Northwestern Journal of International Law & Business

Volume 10
Issue 1 *Spring*

Spring 1989

We Need More "Old-Time Relglion": A Response To Jim Rahl

Douglas E. Rosenthal

We Need More "Old-Time Religion": A Response To Jim Rahl

Douglas E. Rosenthal *

Jim Rahl believes in the old-fashioned religion of open global markets and free international competition, uncontaminated by private or public restraints. He has pursued this goal brilliantly, aggressively, and consistently for more than thirty years. While the problem Jim presents in this issue indicates his frustration that we are still far from achieving the goal, it is in no small part thanks to him, and the force of his scholarship and advocacy, that some real progress has been made.

In the heady days after World War II, developed nations sought to create a comprehensive International Trade Organization ("ITO") which would have included the Havana Charter,[1] an international treaty like the General Agreement on Tariffs and Trade ("GATT") that would have made restrictive business practices in international markets a violation of international law. While for much of the forty years since the effort to draft the Havana Charter the United States has taken a leading, if not consistent, position in favor of greater global competitiveness, ironically it was cold feet by the United States that played a decisive part in the failure to adopt the Havana Charter.

In the wake of this unsuccessful effort to develop an international competition law, developed states focused their attention on reducing tariff barriers as an effective means to pursue free trade. This was the purpose of the GATT, and it has been constructive. Non-tariff restraints, however, have prospered. I believe that many countries were slow to develop national competition law regimes, in part because they

* Partner, Coudert Brothers, Washington, D.C.; formerly Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice.

[1] The official text of the ITO Charter is contained in U.N. Doc. E/Conf. 2/78 (Mar. 24, 1948), *reprinted in* U.N. Doc. ICITO/1/4 (1948) and in U.S. Dept. of State, Pub. No. 3206, Commercial Policy Series No. 114 (1948).

believed that nurturing domestic industry and protecting it from foreign competition was more important than realizing the benefits of the market mechanism. Even in those countries that adopted national antitrust laws and established government agencies to enforce those laws, limits were placed on the scope of antitrust enforcement. At the same time, governmentally approved non-tariff barriers, such as import quotas, restrictive licensing of service sectors, and orderly marketing agreements, were implemented to undercut the antitrust goal of open markets. The old time religion was shelved in favor of the pragmatic gospel of neo-mercantilism and the virtues of guided national industrial policies.

I suspect that Jim broadly agrees with me on this diagnosis of how we lost the old time religion of open global markets. His statement, however, and much of his past scholarship lead him to favor some different remedies from those I would propose. First, and perhaps foremost, Jim believes that the goal could be better pursued if nations took responsibility for applying their competition law so as to reach their own citizens engaging in anti-competitive conduct in foreign markets. He and I have debated this issue,[2] but neither has persuaded the other.

I think it is largely unnecessary for the United States, for example, to outlaw a price fixing conspiracy between two U.S. firms that relates only to their sales of products into another country's market, sales only injuring consumers in that market. If those sales are into a developed nation that promotes domestic competition, that nation is likely to have a competition law and enforcement mechanism that will deal effectively with such price fixing. This is demonstrated in the recently decided European Communities *Wood Pulp* case.[3] If those same two firms were to fix prices in a developed or undeveloped national market that lacked an effective competition law, the local authorities probably would have little commitment to free trade. This makes it more dubious for the U.S. antitrust law to be applied to anti-competitive practices in the foreign market over which the other country's authorities have primary jurisdiction. Furthermore, only a modicum of diligent inquiry is required for officials in that other country to determine when their national consumers are paying artifically high prices. Sometimes, high pricing of imported goods in foreign markets is encouraged to protect domestic industry or reduce drains on foreign exchange reserves.

---

[2] *See* Rosenthal, *Subject Matter Jurisdiction in U.S. Export Trade*, 71 AM. SEC'Y INT'L L. PROC. 214 (1977); Rahl, *Applicability of U.S. Antitrust Laws to Export Commerce*, 1985 FORDHAM CORP. L. INST. 131 (1986).

[3] A. Ahlström Osakeytiö v. Commission, 4 Common Mkt. Rep. (CCH) ¶ 14,491 (Sept. 27, 1988).

In short, private export cartels are a decreasing problem and are a small economic cost when compared to non-tariff import barriers. Even if some exports of textiles or steel to the United States reflect certain private quantity or price restriction agreements, the truly significant adverse impact on U.S. textile and steel consumers comes from the legalized cartelization reflected in the Multi-Fiber Agreement[4] and the Steel Voluntary Restraint Agreements[5] between nations.

Another point of disagreement between us is Jim's conviction that, to the extent that governments do promote restrictive policies, private firms that abide by such policies should not be able to avoid liability under U.S. and other national antitrust laws. Jim would be tempted to deny these private firms the protection of exculpatory defenses that immunize most governmental acts, private acts compelled by governments, and private acts that are more clearly subject to the jurisdiction of the foreign state promoting the anti-competitive policies than they are to the jurisdiction of the state attacking them (comity).

Unlike Jim, I do not find the U.S. case law over the past several years particularly hospitable to these defenses,[6] and that is regrettable. Furthermore, largely nullifying them would promote a lawless state of nature in which the nation that carried the biggest stick could force its pro-competitive policies on weaker states that have explicitly chosen to promote non-competitive objectives. That might be appropriate if an international antitrust law had been ratified by the nations involved, but I doubt that such a law will be promoted simply by states pretending it is already in place.

We also disagree on two smaller points. One is Jim's implicit suggestion that the Restrictive Business Practices Code ("RBP Code")[7] of the United Nations Conference on Trade and Development ("UNCTAD") could provide the necessary international legal framework for global competitive markets if it were made binding and were given an enforcement mechanism. Some of the strongest supporters of the RBP Code were nations with the weakest commitment to competition in their internal markets. The RBP Code had a political agenda of

---

[4] Arrangement Regarding International Trade in Textiles, 25 U.S.T. 1001, T.I.A.S. No. 7840 (entered into force Jan. 1, 1974, except for art. 2, paras. 2, 3, and 4, which entered into force Apr. 1, 1974).

[5] *See, e.g.*, Arrangement Concerning Trade in Certain Steel Products Between the European Coal and Steel Community and the United States, 47 Fed. Reg. 49058, app. III (Oct. 24, 1982)(amended and extended on Dec. 11, 1985 and Sept. 5, 1986).

[6] *See, e.g., In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); *In re* Grand Jury Proceedings, United States v. Bank of Nova Scotia, 722 F.2d 657 (11th Cir. 1983).

[7] *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF/10/Rev. 1 (1980).

promoting the redistribution of resources from have to have not nations, a special concern of the UNCTAD which has no necessary connection with promoting global competition and in many respects can be antithetical to it.

The second suggestion is that consultation and cooperation among competition officials of member states in the Organisation for Economic Cooperation and Development ("OECD") and in bilateral discussions has not been a meaningful procedure for attacking cartels, primarily because there is no mechanism for bilateral or multilateral antitrust enforcement, even at a level well short of the inclusiveness of nations of the UNCTAD.

Competition officials are kept on short leashes. That is why their consultations do not produce more competitive markets. Joint enforcement by two or more national competition agencies is not likely to reflect the trade policies of one or both of the respective national governments. To the best of my knowledge, antitrust enforcers and trade policy officials in every nation see international trade and commerce in very different and frequently hostile terms. Antitrust enforcers are often seen as parochial and impractical by trade officials who consider themselves pragmatic and non-ideological. This means that with the support of their political leaders—who, alas, are frequently wary of antitrusters—trade officials promote the most economically damaging cartel behavior of all: market allocation agreements involving many agricultural products, heavy industrial products, textiles, and, increasingly, electronic products.

There is, however, one sentence in Jim's preamble to the question "What is to be done?" with which I do agree strongly. Cutting out the middle clause, the sentence to which I refer states, "We should face the fact that . . . governments . . . arrange [internationally applied] restraints . . . through our own respective trade practices and policies." This is the heart of the problem. There is still too much neo-mercantilism and too little of the old time religion that tells us that more will benefit from true free trade than will benefit from governmentally restricted trade.

What is to be done? I have three proposals. First, we true believers should recognize that the conviction that free trade is best must constantly be examined in the light of new economic learning. In a world of imperfectly free trade, some countervailing restrictions, some tactical threat of imposing countervailing restrictions, and some circumstances in which we are just not prepared to pay the full price of free trade in other lost values may sometimes be justified, not only because that is what the majority wants, but because sometimes that might be the best possible

result. We true believers must acknowledge that free trade is an aspiration which, like perfect virtue, will always elude us.

Second, we need to break down the barriers between trade law and competition law, or at least the application of such laws. We need trade laws that incorporate competitive concerns, and we need to limit the application of competition laws when duly authorized policymakers have clearly and transparently adopted anti-competitive international trade policies. State action defenses should not be scaled back; they should be a safe harbor, provided the authority is clear and the supervision of private conduct is close. I consider it a positive development that President Bush has nominated a distinguished antitrust lawyer, Carla Hills, to be the U.S. Trade Representative. At least in her, trade and antitrust perspectives will intersect.

Third, as a corollary of the second proposal, greater efforts should be made to involve the GATT in attacking unfair competitive practices. The GATT negotiators are currently addressing more directly and substantially than ever before the problem of non-tariff barriers in the international market for services and agricultural products in the Uruguay Round. While the bringing of unfair trade practice actions under the GATT is a neo-mercantilist solution to a neo-mercantilist problem, it does provide an opportunity to hold governments accountable for the import restrictive practices they encourage or condone, at least to the extent the GATT treaty has developed an international competition law relating to import restrictions.

I am less discouraged than Jim. I see progress. I see progress in the Canada-United States Free Trade Agreement,[8] in some of the work underway towards a more unified European market by 1992, in significant deregulation in many nations, not the least Great Britain, and in the greater degree of acceptance of competition values today—even behind the Iron Curtain (especially behind the Iron Curtain)—than ever before.

It may be that the old time religion is renewing itself. Keep active in its ministry, Jim, as you retire from Northwestern Law School. We still need your proselytizing.

[8] *See, e.g.*, Rosenthal, *Antitrust Implications of the Canada-United States Free Trade Agreement*, 57 ANTITRUST L.J. 485 (1988).