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U.S. Antitrust Aspects of Competing in Foreign Markets and the Canada-U.S. Trade Agreement

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I. INTRODUCTION

In this Article we will examine the recent evolution of U.S. antitrust policy. This subject has been commented on frequently,¹ though much of what has been written has been, in our view, misleading or wrong. After reviewing these changes, we will discuss the recently concluded Canada-U.S. Trade Agreement² ("FTA") and what impact it may have on competition policy issues between Canada and the United States.

One of the historical ironies of U.S. antitrust policy is that, in hindsight, the 1950s were the high water mark of U.S. antitrust extraterritoriality, or what might be called the evangelical period of the antitrust religion. The United States imposed its antitrust policies on Germany and Japan while acting as the occupying power after World War II. Those policies subsequently were adopted by the European Community in the late 1950s. Yet, just as the United States was attracting converts to our antitrust beliefs, we began to have substantial doubts ourselves, first for economic reasons and later for political and finally, foreign policy reasons.

II. ANTITRUST UNDER ATTACK

In the 1950s, the U.S. antitrust laws began to be subjected to increasing criticism by various commentators for a number of different reasons. The first of these objections is the frequent complaint of businesspersons that the antitrust laws are impossible to comply with due to their ambiguity and complexity.

This sentiment is reinforced by a number of peculiarities of the U.S. legal system which create incentives to litigate business disputes. Trebled antitrust damages is a major incentive. A successful antitrust plaintiff is

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¹ See, e.g., Donlan, *When Justice is Done*, BARRONS 15 (Dec. 15, 1983); Meadows, *Bold Departures in Antitrust*, FORTUNE 180 (Oct. 5, 1981).

² Can.-U.S. Trade Agreement, Dec. 10, 1987, reprinted in DEP'T OF EXTERNAL AFF. (1987) [hereinafter FTA].

entitled to three times alleged damages³ and, pointedly, attorney fees, which can be larger than the damages. However, the United States does not follow the English practice whereby successful defendants are able to recover their costs.

In addition to trebled damages, the U.S. legal system allows contingent fees, class actions, "fishing expedition" type discovery, and notice pleading, all of which are incentives to bring a lawsuit. Thus, the combination of the ambiguity of the law itself, the very substantial penalties for its violation, and the incentives to litigate in the U.S. system all lead to considerable fear of violating the antitrust laws on the part of businesspersons.

As businesspersons began to point out some of the negative commercial consequences of the U.S. antitrust laws, economists began to argue that the antitrust laws do not always make economic sense. This thesis was developed mainly by economists from the University of Chicago and has been characterized by its proponents as a theory of "economic rationality." The thesis has several subparts but, simply put, the idea is that many aspects of the antitrust laws are premised on either incorrect or outdated economic assumptions. These commentators point out that the antitrust laws were enacted at a time when international competition was practically nonexistent.

These theorists argued that in today's highly competitive global environment the U.S. antitrust laws must be adjusted to relate to the phenomenon of global competition. Trade policy concepts such as "reciprocity," "level playing fields," and "targeting" of U.S. companies were developed as antitrust law began to be seen as a deterrent both to U.S. penetration of foreign markets and the preservation of domestic U.S. markets from foreign competition. Other antitrust scholars argued that antitrust laws were simply never meant to deal with international trade; they are entirely domestic in their focus and, for that reason also, are outdated in the modern world.⁴

A third strain of criticism came mainly from abroad, as foreign companies and governments maintained that U.S. antitrust policies were insensitive to foreign interests. So-called "blocking" statutes were enacted, and there arose substantial foreign resistance to U.S. discovery procedures, to U.S. notions of the way to run a business, and the way to organize an economy.⁵ As these foreign voices grew in economic power

³ 15 U.S.C. § 15 (1982).

⁴ See, e.g., D. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* (1986); R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Easterbrook, *The Limits of Antitrust*, 63 *TEX. L. REV.* 1 (1984); Smith, *Why Not Abolish Antitrust*, 7 *REG.* 23 (Jan./Feb. 1983).

⁵ J. GRIFFIN, *PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS* (1979); April & Fried, *Compelling Discovery and Disclosure in Transnational Litigation: A Canadian View*, 16 *N.Y.U.J. INT'L L. & POL'Y* 961 (1984); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 *YALE L.J.* 612 (1979).

they became more and more strident in their criticism of U.S. extraterritoriality. Indeed, the decline of U.S. economic power abroad has been simultaneous with the decline of the extraterritorial application of U.S. antitrust.

III. "CORRECTIVE" MEASURES

In 1977 the U.S. Justice Department tried to lessen the criticism by attempting to clarify how the U.S. antitrust laws applied to international business. The Division published a set of guidelines called the *Antitrust Guide for International Operations*,⁶ which was meant to be a statement of the Antitrust Division's enforcement policy. The changes in law and policy that were occurring during this period soon put the 1977 *Guide* out of date. After three years of dedicated work, the Justice Department has recently released a Draft *Antitrust Guidelines for International Operations* that reflects a number of the changes in antitrust law and policy that occurred during the past eleven years.⁷

The U.S. Congress also attempted to clarify the international aspects of U.S. antitrust policy. In 1982, Congress amended parts of the antitrust laws to limit the effect of the 1978 *Pfizer*⁸ decision. In *Pfizer* the Government of India sued a U.S. drug company asserting that the Government had standing to litigate price fixing of drugs that it purchased. The U.S. Supreme Court held that the "persons" entitled to sue for treble damages under section 4 of the Clayton Act include foreign governments. Congress limited the *Pfizer* decision by amending the Clayton Act to provide that in situations where the government plaintiff acts in a sovereign rather than a commercial capacity, that government may only recover actual damages, plus costs.⁹

Also in 1982 Congress enacted the Export Trading Company Act,¹⁰ another attempt to clarify how the antitrust laws apply in the international marketplace. Pursuant to this statute, any U.S. person engaged in the export trade may request a certificate of review from the U.S. Secretary of Commerce covering certain conduct specified in an application. If (after consultation with the U.S. Attorney General) the certificate is granted, the holder is protected against criminal and treble damage liability for the conduct specified in the certificate that occurred while the certificate was in effect.

The problem with the Export Trading Company Act was that it was premised on the notion of developing a Japanese-style trading company system. But instead of promoting the creation of Japanese-style trading companies, the program has promoted the establishment of small groups

⁶ U.S. DEP'T. JUST., *Antitrust Guide for International Operations* (1977).

⁷ See *Antitrust Guidelines for International Operations*, 53 Fed. Reg. 21, 584 (1988).

⁸ *Pfizer v. Gov't of India*, 434 U.S. 308 (1978).

⁹ 15 U.S.C. § 15(b)(1982).

¹⁰ *Id.* §§ 4011-21.

of small- to mid-size exporters of primarily agricultural products. In the 6 years of the program, more than 80 certificates have been issued covering over 700 different U.S. companies. However, principally because the export trading companies have been small- to medium-size firms, the U.S. exports facilitated through export trading companies have not been significant.¹¹

Also in 1982 Congress passed amendments to the Sherman and Federal Trade Commission ("FTC") Acts. These amendments provided that the Sherman and FTC Acts would apply when there is a "direct, substantial and reasonably foreseeable effect on U.S. domestic or import commerce."¹² This also marks the first time in U.S. history that the anti-trust laws made a clear legal distinction between export-related conduct and import-related conduct, permitting conduct related to the export trade that would be prohibited in import trade or domestic commerce.

IV. CHANGES IN PUBLIC POLICY AND JUDICIAL ATTITUDES

In the meantime, the Reagan administration was adopting as public policy the theories of the Chicago school antitrust critics. One of the great apostles of the economic rationality movement, Professor Baxter from Stanford University, was put in charge of the Antitrust Division of the Justice Department. He promptly reduced the Division staff and budget, and reoriented the Division to focusing on why they should not sue people rather than why they should. It was Professor Baxter who in 1982 terminated the *IBM* case after thirteen years of inconclusive litigation.¹³

The Reagan administration also appointed as judges numerous proponents of the Chicago school approach to antitrust, such as Judges Posner, Easterbrook and Bork, and the courts began to render Chicago school type antitrust decisions. One of the most well known of these is the U.S. Supreme Court's 1986 decision in the *Zenith*¹⁴ case, which substantially revised the definition of predatory pricing.

Just a year earlier in the *Mitsubishi* case, the Supreme Court reversed a long-standing policy by holding that parties could arbitrate antitrust disputes arising in international contexts.¹⁵ The U.S. policy always had been that antitrust enforcement was so sacred and so important, that one could not possibly rely on the decisions of arbitrators. Although the Court's decision in *Mitsubishi* is limited to international situations, there are now a number of lower court cases applying the *Mitsubishi* rationale

¹¹ See CORP. COUNS. INT'L ADVISOR, UPDATE: ANTITRUST 34-39 (Mar. 1988); U.S. GEN. ACCT. OFF., EXPORT PROMOTION: IMPLEMENTATION OF THE EXPORT TRADING COMPANY ACT OF 1982 at 1 (Feb. 1986).

¹² 15 U.S.C. §§ 6a, 45(a)(3); see H.R. REP. NO. 686, 97th Cong., 2d Sess. (1982).

¹³ See Wall Street J., Jan. 11, 1982, at 3.

¹⁴ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 615 (1985).

domestically and enforcing agreements to arbitrate domestic antitrust disputes.¹⁶

Even before the Reagan appointees' influence was felt, another approach to limiting the international applicability of U.S. antitrust law was developed by the courts. Beginning in the mid-1970s, a number of U.S. courts began to agree with the assertion that the United States should be sensitive to foreign interests in the international application of its laws. In determining whether U.S. antitrust jurisdiction should reach international conduct, these courts developed an approach based on conflicts-of-law principles pursuant to which foreign interests were balanced against U.S. interests. Under this "jurisdictional rule-of-reason" approach, rather than simply asserting that an act that affects U.S. commerce provides antitrust jurisdiction, judges began to consider facts such as the nationality of the parties, the location of the conduct, the expressed policy interests of foreign governments, and the identity of the foreign governments. But, to one's great surprise, the courts that used this approach almost universally concluded that, even after the balancing, there was jurisdiction.¹⁷

The Reagan administration has recently introduced legislation codifying this jurisdictional rule of reason.¹⁸ In addition, a jurisdictional "rule-of-reason" analysis has been adopted by the most recent Restatement of Foreign Relations Law published by the American Law Institute.¹⁹

In response to the balancing of interests approach a number of foreign governments became more assertive in enacting blocking statutes to firmly declare their opposition to extraterritorial jurisdiction. An example is Canada's Foreign Extraterritorial Measures Act.²⁰ There is also an antitrust cooperation agreement between the Canadian and U.S. Governments.²¹ It provides for cooperation, consultation, and prior notification. It does not resolve the extraterritorial issue, but tries to manage it by interposing an obligation of advance notification.

¹⁶ See, e.g., *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F. Supp. 972 (S.D.N.Y. 1987).

¹⁷ See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 631 F.2d 909 (D.C. Cir. 1984); *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 473 U.S. 1032 (1985).

¹⁸ See H.R. 1155, 100th Cong., 1st Sess. (1987); S. 572, 100th Cong., 1st Sess. (1987).

¹⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW §§ 403, 415 (1987).

²⁰ See 24 I.L.M. 794 (1985). For similar developments in other countries, see, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 473 n. 1, 4; Griffin, *United States Antitrust Laws and Transnational Business Transactions: An Introduction*, 21 INT'L LAW. 307, 309 n. 3 (1987) (collecting authorities).

²¹ See 23 I.L.M. 794 (1984).

V. THE DECLINING IMPORTANCE OF ANTITRUST

Other issues such as U.S. trade policy have overtaken antitrust policy in national importance. For example, in 1987, in announcements concerning U.S. Government intervention in the superconductor area, President Reagan said that "the antitrust laws must be brought up to speed. Let's stop penalizing American business and treating it like an enemy. Let's give ourselves a fair shake in the world marketplace."²² His remarks were in the context of promoting what otherwise might be deemed to be an anticompetitive agreement to promote the joint development of superconductors.

To summarize this recent history, a number of propositions seem evident.

First, there is a very clear distinction between export-related conduct and import-related conduct. U.S. laws either by their terms do not apply, or simply will not be enforced against conduct that promotes U.S. exports or injures only foreigners outside the United States. That is, if Americans can increase their market share in Canada by engaging in anticompetitive activity in Canada, the U.S. antitrust laws will not apply to that activity. On the other hand, if Canadians take actions in Canada that have an anticompetitive effect in the U.S. market, either directly or on U.S. exports, U.S. courts certainly will exercise jurisdiction, and there will be U.S. Government enforcement. Thus, the United States is much more interested in enforcing and protecting competition inside its own market than outside of its market, even if that conduct is engaged in by Americans. The most dramatic example is that of the export trading company that is granted an antitrust certificate of immunity for conduct in Canada that would be illegal if done within the United States. As long as the conduct relates only to U.S. export trade, it will be immunized.

Second, the "management of international trade" has been adopted as a U.S. public policy. There has always been at least a potential conflict in the United States between antitrust policy and international trade policy for very fundamental reasons.²³ Antitrust law is meant to preserve competition, and where there is competition, there are winners and losers. In many international trade situations, particularly those cases in which the firm employs many voters, the objective of the case is to protect the losers, to prevent them from losing and to have their market share and their industry preserved. Recent developments show a U.S. preference for managed, protectionist trade policies over policies aimed at enhancing competition.

Third, as the United States has become more sensitive and susceptible to foreign challenges, it has taken an increasingly schizophrenic approach to international trade management. With respect to large, important in-

²² See INT'L TRADE REP. 993 (Aug. 5, 1987).

²³ See, e.g., Symposium, *The Interface of Trade/Competition Law & Policy*, 56 ANTITRUST L.J. 397 (1987).

dustries and issues such as automobiles, steel, semiconductors and superconductors, the United States does not pretend to take a competitive approach. In some ways the U.S. Government tries to conceal its management of trade by using terms such as “voluntary restraints” or “unilateral conduct,” but such references are not seriously to be believed.

The most egregious example of this trend is the semiconductor agreement with Japan²⁴ which resembles a price fixing cartel organized by the U.S. and Japanese Governments, applying not only to Japanese-American trade, but in third countries as well. How could such an agreement survive the U.S. Government’s antitrust scrutiny? The answer is that trade politics makes strange bedfellows. On the other hand, U.S. politicians are perfectly happy to let the competitive process work in other cases, where there is no significant political interest, voting block or political action committee.

VI. COMPETITION POLICY AND THE FTA

Against this background stands the FTA. The FTA is justly praised as a significant bilateral achievement. It is ambitiously broad in scope, providing for trade liberalization in nearly all economic sectors of both countries. It is ambitious in that it provides for binding commitments in the areas of trade in services, business travel and investments. But it works no revolution with respect to bilateral competition policy issues.

The FTA is unlikely to have a major impact on U.S. competition policy. The FTA is silent with respect to international antitrust and extraterritorial discovery issues. The FTA does promise less Canadian Government control of acquisitions by U.S. companies.²⁵ There will be intergovernmental consultations about designating monopolies²⁶ and about restrictions on government-created monopolies.²⁷ That is all the FTA has to say about competition policy.

The FTA will not create a unified North American market. Unlike the European Community model, Canada and the United States are not creating a single market or a supranational enforcement mechanism, like the European Court of Justice, to maintain a system of both law and enforcement. There has, in fact, been no real attempt to harmonize the competition laws of Canada and the United States. The dispute resolution mechanism of the FTA does not apply to competition issues. Thus, disputes over extraterritoriality, discovery procedure, and the U.S. incentives to litigation will remain.

The FTA offers significant opportunities for bilateral consultation, but leaves a number of significant competition policy issues unanswered. The FTA continues the trend, begun with the 1984 antitrust cooperation

²⁴ See 25 I.L.M. 1048 (1986).

²⁵ FTA, *supra* note 2, arts. 1601-11.

²⁶ *Id.* arts. 2010(1), (2).

²⁷ *Id.* arts. 2010(3).

agreement, toward consultation and away from confrontation. The biggest remaining problem is what the British call the "rogue elephant of U.S. antitrust," which is the private treble damage action. What about other "rogue elephants" of U.S. antitrust — the contingency fee class action and "fishing expedition" type discovery? These, too, are left unaffected by the FTA.

As more Canadian firms export to the United States and the market opens up, the firms are going to be subject to the jurisdiction of the U.S. courts. As they begin to compete with and to surpass the U.S. firms, what response will the Americans make? It is not an unknown tactic to bring massive antitrust litigation, designed not so much to win, but to slow down your opponent's market penetration.

What about using the import relief statutes against market penetration practices? These actions are very expensive to defend and it is difficult to prove whether or not they are being brought in good faith. Does the FTA imply that potash quotas and uranium quotas can now be challenged more easily by U.S. antitrust plaintiffs?

How are Canadian officials going to react to the increasing use of U.S. export trading companies in Canada? What will be the reaction of the Canadian antitrust authorities in dealing with the anticompetitive activities that have been certified by the U.S. Government?

In conclusion, we believe that the FTA has little to offer with respect to a harmonized competition policy for North America. Conflicts in competition policy are, therefore, likely to continue.

It also seems that the U.S. antitrust "religion" is coming back to haunt its first proponents. In its 1984 *Wood Pulp* decision,²⁸ the European Commission found a violation of the European Community antitrust laws for price fixing in the European wood pulp market by an export trading association formed under the Webb-Pomerene Act — an earlier version of the Export Trading Company Act — and imposed a very substantial fine. Just for good measure the Commission based its decision on the "effects" doctrine of jurisdiction, which is the jurisdictional premise for U.S. antitrust extraterritoriality at its most extreme.

The *Wood Pulp* case is now pending before the European Court of Justice, and should be decided very shortly. It will be fascinating to see how the United States reacts to that decision, and if U.S. policy makers admit that, while they believed in antitrust extraterritoriality in 1950, they certainly do not believe in it today.

²⁸ 28 O.J. EUR. COMM. (No. L 85) 1, 3 (1984).