The WTO as a Supranational Competition Authority

*By Keith R. Fisher**

There has been a significant wave of transnational mergers and acquisitions this past decade, a wave as significant in its frequency (i.e., sheer numbers of transactions)[1] as in its amplitude (the size of those transactions).[2] Reductions in trade barriers have enabled increased foreign investment, and many multinational enterprises (MNEs) have found it most expedient to expand overseas operations by acquisition of existing businesses rather than *de novo*. By the 1990's, this trend toward increased transnational M&A activity had greatly accelerated, with business characterized by ever-more-rapidly evolving technology, and timeliness of entry or expansion in a given market becomingly increasingly crucial.[3] Total dollar amounts of global M&A activity[4] rose dramatically during 1995-1999,[5] with approximately eighty percent of those transactions involving American and European firms.[6] In response, there has been a veritable explosion of national competition laws, resulting in a massive increase in review of individual transactions by the competition authorities of multifarious jurisdictions.[7]

Thus, transnational mergers, while affording large corporations significant business opportunities, also present challenges because of the occasionally daunting task of compliance with a multiplicity of competition law regimes.[8] These merger review schemes either prohibit or assert governmental controls over transactions, from the incorrigibly anticompetitive to the competitively neutral or benign, with important way stations in-between for transactions that, while anticompetitive, confer economic advantages upon the reviewing nation (such as job creation or preservation, investment in infrastructure, etc.) deemed to outweigh the anticompetitive effects.[9] Along this spectrum, not only are the applicable legal standards somewhat different, with the two most prominent[10] being "dominance" (as used in the EU) and "substantial lessening of competition" (as used in the United States),[11] but the substantive legal content accorded those standards, as well as the remedies prescribed, can be widely divergent in countries purporting to apply the identical standard.[12] Such disparities can result from changes in personnel or changes in antitrust enforcement profiles attributable to the winds of political change.[13]

Globalization has created challenges for a variety of legal regimes, and competition law is certainly one of them. Regulators will, with considerable justification, assert authority to subject to antitrust[14] scrutiny merger transactions that arguably may have an anti-competitive effect on the territory subject to their jurisdiction, regardless of whether the legal situs or "center of gravity" of any party to the transaction falls within that jurisdiction. By the same token, a blanket assertion of authority to scrutinize transactions with little or no actual or even potential effect within that territory not only is incompatible with recognized principles of international law but often results in political conflicts.[15] In connection with the merger of Boeing and McDonnell Douglas, for example, U.S. politicians expressed outrage at the prospect that the European Commission[16] would block a quintessentially American merger and threatened to file a complaint with the WTO or impose unilateral trade sanctions in retaliation.[17] Though the Commission ultimately cleared that transaction, the subsequent blocking of the GE/Honeywell merger led to additional rancor from U.S. politicians and officials.[18]

That same year, competition policy was placed on the World Trade Organization agenda for the Ministerial Round in Doha, Qatar.[19] In anticipation of the next GATT/WTO negotiating agenda, the Doha Ministerial Declaration mandates clarification of world competition rules on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels."[20] The question whether to vouchsafe antitrust law, which concerns itself with *private* restraints of trade, to the tender care of an international body that concerns itself with *public* restraints of trade[21] has been the subject of academic discussion and debate pro[22] and contra.[23] Complicating the issue further is the optimal degree of WTO involvement, if any.

Proposals For World Trade Organization Involvement

Divergences in antitrust analysis between the different legal systems, exemplified as between the U.S. and the EU by the GE/Honeywell and Boeing/McDonnell Douglas imbroglios, are by no means a newly discovered problem.[24] Since the days of the Havana Charter in the late 1940's, there have been sporadic efforts to achieve some form of multinational competition law framework.[25] Examples of such efforts include the draft restrictive business practices codes of the United Nations Conference on Trade and Development (UNCTAD)[26] and the OECD[27] and the Munich Draft International Antitrust Code.[28]

At the urging of the European Union, among others, a decision was made to put the propriety of negotiation of a multilateral competition policy under the auspices of the WTO on the agenda for the next trade negotiations "round."[29] The likelihood of any consensus on the issue emerging is remote, however, because of significant differences between developed economies, most of which now have their own competition laws, and developing economies, most of which do not.[30]

Indeed, such a lack of consensus is all too familiar in—indeed, almost emblematic of—international law and internationalist tendencies generally. Even if internationalization of a particular matter is a desideratum, it is far from an inevitability. One need think only of the movement for world governance after World War I that gave rise to the pitifully inadequate League of Nations, or the push for a kind of world federalism after World War II. These movements were fated to be dashed against the rocks of long-standing—and possibly innate—sociological, political, historical, and cultural

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differences among nations and peoples. The same sorts of socio-political and historico-cultural differences doomed an attempt at an international language (Esperanto),[31] and have even scotched the effort to ratify a Constitution for the European Union.[32]

Even among developed economies with established competition law regimes, a variety of countervailing policy interests can often dilute a given state's commitment to competition law. Examples of these sorts of interests are plentiful and well-known: granting of monopoly power associated with certain rights in intellectual property; government subsidies for, or regulatory policies applicable to, certain sectors; protectionist trade policies aimed at limiting competition from foreign imports or investment by foreign multinational corporations; trade initiatives creating preferences for export cartels.[33] Indeed, the Commission's approaches in the Boeing/McDonnell-Douglas and GE/Honeywell merger applications demonstrate beyond cavil that parochial national (or, in this instance, regional, as a proxy for national) interests can often diverge and that significant disparities in merger policies can serve—and, in fact, are normally intended to serve—those interests.

Several commentators have advocated, to a greater or lesser degree, reasonably comprehensive roles for the WTO in harmonization of competition law, potentially a uniform international antitrust code for pre-merger review with the WTO as either a supranational enforcement agency[34] or a super-clearinghouse with authority to dictate which national competition regimes have sufficient nexus to a particular transaction so as to justify pre-merger notification filings.[35] Neither suggestion appears workable, however, both for institutional WTO reasons and for pragmatic reasons relating to sovereignty and national competition regimes.

Axiomatic to the trade law orientation of the WTO are principles of non-discrimination, typically formulated as "most favored nation" treatment ("MFN"),[36] national treatment[37] or some combination thereof.[38] It is therefore to be expected that extending those principles to competition law would be advocated for WTO consideration (along with the principle of transparency) by some antitrust scholars[39] and by some members of that organization.[40]

Uncritical transference of these international trade principles of non-discrimination, forged as a result of multilateral negotiations intended to affect the *sovereign* behavior of nation states, to competition law, which is targeted at *private* (i.e., non-sovereign) conduct and is, moreover, very much a *sui generis* concept as one moves from one nation's competition law to another's, raises a host of difficulties.[41] Among these are problems of asymmetry. MFN obligations, for example, are well-known in the international trade literature as being susceptible to the free-rider syndrome. When a nation state with MFN status knows that it can secure for itself any benefit extended to another nation state, the incentive to bargain is considerably reduced, if not entirely eliminated. At the same time, one country may be discouraged from offering a concession to another if that same concession must be extended equally to all states partaking of MFN status.[42] Similar problems may attend according national treatment. Suppose that it would be beneficial, as a matter of competition policy, for a particular nation to lower the threshold for pre-merger notification. A national treatment regime could dissuade the government from taking that action where the administrative onus of doing so—having to review a burdensome number of pre-merger filings from foreign enterprises—would threaten to overwhelm the resources at the competition authority's disposal. Similarly, local industry might be deterred from seeking legal reforms the benefits of which would also have to be extended—again, often asymmetrically—to foreign enterprises.

Other asymmetries arise out of the disparate levels of regulatory strength and the accompanying disparities in regulatory incentives that are characteristic of different types of national economies. Encouragement of exports, protectionism for indigenous industries, and promotion of local employment are all typical, if parochial, non-antitrust goals that can cause governments to skew the results of competition-based assessments of transnational transactions.[43] Although this danger lurks behind any nation's competition policy, it is particularly acute for larger, more developed economies (e.g., the U.S. and the EU), which have sufficient market "clout" to be able unilaterally to assert extraterritorial jurisdiction in a meaningful way. At the same time, while smaller economies can rarely expect to make a plausible threat to prohibit *altogether* conduct by a large MNE that might have negative welfare effects within their borders,[44] they can band together and create a regional competition authority—a mini-EU, in effect—that will enjoy enough resources from member countries to portend a credible, joint prohibition or other regulatory response.[45]

Another problem with a WTO-based attempt at harmonization of competition law is that, in stark contrast to the bulk of the trade regime with which the WTO has experience, competition law predominantly addresses private, as opposed to sovereign, conduct.[46] Principles on which universal agreement can be anticipated are few and at a level of generality that does not further the analysis (such as the notion that anticompetitive mergers and acquisitions should be prohibited and that enforcement action against cartels should be vigorous). Even these principles, however, are subject to exceptions, such as for anticompetitive transactions that promote certain non-competition-related interests that are deemed to outweigh their anticompetitive effects, and for the frequently tolerated export cartels.

Furthermore, applying "core" non-discrimination principles to competition law is rather like attempting to force a square peg into a round hole. While national antitrust laws are, on occasion, relatively indifferent to anticompetitive effects that are *wholly* external,[47] fundamentally they make no distinctions based on the nationality of the actor.[48] Unlike tariffs, subsidies, and the like, there is little basis in competition law for the application of concepts such as MFN or national treatment.

The trade law principles animating the WTO approach raise yet another problem. Whatever consensus on competition principles has emerged internationally has largely been the result of *bilateral* agreements on antitrust matters.[49] For example, the United States has entered into several of these bilateral cooperative antitrust agreements,[50] which may be regarded as a supplemental to, or perhaps a subset of, the network of

bilateral treaties, known as Mutual Legal Assistance Treaties (MLATs),[51] that have proliferated in recent years in an effort to promote effective transnational law enforcement.[52] Likewise, the European Union has entered into several such bilateral antitrust agreements.[53] In theory, such agreements endeavor to effect a mutual allocation of prosecutorial resources in order to maximize enforcement and minimize duplication. In practice, however, this is not always possible, particularly in cases affecting significant national (or communitarian, as the case may be) interests, be they competitive or extra-competitive.[54]

The characteristic WTO non-discrimination principles are fundamentally incompatible with the effectiveness of these sorts of bilateral antitrust agreements. If the parties to such a bilateral regime were simultaneously subject to such WTO obligations, they would find themselves in the awkward position of being compelled to accord the positive comity[55] benefits of their bilateral cooperative arrangement to *all* WTO members, e.g., providing them notification of competition enforcement actions that might affect their interests (assuming those could be known in each case), expending resources to provide them with antitrust assistance with no reciprocal obligation having been entered into by the majority of the recipients, and, worst of all, being forced to take into account, as a matter of traditional (or "negative") comity, the interests of these multifarious third-party nations in assessing whether to take enforcement action that might affect nationals of such nations (and, if so, the extent to which such enforcement would be compatible with those third-party interests).

The glib solution likely to be offered by the WTO's Working Group on the Interaction of Trade and Competition[56] (the "WTO Working Group") would be to exempt such bilateral agreements from non-discrimination principles. That, indeed, is the position advocated by the European Union[57] and is likewise the *preliminary* conclusion drawn by the WTO Working Group.[58] Such an exemption would seem to vitiate the efficacy of any WTO centralization effort on global competition norms and would call into question the wisdom of considering that particular international forum in the first place.[59]

Finally, there is the potentially messy and uncertain area of sectoral exceptions. Many countries, including the United States, commit to the discretion of authorities other than competition authorities the power to approve or deny mergers in certain regulated industries (e.g., telecommunications, energy, banking). One is hard-pressed to imagine how an organization like the WTO could obtain sufficient consensus to approve the infringement on sovereignty necessary to eliminate what will, of necessity, be a patchwork quilt of national laws containing myriad sectoral exceptions, exemptions, and special rules. Governmental motivations underlying these exemptions are, of course, varied; most are likely non-discriminatory, but perhaps not all. The WTO Working Group has acknowledged this problem but, in order to avoid dealing with it, has blithely asserted that non-discrimination in antitrust "would not preclude the enactment of sectoral exceptions, exemptions and exclusions from national competition regimes."[60] That evident reluctance to come to grips with so fundamental an issue to competition policy, particularly where the potential detriment to maintaining these special regimes includes not only the inefficiency that lack of competition in such sectors brings but also the rather obvious risk of kindling protectionist international trade responses in some cases, confirms the inadequacy of the WTO forum.

The proposal to use the WTO as a clearinghouse is also flawed. Undoubtedly it would be more convenient for an MNE to be able to make one preliminary filing with a supranational competition regulator, which would then make a binding determination as to which member countries would, and would not, be entitled to premerger notification and to exercise jurisdiction over the proposed transaction.[61] Apart from the fact that the WTO lacks both the particular institutional expertise and the resources to staff such an operation, there is no principled basis on which such determinations could be made. To do so, the WTO would, in effect, be substituting its judgment for someone else's—either (1) the considered judgment of individual sovereign nations about their own competition policy and about what sorts of transactions raise competitive (or even extra-competitive) concerns sufficient to trigger a reporting requirement, or (2) the judgment of competition authorities, charged with interpreting (and with expertise in interpreting) their own country's antitrust laws, that a particular transaction should be notified because it raises the sorts of policy concerns at which those laws were directed. The entire notion, while perhaps superficially attractive, is too rife with practical difficulties to be workable, even if nation states were willing to cede so much of their sovereignty to an international organization—a dubious proposition at best.

André Fiebig's proposal, while offering some palliatives, suffers from these same infirmities. He suggests that exemptive rulings[62] by the WTO[63] would be binding on member nations, which would have to amend their national competition laws accordingly, subject to the right of a member nation to overrule the WTO upon a showing of compelling reasons.[64] That any nation would cede authority to determine whether its own competition experts could even review the transaction is patently politically unrealistic, even if there were (1) a meaningful quantitative standard that could be applied to reach such a conclusion and (2) a qualitative set of criteria for ascertaining market share upon which all countries either would or should agree.

Last but not least, even some proponents of a broad role, in principle, for the WTO in competition law and policy concede that, notwithstanding the proliferation of merger control regimes, recourse to a regime such as the WTO is in part premature and in part uncalled for. As Professor Mitsuo Matsushita has observed:

> Mergers and acquisitions in the scope of the WTO should be put off for future consideration until such time comes when national markets will have been so globalised that they are integrated into one world market and the distinction between domestic policy and international trade policy will have been blurred so much that convergence of merger policy is essential to maintain the integrated world market…. [I]tems such as the convergence of filing requirement in mergers and acquisitions is a very important issue. This should be dealt with in the appropriate forum.

However, taking into account the objective of the WTO, one may say that this is outside its scope.[65]

A More Circumscribed Role for the WTO

The preceding discussion has identified certain immanent flaws that render the WTO unsuitable for the supranational competition authority role advocated by several scholars and commentators. Nevertheless, there do seem to be a number of more modest functions that organization could usefully perform.

At the outset, however, it should be acknowledged that concerns about proliferation of merger control regimes have a tendency to be overblown. To listen to complaints from multinational corporate behemoths or their sophisticated M&A counsel about the number of filings they have to make is likely to evoke about as much sympathy as an obese child whining for a candy bar. If one is large enough to be conducting business on a manifold multinational basis, surely it should come as no surprise, either *a priori* or *a posteriori*, that compliance with the laws of each jurisdiction in which one does business will be required. These include not just competition laws but tax laws, corporate laws, securities laws, licensing laws, and potentially a host of others.[66] Such compliance is merely a recognized cost of doing business for all enterprises, large and small, domestic or multinational.

Nor is there any question about the legitimacy, at least in principle, of substantive competition concerns even among nation states that are remote from a transaction's so-called "center of gravity." The transaction's effect on local economies may well justify not only review but a remedy—though clearly, under the well-established territoriality principle of public international law, that remedy should be tailored to address anticompetitive effects within the local economy only and, mindful of those bounds, should not unduly trammel extraterritorially the parties' ability to effect the transaction.[67]

Acknowledging that potential for exaggeration and the legitimacy of substantive competition concerns does not, however, eliminate the possibility that there are useful, efficiency-enhancing, and harmonizing functions of a *procedural* nature that could be performed for international M&A transactions on a centralized basis. Foremost among such procedural approaches would be the implementation of an internationally enforceable requirement of transparency in merger review. Under such a regime, each country would be required, before applying its competition law to any M&A transaction involving a foreign party, to have published reasonably detailed merger guidelines. To be satisfactory, these guidelines would—(a) identify the national agency or agencies with jurisdiction over the transaction; (b) articulate the basis on which such jurisdiction will be exercised;[68] (c) elucidate each such agency's enforcement policies in a manner adequate to facilitate strategic planning, provide guidance on each such agency's approach to market definition; (d) detail which defenses or mitigating factors (if any) will be taken into account by each such agency when reviewing a reportable transaction;[69] and (e) delineate any non-competition factors that will be taken into account in the merger review process.[70]

Apart from considerations of transparency, there are other harmonizing procedural suggestions that might tentatively be offered. The goals animating these suggestions are, wherever possible, to streamline transaction costs, expedite pro-competitive or competitively neutral international M&A transactions, and dilute the potential (which, admittedly, can never entirely be erased) for conflict between and among merger review jurisdictions.

To be sure, there neither is, nor can there be, any requirement that WTO members enact their own competition laws. For those that do, however, and specifically for that further subset that include merger control and pre-merger notification within their competition law regimes, certain modest but meaningful reforms could be practicably implemented and enforced under the aegis of the WTO.

First, requiring filings on transactions unlikely to cause any appreciable detrimental effect on competition within the member's territory should be prohibited and sanctionable as violative of customary principles of international law.[71]

Second, procedures should be implemented by each member nation for advance advisory opinions (a kind of *pre*-premerger notification) on whether a filing will be required. Such advisory opinions would perforce be based on and subject to accurate submissions by the parties, including information about (a) their businesses, (b) business conducted within the member nation's territory, (c) revenues from the member's territory, and (d) the extent (if any) to which the parties actually compete within the member's territory (and, if so, whether their combined market share is too low to occasion competitive concern).[72]

Third, filings should not be required unless one of the parties to the transaction either carries on significant operating business in the jurisdiction or has more than *de minimis* sales revenues there. Mere ownership of assets in a country, without any indicia of impact on consumers or the economy, should not be a sufficient nexus. Nor should either reliance on worldwide sales figures (i.e., those outside the jurisdiction) or vaguely articulated *potential* effects on the local economy be sufficient bases for the exercise of jurisdiction.

Fourth, notification thresholds should be specified with precision. In particular, the imprecision and subjectivity inherent in market share tests should, if at all possible, be avoided.[73]

Fifth, guidance should be provided (i.e., transparency) on the timing for providing notifications. That will avoid uncertainty and the potential levying of substantial fines.[74]

Finally, there should be additional guidance in the form of regulations or published policy statements and interpretations (transparency again!). This guidance will enable counsel, including especially local counsel, intelligently to advise their clients about a variety of matters, including, in particular, whether pre-merger notification will, in fact, be required for a particular transaction.

CONCLUSION

With the proliferation of national competition laws, a number of proposals have been put forward for a supranational competition authority to be housed within the World Trade Organization. To be sure, even within well-developed competition law regimes, such as those of the United States and

the European Union, substantial disparities in market definition and in the methodology of assessing market power can and do arise, notwithstanding convergence and nominal use by both systems of the same or similar yardsticks and principles. The GE/Honeywell fracas established that beyond cavil.

To the extent that the aforementioned supranational competition authority proposals envisage a substantive role for the WTO, they fail to take adequately into consideration not merely the political un-palatability of such an arrangement but, more significantly, the institutional unsuitability of the WTO for the task. This article suggests an alternative, and considerably more modest, role as an enforcer of purely procedural reforms designed to abate the potential for inter-jurisdictional conflicts, diminish transaction costs, expedite pro-competitive or competitively neutral M&A transactions, and, most important of all, promote transparency in transnational merger review.

Endnotes

1 *See* U.S. Department of Justice, Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust [*hereinafter* ICPAC Report] 43-46 (2000) (discussing merger wave of the 1990's), *available at* http:// www.usdoj.gov/atr/icpac/finalreport.htm (last visited October 30, 2004).

2 *See, e.g.*, Frederic L. Pryor, *Dimensions in the Worldwide Merger Boom,* 35 J. Econ. Issues 825 (2001). *See also* note 5, *infra*.

3 An interesting contrast was offered by former FTC Chairman Robert Pitofsky, who noted, in connection with a speech (though not as part of his prepared remarks) to the Antitrust Section of the A.B.A. at that organizations's 1998 annual meeting, that during the Carter Administration (late 1970's), the FTC reviewed only one transaction with an international dimension. *See Mergers and Acquisitions: ABA Section Examines Consequences of Proliferation of Premerger Notification*, 75 Antitrust & Trade Reg. Rep. (BNA) 163 (1998) (reporting Pitofsky's remarks). The text of Pitofsky's prepared remarks (which do not contain the preceding observation) is available on the FTC's website. *See* Merger and Competition—The Way Ahead, Prepared Remarks of Robert Pitofsky, Chairman, U.S. Federal Trade Commission, Before the American Bar Association Annual Meeting, Toronto, Canada (August 4, 1998), *available at* http://www.ftc.gov/speeches/pitofsky/canada.sp2.htm (last visited October 28, 2004).

4 If the theory of potential competition has any validity, then global M&A activity, with its propensity to produce transnational behemoths, has a tendency to eliminate whatever restraining effect such potential competition might have. The theory arises, after all, "as a negative implication from the perception that, in a market that would otherwise permit monopoly pricing, the existence of potential competition dampens the ability to price in that manner, just as the existence of substitute competition increases the elasticity of the monopolist's demand curve and thereby reduces the level and the social costs of monopoly." Keith R. Fisher, Mergers and Acquisitions of Banks and Savings Institutions § 3.10.2 (1993). Marked diminution in the number of competitors who *could* enter the market *de novo* would tend to vitiate any vestigial market discipline the theory of potential competition might contribute. This tendency would, as a theoretical matter, only be exacerbated by high barriers to entry occasioned by technology and technology licensing or by high levels of industry-specific sunk costs.

5 One estimate of this increase was from $199 billion to $498 billion. *See* Simon J. Evenett et al., "Antitrust Policy in an Evolving Global Marketplace," *in* Antitrust Goes Global: What Future for Transatlantic Cooperation? 1, 4 (Simon J. Evenett *et al.* eds. 2001) (furnishing statistics). That appears relatively modest compared with other estimates. *Cf.* Judy Radler Cohen, *Blockbusters, Nonstop! Global M&A Hits $3.4 Trillion as Europe Takes Off and Telecom Soars,* Investment Dealer's Digest, Jan. 17, 2000 (citing data from Thomson Financial Securities and asserting an increase in global merger activity from $2.5 trillion in 1998 to $3.4 trillion in 1999). These numbers seem at first blush to be inordinately large, but then one must remember the types and magnitudes of transactions announced during those years (*e.g.,* in 1998, Travelers-Citicorp, WorldCom/MCI, NationsBank/BankAmerica, SBC/Ameritech, Norwest/Wells Fargo, and in 1999, Vodafone/Mannesmann, Sprint/MCI WorldCom, Olivetti/Telecom Italia). *See* ICPAC Report, *supra* note 1, at 45 n.9. The impact of rapidly evolving technology can be seen in the industries witnessing the most consolidation: telecommunications and financial services.

6 The aggregate amount of European M&A transactions in 1999 was more than double that of the preceding year. *Id.* at 45.

7 *See* ICPAC Report, *supra* note 1, at 33 (noting that by 2000, approximately sixty nations had adopted antitrust laws, mostly in the early 1990s, and that twenty more were in the process of drafting laws). According to more recent estimates, over 100 countries had competition laws as of the summer of 2004, and nearly 70 had pre-merger notification laws. *See* R. Hewitt Pate, *Securing the Benefits of Global Competition*, Address At the Tokyo American Center, Tokyo Japan (Sept. 10, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205389.htm (last visited October 30, 2004). For some late 1990's perspectives on this phenomenon, *see* William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. Cin. L. Rev. 1075 (1998).

8 For example, according to one commentator, when MCI merged with WorldCom even back in 1997, over 30 agencies reviewed the transaction. Adam Frederickson, *A Strategic Approach to Multi-jurisdictional Filings,* 4 Eur. Counsel 23 (Dec. 1999/Jan. 2000). *See also* Notification and Procedures Subgroup, Int'l Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review 10-12 (2002), *available at* http://www.internationalcompetitionnetwork.org/costburd.pdf (last visited February 12, 2004). *See also* Ariel Ezrachi, *The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control,* 36 Geo. Wash. Int'l L. Rev. 433, 435 n.5 (2004) (asserting that the Exxon/Mobil merger was subject to review in "roughly forty jurisdictions").

9 The variations on this theme are as many and multiform as there are individualistic national customs or priorities that animate competition policy. Some competition laws, for example, concern themselves in particular with the impact of a transaction on local small- to medium-sized business. *E.g.,* South Africa, Competition Act of 1998, ch.3, § 16(3).

10 A third, oft-cited, is the nebulous "public interest" standard, which used to be the test under the U.K.'s competition law. Recognizing that this standard facilitates the substitution of non-antitrust goals for rigorous analysis of the effects of a particular transaction on competition, the U.K. has replaced its overtly politicized public interest approach with an explicitly competition-oriented standard. *See generally* U.K. Department of Trade and Industry, Productivity and Enterprise: A World Class Competition Regime 23-24 (2001), *available at* http://www.dti.gov.uk/ccp/topics2/pdf2/compwp.pdf (last visited October 28, 2004); Enterprise Act 2002, Ch. 40, § 35 (adopting as basic framework "substantial lessening of competition" test), *available at* http://www.legislation.hmso.gov.uk/acts/acts2002/20040-d.htm#36 (last visited Oct. 28, 2004).

11 Antitrust regulators in both the United States and the European Union provide training programs and other assistance for those in charge of establishing and enforcing competition laws in other countries. *See* Fed. Trade Comm'n, *A Positive Agenda for Consumers: The FTC Year in Review* (2003), *available at* http:// www.ftc.gov/reports/aba/gpra2003.pdf (last visited October 16, 2004) (describing FTC program); Kathleen E. McDermott, *Antitrust Outreach: U.S. Agencies Provide Competition Counseling to Eastern Europe,* Antitrust, 4-7 (Fall/Winter 1991) (describing Antitrust Division's initiative in Eastern Europe); Juan Antonio Rivière Martí, *Competition Policy in Latin America: A New Area of Interest for the European Union,* EC Competition Pol'y Newsl. (Spring 1997), *available at* http://europa.eu.int/comm/competition/speeches/text/sp1997_014_ en.html (last visited Oct. 16, 2004) (describing EU initiative in Latin America).

12 *See* Evenett, *supra* note 5, at 16.

13 This is a familiar phenomenon in the United States. Contrast the profile of antitrust enforcement under the Carter Administration with that under the Reagan Administration; a similar comparison can be made with the Administrations of Bill Clinton and George W. Bush (as Microsoft can readily attest).

14 At least where there are no differences in nuance, the terms "antitrust" and "competition" (in the sense of regulation of competition or competition policy) will be used interchangeably herein. *Cf.* Wolfgang Pape, *Socio-Cultural Differences and International Competition Law,* 5 Eur. L.J. 438, 444 (1999) (noting that in bilateral discussions between the United States and the European Community, European negotiators agreed that "competition" should be interpreted as meaning "antitrust" in the American sense).

15 Competition law jurisdiction is generally based upon the territoriality principle. *See, e.g.,* Cases 89, 104, 114, 116-7, 125-9/85, Ahlström v. Commission, 1988 E.C.R. 5193 ¶ 18.

16 To avoid confusion, in this article the abbreviation "Commission" will be used to refer to the European Commission but not the U.S. Federal Trade Commission, which shall only be abbreviated by its acronym, "FTC."

17 *See generally* Alison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. Times, July 18, 1997, at D2; William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 Antitrust L.J. 805, 826 (2001). A common view in the United States was that the position taken by the European Commission in the Boeing/McDonnell Douglas matter was pure and simple protectionism of its aerospace industry in general and of Airbus in particular. *See* Interview with Thomas L. Broeder and Benjamin S. Sharp, Attorneys for Boeing, 12 Antitrust 4, 5 (1997); Catherine Yang, *When Protectionism Wears Camouflage,* Business Week, June 2, 1997, at 60. Predictably enough, the Commission's position was that its concerns were exclusively of a legal nature and absolutely legitimate under applicable EC competition laws. *See, e.g.,* European Commission, Press Release IP/97/400 (May 13, 1997) (quoting former EC Competition Commissioner Karel Van Miert: "Our analysis of this case is strictly conducted along the lines and criteria which have been spelled out in the legal framework of the European Merger Regulation, and nothing else.").

18 Democratic Senators John D. Rockefeller, IV and Ernest F. Hollings warned of possible retaliatory action by Congress. *See* William Drozdiak, *European Union Kills GE Deal*, Wash. Post, Jul. 4, 2001, at A1 ("U.S. Senators… warned that thwarting the merger would… compel retaliatory action by Washington."). U.S. Treasury Secretary Paul H. O'Neill derided the Commission's decision as "off the wall" and said that something needed to be done to bring the EU back in line. Brian M. Carney, *Loggerheads: Mario Monti, Central Planner,* Wall St. J. Eur., Jul. 6, 2001, at 6. *See also* Brandon Mitchener & Philip Shiskin, *The Honeywell Deal: Who Asked Monti, Anyway?*, Wall St. J., June 19, 2001, at A14.

19 Ministerial Declaration, WT/MIN(01)/DEC/1, ¶¶ 23-25 (Nov. 14, 2001), *available at* http://www.wto.org/english/thewto_e/minist_ e/min01_ e/mindecl_e.htm (last visited August 8, 2004) (*hereinafter* "Doha Ministerial Declaration"). This Declaration announced a "work programme" rather than a "round" of negotiations, a somewhat murky distinction but one that was doubtless significant for those countries, such as India, that are skeptical of antitrust negotiations in this forum. *See* Press Release, Government of India Press Information Bureau, Major Gains for India at Doha Ministerial Conference (Nov. 15, 2001), *available at* http://commin.nic.in/doc/nov01_ release.htm (last visited August 8, 2004) ("India has also succeeded in warding off any commitments for negotiations in the important areas of Investment, Competition Policy and Transparency in Government Procurement. This has been made possible through extremely hard bargaining on India's part during the Doha Ministerial Conference.").

20 Doha Ministerial Declaration, *supra* note 19, ¶ 25.

21 Though there are many proponents of this view, it was actually Sir Leon Brittan, one of the principal contemporary architects of the European Union, who first suggested that a trade dispute mechanism (then under GATT auspices) might be used in transnational M&A situations. *See, e.g., EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy,* BNA Antitrust & Trade Regulation Daily (Feb. 10, 1992).

22 *E.g.,* Eleanor M. Fox, *Toward World Antitrust and Market Access,* 91 Am. J. Int'l L. 1, 13 (1997); Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. Int'l Econ. L. 665, 670- 72 (1999); Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 Nw. J. Int'l L.& Bus. 233, 247-251 (2000).

23 *E.g.,* ICPAC Report, *supra* note 1, at 279; Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy,* 94 Am. J. Int'l L. 478, 487-94 (2000).

24 *See, e.g.,* Stefan Schmitz, *The European Commission's Decision in GE/Honeywell and the Question of the Goals of Antitrust Law,* 23 U. Pa. J. Int'l. Econ. L. 539, 567-68 (2002); Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?,* 11 Stanford J. Law, Bus. & Fin. 327, 359-372 (2006).

25 In 1948, the UN Conference on Trade and Employment resulted in what became known as the Havana Charter or the International Trade Organization (ITO). Some 53 nations signed the Havana Charter and pledged therein to promote both domestic and international actions for the purpose, *inter alia*, of eliminating restrictive business practices on the part of public or private commercial enterprises, including business practices that might limit access to markets or foster monopolization. *See* Havana Charter for an International Trade Organization, United States Conference on Trade and Employment, held at Havana, Cuba, 21 November 1947 to 24 March 1948, Final Act and Related Documents, U.N. Doc. ICITO/1/4 (March 1948), at Chapter V, Restrictive Business Practices, Art. 46, *available at* www.worldtradelaw.net/misc/havana.pdf (last visited Dec. 1, 2004). *See generally* Clair Wilcox, A Charter for World Trade 153-60, 227 (1949); Frederick M. Abbott, "Public Policy and Global Technological Integration: An Introduction," *in* Public Policy and Global Technological Integration 3 (Frederick M. Abbott & David J. Gerber, eds., 1997). Congress, however, objected to the Havana Charter, and the creation of the ITO was aborted, although the trading system was preserved under the General Agreement on Tariffs and Trade. For more background information, *see* Robert R. Wilson, *Proposed ITO Charter*, 41 Am. J. Int'l L. 879 (1947); George Bronz, *The International Trade Organisation Charter*, 62 Harv. L. Rev. 1089 (1949).

26 *See* UNCTAD, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10, *reprinted in* 19 I.L.M. 813 (1980). For the more recently revised version, *see* U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000), *available at* http://www.unctad.org/en/docs/tdrbpconf10r2en.pdf (last visited Dec. 1, 2004).

27 *See, e.g.,* OECD, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade (Oct. 5, 1967), *reprinted in* 8 I.L.M. 1309 (1969); OECD, Council Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade C (73) 99 (Final) (July 3, 1973), *reprinted in* 19 Antitrust Bull. 283 (1974); Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting Trade, OECD Doc. No. C (86) 44 (Final) (May 21, 1986), revised by OECD Doc. C(95)130/final (July 27-28, 1995), *reprinted in* 35 I.L.M. 1314 (1996).

28 *See* International Antitrust Code Working Group, Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (July 10, 1993), *reprinted in* 65 Antitrust & Trade Reg. Rep. (BNA) S-1, Issue No. 1628 (Aug. 19, 1993) (Special Supp.). This proposal went nowhere fast—even faster, indeed, than its predecessors. For discussion, *see generally* Daniel J. Gifford, *The Draft International Antitrust Code Proposed At Munich: Good Intentions Gone Awry*, 6 Minn. J. Global Trade 1 (1997).

29 Doha Ministerial Declaration, *supra* note 19, ¶ 23 (declaring agreement that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations").

30 Among those that do not there is also apparently a widespread mistrust about the value of such regimes to the developing world. *See, e.g.,* Working Group on the Interaction Between Trade and Competition Policy, Report on the Meeting of 26- 27 September 2002, WT/WGTCP/M/19, P 17 (Nov. 15, 2002), *available at* http:// www.wto.org (last visited October 30, 2004) (reporting submissions by India on the non-discrimination principles). *Cf.* Michal S. Gall, *Size Does Matter: The Effects of Market Size on Optimal Competition Policy*, 74 S. Cal. L. Rev. 1437, 1439 (2001) ("the size of a jurisdiction's market significantly affects the competition policy that it should adopt"); A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust for Reforming Economies*, 18 Hous. J. Int'l L. 311, 312 (1996) (suggesting that "antitrust policies adopted in reforming economies should be strictly limited in scope").

31 Esperanto, an invented language not springing from any particular people or geographic region, was developed in the late 19th century in the belief that a common language, allowing people with different native tongues to communicate more effectively, would be useful in resolving human problems that historically had led to strife. Esperanto is not officially supported by any sovereign government. *See generally* Esperanto—An Overview, *available at* http://www.webcom.com/~donh/efaq.html (last visited April 15, 2005).

32 *See, e.g.,* World Briefing Europe: *European Union Chief Gives Up on Constitution*, N.Y. Times, Sept. 22, 2005, at A10; Elaine Sciolino, *European Charter Architect Faults Chirac for Its Rejection*, N.Y. Times, June 15, 2005, at A3; Alan Cowell, *Britain Suspends Referendum on European Constitution*, N.Y. Times, June 7, 2005, at A10; Marlise Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. Times, June 2, 2005, at A10; Elaine Sciolino, *French Voters Soundly Reject European Pact*, N.Y. Times, May 30, 2005, at A1.

33 *See, e.g.,* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. Rev. 343, 374 (1997) (noting that such countervailing interests will determine the rate and nature of future progress and giving as examples governmental and subgovernmental pressures, business pressures, institutional pressures, private interest groups, transnational coalitions, and international organizations).

34 *See* Eleanor M. Fox, *Toward World Antitrust and Market Access,* 91 Am. J. Int'l L. 1, 13 (1997).

35 *See* Fiebig, *supra* note 22, at 247-251.

36 MFN status typically arises from clauses in international trade arrangements pursuant to which parties to a treaty are bound to extend trading benefits equal to those extended to any third party state.

37 National treatment is the commitment of a country to accord to foreign investors and to foreign-controlled enterprises in its territory treatment no less favorable than that accorded in like situations to domestic investors and enterprises.

38 *See, e.g.,* John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited,* 4 J. Int'l Econ. L. 67, 72-73 (2001) (listing MFN as one of seven "mantras" central to the WTO); Debra P. Steger, *Afterword: The "Trade and…" Conundrum—A Commentary,* 96 Am. J. Int' L. 135, 137, 139 (2002) (suggesting that non-discrimination and affiliated legal principles now predominate over market access and reciprocity norms).

39 *See, e.g.,* Eleanor M. Fox, *Global Markets, National Law, and the Regulation of Business: A View From the Top,* 75 St. John's L. Rev. 383, 396 (2001) (advocating transparency and non-discrimination based on nationality); Donald I. Baker et al., *The Harmonization of International Competition Law Enforcement*, *in* Competition Policy in the Global Economy 439, 441-47 (Leonard Waverman et al. eds., 1997) (including national treatment and transparency as fundamental principles for harmonized international antitrust).

40 *See, e.g.,* Communication from the EC Communication from the European Community and its Member States, WT/WGTCP/W/222, ¶ 11 (Nov. 19, 2002), *available at* http://www.wto.org (last visited October 16, 2004) (stressing prevalence of non-discrimination principles in trade law and national antitrust laws as argument for incorporating them as part of WTO antitrust regime).

41 Commentators have differentiated international trade law from international competition law on this sovereign-private distinction. *See, e.g.,* P.J. Lloyd, *The Architecture of the WTO*, 17 Eur. J. Pol. Econ. 327, 348 (2001); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy,* 94 Am. J. Int'l L. 478, 489 (2000).

42 *See, e.g.,* Henrik Horn & Petro C. Mavroidis, *Economic and Legal Aspects of the Most-Favored Nation Clause,* 17 Eur. J. Pol. Econ. 233, 253 (2001) (discussing the free-rider phenomenon and concessions).

43 ICPAC Report, *supra* note 1, at 50 & n. 30 (citing James B. Kobak, Jr. & Anthony M. D'Iorio, *The High Costs of Cross-Border Merger Reviews*, *in* The Global Economy at the Turn of the Century, Vol. III: International Trade, at 717, 721 (Gulser Meric & Susan E. W. Nicholds eds., 1998)).

44 The MNE will simply "vote with its feet" and abandon doing business in such a country, at least where the loss of revenues from such an exit (or the increase in costs from remaining) would be smaller than the anticipated increase in revenues from the merger or other transaction.

45 *E.g.,* the Caribbean Community (CARICOM) Single Market and Economy (CSME), Protocol VIII on Competition Policy, Consumer Protection, Dumping and Subsidies (Protocol Amending the Treaty Establishing the Caribbean Community) art. 30, *available at* http://www.caricom.org (last visited October 30, 2004).

46 For simplicity, this discussion will ignore the analytical complications engendered by the odd state-conferred monopoly, by state-owned enterprises, and by barriers to entry effected as a matter of extrinsic regulatory policy.

47 In the United States, for example, the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act (FTAIA), is simply inapplicable to trade or commerce with foreign nations except where "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic trade or commerce. 15 U.S.C. § 6a. *See, e.g.,* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796-97 n.23 (1993) (FTAIA "was intended to exempt from the Sherman Act export transactions that did not injure the United States economy"). Indeed, export cartels are a well-known exception to the ukase against cartels. *See* Waller, *supra* note 33, at 397 (noting the disparity of treatment). Another example is the Webb-Pomerene Act, 15 U.S.C. § 61 *et seq.* (exempting from the Sherman Act associations engaged exclusively in export trade). *See also* Diane P. Wood, *The U.S. Antitrust Laws in a Global Context,* 2004 Colum. Bus. L. Rev. 265, 267-68 ("Another persistent sore spot in the cartel area is the existence of legally tolerated export cartels. Some (though not necessarily all) Webb-Pomerene associations and export trading companies might fit that description. To the extent that an export arrangement among competitors is legitimately described as a cartel rather than a joint venture—that is, it exists solely because it will be more profitable to reduce output and increase prices and no efficiencies from joint operations are likely—it is a raw way of harming foreign consumers, whose injuries are not likely to bother a domestic political constituency."); Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy,* 1 Wash. U. Global Stud. L. Rev. 462, 471 & n.16 (2002) (citing Japanese export cartel law, *Yushutsunyu torihiki ho* [Export and Import Transactions Law], Law No. 299 of 1952, as amended). *Cf.* U.S. Department of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.122 (1995) (authorizing invocation of the Sherman Act to open foreign markets closed by anticompetitive restraints such as an import cartel or monopolistic exclusive dealing), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm (last visited October 30, 2004).

48 Assuming, that is, in the case of a MNE, that corporate domicile—"nationality"—continues to have any significance at all. *See, e.g.,* Peter T. Muchlinski, Multinational Enterprises and the Law (1995); *The Discreet Charm of the Multicultural Multinational*, Economist, July 30, 1994, at 58; U.S. Int'l Trade Comm'n, *The Effect of Greater Economic Integration Within the European Community in the United States* (USITC Pub. No. 2204) (July 1989).

49 *See, e.g.,* Antitrust Cooperation Agreements, *available at* http:// www.usdoj.gov/atr/public/international/int_arrangements.htm (last visited October 30, 2004).

50 These bilateral antitrust agreements have been entered into pursuant to express authority granted by Congress under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq*. The Act requires that the treaty partner have comparable ability to that of the United States enforcement apparatus to provide assistance and that it maintain the confidentiality of information disclosed.

51 MLATs create frameworks for mutual (usually bilateral) cooperation in the investigation and prosecution of transnational crime. *See* Keith R. Fisher, *In Rem Alternatives to Extradition for Money Laundering,* 25 Loyola of L.A. Int'l & Comp. L. Rev. 409, 436 (2003). As antitrust violations are criminal offenses under the laws of many jurisdictions, bilateral competition agreements are conceptually similar.

52 Typically MLATs deal with obtaining and preserving evidence and providing assistance to facilitate confiscation of criminal proceeds and instrumentalities. *Id*. (citing Jimmy Gurulé, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 Fordham Int'l L.J. 74, 90-91 & n.55 (1998) (listing MLATs entered into by the United States with Colombia, Mexico, the Cayman Islands, Thailand, Panama, Switzerland, and other nations)).

53 Indeed, one of the key agreements is the Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, *available at* http://www.usdoj.gov/atr/public/international/docs/1781.htm (last visited February 12, 2004).

54 The contretemps over Boeing/McDonnell Douglas and GE/Honeywell are cases in point.

55 The notion of comity in international law refers traditionally to respect for the interests of another nation state. This is sometimes referred to as "negative comity." "Positive comity" is the obverse: a request by Country A that Country B initiate (completely voluntarily, and in whatever form it deems appropriate) some form of enforcement proceeding to remedy anticompetitive conduct taking place within Country B's borders that is substantially and adversely affecting the interests of Country A. "[I]f a signatory [*e.g.*, to a bilateral antitrust agreement] believes that anticompetitive practices carried out in the territory of another signatory are adversely affecting its own important interests, it may notify the other signatory and request its competition authorities to initiate appropriate enforcement procedures. However, in order to preserve control over limited enforcement resources, the requested signatory would retain the right not to act on the request." Joanna R. Shelton, Deputy Secretary-General, OECD, Competition Policy: What Chance for International Rules?, at 5, *available at* http://www.oecd.org/dataoecd/34/39/1919969.pdf (last visited November 1, 2004). *See also* OECD Committee on Competition Law and Policy, CLP Report on Positive Comity, OECD Doc. DAFFE/CLP(99)19, at 46-49 (June 14, 1999); Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?,* 14 Duke J. Comp. & Int'l. L. 1, 11 & n.42 (2004).

56 This working group was established in 1996 after the Singapore Ministerial Conference.

57 *See* Communication from the European Community and its Member States, WT/WGTCP/W/222, at 8 (Nov. 19, 2002), *available at* http://www.wto.org (last visited October 30, 2004).

58 Working Group on the Interaction Between Trade and Competition Policy, Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/5, at 28 (Oct. 8, 2001), *available at* http://www.wto.org (last visited Oct. 30, 2004).

59 Granting regulatory forbearance or providing assistance to some WTO members but not to others would appear antithetical to the core principles of non-discrimination and transparency invoked by the Doha Ministerial Declaration. Analogous exemptions for customs unions and free trade areas under the GATT and other agreements have been quite controversial. *See, e.g.,* John H. Jackson, The World Trading System 165-73 (2d ed. 1997).

60 Working Group on the Interaction between Trade and Competition Policy, Core Principles, Including Transparency, Non-Discrimination and Procedural Fairness: Background Note by the Secretariat, WT/WGTCP/W/209, ¶ 36 (Sept. 19, 2002), *available at* http://www.wto.org (last visited October 16, 2004).

61 The downside is that for transactions that present anticompetitive profiles in particular jurisdictions, one is merely adding an additional layer of regulatory scrutiny.

62 These would be rulings by Fiebig's suggested WTO Premerger Office that particular transactions pose no threat to competition within particular countries. Fiebig, *supra* note 22, at 249.

63 To his credit, Fiebig acknowledges that one has difficulty offering a cogent standard for identifying transactions that are competitively innocuous. *Id.* at 252.

64 He posits, however, that this possibility of overruling the WTO would be available only where the country could establish that within its borders the parties to the transaction would have more than 10% of the market share. *Id.* at 251. One wonders at the arbitrariness of this or any other percentage that might be selected, short of one that was truly and irrefutably *de minimis* (*e.g.,* less than 5%). That any sovereign nation would accede to such a suggestion seems implausible.

65 Mitsuo Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO*, *in* Fordham Corp. L. Inst. 31, 34-38 (Barry E. Hawk ed., 1998).

66 It is especially incongruous, even embarrassing, to hear such complaints about foreign competition laws from large, U.S. corporations, which, because of their long experience in doing business on a multi-state basis domestically, have every reason to expect compliance costs arising from a multiplicity of legal regimes and requirements.

67 *See supra* note 15, and accompanying text.

68 This would entail, at a minimum, defining with some precision the types of transactions subsumed within the regulatory scheme, the threshold below which such transactions need not be reported or will have no competitive concern, and the manner in which such threshold is calculated.

69 *E.g.,* failing firm defenses, efficiencies, etc.

70 For example, those countries that require, or permit, policies designed to promote "national champions" should not endeavor to conceal such policies but should put other countries and foreign businesses on notice.

71 *See supra* note 15, and accompanying text.

72 Canada, for example, has a procedure under which the parties may apply for an Advance Ruling Certificate, the granting of which is discretionary with the Bureau of Competition Policy but which, if granted, absolves the parties from premerger notification.

73 According to the ABA Antitrust Section, a significant number of jurisdictions use this approach for ascertaining whether a proposed transaction is reportable, including Brazil, Bulgaria, the Czech Republic, Estonia, Greece, Israel, Portugal, Slovenia, Slovakia, Spain, Taiwan, Tunisia, and Turkey.

74 *See, e.g.,* ICPAC Report, *supra* note 1, at 111, n.49 (noting reports of "recent problems that parties meet under the Brazilian system, including threats to retroactively apply changes in the law so as to impose fines on parties for 'late' notification.").