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学术顾问

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Articles

The Use And Utilities of a Conflict-of-laws Approach to International Antitrust

Wei Zengchan*

"Only the generalization of a one-stop-shop system at world level could eliminate the conflict of laws. The difficulties that we have encountered in imposing it at the regional level of the European Union clearly prove that it is still a dream. Upon this condition, we have to think about a conflict-of-law approach even in the field of mergers."

—Laurence Idot①

I. Introduction

Economic competition is the preeminent dynamic force within market economies. However, both market and competition have to be created. ② Antitrust law, as called "the constitution of market economies", has been used as the most effective means to achieve workable competitive market by national authorities. With the development of technology and the increasing expansion of international trade, a global market has taken shapes, which entails the elimination of market barriers instituted by both states and individuals to

* Associate Professor of Law, University of Science and Technology, P. R. China; Ph. D. Candidate, Wuhan University Institute of International Law, P. R. China.

① Laurence Idot, *Restraints of Competition as an Issue of International Trade Law: Concentration and Cooperation Cases*, in: Josef Drexl (ed.), The Future of Transnational Antitrust—From Comparative to Common Competitive Law, Kluwer Law international, 2003, p. 80. Merger is among the major issues to be regulated by antitrust law in the legislation of almost all the countries or regions.

② G. Bruce Doern and Stephen Wilks (eds.), *Comparative Competitive Policy, National Institutions in a Global Market*, Clarendon Press, 1996, p. 1.

establish a competitive global market. Market barriers set up by states are being removed in the course of trade liberalization through WTO, yet private actions designed to restrict international competition are becoming increasingly serious. ① As a result, how to bring down the private barriers by law has been a major world-wide concern for both the legislation and academic world. ②

International problems can be approached by law in various ways. The most radical, however often impractical, way is a uniform (or at least harmonized) law. The least radical way leaves the legal solution to international issues to national law, with its limits of impermissible extraterritoriality, eventually mitigated by a classical conflict of law approach. For international antitrust, approaches adopted or proposed can be divided into two categories: minimum or detailed substantive rules for the world by use of international agreements, and unilateral action by extraterritorial application of their domestic antitrust law including positive comity. ③ Conflict-of-laws approach, though advanced by some scholars, ④ is roughly excluded, because the traditional field of conflict of laws involved

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① For market barriers set up by private actions, *see* Jurgen Basedow, *International Antitrust: From Extraterritorial Application to Harmonization*, Louisiana Law Review, Vol. 60, 2000, pp. 1037-1049. For the interaction between the success of WTO and the rising of private action to restrict international competition, *see* Eleanor M. Fox, *The Harmonization of Competition and Trade Law*, World Competition, Vol. 19, 1995, p. 6.

② *See* Roger Zach (ed.), *Towards WTO Competition Rules*, Kluwer Law International, 1999; Josef Drexl (ed.), *The Future of Transnational Antitrust—From Comparative to Common Competitive Law*, Kluwer Law international, 2003.

③ *See* Roger Zach (ed.), *Towards WTO Competition Rules*, Kluwer Law International, 1999; Josef Drexl (ed.), *The Future of Transnational Antitrust—From Comparative to Common Competitive Law*, Kluwer Law International, 2003.

④ A number of US scholars have, like Joel P. Trachtman, argued that US courts should rely explicitly on conflict-of-laws principles in determining the extraterritorial scope of antitrust law. *See, e. g.*, Joel P. Trachtman and Bruce Alan Rosenfield, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, Yale Law Journal, Vol. 70, 1960, p. 259; William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, Harvard International Law Journal, Vol. 39, 1998, pp. 101-147; Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, Texas Law Review, Vol. 70, 1992, p. 1799. Some scholars even argued that an international antitrust agreement should include a rule defining the scope of application of national antitrust law, Josef Drexl, *Comments on Harry First*, in: Josef Drexl (ed.), The Future of Transnational Antitrust—From Comparative to Common Competitive Law, Kluwer Law international, 2003, p. 58.

private laws and private actors, while antitrust law as economic law is often deemed to be public law in nature and in the area of public laws, conflict- of-law rules had no place whatsoever. ①

Nevertheless, given the diversities or conflicts of the antitrust laws prevailing in all the countries and the difficulties in establishing a uniform international antitrust law, we have to think about the use and utilities of a conflict-of-laws approach to international antitrust.

However, in order to reveal how the approach can operate *vis-à-vis* other approaches, we have to answer some preliminary questions for the use of such an approach. This article is therefore constructed as follows.

For further analysis I will have to define antitrust law, its objectives and characteristics, the conflicts of antitrust law and the impacts thereof which call for the creation of an international antitrust regime. Part III of this article turns to the comparative study of the current approaches to international antitrust, with focus on their respective limitations, because only the gaps in the protection of worldwide competition can justify the use of conflict of laws approach to international antitrust. In Part IV, I will define the conflict-of-law approach first, and then focus on how to break the obstacles to the use of such an approach. And based on the arguments by famous professors, I will delimit the scope of the conflict-of-law approach. With the scope of this approach delimited, Part V is devoted to examining how this approach operates in international antitrust. In Part VI, I will describe some challenges to this approach to international antitrust. In the last Part, I will draw the conclusion that the use of a conflict-of-laws approach is a necessary and practical approach in private enforcement to international antitrust.

II. Conflict of Antitrust Laws and Its Impact on the Global Market

A. Definition, Objectives and Characteristics of Antitrust Law

Antitrust law is the body of law dealing with the market behavior of corporate and business entities. It is known by various names, such as "trade practice law" in

① Milena Sterio, *Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules*, UC Davis Journal of International law and Policy, Vol. 13, 2007, p. 96.

Australia, "competition law" in EU, "cartel law (Kartellrecht)" in Germany and "antimonopoly law" in China. ① Antitrust law of different countries typically provide for measures designed to protect trade and commerce from restraints, cartel and monopolies, price fixing and price discrimination, ② which can be categorized as uniform acts, abuse of monopoly power and anti-competitive mergers. In China, antitrust law regulates prohibition of administrative monopoly.

Antitrust law is generally based on the premises that while free market behavior is desirable, some interference in the market is necessary to maintain competitive pressures and promote competition among producers, and hence to obtain efficient allocation of resources. ③ Though antitrust law in different jurisdictions may be influenced by different economic and political considerations, as a result of different objectives varying from country to country, their common objectives can be twofold: one is economic, namely to maximize economic efficiency; the other is non-economic, namely to serve public interest. For the purpose of this article, it should be noted that one of the original EC competition laws is politically oriented, i. e., it is designed to integrate Europe by market integration. ④

From the above discussion, we can draw some conclusion about the antitrust law's characteristics which are relevant to the use of a conflict-of-laws approach for international antitrust. First and foremost, antitrust law is public law in nature, yet with strong private law characteristics. Though there is no clear answer to whether competition rules belong to public law, ⑤ the purposes of antitrust law discussed above suggest that it is public law in nature. Antitrust law is enacted for public interest. ⑥ Some scholars even go so far as to

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① Antitrust law, competition law, cartel law and antimonopoly law are used interchangeably in this article.

② Andrew D Mitchell, *Broadening the Vision of Trade Liberalization: International Competition Law*, World Competition, Vol. 24, Issue 3, 2001, p. 345.

③ Phillip Areeda and Louis Kaplow, *Antitrust Analysis*, 5th ed., Aspen, 1997, p. 18.

④ For the authoritative discussion of objective of antitrust law, *see* Claus-Dieter Ehlermann, Laraine L. Laudati (eds.) *European Competition Annual* 1997—*Objectives of Competition Policy*, Hart Publishing, 1998.

⑤ Michael Hellner, *Private International Enforcement of Competition Law*, in Yearbook of Private International Law, Vol. 4, 2002, p. 266.

⑥ Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, Yale Journal of International Law, Vol. 26, 2001, p. 223.

describe competition law as national interest by arguing that competition law reflects many of a state's most basic principles and believes, and directly touches on issues relating to a State's economic well-being and power. ①

In China, antimonopoly law falls within the category of economic law whose objectives are to prohibit monopoly conducts, safeguard fair competition, protect legitimate interests of consumers and public interests, and ensure the healthy development of the socialist market economy,② and accordingly falls into the category of public law.

The public law nature of antitrust dictates that antitrust rules are mandatory rules and form one kind of public policy.

Yet antitrust laws have not lost the private law character. Antitrust rules are used to govern damages and contractual nullity. Jurgen Basedow and Ivo Schwartz trace back to the historical background of antitrust rules providing for the right to damages and various forms of nullity or unenforceability of contracts. ③ The antitrust rules giving rising to damages and nullity of contract serve dual purposes. They serve the interest of a state in maintaining free competition on the market, as well as the interest of individuals in recovery of damages suffered or withdrawal from an illegal contract. ④ The private enforcement of antitrust law by national courts and arbitration tribunals strongly reflects that enforcement is of course a private action. Both parties to such an action are private parties, neither of whom exercises public powers nor is subordinate to the other The action thus has a wholly private aspect-securing compensations for the victim of a wrong,⑤ which strongly suggests that antitrust law has characteristics of private law.

B. Conflict of Antitrust Laws and Its Impact on the Global Market

The fact that different jurisdictional antitrust law may be influenced by different economic and political considerations will inevitably lead to the conflict of antitrust laws

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① David P. Fidler, *Competition Law and International Relations*, International and Comparative law Quarterly, Vol. 41, 1992, p. 566.

② *See* Article 1 of the Draft Antimopoly Law of People's Republic of China.

③ Michael Hellner, *Private International Enforcement of Competition Law*, in Yearbook of Private International Law, Vol. 4, 2002, p. 267.

④ Michael Hellner, *Private International Enforcement of Competition Law*, in Yearbook of Private International Law, Vol. 4, 2002, p. 274.

⑤ Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, Yale Journal of International Law, Vol. 26, 2001, p. 223.

across the globe. This conflict can be seen completely in the Model Law on Competition drafted by experts from all over the world, covering substantive possible elements for a competition law, commentaries and alternative approaches in existing legislation. These conflicts range from general principles to detailed rules of both substantive and procedural nature. The diversities of general principles originate from the different economic mode adopted by different countries. Capitalist countries such as the U. S. will naturally have an antitrust law with general principles different from those of socialist countries such as China or those of a country in transition such as Russia. The devil is in the details. Differences in the details of procedural rules can exist in answering such questions as to whether the treble or single damages are recoverable, or whether private suits may be brought, or how long the statute of limitation may be. Differences in the details of substantial rules can be illustrated by the different approaches adopted by the U. S., and Japan to vertical arrangements. In the U. S., as a consequence of adopting economic analysis of antitrust enforcement, vertical restraints are often immunized, while in Japan they are a central part of the antitrust regime. ①

If the market behaviors of enterprises are confined only in the territory of one country or one region, the conflict of antitrust law does not matter. However, in the age of global village where many markets are global, economic activities are increasingly reaching beyond national borders, as are antitrust sensitive conducts by multinational and transnational entities. This kind of conduct can be regulated simultaneously by conflicting antitrust laws of different jurisdictions. The impacts brought about by the differences in antitrust law are twofold. For instance, it will strain the relationship between countries concerned. Professor Mitsuo Matsushita, Former Judge of WTO Appellate Body, illustrated the impact in international trade. His example is cited as follows: if Country A's competition law prohibits a boycott to exclude foreign products but it is allowed in Country B, enterprises in Country B are at an advantage over their counterparts in Country A. In Country B, enterprises can exclude foreign competing products with impunity while enterprises in Country A cannot. This creates the sentiment that Country B's lax enforcement of competition law is unfair to enterprises of Country A, which could result in

① Diane P. Wood, *International Competition Policy in a Diverse World: Can One Size Fit All?*, in Barry Hawk. (ed.), EC & US Competition Law & Policy: 1991 Fordham Corporate Law Institute ch. 5, p. 83.