatization efforts within their economies.[4] Many lesser developed countries have embraced antitrust for both substantive and symbolic purposes as they seek new paths of development and prosperity.[5] Mature market economies periodically consider revising their competition laws to better reflect national and international economic realities.[6] Most recently, free trading areas, regional trading blocks, and the World Trade Organization have begun the long arduous process of reconciling the different notions of competition inherent in antitrust and international trade law.[7]

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55 (1995).

3. *See, e.g.*, JOHN FINGLETON, ELEANOR FOX, DAMIEN NEVEN & PAUL SEABRIGHT, COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE xi (1996); Anna Fornalczyk, *Competition Policy During Transformation of a Centrally Planned Economy*, 1992 FORDHAM CORP. L. INST. 385, 386 (1993).

4. *See, e.g.*, Maureen Brunt, *Australian and New Zealand Competition Law and Policy*, 1992 FORDHAM CORP. L. INST. 131, 178-84 (1993).

5. *See, e.g.*, William E. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 ANTITRUST L.J. 253, 254 (1992) (discussing Zimbabwe's commitment to antitrust policy, as well as the obstacles it and other developing countries face in instituting antitrust policies).

6. *See* Mark Furse, *Competition Law Reform Revisited*, 17 BUS. L. REV. 247, 247 (1996) (discussing draft bill amending British competition law); *see generally* Working Group of the American Bar Association Section of Antitrust Law and Section of International Law and Practice, *Report on The Canadian Bureau of Competition Policy Discussion Paper on Canadian Competition Act Amendments* (Sept. 21, 1995) (tentative draft, on file with author). *See also* James R. Maxeiner, *Berlin Brief: West Germany Amends its Antitrust Law*, N.Y. L.J., Apr. 3, 1990, at 1, 1 (1990).

7. *See* Canada-Chile Free Trade Agreement, chs. J., M. (Nov. 18, 1996) (adopting competition provisions and enforcement cooperation for free trade area and abolishing antidumping duties for bilateral trade); Singapore Ministerial Declaration, para. 20, WTO DOC WT/MIN(96)/DEC/W (Dec. 13, 1996), *reprinted in* 36 I.L.M. 218, 226 (1997) (adopting study program on trade and competition issues); North American Free Trade Agreement, done Dec. 17, 1992, Can.-Mex.-U.S., arts.

These countries and organizations look with puzzlement at the United States and its current fascination with antitrust as a technical exercise for legal and economic specialists and wonder why we do not seem more faithful to the lessons we have taught the rest of the world over the last hundred years.

For all the obvious reasons, the rest of the world looks to the United States as one of the important sources of learning about competition law. Foreign legislatures considering antitrust legislation often turn to the United States enforcement agencies[8] and the American Bar for comments on the best path to choose.[9] Foreign enforcement officials read American cases and the voluminous antitrust literature, attend international conferences, and frequently interact with their foreign counterparts. Attorneys and experts from a variety of countries, frequently Americans, are often involved in foreign competition proceedings at various levels.[10] Foreign case reports

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1501-05, 32 I.L.M. 630, 633-34 (1993) (requiring adoption and enforcement of national competition laws and enforcement cooperation); Australia-New Zealand Closer Economic Relations Trade Agreement, Mar. 28, 1993, art. 15, 1983 N.Z.T.S. No. 1, *reprinted in* 22 I.L.M. 945, 963-65 (1983) (abolishing antidumping duties for bilateral trade and creating transborder system of competition law enforcement).

8. Both the Justice Department and the Federal Trade Commission routinely consult with foreign countries about the institution and enforcement of new antitrust regimes. In addition, the agencies have stationed career officials abroad to assist their foreign counterparts on a more intensive long-term basis. *See* James Langenfeld & Marsha W. Blitzer, *Is Competition Policy the Last Thing Central and Eastern Europe Need?*, 6 AM. U.J. INT'L L. & POL'Y 347, 348-49 (1991); James F. Rill, *Creating and Maintaining Competition in a Common Market: The Future of Antitrust in an Integrated World Economy*, 1992 U. CHI. LEGAL F. 263, 274-75. For a debate about the utility of such programs, see A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209, 211-12 (1994) (evaluating the effectiveness of competition advocacy in developing countries) and Craig W. Conrath & Barry T. Freeman, *A Response to "The Effectiveness of Proposed Antitrust Programs for Developing Countries"*, 19 N.C. J. INT'L L. & COM. REG. 233, 234-35 (1994) (examining limitations of Rodriguez' and Williams' approach).

9. For example, the Central and Eastern European Law Initiative of the American Bar Association has organized an extensive network of volunteer attorneys to advise on new legislation, including draft antitrust laws, lecture in foreign countries, and act as longer-term advisers while stationed abroad. I have participated in several projects regarding proposed competition laws. While each project has been informative for both the American reviewers and the foreign drafters, too often many of the comments have consisted of criticism that the proposed law is insufficiently similar to the more familiar American equivalent.

10. For example, several New Zealand competition matters have featured such prominent American antitrust academicians as George Hay of Cornell and William Baxter of Stanford, former head of the Antitrust Division. In a sign of true anti-

and agency decisions are filled with citations to United States cases, guidelines, and scholarly commentary.

The United States is by no means the only model being examined or adopted. In fact, the United States antitrust laws have a number of unique characteristics that make it unlikely that other countries will adopt our system wholesale. We are among the few countries that have adopted criminal sanctions as a means of antitrust enforcement. We are the only country with two separate federal level antitrust enforcement agencies. Both the Antitrust Division and the Federal Trade Commission differ quite dramatically in structure and function from their foreign counterparts, each of the U.S. agencies having comparatively fewer formal powers of exemption and requirements of advance notifications outside of the area of mergers and acquisitions. While an increasing number of countries provide for a private right of action for antitrust violations, ours is the most robust system of private enforcement combining private treble damage actions with contingent fee arrangements, class actions, wide-ranging discovery, civil jury trials, punitive damages, as well as restrictive rules regarding contribution among defendants and the way settlements are deducted from the potential liability of the remaining defendants. Finally, the United States antitrust system appears to be more narrowly focused on questions of competitive impact and has fewer opportunities for explicit considerations of health, safety, and social welfare arguments that are considered in other systems to trump injury to competition.[11]

Any salesman for U.S. style antitrust abroad quickly runs into a formidable competitor selling a model based on the competition provisions of the European Union (EU). The EU model is a sophisticated system of competition rules geared first and foremost toward the completion and expansion of the common market. Competition for its sake is valued, but as an instrument of market completion and expansion. Direct comparisons with the United States thus become difficult. Certain horizontal agreements that restrict competition are excused if they further the fundamental EU goals of market integration.[12]

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trust cosmopolitanism, New Zealand has had as a lay member of its High Court for competition matters Maureen Brunt, a prominent Australian economist.

11. *See* Spencer Weber Waller, *A Comparative Look at Failing Firms and Failing Industries*, 64 ANTITRUST L.J. 703, 703 (1996).

12. TREATY ESTABLISHING EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957,

Certain vertical agreements are strictly prohibited because of their tendency to reinforce national boundaries that would be ignored, if not praised, in U.S. antitrust circles. To benefit from individual exemptions, agreements must be submitted for advance review by the EU Commission, the sole EU enforcer of competition law.[13] Block exemptions may alleviate the need to notify and seek approval from the EU Commission, but the available block exemptions are incomplete, complex, and geared more to prohibiting certain clauses in contracts rather than market realities.[14] Penalties include fines up to ten percent of worldwide annual turnover.[15] Criminal penalties are nonexistent and private damages available only when allowed under member state law. The courts of the member states have a complex role enforcing their own national competition law when not inconsistent with EU law and in enforcing EU competition law through the doctrine of direct effect, while not treading on the authority of the EU Commission.

Throughout the world, comparative competition law is in full flourish, not for the purpose of imitating U.S. or EU law, but to understand and apply whatever may be relevant to the unique foreign national problem being studied. Through contacts with both the U.S. and EU systems, foreign lawmakers and competition enforcers have learned to pick and choose what they need for their own economies, unless the dictates of regional integration or preferential trade access requires them to sign up wholesale to one of these two dominant models. Even then, the foreign model is quickly translated into requirements more congenial to the national economy and culture.[16]

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art. 85(3), 298 U.N.T.S. 11, 1973 G. Brit. T.S. No. 1 (Cmd. 5179-II).

13. Council Regulation 17/62, art. 4, 1962 J.O. 204, 1959-1962 O.J. SPEC. ED. 87, 88 [hereinafter Council Regulation 17/62].

14. Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55, 63-65 (1992). The European Union (EU) is currently contemplating major revisions to its system of block exemptions governing distribution agreements. *See* European Commission, Green Paper on Vertical Restraints in EU Competition Policy, COM(96)721, Executive Summary paras. 38, 39 (Jan. 1997) (discussing four options for revising current Commission policy for vertical restraints and block exemptions) (visited Aug. 4, 1997) <http://europa.eu.int/en/comm/dg04/entente/en/96721en.htm> [hereinafter Green Paper on Vertical Restraints].

15. *See* Council Regulation 17/62, *supra* note 13, art. 15.

16. *See* Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 573-74 (1994) (using efforts to harmonize Japanese and U.S. competition law to illustrate the frustra-

This ferment of activity abroad rarely seems to be the subject of serious interest in the United States. An interest in comparative anything is difficult to discern in federal antitrust (or any other kind of) lawmaking on Capitol Hill. It is a rare case indeed in which a United States court cites to foreign precedent in an antitrust opinion except as part of the background or procedural history of the case. It would be an equally rare government guideline or report in the antitrust area that substantively discusses how the same issues are treated elsewhere.[17] Foreign cases, guidelines, and enforcement decisions are normally considered only insofar as they are praiseworthy when they resemble our thinking on the same subject and blameworthy when they do not or otherwise impinge on U.S. interests.[18]

Fortunately, the attitude of the legislature and the judiciary does not carry over to much of the day-to-day international work of the antitrust enforcement agencies. Both the Antitrust Division and the Federal Trade Commission have cadres of truly dedicated and knowledgeable officials who understand foreign competition law and interact with their foreign counterparts in notifications, cooperative investigations, consultations, negotiations, and participation in multilateral fora on competition law. However, these sections of the agencies represent only a small part of large bureaucracies and do not speak for the vast majority of colleagues in government or in the private

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tion produced by the assumption that "competition law in Japan should work in a similar fashion as in the United States").

17. This criticism is hardly limited to the antitrust field. *See generally* Ernst C. Stiefel & James Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from 'Civilized' European Procedures Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147, 147 (1994); James R. Maxeiner, *1992: High Time for American Lawyers to Learn from Europe, or Roscoe Pound's 1906 Address Revisited*, 15 FORDHAM INT'L L.J. 1, 2 (1991); Eric Stein, *Uses, Misuses—and Non-Uses of Comparative Law*, 72 NW. U. L. REV. 198, 198 (1977).

18. The two principal times when foreign competition law efforts have received any substantial attention in the United States were the EC's competition investigation of IBM which continued after the dismissal of the U.S. government's antitrust complaint against the company and the recent EU competition investigation and imposition of conditions on the approval of the Boeing-McDonnell Douglas merger despite the foregone conclusion that it would not be challenged in the United States on antitrust grounds. *See Boeing-McDonnell Douglas Deal Flies with Conditions, EU Approves Merger*, 14 INT'L TRADE REP. (BNA) 1313 (1997); Edmund L. Andrews, *Minister of Objection Nettles Washington*, N.Y. TIMES, May 21, 1997, at D1 (profiling EU Commissioner for competition Karl Van Miert and EU investigation of Boeing-McDonnell Douglas merger).

bar who vigorously enforce the United States antitrust law on an everyday basis without a great deal of knowledge or interest in the rest of the world's treatment of similar issues.

The Hearings on Global and Innovation-Based Competition, conducted throughout the fall of 1995 by the Federal Trade Commission, were a welcome respite from the overall parochialism of United States antitrust.[19] In addition to gathering traditional empirical information about the United States and global economy, the hearings were a deliberate effort to consider foreign antitrust treatment of such issues as market definition, innovation markets, failing firms, and distressed industries.[20] The published report and subsequent initiatives that emerged from these hearings should be a valuable resource for the introduction of comparative thinking in the antitrust field.[21]

Surely, the United States can learn from the success (and failure) of foreign competition law and practice. Even a cursory glance abroad reveals a number of innovative provisions worthy of careful study:

- the application of competition law (instead of exemption) to the actions of state and local governments and the private firms enjoying special privileges as a result of subnational legislation (EU and Mexico)
- the provisional approval of mergers subject to subsequent review for anticompetitive effects (Canada)
- the replacement of antidumping law with antitrust principles (New Zealand-Australia, Canada-Chile, intra-EU)

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19. *See FTC Hearings on Enforcement Policy Delve into Dynamics of Global Rivalry*, 69 ANTITRUST & TRADE REG. REP. (BNA) 487 (1995); *FTC Schedules Hearings on State of Competition in Global Marketplace*, 69 ANTITRUST & TRADE REG. REP. (BNA) 377 (1995).

20. The testimony of several of the witnesses for these hearings served as the basis of the essays and articles appearing in Symposium, *Perspectives on Efficiencies and Failing Firms in Merger Analysis*, 64 ANTITRUST L.J. 571 (1996).

21. *See FTC Staff Report: Competition Policy in the New High-Tech, Global Marketplace*, 64 ANTITRUST L.J. 791 (1996) (reprinting the Executive Summary and Principal Conclusions of the hearings). Two offshoots of this project are the revised efficiencies section to the 1992 Horizontal Merger Guidelines issued in April of 1997 and the FTC's ongoing joint venture project where additional hearings were conducted in the summer of 1997 to reassess existing policy in this area.

- transborder enforcement in lieu of mere transborder cooperation (New Zealand-Australia, intra-EU)
- a more powerful formal role for competition advocacy in administrative decision making (Mexico)
- greater practical and formal political independence for antitrust enforcement (Germany)
- antitrust as a constitutional principle (numerous).

The isolation of United States antitrust must end.[22] Antitrust learning must become a two-way street. If the states are a laboratory of experimentation for the federal government, then the rest of the world must become a laboratory of experience and experiment for federal antitrust formulation and enforcement. Foreign practice is relevant in helping to draw the lines of demarcation between competition and traditional regulation in setting policy for such industries as telecommunications, energy, and transportation. Antitrust counselors and litigants must consider foreign experience and create "Brandeis" briefs drawing on such material when helpful to persuading an agency or court of the better way to proceed. Agencies and courts should consider foreign experience in deciding whether practices should be treated as per se unreasonable or subject to more searching inquiry on a case-by-case basis under the full rule of reason, or in predicting the likely effect of challenged practices under the Clayton Act.[23] Of course, foreign precedent and policy is no more binding than that of a state court or a lower court opinion in litigation before the United States Supreme Court. But unless and until we reach a point where the search costs exceed the value of the

22. *See* Eleanor M. Fox, *The End of Antitrust Isolationism, The Vision of One World*, 1992 U. CHI. LEGAL F. 221, 221 (arguing that globalization and democratization have revealed the limits of isolationism and proposing a new model for competition policy).

23. For example, the EU is engaged in an intensive reexamination of its policies on vertical agreements which restrict the distribution of products and services. *See* Green Paper on Vertical Restraints, *supra* note 14. At precisely the same time, the United States Supreme Court is reexamining one aspect of U.S. antitrust policy toward vertical agreements, namely whether vertical agreements imposing maximum resale prices should remain per se unlawful. *See* Kahn v. State Oil, 93 F.3d 1358 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 941 (1997). So far, no discussion of EU, or any other foreign, experience on this issue has been offered or is likely to be considered by the Court, although the EU has actively sought input from the United States for its reform efforts.

information, the courts should have the benefit of arguments based on foreign law and the burden of considering the foreign information and responding to it. Up until now, no court has ever seriously made the effort in the antitrust field.

A better knowledge, and more frequent use, of comparative competition law also should affect how we offer our advice to the rest of the world. We cannot avoid the responsibility of responding to requests for assistance from nations with new competition regimes. At the same time, we should avoid reflexively selling the Sherman Act as the answer to the rest of the world's competition needs.[24] If we care about antitrust, we care about the complex forces of history, politics, and economics that have shaped our law in the United States. That history cannot be characterized as a straight-line evolution from a stone age to an age of total enlightenment, but a convoluted series of rises and falls of theories, doctrines, institutions, interest groups, and even accidents that have shaped our law.[25] We need the humility to understand that, regardless of the direction of change in future policy, the U.S. legal community of 2030 probably will look at contemporary antitrust with about the same fondness that a law and economics antitrust scholar today looks at the *United States v. Von's Grocery Co.*[26] or *United States v. Arnold, Schwinn & Co.*[27] decisions.

Antitrust, like all law, is not universal, but specific to a time, place, and culture. If a comparative approach becomes more commonplace, we will make three giant strides forward. First, as antitrust elders, we will be *more* sensitive to the needs of others who seek our advice, but not necessarily our solutions. Second, we will be *less* sensitive and prickly to the internationalization of substantive antitrust law and the im-

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24. *See* Waller, *Neo-Realism*, *supra* note 16, at 603 (concluding that neither efforts to transfer existing national laws nor efforts to harmonize competition law internationally are likely to be successful).

25. *See generally* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA 1888-1992 (1996) (identifying six major periods in the history of American antitrust law and analyzing the rhetorical confrontations between the commitment to individual liberty and the commitment to equality).

26. United States v. Von's Grocery Co., 384 U.S. 270, 281 (1966) (prohibiting merger between two supermarket chains in Los Angeles with small combined market share based on trend toward concentration in industry and demise of independent grocery stores).

27. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967) (prohibiting all vertical restraints as per se unreasonable after title to goods passes).

pulse to cast reasoned debate as an "us versus them" exercise. Finally, at home we have the very real possibility of using a whole new set of data to wrestle with the familiar antitrust demons that the United States must consider on an ongoing basis in deciding the importance of competition and the proper role of antitrust law in our legal system.