AMERICA-FIRST ANTITRUST

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I. INTRODUCTION

"From this moment on, it's going to be America First." So spoke Donald J. Trump in his inaugural address as President of the United States.

What is America-First antitrust? America First means nationalism, which of course extends beyond America. Nationalism is the watchword of Brexit and of any number of political parties in Europe that might soon come to power. The new Administration appears to embrace these trends, while at the same time criticizing what it sees as nationalistic policies of our trading partners, particularly China, but Japan and Korea as well.

We see America-First antitrust playing out in the following ways:

1. Making deals: forgoing good antitrust in exchange for promises to invest in America;

2. Applying U.S. antitrust laws more aggressively against foreigners or applying them in disregard of foreign sovereigns' legitimate interests;

3. Allowing antitrust transgressions by American firms that hurt only foreigners;

4. Using antitrust enforcement as a hook to get concessions from foreign firms that will help America; and

5. Fighting, at the highest levels, foreign use of antitrust that hurts American firms, and broadly accusing the foreign antitrust agencies of misapplication and discrimination.

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II. FLESH ON THE BONES OF AMERICA-FIRST ANTITRUST

America-First antitrust can produce some mixed results; but the principle compromises antitrust and the results are mostly bad.

Making deals: Making deals is about process. It means that the Executive as businessman cuts through the facts and makes trade-offs he thinks are good for America. Results matter, principles do not. Even before Donald Trump took the oath of office, he met with the CEOs of Bayer and Monsanto, hopeful partners to the biggest ever agribusiness merger, to strike a deal on jobs and investment in the United States at the same time that the Department of Justice was reviewing their merger. The press speculated that favorable treatment of the merger was implied in return.

More aggressive enforcement against the foreigners. Under America-First antitrust, we can imagine a world in which the Department of Justice sues the Chinese solar panel manufacturers in antitrust for their low American prices, alleging a conspiracy even if there is no evidence of one, and threatens them until they raise their prices. We can imagine a world in which the Department of Justice sues Samsung or Huawei for refusing to license patents at reasonable prices to American manufacturers, while asserting when tables are turned that price levels are a matter for the market and contract, not antitrust.

These cases involve the substance of the law. Other scenarios involve the geographic reach of the law. Firms in Japan and Korea fix prices of liquid crystal display panels, which they sell to Chinese subsidiaries of Motorola Mobility; the Chinese subsidiaries incorporate the panels into smart phones and sell the finished products to Motorola Mobility U.S. and the world at large. Can U.S. antitrust reach the price-fixers? America-First antitrust would have no doubt that it can.

Enforcement when sovereigns claim their interests are at stake. State-involved restraints suggest another application. Would America-First antitrust challenge OPEC? The OPEC nations and their oil firms have been protected from the market for almost 60 years by the most open notorious cartel in the world. The NOPEC bills ("No Oil Producing Export Cartels") would have authorized the Executive to sue to enjoin OPEC. The OPEC nations clung to assertions of sovereignty. America-First antitrust (and Donald Trump before he was president) support the bill.

Would America-First antitrust bow to China's attempt to shield Chinese manufacturers' price-fixing into America? Chinese vitamin C producers admittedly fixed prices into the United States, allegedly raising prices by more than 100 percent. The Chinese Ministry averred in the U.S. court proceedings that it ordered the companies to set their export price, and thus that the companies should have the benefit of the foreign sovereign compulsion defense. The same Ministry averred in the WTO – wherein it undertook not to distort export trade – that it gave no such order. America-First antitrust would disregard the Ministry's claim, preferring to protect American buyers rather than to defer to China's assertions of sovereignty.

Allowing antitrust transgressions by Americans that hurt only or especially the foreigners. Suppose American alkali companies fix export prices. The behavior is the worst antitrust restraint, by international consensus – but it hurts only foreigners. America-First antitrust does not care about foreigners. In fact, that strategy is good; American companies profit.

Or suppose a big merger creates a U.S. national champion in passenger jet aircraft. The merger might create market power and ultimately raise the cost of air travel, but U.S. antitrust authorities approve it because America and its champion win (in profits and power) more than American consumers lose.

Antitrust as a hook to get concessions that will help America. China may already have written the playbook. There is a merger that requires U.S. clearance. It is a rich deal, and the companies will do what is necessary to get clearance. The merging companies are foreign and they hold less than 10 percent of any market – but they have something the U.S. wants – important natural resources. The U.S. enforcers bargain for a promise that the firms will sell a mineral plant abroad to a U.S. buyer and will promise to supply the needs of U.S. buyers of the mineral for 20 years.

Fighting foreign suits against U.S. firms, especially high tech and big data firms and firms that own important intellectual property. Perhaps suits are brought by the competition authorities in China, Korea or Europe. America-First antitrust will attack and discredit the suits, and charge the foreign competition authorities with discriminating against U.S. firms and illegitimately pursuing industrial policy, not antitrust.

III. WHAT WOULD NATION-BLIND ANTITRUST DO?

As we have signaled, America-First antitrust outcomes are not 100 percent bad. They sometimes map on to principled antitrust; but not usually. When they do, it is just by chance. This happy convergence occurs when the enforcement is against foreign firms that have harmed U.S. competition but firms might, under current principles, successfully argue for exemption. It may occur also when U.S. firms are in fact the targets of discrimination and excessive unprincipled application of foreign antitrust law. In this section we revisit our list of America-First applications.

Making deals without transparency or process is all bad. Anticompetitive mergers might get approved in return for promises of jobs and investment, and procompetitive deals might be disfavored. CEOs who stand by their rights to get cheaper production abroad (and their firms and customers) might get punished. The Executive is likely to make big decisions without critical facts and without the advice of technical experts. Cronyism and private interests might creep in undetected. The rule of law will be compromised. Even if one should believe in trading off competition for jobs, who will know if jobs will really be saved, and who will calculate the costs of saving them?.

The double standard (more aggressive antitrust against foreigners) is all bad. It compromises the rule of law. It sells American consumers short. It is a lightning rod for retaliation, perhaps in the form of tit for tat. And it teaches the wrong lesson to competition enforcers abroad who are fighting for competitive markets and see U.S. process and standards as an example.

On the other hand, extraterritorial reach to condemn foreign actors who hurt American competition is not in essence bad, nor is action against foreign state-supported offenses. Trade and competition are global, and there is every reason for a harmed nation to reach out to protect itself. If a harmed nation has no power to do so, especially where the most directly affected jurisdictions are unlikely to enforce their own laws, the whole competition system gets compromised. Moreover, the OPEC cartel is a persistent problem that invites cynicism with regard to antitrust itself. If producers of one of the most important resources of the world can legitimately fix prices and allocate quotas, how can it be that price fixing is essentially evil? The NOPEC bills were narrowly drawn; only the Department of Justice could sue, and only for an injunction, and the Executive could decide not to sue if it would harm foreign relations. Similarly for use of foreign sovereign compulsion and/or elastic uses of comity to let foreign sovereigns shield "their" firms from American antitrust. Good antitrust requires at the least a healthy skepticism of foreign sovereign attempts to shield their firms from the price-fixing offense. Thus, just because a policy happens to correspond with the America-First agenda does not mean it is bad. But beware the shoe that did not fall. What is a good principle for America when our competition is harmed by firms abroad, even under a gauzy cloak of sovereign support, is also a good principle against America when American firms harm competition abroad. We suspect America-First is not on board for reciprocity.

This leaves our last three applications of America-First antitrust. These are: relaxing antitrust when American firms hurt mostly foreigners, using antitrust against foreign defendants to extract non-competition concessions, and fighting foreign uses of antitrust against American firms by exaggerating or imagining discrimination or excessiveness. All of these applications involve the double standard problem. They bend process and the rule of law. They impose costs on consumers or on foreign firms or systems of law. And they fail to give appropriate respect to our trading partners to develop their own competition rules of law.

Two nuances are important. First, under common antitrust jurisprudence, nationals may hurt foreigners as long as the predatory actors do not hurt competition in their own markets. The assumption is that the harmed jurisdiction can and will sue (even if the assumption is wrong). Second, the United States has the right to stand up for its firms when other jurisdictions are applying their laws in nationalistic and discriminatory ways that harm the competitiveness of American firms.

IV. CONCLUSION: WHY AMERICA-FIRST ANTITRUST IS BAD FOR AMERICA

We have reviewed an America-First antitrust agenda. We have shown why this agenda lacks legitimacy, undermines the rule of law, and usually (although not always) harms competition and consumers. Moreover, the agenda is dangerous in the world marketplace. Just as many Americans fight a China-first antitrust agenda, China and the world will be incentivized to fight an American one. An America-First agenda would lower the discourse to tit for tat, inspire trade friction and trade wars, and in addition, bear the high opportunity cost of unraveling the cosmopolitan antitrust consensus that, among other things, aims at improving competitiveness and minimizing systems friction in the world. In antitrust, as in many other areas, the United States is a teacher to the world. We should not teach parochial lessons. America-First antitrust is bad for America and bad for the world.