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ARTICLES

FOREWORD: Mergers, Market Access and the Millennium

*Eleanor M. Fox**

The global economy is no longer merely a prospect. In all of its untidiness, it has arrived.

As Professor David Gerber astutely observes, in his review of Professor Spencer Weber Waller's *Antitrust and American Business Abroad,* international antitrust is no longer simply a study of U.S. law and the limits of its extraterritorial reach. It encompasses law, context, values, and evolutionary paths of many nations. Good analysts must adjust their focus to the new economic and regulatory world, which demands deeper, broader, and more contextual understanding.

The effective analyst needs to know more about international economic issues, how they tend to affect private and public institutions in many parts of the world, and how decision makers view these developments. Often the skills necessary to interpret these situations are as important as -- perhaps more important than -- the skills necessary to operate within the U.S. antitrust system.

This symposium issue contains and conveys both information and ideas for building the new knowledge. The articles focus in particular on two emergent problems in the global economy -- market access and international mergers. The problem of market access emerges in the wake of

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lower trade barriers. As government restraints have receded, private restraints have emerged.

Moreover, as globalization proceeds, the number of international mergers increases exponentially, as do merger control regimes. Any of some 40 nations may vet and delay the same merger, although it may be clearly harmless (95 percent of mergers are) and although some of the regulating nations may be small economies with no differentiated market and no real stake other than collection of a filing fee.

The articles in this symposium issue are descriptive, synthesizing, and normative. The market access article of Professor Spencer Weber Waller has all three qualities. It provides a history and evolution of the law at the interface of trade and competition; a roadmap of the cooperative efforts of nations and their increasing density; and a cautionary word about the limits of antitrust in the quest for free markets; and it offers a prescription -- deepened diplomatic antitrust solutions.

The article by Andre Fiebig addresses merger control. Mr. Fiebig is internationalistic in his approach and more ambitious in his vision for supranational coordination. Emphasizing the gross inefficiencies and superfluous overlapping multi-nation merger control systems, he makes a modest proposal: a premerger control office in the framework of the World Trade Organization for a limited purpose: "to assist business and regulators by identifying those transactions which present no threat to competition." Action of the office would be triggered only by the voluntary request of the merging parties. A mechanism would be provided for regulating nations to spring into action where their important interests would otherwise be impaired. By using methods of international coordination only to screen out harmless mergers, Mr. Fiebig proposes to sidestep the sovereignty debate and political opposition (especially by the United States) to international antitrust coordination in the World Trade Organization ("WTO").

A third essay, by Professor S.G. Corones, provides a multli-faceted in-depth treatment of the Australian merger law and its jurisdictional reach. This essay is followed by an informative piece by William M. Hannay, providing helpful information for the corporate counselor on transnational aspects of mergers and acquisitions, substantive and procedural, in the United States, the European Union, and the EU Member States of France, Italy, Germany, and the UK. Concluding the collection, Professor Gerber's book review cautions us to adapt our perspectives to the new inter-active, multi-tiered world economy.

The symposium issue is a nice microcosm of the competition law issues facing the world. It presents the tensions between national control and world integration. It presents the twin, conflicting impulses to eschew internationalization, hoping to do well enough by deepened positive comity (Waller), and to embrace internationalization at least cautiously to address concerns where unharnessed operation of national interests obstructs effi-

cient solutions and where internationalization is most likely to sidestep the political landmines (Fiebig).

These twin tensions and impulses are revealed also in the recently issued Report of the International Competition Policy Advisory Committee ("ICPAC") to the U.S. Attorney General and Assistant Attorney General for Antitrust.[1] The ICPAC Report and Professor Waller's analysis are quite compatible; indeed Professor Waller contributed to the Committee's deliberations. The ICPAC Report on market access issues expresses particular concern with private restraints facilitated by government action, suggests further empirical and analytical studies on the scope of market-blocking restraints and the sufficiency of circumstantial evidence, encourages continued work of the WTO Working Group on the Interaction between Trade and Competition, proposes increase in the antitrust expertise at the WTO and in country missions, and suggests inclusion of competition policy in the WTO's country reviews.[2] The members of ICPAC apart from this author opposed market access competition rules in the WTO. In a separate statement,[3] however, I disagree. I note that market-closing private restraints are the other side of the coin of market-closing public restraints, and suggest that the WTO rules should be modestly extended to place on member nations the responsibility to keep their markets free from artificial private as well as public restraints. To avoid uncertainty of substantive law, I propose choice of the excluding nation's law to determine what is "anticompetitive;" and I suggest including, in a broadened market access provision, obligations of non-discrimination, transparency and process.

The ICPAC Report also addresses merger issues. ICPAC found, like Mr. Fiebig, that the overlapping merger control systems are excessively burdensome and constitute bad regulation. ICPAC proposes a number of incremental steps to alleviate the problems that arise from overlap and systems clash, including protocols against discrimination, against national champion trumps, and against weighing non-competition interests, and it suggests obligations of transparency proportionality. ICPAC also proposes deeping merger review cooperation by means of cross-nation work sharing, and, perhaps ultimately, integrated analysis of international mergers by teams headed by a lead jurisdiction.[4]

As for pre-merger vetting and process, which is the issue Mr. Fiebig addresses, ICPAC proposes only national solutions: the raising of merger thresholds, the screening out (by each jurisdiction) of mergers unlikely to generate an appreciable economic effect within that jurisdiction, de-linking of filing fees from agency budgets (to remove an incentive for overreach-

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[1] ICPAC Report (2000), available at <http://www.usdoj.gov/atr/icpac/icpac.htm>.

[2] *Id.* at ch 5.

[3] *Id.* at Annex 1-A.

[4] *Id.* at ch 2.

ing) where this can be done without undermining the work of the agency, two-stage notification obligations to allow the agencies to identify possible competitive issues and to close the investigation after receipt of a simple form that reveals an absence of competition concerns, and a provision that would allow notification of mergers at any time after the execution of a letter of intent, contract, agreement in principle, or public bid, so as to allow parties to proceed in all jurisdictions simultaneously.[5]

Again, as in the case of market access problems, the Committee was reluctant to move from national level to a coordinated supranational level.[6] I alone would have gone further to propose an opt-in (thus voluntary) premerger notification clearing house, wherein multinational merger parties could file once, perhaps in the state at the center of gravity, and other interested states would be required to accord mutual recognition to the notification.[7]

In the globalizing world, the big questions will not go away; they will become more urgent. National law has a poor and incomplete fit with international markets. This volume contributes importantly both to the infrastructure of knowledge and to the debate.

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[5] *Id.* at ch 3.

[6] The Committee does, however, recognize the large number of international competition issues that are not trade issues and proposes, as I do, the establishment of a world competition body to discuss these issues with all interested nations and non-governmental organizations ("NGOs") and perhaps to develop common approaches. *See id.* at ch. 6.

[7] The other interested states would be free to require codicils for separate markets as needed.