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**From the Selected Works of David J. Gerber**

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## Afterword: Antitrust and American Business Abroad Revisited

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# AFTERWORD: Antitrust and American Business Abroad Revisited

*David J. Gerber\**

Kingman Brewster's exceptionally influential *Antitrust and American Business Abroad* (1958) came to symbolize an era in antitrust law and in the relationship of U.S. business to international economic activity. It gave conceptual contours to a fundamental problem that had been only dimly perceived before -- namely, the need to define the reach of U.S. antitrust law.<sup>1</sup> In a masterful and much expanded third edition of the book, Professor Spencer Waller marks the transition to a new, very different, and far more complex era in antitrust law and in its significance for international business.<sup>2</sup> We have only begun to recognize and grapple with the extent and implications of these changes, and I here use these two books to underscore some of their key features and implications.

## I. THE EXTRATERRITORIALITY ERA

For Brewster, the situation was relatively simple, and the problem was straightforward. There was only one significant competition law in the world -- U.S. antitrust, and the issue was how it should be structured and applied.<sup>3</sup> In many ways, the United States sat astride the world. The U.S. government set the tone for much that happened in the non-communist world, and U.S. economic interests tended to dominate international markets. This situation induced or at least encouraged American legal and political decision-makers to extend the reach of U.S. antitrust law to conduct

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<sup>1</sup>KINGMAN BREWSTER, JR., *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958).

<sup>2</sup>SPENCER WEBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (3d ed., 1998)

<sup>3</sup>Competition laws were just beginning to acquire significance in Europe. For discussion, see generally DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).

within the territory of other countries. After all, the U.S. had discovered the value of antitrust, and it was "doing the rest of the world a favor" by using it to shape international economic relations.

In the famous *Alcoa* case of 1945, the Second Circuit Court of Appeals, sitting for the U.S. Supreme Court, ruled that U.S. law could be applied to conduct anywhere in the world if it was intended to affect the U.S. and the Court in fact did so.<sup>4</sup> Armed with this doctrinal tool, U.S. government representatives, judges and scholars developed a policy of extraterritorial application of U.S. antitrust law. The basic idea was that the U.S. antitrust laws would provide the normative structuring mechanism for international commerce, at least where effects on U.S. commerce were involved. Brewster's book thus had one dimension, because international antitrust law had one dimension. It was about the extraterritorial application of U.S. laws!

Brewster's great contributions were to identify the need for judicial control of this exercise of U.S. power and to articulate a conceptual framework for meeting that need. He developed the now famous "jurisdictional rule of reason", which during the following was at the center of the dialogue of international antitrust, particularly in the United States. This doctrine calls for U.S. courts to balance the positive pro-competitive effects of extraterritorial application of U.S. law against its negative effects on foreign interests and U.S. foreign policy interests.

## II. THE NEW INTERNATIONAL ANTITRUST ENVIRONMENT

The situation today differs in fundamental ways from what existed only a few years ago. The applicable rules, the institutions that influence decisions, the skills and knowledge needed to practice effectively in the area -- all have changed, often radically.

Even the basic terms of the discussion are either new or have acquired different meanings and significance. The term "antitrust" is no longer, for example, the central term in the discussion. "Antitrust law" is now merely understood as the U.S. version "competition law"; a term that is generally used in other countries to refer to laws designed to deter restraints of competition. "Antitrust law" has thus vacated its central position in the discourse of international antitrust law.

If we look at the normative structure within which international business decisions are made -- *i.e.*, the legal prescriptions that must be taken into account when engaging in international business, we see a similar development. U.S. antitrust law no longer monopolizes the picture. When Kingman Brewster wrote his book, that structure consisted almost exclusively of U.S. antitrust law. No longer. U.S. antitrust law continues to play an important role, primarily because of the size and importance of the U.S.

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<sup>4</sup>United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

market, but it is now merely one among many sets of rules and norms that comprise the relevant normative structure. There are now more than eighty countries with some form of competition law. Not all are of general significance for international business and their advisers, but several are, and in the aggregate they certainly are. The competition law of the European Union is in many ways as important as is the law of the U.S., and each of its members has its own competition law, several of which (most notably, German competition law) play important roles in many international business contexts. Moreover, the antitrust law of Japan has gained greatly in significance and impact in recent years, and even in Latin America competition law is being taken more seriously.

This means that the bureaucrats, judges and lawyers that administer, apply and manipulate these laws have acquired new and greatly expanded roles in relation to international business. In Brewster's world, the only people and institutions that counted very much were American -- U.S. judges, administrators and lawyers. Today that group is merely a subset of the international antitrust community -- still the most influential subset, but a relatively small subset nevertheless. Firms engaging in international business must, or should, pay every bit as much attention to what competition law decision makers in Brussels, Luxembourg, Tokyo and Berlin do and say as they pay to what their analogues in the United States say and do.

But these immensely important changes are only part of the story. Not only have the normative structure and the dramatic personae changed, but the relationships among them have also acquired profoundly important new roles. During the 1990s, for example, cooperation among competition law officials increased dramatically. It is now a centerpiece of the field. It is no longer sufficient to ask "What are the rules and procedures in the potentially relevant competition law systems?" The competent antitrust adviser must investigate the potentially relevant jurisdictions. Questions such as the following become critical: "To what extent can the enforcement agencies involved exchange information? Is there a positive comity agreement that permits state A to request state B to take antitrust enforcement action to protect the interests of state A? Do the officials involved actually use the opportunities and the authority for cooperation that they have been granted and, if so, how?"

The issue of relationships among jurisdictions also has a temporal, developmental component. The competent legal adviser must always ask what processes of change are likely to influence changes that might affect relevant decisions. This is particularly important in competition law, where business decisions made today may be affected by antitrust law developments. Until recently, the factors influencing such changes were primarily, often exclusively, located within the particular political and legal system involved. Today, such factors are often imbedded in relationships among jurisdictions. In Europe, for example, events and forces within the European Union are often the primary factors in developments within national

competition law systems. Moreover, changes within those national systems often relate directly to developments in other member states of the Union. On a worldwide scale, international institutions such as the OECD actively seek to bring about change within antitrust regimes, not least by establishing a forum of regular interaction among decision makers within national competition law systems, and their influence is often extensive.

Finally, the issue of whether, when, and in what form there should be some form of "international" antitrust law has become a major topic of concern. Since the mid-1990s, when the European Union announced its support for the idea of including some form of international competition law framework within the jurisdiction of the World Trade Organization, states and individual decision-makers in many countries have paid growing attention to this issue.<sup>5</sup> The conflict between the U.S. and Europe that has developed on this issue cannot be ignored by anyone who seeks to understand the forces at work in the field of international antitrust law.

Waller's book reflects these changes in the competition law context of international business. Its sheer size (roughly five times longer than the original) and its loose-leaf format indicate that it is a very different kind of work than was Brewster's first edition. The table of contents makes the changes apparent. Where Brewster focused almost exclusively on U.S. antitrust law, because that was what counted then, Waller provides treats each of the new issues I have noted above. Designed for the U.S. market, the book still treats U.S. extraterritoriality issues at length, but it also contains chapters on the competition law of the European Union, on North American competition law, and on specifically international antitrust issues (e.g. chapter 18, *Toward an International Antitrust*). But Waller does not merely include new material; he adjusts the analytical focus to reflect the implications of that material. He is sensitive to the factors at work and the issues in discussion not only in the U.S., but also in other parts of the world. He ties U.S. concerns to this broader context in solidly conceived and often creative ways.

### III. IMPLICATIONS OF THE TRANSITION

The implications of these changes in the international antitrust world are vast. The new world is multi-dimensional, where the preceding regime had but one dimension, and thus those who operate effectively in this environment must ask different questions than were asked before. There are now not only substantive and procedural law issues from many jurisdictions at play, but there are also a variety of relationships among the norm-setting states involved. They may be cooperating in a variety of ways, developing their legal regimes in relation to particular institutions and groups, and even

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<sup>5</sup>For discussion, see David J. Gerber, *The U.S.-European Conflict over the Globalization of Antitrust Law*, NEW ENG. L. REV. (forthcoming).

positioning themselves with regard to possible future multilateral antitrust regimes.

Whereas Brewster looked to the law of one jurisdiction and ask questions that were essentially the same kinds of questions as any others in U.S. law -- *i.e.*, what the relevant cases are and how the law is administered, the competent legal advisor now often must take into account the laws of other jurisdictions, and this means understanding the ways in which they operate. Moreover, she may have to look at numerous international sites in which antitrust concerns are discussed and influence is exercised.

For the antitrust analyst, this means the acquisition of a different set of skills and knowledge than was the case only a few years ago. She needs to understand not only the operation of U.S. domestic law, but also how competition law is understood and applied in foreign countries. She needs to see patterns among the array of systems involved, because she cannot know the details of each. This, in turn, changes the focus of analysis to understanding the factors -- assumptions, historical forces and patterns of thought -- on which individual decisions are based. In Europe, for example, there are many competition law systems, but understanding commonalities in the factors that produce these laws allows one to see their similarities and, therefore, to navigate more effectively the antitrust waters in which they are located.

Finally, the new situation requires sensitivity to different dynamics than those of Brewster's antitrust world. Brewster was primarily concerned with the political consequences of failure to bridle U.S. extraterritorial jurisdiction. The issues were localized to the legal and political arenas. Today, in contrast, the "globalization" of economic activity is driving many of the changes, and, as a result, the issues revolve around what such forces do and should mean for both public and private actors.

As competition becomes increasingly transnational, so do restraints on competition. If a group of firms achieves dominance of an international market, that dominance tends to have negative effects on each of the governments whose nationals participate in the market -- whether as purchasers or producers. Yet precisely because of the transnational dimensions of the conduct, the members of this group may be in a position to avoid the controls of the states involved. For example, administrators and courts in a country where conduct causes harm or even where conduct has occurred frequently lack authority to impose sanctions on those who have engaged in the conduct. Even if they achieve such jurisdictional competence, they frequently cannot acquire the evidence that would be necessary to take action against those responsible.

In addition, to the extent that national decision-makers increase their efforts to respond to the harms associated with restraints on competition, they create an increasingly dense network of norms and institutional forces that in themselves create compliance costs for the firms subject to them and, indirectly, for those who purchase from such firms or compete with them.

Moreover, national competition law systems differ greatly in the degree of restrictiveness of their norms and, especially, in the strictness with which they are applied and enforced. This, in turn, causes uncertainty, creates incentives for firms to seek "havens" in which competition law systems are weaker, and therefore distorts the competitive process. Responses to the problem are, in other words, part of the problem.

This type of dynamic demands knowledge of a much broader set of developments and issues. The effective analyst needs to know more about international economic issues, how they tend to effect 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.

#### IV. CONCLUDING COMMENT

From the slim, single-focus first edition to the large two-volume, multi-faceted third edition, *Antitrust and American Business Abroad* symbolizes the fundamental changes that have taken place in the legal landscape of international business. These two books stand as icons of different periods, not only because they capture the problems and issues of the respective periods, but also because they provide valuable guidance in dealing with those problems and issues.

When a field changes as rapidly as international antitrust law has changed in recent years, assumptions, institutional structures and habits of thought tend to lag behind the changes and to distort perceptions of the current situation. These changes and their implications are likely to occupy antitrust lawyers for a long time, and the more quickly they recognize the features of the new landscape, the more effectively they are likely to respond to it.