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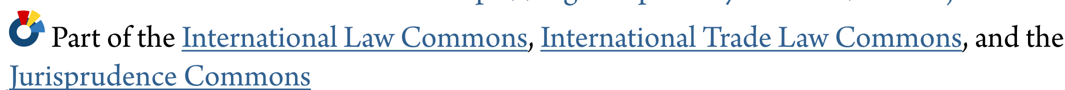
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THE ANTITRUST LAWS OF THE UNITED STATES AND THE LEY DE COMPETENCIA OF MEXICO: A COMPARATIVE REVIEW, 1992-1994.

ELEANOR M. FOX*

By these remarks, I shall try to put antitrust law into the context of trade law in order to highlight their interrelationships. I shall give a broad picture of why and how trade and competition have become linked, and I shall state why we cannot keep up the barriers between trade and antitrust law and between trade and antitrust lawyers if we are to solve the trade/competition problems of North America or the world.

First, I shall address the interaction of trade and competition. Second, after I raise some questions about tensions and relationships, I shall refer to the European Economic Community (EEC) model, which has taken account of just about every issues involved in the relationship of trade and competition. Third, I will speak of trade-competition problems in the world, most notably pending questions between Japan and the United States, Eastman Kodak and Fuji, to convey the larger world dimension. Fourth, I will deal more specifically with antitrust law - what is it, what are the main categories, and how do we analyze them. Fifth, I am going to reshuffle my explanation of antitrust law trade-related antitrust restraints. Sixth, to bring us back to the North American Free Trade Agreement (NAFTA)[1] and North America, I will set forth some proposals of the ABA Antitrust Section NAFTA Task Force.[2]

First, the interaction of trade and competition. There are three categories in which there are objectives and problems. The first category relates to the following: trade law is about government restraints of trade and antitrust law is about private restraints of trade. As the world shrinks, we complete the various trade rounds and have freer trade in the sense that government barriers are reduced farther and farther. As trade barriers are reduced, new hurdles in the world trading system appear. Trade does not move as freely as one might expect and one observes that there are other barriers, including private barriers, to the free flow of trade. There is concern that as government barriers recede, firms with market power in their own backyard want to preserve that market power rather than let the competition into the market. Antitrust law must be equal to the task in tearing down private barriers. Thus, trade and competition problems are symbiotic. We may wish to maximize the common objectives

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1. North American Free Trade Agreement Dec. 17, 1992, U.S.-Can.-Mex. (effective Jan. 1, 1994), 32 I.L.M. 605, [hereinafter NAFTA].

2. Eleanor M. Fox, *Report of the Task Force of the ABA Section of Antitrust Law on the Competition Dimension of NAFTA*, 1994 A.B.A. SEC. ANTITRUST L. REP.

of free trade and free competition. We may wish to do so across North America and across the world. This is the first objective.

Second, national trade laws tend to protect business, whereas competition law protects competition. Competition law says, in effect, that competition is good for you. It is good to serve consumers and to preserve opportunities for competitors. If business cannot stand foreign competition, it should adjust. Adjustment is a necessary, dynamic process good for the firm and good for the world trading system. Protective national trade law and liberal antitrust law are in tension. The tension is captured in part by stances on low pricing. Antitrust law regards low pricing as the heart of competition. Low price competition increases trade and helps consumers; the right of low pricing provides opportunities for the efficient firm's entry and success in the marketplace. National trade laws, however, repress low pricing when national industries are threatened. So we have anti-dumping/price predation tension. Accordingly, a second objective is to minimize the tensions between the national trade laws and the competition law.

A third objective involves convergence of law. When legal systems require people to do the same thing in different ways, there are transactional costs. Sometimes, the differences are just a matter of practice, a matter of tradition, rather than a difference in principle. I will adopt the phrase used by Professor Kozolchyk and say one should look for best practices. In antitrust law, one can look for best practices such as common merger notification forms. We should seek out best practices in antitrust law just as in any other kind of law or regulation. Thus, there are three objectives: maximizing the free flow of trade and competition; minimizing the tensions between protectionist trade law and liberal antitrust law; and eliminating unnecessary transaction costs.

I turn now to Europe because European thinkers have been pioneers addressing these three objectives for the European internal market; i.e., the Common Market of the European Economic Community. While there is much of the European Economic Community that you might rightly say is not relevant to NAFTA, there is a great deal about the basic economic blueprint that has very powerful lessons for North America.

The Treaty of Rome, which is the treaty establishing the European Economic Community, was adopted in 1957.[3] The Treaty was conceived after World War II when Europe was balkanized and each nation became separate market unto itself. Business was very inefficient because of the high tariff barriers. The brilliant idea behind the EEC was that if Europe could be an integrated market, the tensions between the nations would tend to disappear. The blueprint was an endorsement of the old Adam Smith idea that people who trade together do not fight one another. It was a political idea to be implemented through the power of economics. The first initiative was to tear down all government barriers at member

3. Rome Treaty, Mar. 25, 1957, Belg.-F.G.R.-Fr.-Italy- Lux.-Neth., 298 U.N.T.S. 11 [hereinafter EEC].

state borders; tariffs and quotas and measures of equivalent effect are forbidden. As a corollary, states may not take anti-competitive trade-restraining action unless the action passes a test requiring tight justification. States may not undertake industrial policy initiatives that protect them at the expense of other states when such initiative interferes with the flow of trade among and between member states.

There are many principles in the Treaty of Rome. Some are drawn from the GATT itself and some have found their way into NAFTA. There is a transparency principle and a national treatment principle. In addition, in the EEC, the unitariness of trade and competition and the impulse for free-flow of goods and services is reflected even in disciplines on public procurement. Member states may not discriminate in their procurement unless tightly justified for national security reasons.

The EEC has a common competition policy, and, as well, each member state has its own antitrust law. Only with respect to big mergers does the common competition policy overrides national law. Otherwise, member states may apply their own competition laws as long as it does not conflict with EEC competition law or enforcement. As for areas without common policy, Europe has a harmonization program. Where convergence of law is thought important to an economically unified Europe, certain strong common principles are harmonized with rights of the member states to effectuate the principles in their own way.

Moving to the world, the trade/competition problem is now under consideration by various groups, including the Organization for Economic Cooperation and Development and the World Trade Organization. Experts are considering whether it may be necessary or helpful to have some common world policy. The most recent dispute that is feeding into this issue is the Kodak-Fuji dispute, which is a market access dispute, the most prominent antitrust issue on the world trade agenda.[4] The claim is that Japan is barring access to Kodak and that the Japanese government, responding to the lowering of trade barriers, "privatized protection" by giving Fuji the tools to shut out foreign competition. Kodak has brought a 301 petition in the United States. Fuji and the Japanese government have denied all material facts. Fuji claims that Kodak has done to it, in the United States, virtually all that Kodak alleges Fuji has done to Kodak in Japan. We have Japanese antitrust issues, U.S. antitrust issues, U.S. national trade law issues, and world trade law issues all wrapped into one problem, and there is no good and sufficient home for resolution of the total dispute.

I turn now to the specific content of antitrust law. U.S. antitrust law, at this time, focuses on protecting consumers. While the law is designed to protect the competition process, consumer welfare is the anchor. If

4. For a discussion of the controversy, *see* Helene Cooper, *Kodak Case Against Japan is Stronger Than That of Auto Firms, Analysts Say*, WALL ST. J., June 9, 1995, at B4 *and* Wendy Bounds, *Fuji Says Kodak's Woes in Japan Stem from Bad Marketing, Not Unfair Trade*, WALL ST. J., June 22, 1995, at A4.

the problem is a merger problem, we must ask if the companies getting market power will cause prices to rise for consumers. If the problem is a monopolist strategy, we must ask if the monopoly firm is responding to the marketplace or is the monopoly firm putting cost on its rivals to prevent them from getting to consumers.

The United States is very consumer-focused. In other countries of the world there are additional values and objectives that underlie antitrust. For example, in the EEC, market integration is a value of antitrust. That free movement of goods across member state lines should not be frustrated by private restraints is a major principle of EEC competition law. The EEC also values small and middle size enterprise. And, it also values protecting entrepreneurs from unfair abuses. In principle, as opposed to the carrying out or not of a program, U.S. law seems to be the most laissez-faire of the antitrust systems of developed nations in the world.

In the EEC, private restraints may be classified in the following categories: are they exploitative, or are they exclusionary? An exploitative restraint is a restraint that harms buyers. A transaction may give a firm the power and incentive to exploit the people buying from it. In all countries, this is one of the most common kinds of restraints. Then there are exclusionary restraints. Exclusionary restraints are restraints that keep competitors out of the market or tend to do so. U.S. law treats exclusionary restraints skeptically. The conduct is usually not a violation, even if it hurts competitors, unless it also hurts consumers. But many or most other countries in the world will say unreasonable private exclusionary action that is not justified as response to a market is an antitrust violation. It is the "exclusionary market access" problem that has surfaced to the top of the agenda of trade/competition in the world; and as I have noted, nations are not in agreement on the components of an antitrust violation. There may be a third concept in some countries in the world - not the United States - and that is unfairness.

Let us look now at some common antitrust restraints. From the U.S. point of view, if one asks for identification of the worst kind of violation, the answer is cartels; i.e., agreements among competitors to eliminate competition. If the cartelists are afraid that as soon as they raise their prices others will come into the market and take new profit opportunities, the firms might perfect their cartel with a boycott to keep the outsiders out. In the United States, cartels are, per se, illegal. In many other places in the world there are rules of law that are close to a per se rule.

U.S. law also prohibits "monopolization," but it does not prohibit monopoly. People are encouraged to be the best they can, which in theory could result in monopoly. We do not condemn monopoly in the United States. We do not even condemn monopoly prices of a monopolist as do some other countries or regions, including the European Community.

For the monopoly-type violation, let us take a Microsoft example. Microsoft has about 80% of the operating systems for personal computers. Microsoft deals with manufacturers of personal computers who want licenses to put Microsoft's operating system in computers. Microsoft said

to the manufacturers, "I won't license my operating systems to you unless you pay me royalties for every computer you sell, whether or not it contains Microsoft operating software." This was equivalent to Microsoft's refusing to license unless the PC manufacturer used exclusively Microsoft operating software. Since the PC manufacturers needed to deal with Microsoft, the clause had a monopolization effect. Microsoft would have perfected the monopoly by conduct, not by competitive means.

On the other hand, if Microsoft develops a better product or sells at a lower price that competitors can't meet because they're not as efficient, that is fine. Competitors could, in theory, get wiped out. As a practical matter, the efficient competitors probably will not get wiped out. They will do something consumers want more and they'll stay in the market. But U.S. law is very clear. It is very, very hard for any competitor to win a price predation case because low-pricing is good and rock-bottom pricing is better. Although courts differ on the appropriate cost standard, usually unless the monopolist prices goes below marginal or average variable cost enroute to booting out all of the competitors and then raising its price to a monopoly price and recouping its losses, the low-pricing conduct is permissible under U.S. antitrust laws.

I turn now to vertical restraints. Vertical restraints are restraints in the course of distribution. Schwinn Bicycle may say to its distributors, "You sell only in this territory, you sell only to these authorized dealers, etc." The United States looks at these practices very hospitably. If a firm, not collaborating with its competitors, imposes restraints to help it get to the market, the law lets it do so. Suppose such a firm had 20 competitors and the competitors do not cartelize. Each would have all the incentives to get to the market in the best way possible. The law would not "care" what each one did. It would be right to assume that each was trying to do whatever it thought would serve consumers. As an exception, resale price maintenance (RPM) pursuant to agreement is per se illegal in the United States. If a firm does set minimum resale prices, that probably means that it has market power and is trying to exploit its buyers, or that it is using RPM as a device to collaborate with its competitors to facilitate a cartel. All of these rules fit with a consumer welfare model.

Three merger laws also fits with the model. Under U.S. merger law, we ask whether the merger increases market power in a way that will hurt consumers. Consider the recently proposed Microsoft-Intuit merger.[5] The two firms compete in the money management software applications market. Intuit had about 70% of the market and Microsoft had about 8%. The Justice Department stood firm against the merger and Microsoft subsequently dropped plans to merge. The claim of the Justice Department

5. For a discussion of the controversy, *see* Viveca Novak, *Microsoft and Government Will Appeal Judge's Rejection of Antitrust Accord*, WALL ST. J., Feb. 17, 1995, at A3. *Additionally*, the Antitrust Division of the Department of Justice also produced two News Releases commenting on the Microsoft - Intuit merger dated April 27, 1995 (DOJ AT 241, 1995 WL 249007 (D.O.J.)) and May 20, 1995 (DOJ AT 284, 1995 WL 310719 (D.O.J.)).

was that the merger would significantly eliminate competition, including important technology competition, and by the firms best situated to engage in technology competition.

There are other competitor collaborations other than cartels and other then mergers. Joint ventures are a good example. Generally, if there is no sense that the collaboration is really a cover for a cartel, in which case it would be clearly illegal, and no sense that the reason for the collaboration among competitors is to get the competition off their back, then analysis is performed under a rule of reason. If the market is a highly concentrated market and has high barriers, and the actors are the leading firms in the market, there is potential for serious anti-competitive effects through creation of market power. But, there may also be countervailing pro-competitive effects; the collaboration may help the firms respond to the market. U.S. law is quite liberal allowing competitor collaboration, sometimes with restrictions allowing firms to collaborate to realize synergy, where the collaboration promises to give consumers or other buyers something they could not otherwise obtain.

I go on now to point five, trade-related antitrust measures, which I shall call TRAMS. When we focus on trade-related antitrust problems, we might review all of the antitrust principles I have just summarized, but we might reshuffle the problems. The number one problem is barriers to trade; i.e., market access problems. Removing market access barriers fits with the first objective I specified above: maximizing the common objectives of competition and trade. Barriers to trade created by private persons by definition interfere with the flow of trade. The market access problems of antitrust are:

(*a.*) *Cartels with a boycott.* Note that a cartel in itself is not exclusionary, but a cartel with a boycott is. Let me refer to allegations regarding the glass industry. U.S. glass companies say, "We can't get into Japan. The three Japanese producers are very powerful and they have taken action to keep their power. They agree to keep prices high and to protect those high prices. They agree to keep foreigners out. This they do by tying up the whole distribution system." That is the number one problem: cartels with a boycott. If you could prove it, it is a violation almost anywhere in the world.

(*b.*) *Market access problem - exclusive dealing.* Suppose the same market above. There are only three glass producers. Each one independently and not in collaboration with another has an exclusive relationship with a dealer. Suppose it has good business reasons for saying, "I need an exclusive dealership to get my glass sold in the most efficient way." And suppose also that it is difficult for an outsider to establish its own distributorship in Japan. This is a vertical restraint. Vertical restraints violations are harder to prove. Why doesn't the outsider get its own distributor? Why doesn't the outsider contract with Japanese firms to have its product distributed? Is the outsider's product good? Is the product appealing to Japanese consumers? Why doesn't the outsider just compete harder to do business in Japan? What is the proof that the incumbent producers are not competing against one another? What is the proof

that they are using their dealers to help them collaborate rather than compete?

(c.) *Market access as a monopoly problem.* Monopolistic conduct may be access-restraining. A discriminatory government procurement policy - e.g., buy-national for telecommunications equipment - is a private restraint. State-owned commercial enterprises, as well as private entrepreneurs, might engage in exclusionary conduct.

The above refers to exclusionary restraints as undercutting free trade objectives. Exploitative transactions also play a role in decreasing trade. Suppose a monopolistic merger in Country A of firms whose sales are in the rest of the world. This is an exploitative transaction with spillover effects. Some commentators propose that, precisely because of the externalities, there should be a merger control system for the world.

Thus far, I have identified exclusionary and exploitative restraints. Now, I would like to introduce a problem that does not fit neatly into either box. This may be called the Japanese electronics or *Matsushita* problem.[6] In fact, you do not appreciate the problem except by lifting yourself up to the pinnacle and looking down on all the impacts in the world. The *Matsushita* problem is this: Japanese electronics firms conspired in Japan to raise prices in Japan. The cartel allowed the Japanese companies to get extra profits in Japan. Protecting their market (from too much supply) in Japan and desirous of achieving a large U.S. market penetration, the firms sold their excess Japanese products at a very low price in the United States that was not provable at the austere level that we call predatory pricing.

The central problem is that there can be national industrial strategies to protect one's own market, give one's companies extra profits, and give those companies a war chest so they can sell abroad with comfort, even at marginal cost, and thus "invade" the foreign territory. Now, is that good or bad for the United States as the "foreign territory?" People have different views. Consumers are getting low-priced electronic products but the U.S. electronics industry is getting wiped out. U.S. industry labels this Japanese strategy unfair. If the Japanese electronics industry did not have a cartel in Japan, low-pricing would be legitimate. U.S. industry claims the protected Japanese market makes the strategic behavior unfair. Well, it is unfair, and so at the risk of being expelled from the U.S. antitrust bar, I list as a trade/competition problem: unfairness - the *Matsushita* problem. Is there something we should do about the *Matsushita* problem at the world trading level? Yes, we should take steps to assure that the foreign markets are not closed.

The second objective I propose for TRAMS is minimizing the tensions between trade and antitrust in the field of low pricing. Antitrust price predation rules, which favor sustainable low prices, and national antidumping laws, which protect domestic industries from low-price com-

6. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

petition that will harm them, should be re-examined and brought more closely into harmony.

The third objective for TRAMS is eliminating unnecessary transactions costs: adoption of best practices. Common merger forms ought to be designed for North America, or the countries should adopt a policy of mutual recognition. At least, each country ought to accept the other country's merger form in the first instance, to avoid unnecessary transactions costs; with the right to demand supplemental filings for markets unique to the regulating country. More conceptual problems, such as the vertical restraints law, could also be put on the "convergence" agenda. How efficient it would be if a transcontinental company could design one distribution system for a continent, rather than one for each country. One would want to ask: How different are our laws from Mexican laws? Are the differences matters of principle? Or are the gains from harmonizing more than the costs of giving up the difference?

Finally, I will say a word about the NAFTA Task Force of the ABA Antitrust Section and its work in the area of convergence of U.S. and Mexican law. The Task Force considered whether there should be common substantive antitrust law for North America. We looked at the laws of Canada, the United States and Mexico. It was our view that those laws are quite similar. They are not far apart, and with conversation and discussion, which we and the agencies have with one another, the national laws tend to converge towards best practices. Through cross-fertilization, people may come to appreciate that somebody's way is better than theirs; with sunlight and understanding, law tends to converge.

Having this in mind, our recommendations are not very dramatic on the point of convergence. Although, maybe the time will come for a common competition policy on trade-related issues in North America, that time has not yet arrived and we made certain proposals for today. We propose that the NAFTA parties agree to enforce their antitrust laws; they should maximize the transparency of their law and its applications; and they should participate in frequent consultations and frequent workshops designed around the more difficult and the more meaningful trade-related antitrust problems in North America. In substantive analysis, the idea of community recurs. We recommend that each party take account of anti-competitive harms and benefits throughout the community of nations, so as to move away from a parochial, narrowly-limited vision.

We suggested also that the NAFTA Article 1504 Working Group develop a short list of subject areas and proposed principles in the trade-related areas. The list should include not only prohibitory law against certain likely to harm trade and competition in North America (e.g., cartels), but also permissive law likely to facilitate trade and competition in North American, such as certain joint ventures and rules for distribution. Working from this short list of subject areas and proposed principles, we hope that harmonization will emerge.