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An International Common Law of Antitrust

Spencer Weber Waller*

I. INTRODUCTION

There is a broad conflict over the direction of future progress in international competition law. This conflict is exemplified by the very different tone and recommendation of expert commentators such as Judge Diane Wood and Eleanor Fox and others who have participated in this conference. This conflict is also generally portrayed as a dichotomous choice between the position advocated by the European Union (EU) and its supporters in favor of a true international antitrust code, or at least an optional code enforced by the World Trade Organization (WTO) through its dispute resolution process, and the position of the United States in favor of a cautious approach emphasizing bilateral cooperation, slow harmonization, a search for consensus, as well as a preference for further study in lieu of action at this time. Both positions are well described in a variety of academic policy and official publications. The EU position has been articulated by such notables as Leon Britten, Ernst-Ulrich Petersmann, and Karol von Miert.¹ The recent United States champions include Joel Klein, Charles Stark, Douglas Melamed among others.²

I want to explore some of the serious objections that the United States has raised to the negotiation of an international set of antitrust rules and the delegation of their enforcement to the WTO. I will suggest some ways to take these objections into account, but still allow for progress, and a modest role for organizations like the WTO in promoting competition in global markets and resolving competition disputes, without having to create a full international antitrust code.

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1. See Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111 (1996) (summarizing these arguments).

2. See *id.*

II. TAKING THE UNITED STATES AT ITS WORD

If you believe the articulated reasons of the United States,³ the objections to an international antitrust code enforced by the WTO are some combination of the following:

1. There is no present consensus on substantive competition rules, making the negotiation of any code a waste of effort in comparison to a more practical focus on ensuring that existing antitrust rules are enforced world-wide;
2. A code, even if enacted, would necessarily reflect a lowest common denominator approach and have no real significant impact;
3. A code, even if enacted, would be a rigid and static set of rules that could not be adapted to the rapidly changing circumstances of the global market or future developments in competition law and policy;
4. A code approach has the potential to distort the normatively desirable pro-consumer/efficiency evolution of United States and global policy in antitrust field;
5. The United States would be subject to the whims of a majoritarian organization and certain hostile members only nominally interested in resolving competition disputes and rather more interested in advancing non-competition goals through competition channels and dispute resolutions.⁴

3. In addition to these heartfelt beliefs by key U.S. officials, I also believe that bureaucratic political concerns are a powerful explanation of the U.S. ambivalence on international antitrust issues. These concerns manifest themselves in inter-agency rivalries given the effect that the creation of a WTO competition code would have on those who speak for the United States on these issues and the differing views on competition, trade, and industrial policy held by the various agencies within the United States government. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 378-80 (1997); cf. Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1526-27 (1998) (using economic analysis to suggest that, in a world with extraterritoriality, net importers control the agenda and have no incentive for change in the *status quo* without the possibility of side payments).

4. See A. Douglas Melamed, *International Antitrust in an Age of International Deregulation*, 6 GEO. MASON L. REV. 437, 444-45 (1998) (stating that a code would be too rigid and would lead to injection of non-competition values into enforcement); Robert Pitofsky, *Competition Policy in a Global Economy — Today*

I want to examine one strain of the U.S. position that helps to explain the current and historical ambivalence of the United States to efforts to harmonize or internationalize antitrust law.⁵ I suspect that the United States is reacting at a fundamental level to the vigorous advocacy of a code, or civil law, approach in the field of competition law that historically arose in the United States as a court-centered common law tradition.⁶ Taking this objection seriously does not automatically lead to a posture of nullification or obstructionism, but does suggest new routes to proceed if progress is to be made toward global rules to govern competition in global markets.

Taking a common law approach does require several changes to the current dialogue. Instead of a conflict between two antitrust superpowers or personalities, the challenge of international antitrust regime creation⁷

and Tomorrow, Remarks Before the European Institute Eighth Annual Transatlantic Seminar on Trade and Investment, (Nov. 4, 1998) (visited Sept. 24, 1999) <<http://www.ftc.gov/speeches>> (doubting a consensus on substantive principles); Joel I. Klein, Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century, Address Before the Fordham Corporate Law Institute, (Oct. 16, 1997) (visited Sept. 24, 1999) <http://www.usdoj.gov/03press/03_2.html> (describing that internationalization diverts attention from practical efforts at improving enforcement and would be lowest common denominator); Joel I. Klein, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Address Presented at the Royal Institute of International Affairs, (Nov. 18, 1996) (visited Sept. 24, 1999) (visited Sept. 24, 1999) <http://www.usdoj.gov/03press/03_2.html> (stating the lowest common denominator concern and fear of harmful WTO decision making masquerading as competition policy); Charles S. Stark, Enhancing Market Access Through Trade and Antitrust Law, Address Before the Section of International Law and Practice of the American Bar Association, (Aug. 8, 1995) (visited Sept. 24, 1999) <http://www.usdoj.gov/03press/03_2.html> (indicating there is no consensus and differing policy goals); Diane P. Wood, Antitrust: A Remedy for Trade Barriers?, Address to the Asian Law Program, Japan Information Access Project (Mar. 24, 1995) (visited Sept. 24, 1999) <http://www.usdoj.gov/03press/03_2.html> (emphasizing no consensus and potential for more harm than good); Roscoe B. Starek, III, What are the Limits of Antitrust Cooperation?, Remarks Before the Fourth Annual Symposium on EU Mergers and Joint ventures: New Commission/New Merger Policy?, *available in* WESTLAW, 1995 WL 122743, at *5 (F.T.C. Mar. 17, 1995) (referring to the lack of consensus and differing values).

5. See Waller, *supra* note 1, at 374-80.

6. But see Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998) (arguing that the current enforcement system is inherently regulatory and agency centered).

7. Regime theory is just one of the recent contributions that international relations theory has made to the understanding of international law problems. See generally REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger ed., 1995); Anne-Marie Slaughter, et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998) (including bibliography); Robert J. Beck, *International Law and International Relations: The Prospects for Interdisciplinary Collaboration*, 1 J.

more closely resembles a classic problem of comparative law. Therefore, what is needed is a mechanism or an institution for a dialogue between civilian and common law lawyers and systems.⁸ Taking a comparative law approach seriously would allow the United States to participate more constructively in the current dialogue and sensitize other countries to the historical or cultural basis of the U.S. needs. Such a dialogue would allow progress to be made, if these types of objections are serious ones, and would expose hypocrisy if they are not the real basis for the current U.S. policy.

Constructing an international antitrust regime from a common law perspective is by no means an easy task. It would require persuading officials of competition systems operating under the civil law to suspend their heartfelt historical and cultural preconceptions about how law should be made as well as persuading U.S. officials to suspend their fear of international rule making in this area.

This task of bridging the gap between the two systems is both necessary and well worth the effort. There is already a rich body of classic international law treaty and state practice — akin to an existing body of international common law — that can be applied by the WTO and other international organizations without the negotiation of a code, a process which I view for my own reasons as quixotic and ill-advised on the merits.⁹

III. FINDING THE INTERNATIONAL COMMON LAW OF COMPETITION

Finding the existing international law rules of competition law is not easy. This task requires using the classic tools of international law to identify the core principles of customary international law and treaty law governing competition in international trade.

One must begin with the sources of international law to identify the existence of any particular set of rules of international law. For this purpose, most modern commentators usually begin with the rules of the International Court of Justice which identify the sources of international law as:

INT'L LEGAL STUD. 119 (1995); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Kenneth W. Abbott et al., *International Law and International Relations Theory: Building Bridges*, 86 PROC. AM. SOC'Y. INT'L L. 167 (1992).

8. For an introduction to the conceptually different framework of the civil law see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985).

9. See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons From Antitrust*, 42 U. KAN. L. REV. 557, 557-61 (1994).

- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹⁰

I will focus primarily on treaty and custom to suggest that we already live in a world with certain identifiable international competition rules constituting international law. While the concept of establishing international law by treaty is straightforward, the concept of customary international law is not. The *Restatement (Third) of the Foreign Relations Law of the United States* defines customary law as "a general and consistent practice of states followed by them from a sense of legal obligation."¹¹ Whether or not this particular definition captures every nuance of the meaning of customary international law, it is broadly consistent with the holding of the International Court of Justice on the subject and the writings of international law scholars.¹²

There is already substantial treaty law within the WTO system that has explicit competition law components, although nothing amounting to a unified whole. These provisions can be found in the General Agreement on Trade and Tariffs (GATT) covering trade in goods, as well as the newer Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT), the Agreement on Trade Related Investment Measures (TRIMS), the General Agreement on Trade and Services (GATS), the various sector agreements negotiated pursuant to the GATS, and other parts of the WTO family of agreements.¹³ At least some of these agreements contains explicit rules governing the behavior of private parties in addition to governmental units.¹⁴

10. Statute of the International Court of Justice, art. 38, para 1, June 26, 1945, 59 Stat.1055, 1060.

11. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

12. See generally I REPERTORY OF DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (1947-1992) 5-21 (Giuliana Ziccardi Capaldo ed., 1995); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 15-62 (2d ed. 1997).

13. For the currently existing competition provisions in the WTO system are set forth see ERNST-ULRICH PETERSMANN, THE NEED FOR INTEGRATING TRADE AND COMPETITION RULES IN THE WTO WORLD TRADE AND LEGAL SYSTEM 20-23 (PSIO Occasional Paper WTO Series No. 3, 1996).

14. See, e.g., Agreement on Technical Barriers to Trade, arts. 3, 4, 8, *reprinted*

Other functioning competition systems derived from treaties include: the elaborate competition rules and enforcement system of the European Union, less developed rules within the North American Free Trade Area, a fascinating but little known set of rules governing trans-border competition enforcement in the Australian New Zealand Free Trade Area, new rules in the free trade area between Canada and Chile, the competition protocol in the Mercosur agreement, and the ongoing negotiation of competition issues in the Free Trade of the Americas Agreement. Other treaties to consider include: the soft law of the resolutions of the United Nations relating to restrictive business practices, multinational enterprises, and the transfer of technology, the multiplying web of cooperation treaties between antitrust enforcement agencies, and the thousands of Bilateral Investment Treaties and other systems for the resolution of disputes between investors and host governments.¹⁵

Turning to state practice, the question of any customary international law in the area depends on the nature of state practice in the competition field and the rules that states have adopted out of a sense of obligation. Customary international law thus bears much in common with the common law and also has the classic advantage of the common law's emphasis on solving problems first and figuring out the rules later.

There has been a rush to embrace and adopt competition law across a wide range of geographies, stages of development, former and present ideological frameworks, and political circumstances. Gesner Oliveira, the head of the Brazilian Antitrust Enforcement Agency, has been a leader in characterizing a common set of stages in the development of competition law for new antitrust regimes. He has contended that systems develop from a modest program of domestic enforcement relying on technical assistance from abroad to a robust enforcement system that actively cooperates at the international level and participates in the work of regional and international organizations in cooperating, harmonizing competition law, and creating core principles of true international competition law.¹⁶ There is a growing body of state practice, as well as both soft and hard international law, that supports this characterization of the state of international competition rules arising out of the work of international organizations such as: the EU, the European Economic Area, the Europe Agreements

in JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 149, 152-53, 157 (3d ed. Supp. 1995).

15. See generally KENNETH J. VANDELDE, *UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE* (1992). But see *id.* at 164 (describing present limitations on investment dispute mechanisms).

16. See Gesner Oliveira, *Competition Policy in Brazil and Mercosur: Aspects of the Recent Experience*, 24 *BROOK. J. INT'L L.* 465, 466-70 (1998).

between the EU and the countries of Eastern and Central Europe, the Organization of Economic Co-operation and Development, the Asian Pacific Economic Cooperation, the Strategic Impediments Initiative talks between the United States and Japan and their aftermath, Mercosur, NAFTA, and others.

The hardest part of the customary international law game is inducing which specific rules have achieved such widespread acceptance arising out of a sense of obligation that they should be deemed binding rules of customary international law. Without entering into a fruitless debate as to which specific rules of competition law have achieved such status (i.e., anti-cartel rules, monopolization, etc.), let me suggest that a strong case can be made that international law requires that if a nation chooses to have competition rules, it must enforce those rules in a non-discriminatory manner.

Treaty and customary international law provides two frameworks in which to measure this non-discrimination principle: namely the familiar rules of both "national treatment" (NT) and "most favored nation" (MFN). NT rules prohibit treating foreign products, services, or producers less favorably than domestic producers, while MFN rules prohibit treating one trading partner less favorably than another trading partner enjoying MFN privileges.

These are familiar concepts within the WTO system and exist in virtually every trade agreement between nations. Even the current existing versions of NT and MFN obligations within the WTO will cover many classic competition problems, although certainly there will be situations where individual cases may not fit well within the existing rules.

The current system can be used to resolve a variety of competition problems and build a body of law that can point the way toward more elaborate codes, if feasible and desirable, in the future. For example, either under or over-enforcement of seemingly neutral competition based on the domestic or foreign status of the petitioners or the respondents would be captured within most definitions of either NT or MFN. A similar argument can be made that it is a violation of non-discrimination principles to exempt export cartels in any antitrust system with a general anti-cartel policy for its own domestic economy. It also should be a violation to exempt exporters from antitrust rules and at the same time seek to impose liability on foreign firms for harm solely to exporters. Similarly, a nation with its own antitrust rules and notions of extraterritoriality, in theory or in practice, would arguably be in violation of one or both of these principles if it sought to use blocking statutes or similar devices to shield its firms from antitrust liability imposed by foreign systems which use similar notions of jurisdiction to prescribe.

Most expansively, it may also be a violation of NT and MFN for one antitrust enforcer to refuse enforcement cooperation sought by another country when it routinely seeks and utilizes such cooperation to investi-

gate foreign commerce matters. One could also construct a plausible argument that imposing anti-dumping duties on foreign goods in ways less favorable than the treatment of domestically produced goods under price discrimination statutes would also be a matter for WTO concern.

The prior reluctance of the WTO to use its dispute resolution system for these types of disputes was not the product of a lack of rules, but rather a consensus reached in 1960 to avoid the field.¹⁷ While this consensus held for nearly thirty-five years, it cracked because of the growth of competition law around the world, the changes to the world trading system itself, the creation of the WTO, and the rise of new frontier issues of international trade as a result of the demise of the tariff as a significant barrier to trade. Ironically, the prior consensus also collapsed largely due to the decision of the United States to bring (or threaten to bring) competition-related matters before the WTO.

For example, the Kodak-Fuji dispute was brought to the WTO by the United States in response to a successful petition filed by Kodak pursuant to section 301 of the Trade Act of 1974 alleging that the Japanese government had encouraged and/or tolerated systematic anti-competitive practices in the Japanese photographic film market. That case resulted in a finding that any actions by the Japanese government were not in violation of WTO rules and any anti-competitive conduct was the product of private conduct not subject to WTO rules.¹⁸

While the Kodak-Fuji dispute was pending before the WTO, the United States also threatened to bring a second competition related matter for dispute settlement. The merger between Boeing and McDonnell/Douglas produced opposing merger control rulings in the United States and the EU.

17. See Restrictive Trade Practices: Arrangements for Consultations, G.A.T.T. B.I.S.D. (9th Supp.) at 170 (1961) (report adopted on June 2, 1960). See generally JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 522-27 (1969).

18. The allegations in this matter are quite complex and the actual panel report runs into the thousands of pages. For a discussion of the issues raised by the case and the WTO panel decision see F.M. Scherer, *Retail Distribution Channel Barriers to International Trade*, 67 *ANTITRUST L.J.* 77 (1999); Jay L. Eizenstat, Comment, *The Impact of the World Trade Organization on Unilateral United States Trade Sanctions Under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, 11 *EMORY INT'L L. REV.* 137 (1997); Renee Hardt, Note, *Kodak v. Fuji: A Test Case for the Extraterritorial Application of the Sherman Act*, 15 *B.U. INT'L L.J.* 309 (1997); Hiroyuki Fujii, Comment, *The Kodak-Fuji Dispute: A Spectrum of Divergent Colors and a Blueprint for a New WTO Procedure for Disputes Involving Government Tolerance of Anti-competitive Practices*, 2 *UCLA J. INT'L L. & FOREIGN AFF.* 317 (1997-98); Gary N. Horlick & Yong K. Kim, *Private Remedies for Private Anti-Competitive Barriers to Trade: The Kodak-Fuji Example*, 24 *INT'L BUS. LAW*, Nov. 1996, at 474.

The United States cleared the merger announcing that the transaction did not harm competition. The EU reached the opposite conclusion, but reached agreement with the parties as to the conditions under which they would not contest the acquisition. Both sides believed that the other's decision was the product of industrial policy concerns over creating, or protecting, national champions in the commercial aviation market rather than promoting legitimate competition objectives. A WTO challenge would have been likely had the EU blocked the merger in its entirety.

Finally, the EU has taken its turn in bringing a dispute resolution proceeding before the WTO, which deals with traditional competition laws. The United States has a little-used provision called the Anti-Dumping Act of 1916¹⁹ which theoretically imposes criminal and treble damage liability on certain forms of dumping. Despite a record of no known successful use of the statute, the EU has challenged the lawfulness under the WTO of suing European producers under this statute. The EU has argued that the procedures for imposing anti-dumping duties under article VI of the GATT and the WTO Anti-dumping Code are the exclusive remedy for dumping violations.²⁰

All of these examples, both hypothetical and real, involve existing rules and the availability of a well-developed dispute resolution system capable of answering the questions posed. Who wins any particular dispute depends on the advocacy of the parties and factual and legal findings of the dispute resolution panels. There is, however, a ready made system in place to handle many of the competition issues that would otherwise be the subject of endless negotiations if a full negotiating round were convened to prepare a comprehensive competition code.

The answer in any particular case might be that the current rules do not cover the problem at hand. Law is created through this process, either positively or negatively, and can serve either as a substitute to, or as a guiding path for, a true code of international competition law. That is probably the best that can be expected for the foreseeable future and a pretty good result in the real world.

IV. CONCLUSION

This essay was intended as a middle ground between two extreme positions that argue about what the world of international trade and competition law should be. I instead look at the world that already is. The WTO and many other organizations and treaties have the existing law to create an incremental international law of competition that can at least partially

19. Anti-Dumping Act of 1916, §801, 15 U.S.C. § 72 (1994).

20. See *WTO Sets Up Dispute Panel on U.S. Antidumping Act of 1916*, 16 Int'l Trade Rep. (BNA) at 192 (Feb. 3, 1999).

serve the needs of the world trading system and prevent some of the competitive abuses that go unchecked under the present system.²¹ Using existing dispute settlement procedures, such as in the WTO, to test the limits of how the present systems can handle competition disputes has the virtue of solving real world problems using existing tools, albeit applying them to new problems.²² The rest of the world may not view competition law, or law making generally, in these very common law terms. However this view has the potential of moving forward on an incremental basis until the United States and other skeptics have been both petitioner and respondent in true international competition cases and they have found that they can live with the results.

21. *See supra* notes 13-16 and accompanying text.

22. *See supra* notes 17-20 and accompanying text.