ICC México

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CARTA DEL PRESIDENTE

Estimados Socios y Amigos:

Es un honor para mi presentar a ustedes el número 43 de la Revista PAUTA que tiene un enfoque nuevo: la competencia económica.

La Cámara de Comercio Internacional tiene una importante trayectoria en esta materia, como en otras enfocadas a los negocios y el comercio nacional e internacional. En forma similar, PAUTA lleva muchos años estableciéndose como un foro serio de estudios en materias distintas que han incluido arbitraje comercial internacional, propiedad intelectual y derecho bancario. Este año se decidió crear por vez primera un número que se especializará sobre este tema de gran importancia.

El derecho de la competencia económica es especialmente relevante para la Cámara de Comercio Internacional. El motivo es evidente: el derecho de la competencia económica es una herramienta fundamental para el sano y eficiente funcionamiento de los mercados. Reconociendo dicha importancia, la Comisión de Competencia Económica de este capítulo mexicano ha reunido los esfuerzos de colaboradores distintos del capítulo mexicano para crear este nuevo número. En el mismo se abordan tanto temas novedosos, como temas tradicionales, enriquecidos por experiencias y adelantos recientes.

Es mi sincero deseo que lo contenido en esta revista proporcione a nuestros agremiados conocimientos de interés y utilidad sobre esta interesante área regulatoria y, en el caso de quienes aún no son socios de ICC México, los trabajos de la Comisión de Competencia del capítulo mexicano constituyan un nuevo incentivo para afiliarse y participar en las actividades de ésta y otras comisiones.

Cordialmente,

Luis de la Peña Stettner
Presidente
ICC México

COMPETENCIA ECONÓMICA. EN MÉXICO, UNA BREVE HISTORIA DE CINCO SIGLOS.

Esta nota, cuyo título pudiera generar expectativas que rebasan su objeto, no tiene otro propósito que el de hacernos recordar que el tema de la competencia económica tiene en México casi cinco siglos de historia que se replantea en sólo una década, como una reflexión para presentar este número de Pauta, Boletín Informativo del Capítulo Mexicano de la Cámara Internacional de Comercio, que auspiciado por la Comisión de Competencia Económica de ICC México es el primero que se dedica a este tema, que además de ser inherente al centro de atención de la institución se ha vuelto súbitamente importante en México en contraste con la historia de los casi cinco siglos precedentes.

Sin el afán de hacer un análisis simplista de las cuestiones relacionadas con la competencia económica, puede decirse que en México la competencia económica se resume en tres etapas sucesivas y radicalmente distintas; la primera, en la que por más de tres siglos se limitó la competencia en las principales ramas de la actividad económica; la segunda, que por casi un siglo y medio reconoció formalmente la problemática de la competencia económica en el derecho positivo, mediante normas regulatorias que tuvieron poca y muy limitada vivencia y aún menos efectos en el proceso de competencia económica; y una tercera etapa, de sólo una década, que tiene como *parteaguas* a la Ley Federal de Competencia Económica publicada en el Diario Oficial de la Federación el 24 de diciembre de 1992 para entrar en vigor a los 180 días de su publicación, que además creó a la Comisión Federal de Competencia.

En efecto, desde la conquista y no sólo a lo largo del virreinato sino incluso ya entrada la incipiente etapa independiente, México y su actividad económica vivieron un obsesivo sistema de *estancos* en campos de actividad a la sazón *estratégicos*, como en la minería lo fueron el azogue (mercurio), el cobre, el plomo, el estaño y el alumbre; en el vestido los tintes, los colores y los cordobanes; en las diversiones las peleas de gallos y los naipes; en los alimentos la sal, la pimienta, la nieve, los vinos, los aguardientes y el pulque; y, en otros rubros, la pólvora, el tabaco y los lastres. De obligada y tan interesante cuanto amena referencia, resulta el libro *Los Estancos en la Nueva España*, editado por la Comisión Federal de Competencia en el Año 2000.

El sistema de *estancos*, amén de su acepción jurídica de *monopolio* estatal o de *prohibición del curso y venta libre* de ciertos bienes o de la prestación de ciertos servicios, no sólo dejó cada vez como saldo su significado material y económico en el sentido de de poner coto, de algo cerrado, de la detención del curso y la corriente de las cosas –literalmente una economía *estancada*- sino también una cultura industrial y mercantil a la que por incontables generaciones eran ajenas la vocación y las prácticas de la competencia económica; situación esta última, por demás susceptible de degenerar en esa falta de *competencia* que también puede convertirse en falta de habilidad o de aptitud.

Así, después de tres siglos y medio llegó México a una segunda etapa, que podemos considerar iniciada en el año 1857, cuando la *Constitución Política de la República Mexicana* incluyó un artículo 28 conforme al cual "*No habrá monopolios, ni estancos de ninguna clase, ni prohibiciones á título de protección á la industria. Esceptúanse únicamente, los relativos á la acuñación de moneda, á los correos y á los privilegios que, por tiempo limitado, conceda la ley á los inventores ó perfeccionadores de alguna mejora*."

Muy poco resultó del artículo 28 de la Constitución de 1857, fuera de la presumible vocación del constituyente de proscribir en lo sucesivo los monopolios y los estancos, como es patente por la inclusión de un nuevo artículo 28 en la *Constitución Política de los Estados Unidos Mexicanos* de 5 de febrero de 1917, más extenso y detallado que su antecedente.

En el artículo 28 de la nueva Constitución, además de agregarse en su primer párrafo una prohibición de las exenciones de impuestos se incluyó un significativo segundo párrafo conforme al cual "*En consecuencia, la ley castigará severamente, y las autoridades perseguirán con eficacia, toda concentración o acaparamiento en una o pocas manos, de artículos de consumo necesario, y que tenga por objeto obtener el alza de los precios; todo acto o procedimiento que evite o tienda a evitar la libre concurrencia en la producción, industria o comercio, o servicios al público; todo acuerdo o combinación, de cualquiera manera que se haga, de productores, industriales, comerciantes y empresarios de transportes o de algún otro servicio, para evitar la competencia entre sí y obligar a los consumidores a pagar precios exagerados; y, en general, todo lo que constituya una ventaja exclusiva indebida a favor de una o varias personas determinadas y con perjuicio del público en general o de alguna clase social*."

El *severo castigo en las leyes* y la *eficaz persecución por las autoridades*, de las prácticas prohibidas por el artículo 28 constitucional, aún estaban lejanos y así siguieron durante tres cuartos de siglo. En un principio, el poder judicial aplicó directamente el artículo 28 de la Constitución por no existir una ley reglamentaria del mismo. Acto seguido, la primera Ley Reglamentaria del Artículo 28 Constitucional fue publicada en 1926, para ser abrogada por una segunda ley, emitida el 22 de agosto de 1931 por el Presidente Pascual Ortiz Rubio en ejercicio de facultades extraordinarias para legislar, que a su vez fue abrogada poco después por una tercera ley reglamentaria, publicada en el Diario Oficial de la Federación el 31 de agosto de 1934. A lo largo de todos estos años, tanto el propio artículo 28 constitucional como su legislación reglamentaria sufrieron diversas reformas, mas puede decirse que su impacto no fue tan significativo como habría sido de esperar del texto constitucional.

En contraste con los términos del derecho positivo, el saldo de casi un siglo y medio de disposiciones constitucionales y legislación secundaria en materia de competencia económica puede considerarse pobre y sería válido decir que la cultura en materia de competencia seguía siendo incipiente y, su aplicación, muy limitada tanto por parte de la propia comunidad empresarial como de las autoridades reguladoras.

El resto de la historia, que inicia la tercera etapa en la materia de competencia económica, es bastante más conocido. El 24 de diciembre de 1992 fue publicada en el Diario Oficial de la Federación la Ley Federal de Competencia Económica, para entrar en vigor a los 180 días de su publicación. La nueva ley creó la Comisión Federal de Competencia, que entró en funciones en junio de 1993 y ha cumplido una década de aplicación de dicha ley.
Sin temor de incurrir en ligereza se puede decir que, en México, esa última década ha generado más información, ha producido más conocimiento y conocedores y ha motivado más interés en materia de competencia económica, que los casi cinco siglos que la precedieron, no obstante que la materia fue elevada a rango constitucional casi un siglo y medio atrás y no obstante que en los últimos tres cuartos de siglo estuvo regulada por leyes reglamentarias de los preceptos constitucionales. A la fecha, la competencia económica se ha convertido ya en una disciplina autónoma en México y de ahí su creciente interés.

Según información proveniente de la propia Comisión Federal de Competencia, desde su creación y hasta 2002 había resuelto casi 4,800 asuntos, de los que casi 1831 (38%) representaron *concentraciones*; de las cuales, 87% no fueron objetadas, 3% fueron condicionadas y sólo 1% fueron objetadas, mientras que 9% tuvieron resoluciones de otro tipo. La práctica de investigaciones por presunta infracción a las disposiciones de la ley, teniendo en ocasiones como protagonistas a los principales *agentes económicos*, también ha constituido una parte importante de las tareas de la Comisión, que ha logrado también una presencia de creciente relevancia en el plano doméstico y, como resultado de las políticas de globalización, una creciente presencia en el ámbito internacional. Y durante el mismo período, tanto las disposiciones que rigen la competencia económica como a la Comisión Federal de Competencia, y la actuación de ésta, han sido sometidos al escrutinio judicial.

El resultado de los trabajos de la Comisión y sus criterios se aprecian en detalle, entre otras fuentes, en el informe de su primera década y en cada uno de sus diversos informes anuales, de los que el último publicado es a la fecha el del año 2002, así como en la Gaceta de Competencia Económica, de la que ha sido publicado ya el número 15 (enero-abril de 2003), correspondiente al año 6.

Un escenario como el que en párrafos anteriores se ha descrito explica por qué esta revista, por primera vez dedicada íntegramente a esta materia, recibió de inmediato un número importante de colaboraciones de primer nivel.

El trabajo de Hernany Veytia (México) y de Flora Gancia (Italia), resulta particularmente afortunado al insertarse en el escenario tan actual como creciente de la globalización, mientras que pone el índice en temas tan trascendentes como siempre deseables (que idealmente debieran ser siempre foco de atención y criterio rector), que son la justicia y los valores éticos en la competencia.

En el ámbito internacional, que constituye precisamente la vocación central de la Cámara Internacional de Comercio, de la que ICC México es uno de los más importantes capítulos nacionales, aparecen en primer término los Comentarios de la Cámara Internacional de Comercio (ICC) a la Propuesta de la Comisión Europea en Materia de Transferencia de Tecnología y sus Lineamientos, así como el interesante y propositivo trabajo ("Un Comentario") de Francisco González de Cossío (vicepresidente de la Comisión de Competencia Económica de ICC México), sobre Competencia Económica y Prácticas Desleales de Comercio Internacional, respecto al que habría sido interesante conocer el punto de vista (¿habría sido un contrapunto?) de Rodolfo Cruz Miramontes, Oscar Cruz Barney u otros especialistas que también han escrito sobre la materia, precisamente en relación con el tema del *antidumping*. Quedan abiertas la invitación y la posibilidad, para un número subsecuente de la revista.

El escenario internacional está también atendido mediante otro trabajo de Francisco González de Cossío, tan interesante como actual, sobre los Aspectos Internacionales del Derecho de la Competencia Económica.

Y finalmente, ya en el ámbito espacial de validez de nuestra última legislación en materia de competencia económica, no podrían estar ausentes los comentarios de los especialistas sobre el escrutinio judicial –al nivel de la Suprema Corte de Justicia de la Nación, máximo tribunal de México- tanto de la legislación que rige la competencia económica como de los actos de la Comisión Federal de Competencia, autoridad encargada de aplicarla.

Sobre esto último, de particular interés e importancia resultan las colaboraciones –que por cierto no podrían ser más actuales- de Leonel Pereznieto Castro por una parte y de Bernardo C. Ledesma Uribe y Omar Guerrero R., por la otra, en relación con la Inconstitucionalidad del Artículo 10, Fracción VII, de la Ley Federal de Competencia Económica. En un mismo tema, dos enfoques igualmente válidos y trascendentes, tratados con celosa preocupación, seriedad y profundo conocimiento por sus autores; en el caso de los segundos, como un llamado a la salvaguarda de la certeza jurídica a través del respeto a la legalidad; y en el caso del primero, como un llamado a la urgencia de reenfocar la legalidad en aquellas disciplinas como la competencia económica, en la que la problemática propia de una realidad histórica en permanente evolución pueda demandar soluciones distintas.

Los planteamientos ahí quedan, y sin duda darán lugar a nuevos trabajos, de los mismos y otros estudiosos, que sin duda contribuirán a iluminar la futura actuación de los *agentes económicos*, de las autoridades reguladoras, de los abogados postulantes y de la autoridad judicial, así como de los legisladores en su oportunidad. Mientras tanto, queda a esta publicación el honor y el privilegio de haber sido el portador de la primicia en un tema tan importante.

Un ausente en esta publicación ha sido la Comisión Federal de Competencia, como protagonista directo que por supuesto habría sido no sólo bienvenido sino incluso un invitado de honor en estas páginas, mas es de esperar –y así se desea- que en una próxima ocasión acepte la invitación de la revista y se cuente con la riqueza de sus puntos de vista.

Si bien este número de Pauta, Boletín Informativo del Capítulo Mexicano de la Cámara Internacional de Comercio, es el primero que se dedica íntegramente al tema de competencia económica, no sólo se le publica hoy como parte del objetivo de la Comisión de Competencia Económica de ICC México de dar difusión periódica a estos temas, como parte de su plan de trabajo, sino como una invitación a los interesados en esta materia para hacer esa difusión tan frecuente como sea factible sin demérito de su calidad, dada la importancia que tienen los trabajos monográficos de los especialistas que se divulgan mediante publicaciones especializadas, para dar a conocer oportunamente los temas jurídicos de actualidad.

La Comisión de Competencia Económica de ICC México desea que este número sea de interés para usted.

Cordialmente,

Fernando Estavillo Castro
Presidente de la Comisión de Competencia Económica
Capítulo Mexicano de la Cámara Internacional de Comercio

ÍNDICE

COMPETENCIA ECONÓMICA Y PRÁCTICAS DESLEALES DE COMERCIO INTERNACIONAL
UN COMENTARIO.

Autor: Lic. Francisco González de Cossío[*]

Free trade, one of the greatest blessings which a government can confer on its people, is in almost every country unpopular.
—Thomas Babington Macaulay (1824)

Introducción

El derecho de la competencia económica y del comercio exterior tienen un común denominador: discriminación de precios, *dumping*[1] y depredación de precios. Los tres temas citados encuentran un mismo origen fáctico: la existencia de precios distintos por un mismo producto. Sin embargo, el análisis jurídico, objetivos y consecuencias de cada uno es distinto.

En este estudio pretendo hacer una breve mención de cada uno haciendo resaltar una situación desafortunada de la regulación actual de los mismos y una posible solución.

Para lo anterior procederé a realizar un comentario sobre el antecedente económico del fenómeno (§II), una comparación entre los elementos jurídicos de las tres disciplinas (§III), la relación entre los mismos (§IV), los problemas inherentes a la diferencia de umbrales (§V), una posible solución (§VI), para concluir con un comentario final (§VII).

El fenómeno económico: Precios distintos

La determinación del precio de un producto es un ejercicio difícil y trascendente que todo hombre de negocios debe llevar a cabo. Para entender las opciones disponibles a un agente económico que desea establecer el precio de su producto, deben contemplarse los siguientes escenarios: en un extremo, el monopolista. En el otro, la competencia perfecta. Entre ambos extremos se manifiestan una diversidad de escenarios que permiten que las decisiones sobre precios busquen no sólo los fines inmediatos evidentes (ganancias), sino fines ulteriores. A lo anterior se le conoce como "precios estratégicos".

El empleo del término "precios estratégicos" no debe crear la inferencia que dicha práctica es inherentemente condenable. Una empresa (oligopolista, dominante, u otra) no puede realísticamente maximizar sus ganancias sin tomar en consideración las respuestas de sus rivales (incluyendo potenciales), y maximizar sus utilidades es un objetivo legítimo.

Aunque la mayoría de los precios estratégicos son lícitos, solamente los precios estratégicos pueden ser ilícitos. El problema, entonces, radicará en cómo identificar los tipos de precios que deben ser sancionados sin disuadir el que los agentes económicos establezcan el tipo de precios agresivos que buscan propiciar las leyes de competencia económica.

Respuesta jurídica el fenómeno económico: Diferentes umbrales de intolerancia

La respuesta del derecho al fenómeno descrito ha sido la creación de tres cuasi-delitos que, de reunirse ciertas circunstancias, ameritarán una sanción. A continuación se tratará en cada uno forma breve.[2]

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[*] Barrera, Siqueiros y Torres Landa, S.C.

[1] En este estudio empleo el término "*dumping*" para referirme a lo que se conoce como discriminación internacional de precios. Lo anterior por brevedad y para evitar que se confunda con el otro tema que se aborda en este estudio: la discriminación de precios.

[2] La descripción se mantiene breve puesto que se realiza exclusivamente para el propósito del tema que se aborda en este estudio. En caso de desear abundar sobre ello puede acudirse a Francisco González de Cossío, LAW AND ECONOMICS OF THE MEXICAN COMPETITION LAWS, University of Chicago, 2003.

A. Discriminación de Precios

Las empresas que participan en un mercado perfectamente competitivo no tienen opción más que cobrar un precio competitivo. Es decir, en términos económicos, al enfrentar a una curva de demanda horizontal son "tomadores de precios" (*price-takers*) y no pueden más que vender al precio de mercado. Sin embargo, la mayoría de las empresas que participan en un mercado que dista de ser competitivo tienen alguna discreción en su política de precios.[3] Pueden cobrar precios distintos por los mismos bienes o un precio que varíe dependiendo de cuantas unidades sean adquiridas (lo que se conoce como "precios no-lineales" (*non-linear pricing*) o "precios no-uniformes" (*non-uniform pricing*)). Lo anterior con miras a incrementar ganancias. Existen cinco tipos de precios no-uniformes: (1) tarifas de dos partes (*two-part tariffs*); (2) descuentos por volumen; (3) ventas atadas; (4) discriminación de calidad; y (5) discriminación de precios. En este estudio el enfoque será la última especie de precio no-uniforme.

En términos económicos, la discriminación de precios ocurre cuando un vendedor obtiene diferentes tasas de retorno por la venta de un mismo producto a diferentes consumidores o mercados. Dicho de otra manera, un vendedor que discrimina cobra a diferentes compradores precios que guardan distancias distintas a la curva de costo. Una diferencia de precio no necesariamente implica discriminación de precios, y la identidad de precio no elimina la existencia de discriminación. Cuando una ley toma como punto de partida la diferencia de precios, ignora —en términos económicos— la discriminación de precios cuando los precios son los mismos.

La discriminación de precios es una práctica interesante por varias circunstancias. En primer lugar, encuentra su *raison d'être* en las diferencias de 'valor residual' que cada individuo tiene.[4] A su vez, encuentra su justificación en las diferencias (a veces calidoscópicas) que presentan los distintos mercados.

Una razón adicional por la que la práctica es interesante obedece a que puede ser tan pro-competitiva como anti-competitiva. Puede ser pro-competitiva puesto que le resta eficacia a carteles, conlleva eficiencias, cuando la discriminación es sistemática resulta en competencia vigorosa, reduce el "desperdicio"[5] de cobrar un mismo precio a individuos con diferentes valores residuales, y puede ser utilizada como una manera de eliminar el problema de reducción de precios que se presenta de la venta de un producto a costo marginal.[6]

Pero también puede ser anti-competitiva. Por ejemplo, necesariamente implica cierto poder de mercado (de otra manera sería imposible discriminar ya que la curva de demanda sería plana), y, de no ser perfecta la discriminación,[7] puede implicar ineficiencias. A su vez, la discriminación de precios hace que la depredación de precios sea menos costosa,[8] más lucrativa y, por consiguiente, más probable.

El tipo de daño que la discriminación de precios provoca ha sido catalogada en: (i) daño en primer grado (*primary-line injury*) el cual tiene que ver con el daño a la competencia entre el vendedor y sus competidores; (ii) daño en segundo grado (*secondary-line injury*) el cual es el daño infligido a los compradores desfavorecidos que pagan un precio superior en comparación con otras

3 Dennis W. Carlton, y Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION, HarperCollins College Publishers, Segunda Edición, 1994, pg. 431.

4 En términos económicos, ante un mismo producto, algunos consumidores mostrarán una elasticidad de demanda alta, mientras que otros una elasticidad baja.

5 Desde la perspectiva del vendedor; ya que desde la perspectiva del comprador significará un beneficio (*consumer surplus*) en unos casos, y operaciones no celebrada en otros.

6 Me refiero a la reducción de precio de los productos producidos antes del "producto marginal" que resulta de la producción a niveles de costo marginal.

7 Lo cual con toda probabilidad será el caso. El asumir discriminación perfecta es útil para establecer un modelo que la explique, pero será poco fiel en su reflejo de la realidad económica.

8 La discriminación de precios reduce los costos de depredación en forma eficiente cuando el depredador es capaz de identificar exactamente qué clientes están dentro del ámbito de influencia de la víctima. A su vez, una reducción de precios en un mercado puede ser utilizada para "mandar un mensaje" a rivales que venden no sólo en el mercado depredado sino en otros mercados.

empresas de la cadena productiva que no están en desventaja por el incremento de precio[9] y (iii) daño de tercer grado (*tertiary-line injury*) que se refiere a los consumidores desfavorecidos por los compradores.[10]

Cuando empresas operan en diferentes (o múltiples) mercados (en especial geográficos), por lo general maximizarán ganancias en cada mercado en forma individual. Sus precios serán discriminatorios cuando diferentes mercados muestren diferentes curvas de demanda o tasas de retorno. En sí, esta situación no debe preocupar, particularmente puesto que los esquemas de discriminación de precios con frecuencia incrementan el abasto y sólo rara vez excluyen a competidores. Es un hecho de la vida—y un fenómeno económico aceptado—que, cuando empresas poseen diferentes grados de poder de mercado en mercados distintos, cobran precios distintos en cada uno. Más aún, la discriminación de precios puede ser socialmente benéfica en la medida en que empuja el abasto más cerca del nivel que se generaría en un mercado perfectamente competitivo.

Como puede verse, la discriminación puede ser positiva o negativa, dependiendo de otros factores. Por consiguiente, lo difícil—como todo en la vida—estará en establecer el justo medio que distinga lo bueno de lo malo. No obstante que existen razones económicas que justifican su existencia, la discriminación de precios ha sido tradicionalmente atacada bajo las leyes de competencia y de comercio exterior.

B. Dumping

La Ley de Comercio Exterior ("LCE") contempla dos tipos de "prácticas desleales de comercio internacional":[11] la discriminación de precios y los subsidios. Lo que la LCE denomina como "discriminación de precios" es lo que en el argot internacional se conoce como "dumping". Los elementos de dumping bajo la LCE son:

1. Precio: precios debajo de "valor normal". El valor normal esta definido como el precio comparable de un producto idéntico o similar destinado al mercado interno del país de origen en el curso normal de operaciones.[12]

2. Daño: que las importaciones del producto sujeto a discriminación de precios causen, o amenacen con causar, daño a una industria nacional. "Daño" se define como la pérdida económica o deprivación de cualquier ganancia lícita y normal de la industria nacional[13] que los bienes en cuestión pueden sufrir o que obstaculicen la creación de nuevas industrias. La amenaza de daño es el peligro eminente y claramente previsible que la industria nacional pueda sufrir un daño.[14]

3. VÍNCULO: UN VÍNCULO CAUSAL ENTRE EL PRECIO Y EL DAÑO A LA INDUSTRIA.

En otras palabras, para que un producto importado sea calificado como sujeto a *dumping*, su precio debe ser debajo de *valor normal* del país de origen, causando (o amenazando con causar) un *daño* a la industria del país importador, y el establecimiento del vínculo causal entre el precio y el daño o amenaza del mismo, a por lo menos, el 25% de la industria nacional.

C. Depredación de Precios

La depredación de precios se encuentra dentro del universo de precios estratégicos. En su forma más ortodoxa, la depredación se refiere a la práctica de desplazar a rivales del mercado mediante el establecimiento de precios debajo de costo.

En teoría, el depredador buscará eliminar a sus competidores con la finalidad de cobrar precios monopólicos una vez que los rivales hayan sido eliminados o disciplinados. Lo anterior se considera como la única explicación racional por la que un agente económico consideraría a la depredación de precios como una práctica que maximiza ganancias.[15]

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9 Phillip E. Areeda y Herbert Hovenkamp, ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, Vol. IIIA, Little Brown and Company, Boston/Toronto/London, 1996, pg. 431.

10 TRADE AND COMPETITION POLICIES FOR TOMORROW, Organisation for Economic Co-operation and Development, 1999, pg. 41.

11 Artículo 28 de la Ley de Comercio Exterior.

12 U "*operaciones comerciales normales*", como lo denomina la LCE (artículos 31 y 32).

13 "*Industria nacional*" se define como por lo menos 25% de la producción nacional de los bienes en cuestión. (Artículo 40 de la LCE).

14 Artículo 39 de la LCE.

15 Herbert Hovenkamp, FEDERAL ANTITRUST POLICY. THE LAW OF COMPETITION AND ITS PRACTICE, West Publishing Co., St. Paul Minnesota, 1994, pg. 298.

La noción que un precio es ilegal por ser demasiado bajo podría, de primera impresión, considerarse como una contradicción ya que al derecho de la competencia económica por lo general no le interesa establecer un límite al precio mínimo. Al contrario. Si se entiende que la conducta monopólica puede generar problemas de competencia económica es por que resulta en precios *supra*-competitivos. Entonces, ¿porqué sancionar precios bajos?

La respuesta del derecho de competencia económica es la siguiente. Una empresa que disciplina o desplaza a un competidor mediante la venta de un producto a precios no-económicos no esta *en verdad* compitiendo, está sacrificando ganancias presentes mediante precios no-remunerativos como una inversión para destruir, disciplinar o intimidar a rivales, y así recobrar sus pérdidas en el periodo posterior a la campaña depredatoria mediante la obtención de rentas monopólicas. Es más, para que la conducta sea racional, el precio debe ser lo suficientemente alto para recuperar las pérdidas inmediatas derivadas de la inversión en depredación, descontadas a valor presente.[16]

En México, la depredación de precios es una práctica monopólica relativa.[17] Sus elementos son:

1. Precios debajo de: (a) costo medio variable para ventas ocasionales; o (b) costo medio total para ventas habituales;
2. Por una empresa con poder de mercado; y
3. Que tenga como propósito o efecto el desplazar a un competidor fuera del mercado.

A continuación se comentará cada uno.

1. Precios debajo de costo

Un precio será considerado depredatorio si cae debajo de alguna de las siguientes dos medidas de "costos":[18]

— Ventas habituales: la venta sistemática de bienes y servicios a un precio debajo de su *costo medio total*; o

— Ventas aisladas: las ventas no sistemáticas a precios debajo de *costo medio variable*.

La Comisión Federal de Competencia (" CFC ") ha establecido[19] que dicha práctica involucra precios inferiores al nivel que maximiza ganancias. Es decir, el establecer precios a un nivel que a largo plazo busque incrementar el poder de mercado del depredador una vez eliminados los rivales.

Con la finalidad de abordar el dilema de los costos, la CFC ha establecido ciertos criterios en materia de contabilidad con la finalidad de echar luz sobre lo que constituye "costo" para efectos del análisis involucrado en una investigación de depredación de precios.[20] Como parte de ello se determinan los costos relevantes, la distribución interna de costos indirectos, la relevancia sobre los costos de otras erogaciones, y la contabilidad paralela. No abordaré cada uno por rebasar los propósitos de este estudio.

2. Poder de mercado

Un elemento necesario para la existencia de depredación de precios es que el depredador debe tener poder de mercado[21] en un mercado definido. De lo contrario, el objetivo de la práctica no sería viable. Sería auto-destructivo. A su vez, el depredador tendrá que tener los recursos suficientes para soportar las pérdidas o reducción de ganancias así como la habilidad de infligir daños a sus

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16 Phillip E. Areeda y Herbert Hovenkamp, ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, Vol. IIIA, Little Brown and Company, Boston/Toronto/London, 1996, pgs. 221-223.

17 Es una de las prácticas contenidas en la fracción VII del artículo 10 de la Ley Federal de Competencia Económica ("LFCE"), de conformidad con el artículo 7.1 del Reglamento de la LFCE.

18 Artículo 7.I del Reglamento de la LFCE.

19 El tema ha sido tratado en diversos Informes Anuales de la CFC. El más útil parece ser el Informe Anual 1995-1996 en el cual se reportó la experiencia de un caso que recibió mucha publicidad y que fue bautizado por los medios como "*la guerra de los chicles*" (páginas 58 a 63).

20 Informe Anual 1994-1995.

21 El "poder de mercado" es la habilidad de incrementar precios a niveles supra-competitivos, sin que ello pueda ser contrarestado por los competidores. La LFCE bautiza esto como "poder sustancial" (artículo 13 de la LFCE).

competidores con menos sacrificio a si mismo durante la etapa depredatoria. Al hacerlo, el depredador incrementa su participación y poder de mercado y, por consiguiente, la habilidad de tomar otras medidas depredatorias.

Deben existir factores que retrasen la entrada o salida de un agente económico competidor del mercado o que hagan que sea más costoso que competidores (actuales o potenciales) entren al mercado dados los gastos ya incurridos (*sunk costs*) que ello implicaría. Sin embargo, la CFC ha establecido que la existencia de estas circunstancias no es suficiente para incurrir en responsabilidad. Más bien, dichos elementos serán cuidadosamente analizados durante un periodo de investigación en la medida en que están cercanamente relacionados con dicha práctica. Además, la determinación de la "intención" será un factor adicional en el análisis de la depredación.

En forma relacionada, Informe Anual de la CFC para 1996 reporta seis investigaciones de depredación de precios en donde se estableció el siguiente criterio: las ventas a precios inferiores a los niveles internacionales no necesariamente involucran depredación de precios. Para ello se requiere, por lo menos, ventas debajo de precios consistentemente inferiores al costo medio total a largo plazo y que el depredador genere pérdidas.[22]

3. Daño al proceso competitivo: el desplazamiento de un competidor

La finalidad última de la campaña depredatoria es aniquilar competidores. Si bien la LFCE no es proteccionista, ni busca proteger a los competidores en si sino el proceso competitivo, en la medida en que los mismos no fueron desplazados por una superior eficiencia del depredador, sino por el uso de fuerza bruta (el poder de mercado), se considera que ello implicaría un daño al proceso competitivo.

Lo anterior puesto que el depredador no se ganó el " voto económico " del consumidor mediante medios legítimos (competencia) sino que lo " robó " mediante medios ilegítimos (depredó).

En el Informe Anual de 1997 la CFC estableció que las ventas debajo de costo serían consideradas depredatorias cuando un agente económico armado con poder sustancial busque en forma indebida desplazar a otros agentes económicos del mercado y que dañe el proceso competitivo en la producción, procesamiento, distribución y mercadeo de bienes y servicios.[23]

4. Recobro

El recobro[24] es la habilidad de obtener ganancias supra-competitivas una vez que el objetivo haya sido logrado. Implica que la estructura de mercado y las barreras de entrada permiten recobrar los costos incurridos durante la etapa de depredación.

El recobro no es parte de la definición incluida en la LFCE y los casos reportados que a la fecha se han presentado no arrojan mucho análisis respecto de la relevancia del concepto y qué tan importante es en una investigación sobre depredación de precios.

Un Comisionado ha explicado que la depredación de precios es una reducción de precios no basada en costos con la finalidad de eliminar a un competidor para luego incrementar substancialmente el precio arriba de costo.[25] No se hizo mención alguna a la posibilidad de recobro.

En un artículo publicado en el Informe Anual de 1997[26] se menciona que la posibilidad de recobro se debe presumir como una condición de la depredación de precios. Sin embargo, la discusión no es más rica sobre el tema, ni hay indicios de que se considere un elemento esencial de la práctica.

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22 Vidrios y Cristales Industrializados, S.A. de C.V., Vidrios Marte, S.A. de C.V. y Espejos Nacionales, S.A. de C.V. vs. Vidrio Plano de México, S.A. de C.V., Vidrio Flotado, S.A. de C.V., Vidrio Plano, S.A. de C.V. y Distribuidora Nacional de Vidrio, S.A. de C.V. (Informe de Competencia Económica, Segundo Semestre, 1996, pg. 45.)

23 Informe Anual de 1997, pg. 72.

24 Utilizo el término "recobro" para hacer alusión a lo que se ha llamado "recoupment" en otras jurisdicciones.

25 Dr. Pascual García Alba Iduñate, FUNDAMENTOS ECONÓMICOS DE LAS RESOLUCIONES DE LA COMISIÓN FEDERAL DE COMPETENCIA, Informe de Competencia Económica, Segundo Semestre de 1996, pgs. 106-107.

26 Francisco J. Soto Álvarez, LA DEPREDACIÓN DE PRECIOS COMO PRÁCTICA MONOPÓLICA, Informe de Competencia Económica de 1997, pg. 151.

Por consiguiente, la letra actual de la ley y su aplicación parecen revelar que el elemento de recobro, que es tan importante en otras jurisdicciones, ha recibido poca —o nula— atención bajo el sistema mexicano de competencia económica. La teoría mexicana parece emular la versión europea de depredación de precios, que no incluye el elemento de recobro, sino que deja abierta la posibilidad de analizarlo.[27]

Relación entre discriminación, depredación y dumping

No obstante que la discriminación de precios, la depredación y el *dumping* son parte del mismo árbol genealógico, sus orígenes, fundamentos, objetivos, y cimientos económicos son distintos.

Mientras que la legislación en materia de competencia económica es una invención estadounidense (*antitrust*), las leyes antidumping nacieron en Canadá en 1904.[28]

Los defensores de la política legislativa de las leyes antidumping no son los mismos que las leyes de competencia económica. Mientras que los primeros están conformados por industrias que enfrentan mercados débiles o en declinación a largo plazo,[29] los segundos son personas preocupadas por la pérdida de bienestar social derivada del ejercicio del poder de mercado.

Los fundamentos económicos de ambas legislaciones son distintos. Mientras que la legislación antidumping descansa en un argumento sobre "justicia" o "lealtad",[30] buscando crear una forma —políticamente popular— de proteccionismo contingente que poco tiene que ver con la prevención de monopolios, así como el deseo de competir en igualdad de circunstancias[31] que ha motivado a la misma desde su creación; los fundamentos del derecho de competencia económica son la eficiencia, evitar la pérdida social y "daño al proceso competitivo" que resulta del ejercicio del poder de mercado.

Desde su concepción, las leyes de competencia económica han desarrollado una teoría económica y legal sólida que justifican su existencia.[32] Contrario a lo anterior, la legislación antidumping carece de los cimientos que le brinden los elementos para soportar un escrutinio serio e imparcial.[33] No obstante la falta de una columna vertebral teórica seria y convincente, el derecho del antidumping continúa expandiéndose (o, contagiándose) a las legislaciones internacionales más modernas y de más alto nivel.[34]

Dumping y depredación: dos umbrales, una realidad

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27 En *AKSO v. Commission* (Caso C-62/86 [1991] ECR I-3359, [1993] 5 CMLR 215) la Corte Europea de Justicia reconoció la importancia del recobro (párrafo 71) pero no incorporó el mismo como parte de la ofensa. (Richard Whish, COMPETITION LAW, Butterworths, Cuarta Edición, 2001, pgs. 646-652.)

28 La primera ley canadiense de antidumping establecía que un producto importado a Canadá que también se manufacturara en dicho mercado le sería impuesto una cuota cuando el precio cobrado por el artículo importado en Canadá, menos el costo de envío, fuera inferior al precio al que dicho producto fuera ofrecido en el mercado local (el "valor justo").

29 Alan O. Sykes, ANTIDUMPING AND ANTITRUST: WHAT PROBLEMS DOES EACH ADDRESS?, Brookings Trade Forum 1998, Robert Z. Lawrence Editor, Brookings Institution Press, Washington D.C., 1998, pg. 2.

30 De allí el nombre de "prácticas *desleales* de comercio internacional".

31 O "*level the playing field*" ("nivelar la cancha de juego") como dice la retórica en inglés.

32 Es cierto que han habido tropiezos (legislativos y judiciales) en el proceso de creación de una teoría económica y jurídicamente aceptable. Sin embargo, existe una tendencia mundial a considerar que el punto medular de atención de la disciplina es la pérdida de bienestar social (*deadweight loss*). (ver, en general, James J. Garrett (Editor general), WORLD ANTITRUST LAW AND PRACTICE, A Comprehensive Manual for Lawyers and Business, Little Brown and Company, Boston/New York/Toronto/London, 1995.)

33 Es cierto que cierto análisis económico ha tenido lugar en relación con dumping y su definición. Por ejemplo ver Viner, DUMPING; Dale, ANTIDUMPING LAW; Deardoff, ECONOMIC PERSPECTIVES ON ANTIDUMPING LAWS; Jackson y Vermulst, ANTIDUMPING LAW. Sin embargo, no tienen ni por mucho la seriedad y abundancia que la de competencia económica en general, y depredación de precios en particular.

34 Inclusive han llegado a niveles de la Organización Mundial de Comercio. En específico, el Acuerdo Relativo a la Aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio de 1994, comúnmente referido como el "Acuerdo Antidumping".

Es interesante notar que la existencia concurrente de ambos dumping y depredación de precios significa que un fenómeno relacionado tendrá efectos en dos áreas legales (competencia económica y comercio exterior) pero bajo dos diferentes umbrales. La tabla siguiente ilustrará el punto:

COMPARACIÓN DE UMBRALES DE COSTOS ENTRE
DISCRIMINACIÓN DE PRECIOS, DUMPING, Y DEPRECACIÓN DE PRECIOS

ELEMENTOS DE LA PRÁCTICA	DISCRIMINACIÓN DE PRECIOS	DUMPING	DEPREDACIÓN
Precio	**Precios diferentes** (con mismos costos) o **mismos precios** (con costos diferentes)	Debajo de Valor Normal	Debajo de: Costo medio total: habitual Costo medio variable: ocasional
Efecto	Ganancias Distintas	**"Daño"** (o amenaza del mismo) a la industria nacional	Desplazar a competidores del Mercado
Otros requisitos		Vinculo Causal	1. Poder de mercado; 2. Resultados Anti-competitivos mayores que los resultados pro-competitivos; 3. Recobro.[35]

El hecho que diferentes umbrales existan no debe ser preocupante. Después de todo, cada ley protege bienes jurídicos tutelados distintos. Sin embargo, es más preocupante el punto de fondo: ambas se traslapan; pero mientras que una de las disciplinas (antidumping) es cuestionable—por no decir desdeñable—la otra (competencia económica) es sólida y busca prevenir la ocurrencia de conducta que sí tiene efectos nocivos.

Solución posible

Ante la situación descrita la solución parece ser clara: que la disciplina de competencia económica "absorba" la legislación antidumping. Así lo han hecho otras jurisdicciones avanzadas como la Unión Europea,[36] ANCERTA[37] y el Convenio entre Canadá y Chile;[38] y lo aplauden autores respetados.[39] Sin embargo, dicha postura no es unánime. Otros autores consideran que la relación entre la política de competencia y de comercio exterior se extiende a más que el simple reemplazo de la ley antidumping local con legislación harmonizada sobre precios. Por consiguiente, una no puede abarcar a la otra.[40]

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35 Aunque incluyo recobro, reitero que la teoría y práctica mexicana de depredación parecen no darle tanta atención.

36 El Tratado de Roma excluye la aplicación de reclamaciones antidumping entre Estados Miembros de la Unión Europea. Como resultado de ello, la legislación antidumping es relevante únicamente para importaciones provenientes de fuera de la Unión Europea. (Ver Gunnar Niels y Adriaan Ten Kate, TRUSTING ANTITRUST TO DUMP NTIDUMPING —ABOLISHING ANTIDUMPING IN FREE TRADE AGREEMENTS WITHOUT REPLACING IT WITH COMPETITION LAW, Journal of World Trade, Vol. 31, No. 6, December 1997, pg. 39.)

37 En 1990 Australia y Nueva Zelanda eliminaron las acciones antidumping en relación con los bienes que se originan en el mercado de cada uno. Este paso fue implementado mediante el Protoco de Aceleración de Libre Comercio sobre Bienes (Protocol on Acceleration of Free Trade in Goods) dentro del marco de ANCERTA, 1983. (Niels y Ten Kate, *op. cit*. pg. 40.)

38 El Tratado Bilateral de Libre Comercio entre Canadá y Chile establece excepciones progresivas mutuamente aplicables sobre cuotas compensatorias. Dicho tratado entró en vigor en julio de 1997. (Niels y Ten Kate, *op. cit*. pg. 41.)

39 Gabrielle Marceau, ANTI-DUMPING AND ANTI-TRUST ISSUES IN FREE TRADE AREAS, Clarendon Press, Oxford, 1994, páginas 133 y 310. A su vez, Niels, Gunnar and Adriaan Ten Kate, *op. cit*.

40 Michael J. Trebilcock y Robert House, THE REGULATION OF INTERNATIONAL TRADE, Routledge, London and New York, 1995, pg. 122.

En mi opinión, la eliminación de la disciplina de antidumping sería apropiada por tres motivos: (1) su contradicción con la teoría de la ventaja comparativa; (2) por su falta de una cimentación económica sólida; y (3) porque el derecho de la competencia económica es una mejor manera de abordar el problema. Me explicaré.

A. Contradicción con la teoría de la ventaja comparativa

La teoría de la ventaja comparativa sostiene que el comercio entre dos países beneficia a ambos si cada país exporta los productos en los que tiene una ventaja comparativa.[41] Desde su creación por David Ricardo,[42] constituye el modelo más aceptado en el que descansa la explicación del fenómeno económico del comercio internacional.[43]

A la teoría de la ventaja competitiva se le atribuyen los siguientes beneficios: el abasto agregado es mayor, los precios son inferiores y, dada la especialización que implica, la calidad de los productos (en los que un país tiene una ventaja-comparativa) será superior.

La legislación en materia de *dumping* es contraria a la teoría de la ventaja competitiva en la medida en que obliga a un productor a vender en un mercado extranjero a precios distintos a los que de otra manera hubiera fijado. Lo anterior es ineficiente en la medida en que el precio que hubieran fijado es el óptimo—un resultado natural de asumir que el productor fijará precios en la forma que maximiza sus utilidades dada la curva de demanda que enfrenta. Forzar un precio distinto al que en forma natural hubiere escogido el productor es contrario a una economía de mercado y la teoría de la ventaja comparativa. Más aún, es el tipo de intervenciones que muchos economistas prestigiados rechazan.

Las intervenciones proteccionistas del género de cuotas compensatorias han estado rodeadas de la (malentendida) retórica de "igualdad" y "justicia". Es decir, se habla que el comercio debe ser "leal" de tal forma que si productores extranjeros fijan precios inferiores al "valor normal", estarán actuando en forma "desleal"—de allí las cuotas compensatorias. Sin embargo, todo este discurso es equivocado. *El comercio internacional ocurre precisamente porque los agentes económicos y/o los países **no** son iguales*. Algunos tienen ventajas comparativas sobre otros.[44] Y lo que es más, a todos conviene que las diferencias entre los productores se exploten en beneficio de la productividad—no en contra.

Dicho en pocas palabras, en la medida en que el comercio internacional ocurre gracias a las diferencias entre los países y los productores, es ineficiente y equivocado desear eliminar dichas diferencias mediante intervenciones (y distorciones) gubernamentales bajo el argumento que ello es "justo".

B. Flaqueza de la teoría del dumping

La discriminación internacional de precios carece de una sólida cimentación económica. Implica que la venta de un producto a un precio inferior a su "valor normal"[45] es negativa o injusta para con la industria del país importador.

¿Y que hay de los consumidores? Aceptar dicha postura lleva implícito anteponer los intereses de una industria nacional a los de los consumidores. Implica que es preferible distorcionar el funcionar natural del mercado como mecanismo de determinación del

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41 Me limito a realizar esta enunciación del postulado principal de la Teoría *Ricardiana* del comercio internacional en la medida en que la misma es suficiente para el estudio que se está realizando. Sin embargo, debo admitir que es simplista.

42 En verdad no fue David Ricardo quien la creó. Esta teoría fue mencionada por primera vez por Adam Smith en *The Wealth of Nations* en 1776. A su vez, muchos economistas (e.g., Robert Torrens y John Stuart Mill) han realizado contribuciones importantes. Sin embargo, las contribuciones de David Ricardo (en su libro *On the Principles of Political Economy* de 1819) son tan importantes que con frecuencia se alude a la teoría clásica como la *Teoría Ricardiana*.

43 Melquiades Chacholiades, ECONOMÍA INTERNACIONAL, segunda edición, McGraw-Hill, 1992, pgs. 13 a 32. Stephen Husted y Michael Melvin, INTERNATIONAL ECONOMICS, cuarta edición, Addison-Wesley, 1997, pgs. 60 a 67. Paul R. Krugman y Maurice Obstfeld INTERNATIONAL ECONOMICS, cuarta edición, Addison-Wesley, 1997, pgs. 14 a 39.

44 Por ejemplo, el clima, el costo laboral, recursos naturales, las habilidades de la planta productiva, preferencias y/o gustos de consumidores, etcétera.

45 El lector recordará que "valor normal" es el precio al que se venden dichos productos en el mercado de origen.

agente económico que debe recibir el "voto económico" del consumidor mediante una (artificial) cuota compensatoria que le merma al consumidor nacional los beneficios del libre comercio con el (cuestionable) propósito de eliminar dicha "práctica desleal de comercio internacional". Implica que es preferible soportar artificialmente a un agente económico que propiciar el bienestar del consumidor.

No hay nada de "desleal" en discriminar precios de tal forma que se obtengan ganancias distintas de mercados distintos. El productor extranjero no le debe nada al productor nacional. Más aún, si se discrimina de tal forma que se establezca un precio inferior en un mercado extranjero en comparación al de origen, se estará en presencia de un claro ejemplo de un *beneficio* derivado del libre comercio o, para ser más exactos, de la teoría de la ventaja competitiva ya que debe presumirse que el precio inferior es el resultado de superiores eficiencias productivas por parte del productor extranjero.

Podría contestarse que el productor extranjero sí le debe algo al productor nacional: competir "justamente", entendiendo por "justo" sin vender debajo de costo. De ser éste el caso, esta situación estaría adecuadamente abordada mediante la disciplina de depredación de precios del derecho de la competencia económica.

Parecería que existe un cabo suelto en el análisis: no son substituibles al no ser comparables; y no son comparables puesto que el resultado de cada uno es distinto y, por ende, no abarcable el uno por el otro.

El resultado de la determinación de la existencia de *dumping* es distinto al resultado de la determinación de la existencia de depredación de precios. Mientras que la segunda concluye en multas, la primera resulta en una cuota compensatoria. Dados los objetivos de cada legislación, el resultado de cada uno es el apropiado.[46] Sin embargo, en mi opinión la multa (asumiendo que se calibra en forma apropiada) es una mejor sanción que la cuota compensatoria puesto que sanciona a quien debe sancionar: al productor. La cuota compensatoria, al elevar el precio final del producto, afecta —*en passant*— al consumidor reduciendo el número de consumidores que pueden pagarlo.[47] Por el contrario, una multa sancionará exclusivamente al agente económico que incurre en la conducta indeseada dejando que los consumidores puedan adquirir el producto al precio reducido. Es decir, sanciona sin resultados que afecten el bienestar del consumidor o que busquen ser una excusa para propiciar proteccionismo.[48]

C. Competencia económica como una mejor solución

Una razón adicional para borrar la disciplina de *dumping* de los códigos es que el análisis en el contexto de la depredación de precios es más sólido en lo económico. Dado que ambos se traslapan, al eliminarse el *dumping* subsistirá únicamente la depredación de precios.

En específico, el análisis efectuado en el contexto de depredación de precios sobre "costo" es más sofisticado en lo económico que el análisis sobre "valor normal". Lo anterior es cierto aún para quienes tienen dudas sobre la teoría de depredación de precios.[49]

46 Mientras que la legislación de competencia busca castigar y erradicar conducta anticompetitiva, la legislación *dumping* busca evitar el daño a la industria nacional.

47 Es decir, resulta en un número determinado de operaciones que no se realizan por estar el precio —adicionado con la cuota— por encima del punto de equilibrio (de intersección entre la curva de oferta y la curva de demanda) que de otra manera hubiera mostrado.

48 Podría contestarse que la multa sí afecta al consumidor puesto que es un costo que necesariamente será repercutido en el precio final y, por ende, el consumidor sigue siendo dañado. Sin embargo, al imponerse en una etapa posterior a la que se realizó la operación, el consumidor sigue beneficiado. Una vez implementada la multa, de elevarse el precio en forma congruente el agente económico recibirá una sanción adicional: la del mercado. Menos consumidores adquirirán el producto por ser superior el precio. Como puede observarse, lo anterior es una razón adicional para preferir la multa a la cuota compensatoria como forma de solucionar la práctica. Además, hace relucir una flaqueza adicional de la cuota compensatoria: se impone en una etapa distinta a la época de *dumping*, en la cual puede no presentarse el fenómeno.

49 En otro contexto, este autor ha sostenido que la teoría mexicana en materia de depredación de precios incurre en ciertos errores. Los motivos son (1) la medida de "costo" es demasiado alta, lo cual hace que operaciones justificadas caigan dentro de una sombra de sospecha; (2) la no conjugación del concepto de recobro en la ecuación de depredación; y (3) los criterios de caracterización y distribución de costos invitan que las autoridades de competencia económica realicen evaluaciones *ex post facto* de las decisiones de negocios y contabilidad de las empresas. En caso de desear abundar sobre los motivos que arrojan dichas conclusiones, puede consultarse Francisco González de Cossío, LAW AND ECONOMICS OF THE MEXICAN COMPETITION LAWS, University of Chicago, 2003, pgs. 261-316.

El umbral de "valor normal" de la legislación antidumping es muy distinto al de "costo" en materia de depredación. Por lo general, el primero es más alto. Y aunque no lo sea, el tipo de análisis efectuado en el contexto de "costo" para efectos de depredación es más sofisticado y acercado al análisis que realizan los empresarios al momento de determinar el precio que deben establecer. Por consiguiente, es mejor dejar en manos de autoridades que realizan dicho tipo de análisis que las que usan el de "valor normal".

Conclusión

En mi opinión, toda la disciplina de *dumping* debería ser eliminada. Los motivos son que:

1. Choca con paradigmas actuales en materia de comercio internacional y de bienestar social;
2. Carece de una sólida cimentación económica;
3. Es el resultado de proteccionismo; y
4. Se traslapa con un área que no incurre en los defectos descritos: la competencia económica en general, y la depredación de precios en especial.

INTERNATIONAL ASPECTS OF COMPETITION LAW

Autor: Lic. Francisco Gonzalez de Cossio[*]

I.Introduction and scope of this work

The purpose of this article is to advance a proposal of solution to the current controversy surrounding the regulation of competition law on an international level. To such and I shall briefly canvass the conceptual background of the topic (§II), the efforts that have thus for taken place to address the issue (§III), the specific issues raised by the international ramifications of competition law (§IV), and will conclude with a general proposal as to how to address and regulate the international effects of competition law (§V).[50]

II. Conceptual background

A. Global interdependence[51]

Although national markets have, to some degree, always had influence on one another, they have only recently behaved in an economically interdependent manner, and have increasingly become so in the last half century, particularly after World War II with the economic/financial institutions of global reach created thereafter.[52]

Before World War II, governments traditionally erected 'fences' by taxing goods in international trade, restricting imports, subsidizing exports, and limiting international capital movements. These 'fences' increased costs in cross-border transactions which led to their reduction and sometimes elimination. These practices were particularly rampant during the 1930's, and are now believed to have lengthened the Great Depression.

After World War II, governments began to lower the referred 'fences' either unilaterally or collaboratively. As a consequence, borders became more porous, leading, in certain instances, to the tearing down of these divisions.[53] This tendency has matured from the mere (negative) tearing down the walls of division, to the (positive) building of bridges of collaboration. Today the global economic landscape displays a colorful palette of differing forms of regional integration, ranging from the bilateral trade agreements (e.g., CUFTA,[54] Israel-Mexico FTA[55]) to customs unions which seek to amalgamate the markets comprehended in the same into a

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[50] I should warn the reader that, although the focus is on international regulation, on occasions I have anchored examples on Mexican law. The foregoing due to two reasons: when providing examples, I have felt the need to use *some* legal corpus so as to be specific. Second —and perhaps more important—I am a Mexican attorney by origin.

[51] This section borrows on the Brookings Project of Integrating National Economies. The goal of such project is to address the issues and ramifications inherent in the changes of the global landscape in specific fields, one of which is competition law and policy. To such end some of the world's leading economists, political scientists, foreign policy specialists, government officials and other experts from different parts of the world were commissioned to write scholarly studies in several fields. The topic of competition law and policy was undertaken by Prof. F.M. Scherer in "Competition Policies for an Integrated World Economy", 1994. I have found such study to be of utmost utility to my understanding of the topic.

[52] I refer to the International Monetary Fund and the World Bank which were the result of the Bretton Woods conference of July 1944.

[53] For instance, the General Agreement on Trade and Tariffs ("GATT") negotiations taking place in the Kennedy Round (1960) the Tokyo Round (1970) and the Uruguay Round (1986 —formally ending and signed on 1994) are the most salient examples of the lowering of fences in the trade of goods.

[54] The Canada-U.S. Free Trade Agreement.

[55] Signed on April 10, 2000 and which entered into force on June 30, 2000. Chapter VIII deals with competition matters.

single one (e.g., the European Union). Within these two extremes we find multi-lateral trade agreements (such as NAFTA,[56] Mercosur,[57] and the Group of Three[58]) and initiatives which seek to comprehend entire continents.[59]

This economic interdependence has economic, legal, technological, political and cultural reasons. The economic and legal reasons are apparent from the discussion in the preceding paragraph. However, technology has also played an important role. Changes in technology have progressively integrated the world economy and its impact on the way people now communicate has been qualified by an important source of opinion as "The Death of Distance".[60]

Politically, the landscape has also changed. Early after World War II a single country, or a handful at most, effective wielded economic power and influence having world-wide ramifications. Not any more. Currently, international decision-making is more diffused than it used to be. Three factors are prominent in such change. First, there is a marked growth in the number of independent states. Secondly, the political and economic hegemony of the United States has suffered a gradual loss. Thirdly, the demise of the centrally planned economies has radically changed world politics.[61]

Culturally, the interesting oddness an outsider found in what was known as the "American melting pot", has ceased to be so. Nowadays, most consumers purchase in their domestic markets products from all over the world. The cultural effects of this are obvious and are the result of the fact that culture is exported along with products.

The combined effect of the summarized phenomena has given place to what is now frequently referred to "globalization". Although globalization has many foes,[62] it is believed by many to have significantly improved the living standards of most countries.[63] The foregoing, inter alia, as a result of the theory of competitive advantage.

Globalization and economic interdependence raise issues in several felds. One such field is competition law and policy. Competition policy has obtained a prominent spot in international economic policy discussions inasmuch as a nation's policies are no longer exclusively concerned with the business practices within its borders and addressing cross-border practices is no longer believed to be within the exclusive realm of a single national government. The evolution of such paradigm raises the issue of erosion of national sovereignty and creates the possibility of intergovernmental clashes on the approach to take to address transactions that spill over frontiers. These disagreements risk frictions that may escalate into trade wars.[64]

B. Impact of globalization on competition law and policy

The phenomena described has led to a clash between, on the one hand, political sovereignty and, on the other, cross-border integration. As a result, the effective domains of one market have come to coincide less and less with national jurisdiction giving place to a mismatch between economic and political structures as well as policy and legal instruments of each of the concerned jurisdictions.

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56 The North American Free Trade Agreement between Mexico, the United States of America and Canada.

57 Between Argentina, Brazil, Uruguay and Paraguay.

58 Which comprehends Mexico, Venezuela and Colombia.

59 Such as the Initiative of the Americas, which seeks to include all the countries in the American Continent in a Free Trade Area, and the recent initiative by Asian countries to form a free trade zone.

60 THE ECONOMIST, the leading article and survey of the an issue approximately of 1999. I beg the reader's pardon for my imprecise cite, but I found it to be no longer available.

61 During the period when central planning was the economic method of choice of several countries, their governments limited external influence on their economies.

62 And enemies of a congregated and organized nature who have fought against the crystallization of such phenomenon in many fronts, from the political (take the (sad) episode of Seattle) to the ideological (for instance, *confere* the compilation made by Jerry Mander and Edward Goldsmith, THE CASE **AGAINST** THE GLOBAL ECONOMY, AND **FOR** A TURN TOWARD THE LOCAL, Sierra Club Books, San Francisco, 1996).

63 F.M. Scherer. COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY. The Brookings Institution, Washington, D.C., 1994, at xi ("Scherer – Competition Policies").

64 Simon J. Evenett, Alexander Lehmann and Benn Steil, ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE, in ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 1.

Economic integration between economies and markets has made the artificial divisions (in the form of boundaries) between markets even more artificial. It used to be clear where "domestic"[65] policies ended and "international"[66] ones began. Today the line is blurred. A matter traditionally believed to be reserved in the first category can have an impact on neighboring (or even distant!) countries.

The tensions/issues stemming from the above referred clash can be pigeonholed in one of the following three categories:

1. Cross-Border Spillovers: Put simply, these relate to activities resulting in effects or externalities taking place in jurisdictions other than the one originally concerned.

2. Diminished National Autonomy: governments experience an erosion in their ability to individually and effectively address and control events occurring within their borders as cross-border integration increases.

Although this is not new, it has been sharpened by technological change and tariff/quota reductions. Hence, when a country produces a "good" (e.g., research and development) or a "bad" (e.g., pollution) that affects other nations, individual governments acting sequentially and non-cooperatively cannot effectively deal with the issues inherent in the same. Accordingly, in the absence of cooperation, too few collective *goods* and too many collective *bads* will be supplied.[67]

3. Challenges to Political Sovereignty: Economic integration has qualified the earlier assumption that a government is sovereign with regards to all matters that occur within its jurisdiction. Certain individuals, groups and governments have identified certain circumstances which, it is claimed, allude to universal/international set of values which are not just national and which take precedence over the preferences or policies of particular nations. For instance, Human Rights[68] and environmental matters[69] are now deemed to exceed domestic concern. The common feature in them is that they relate to alleged "psychological externalities" or "political failures" which require the rejecting of unchecked political sovereignty in deference to universal or non-national values.

Several factors have accentuated the importance of competition law in the international arena. The (allegedly) decreasing use of trade barriers, the revolution of communications technology, the falling restrictions on foreign investment, the deregulation tendency displayed by several countries as well as the adoption of market-friendly policies by several governments.

Also, certain business phenomena and strategies have also played an important role. To begin with, an unprecedented scale of cross-border merger activity has taken place as a result of the belief that acquiring or merging with local partners is the most profitable mode of entry into overseas markets,[70] a belief which has been accentuated by the ongoing liberalization of investment laws. Two competition issues are raised by such phenomena: First, the extent to which import competition may discipline the market power of domestic entities; and, secondly, what the competition response should be to such transactions (mergers, acquisitions or joint ventures) when they create efficiencies which lower the cost of supplying foreign markets but not domestic ones.

The international fragmentation of production and vertical integration has also played an important role. The internal organization of businesses and business-to-business contracting and relationships has changed in two ways: a fragmentation of multistep production processes has occurred, and firms have sold their corporate subsidiaries, replacing intrafirm transactions with

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65 Domestic policies traditionally addressed all matters behind a countries' frontiers. For instance, competition law, worker safety, regulation and supervision of financial institutions, environmental protection, taxing, etc. They referred to matters in which a nation was sovereign and which need not be concerned for its effects on other nations.

66 International policies tended to deal with at-the-border barriers such as tariffs and quotas, or related to events taking place abroad.

67 Preface of the Brookings Project, at xviii.

68 Take egregious political arrangements such as Apartheid.

69 Examples are tropical rain forests (which are considered the lungs of the world and a repository for animal and plant species considered the heritage of mankind); timbercutting by Brazilians and Indonesians; as well as tuna fishing by Mexicans and Venezuelans.

70 Patrick A. Gaugan. MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS. 2d. ed. John Wiley and Sons, 1999, explores the reasons of the rationales for corporate mergers and acquisitions as well as a history of several merger waves. (Cited by Simon J. Evenett, Alexander Lehmann and Benn Steil, ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE, at 4.)

transactions between firms. I.e., the relocation of stages of production abroad.[71] The effect of this has been that components often cross many international borders before arriving to the consumer of the final product.[72] The competition issues raised by this phenomenon are that, inasmuch as arm's-length arrangements are subject to more competition scrutiny than supply agreements within firms, vertical disintegration will in all likelihood increase the competition enforcement activity.[73]

An additional business phenomenon that bears relevance in competition analysis is the spread of network-based industries.[74] Because of the characteristics of network industries,[75] the following competition concerns ensue: (a) the incentive to price-discriminate charging higher prices to consumers with price-inelastic demands; (b) whether monopoly in one product can be leveraged into another; (c) the potential for intergovernmental disagreement over standard setting by private entities; and (d) that standard setting[76] could be used to masquerade a discriminatory measure by domestic firms in detriment of foreign competitors.[77]

C. Splitting the Globalization-Cake between Developed and Developing Countries

More than a decade has elapsed since the market economy triumphed over central planning. Although most countries are turning to market economy and some of them are still on a transitional stage (the so-called "transition economies"), the reforms being undertaken involve areas such as price liberalization, deregulation, de-monopolization, privatization, trade liberalization, and foreign direct investment liberalization.[78]

The reforms taking place are being made at different paces in different countries and, while the price to pay is frequently notorious and affects well-organized constituencies, the benefits—which outweigh the disadvantages—are not evident to the public at large, which is greatly benefited.

In such context, it is worth noting that even the so-called "developed market-economies" have not always been (true) champions of free trade. Many of said countries shielded substantive portions of their economy from free-market forces. Amongst these were the so-called "natural monopolies"[79] which often for alleged 'prudential'[80] or 'social'[81] considerations granted monopoly rights through regulation which shielded them from competitive forces and competition rules.[82]

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71 The reasons for such phenomena are the liberalization of foreign investment regimes, decrease of tariffs and intermediate products and improvements in communications. The fact that multiple crossing of borders takes place means that even small reductions of international transportation costs and tariffs have important effects on trade volumes. Also, multinational sourcing decisions are strongly influenced by exchange-rate changes.

72 Simon J. Evenett, Alexander Lehmann and Benn Steil. ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE. At 7.

73 Additional competition concerns, although ancillary to the preceding, are that the availability of inputs overseas should be studied when a firm alleges to be intentionally denied inputs by a domestic rival. Also, although the mitigation of trade impediments reduces the incentives to vertically integrate, inasmuch as other incentives exist for vertically integrating, such type of activity still merits monitoring. (Simon J. Evenett, Alexander Lehmann and Benn Steil. ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE. Pgs. 8-9.)

74 Networks can be physical (e.g., railroads) or 'virtual' (e.g., software).

75 The characteristics of these are: first, that the value of any one consumer derives from connecting to a network depends in a great measure on the number of consumers already using the same. Secondly, network industries usually have high fixed costs and a very low marginal cost. Thirdly, extensive cooperation on standard setting, product compatibility and licensing.

76 See Alan O. Sykes. PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS. The Brookings Institution, Washington D.C., 1995.

77 In this regard, Paul Krugman concludes that, although, theoretically, government intervention may raise national welfare, the preconditions for successful intervention are so difficult that resisting the temptation to intervene is most likely the best rule of thumb. (Paul Krugman, IS FREE TRADE PASSÉ?, Journal of Economic Perspectives, 1:131-44, 1987.)

78 Phillippe Brusick. UNCTAD's Role in Promoting Multilateral Co-operation on Competition Law and Policy. World Competition, vol. 24, No. 1, 2001, at 32.

79 E.g., network industries often the preserve of State or private monopoly.

80 For instance banking, insurance, civil air transport.

81 Cross-subsidizing low profit services with high profit ones.

82 Brusick at 31.

A concern that can be observed in the North-South relation *vis-à-vis* globalization is that, while it is accepted that globalization unleashes competitive forces that are believed to foster efficiency by gradually eliminating economic distortions and serves as a catalyst for increased efficiency, accelerated innovation and, eventually, economic development, the absence of globally agreed upon rules of the game and limited world-wide co-operation gives place to "unfettered competition" aggravating discrepancies which could result in monopolization of entire sectors of the world economy as a result of regional or international cartels, megamergers and takeovers, ultimately creating dominant firms and monopolies.[83]

By and large, globalization has been taking place without the adoption of competition rules of a global reach. I.e., globalization of markets has not been accompanied by globalization of the rules of the game, of which competition law is an important component. This concern led the UNCTAD to state at the X Bangkok Declaration that "*the international community as a whole has the responsibility to ensure an enabling global environment through enhanced co-operation in the fields of trade, investment, competition and finance … so as to make globalization more efficient and equitable*."[84]

D. Problems of Status Quo

It has been noted that the current status quo of competition enforcement, coupled with certain trends in international affairs,[85] has generated the following problems with regards to competition law enforcement:[86]

1. Competition authorities increasingly target foreign nationals and foreign-based companies in their enforcement efforts and increasingly seek access to evidence located abroad. The foregoing is particularly true in the fields of cartel and merger enforcement.

2. Conduct is investigated by multiple competition agencies simultaneously, each applying its own substantive laws. The problems stemming from the referred parallel enforcement are that matters sensitive to other countries may be affected, and simultaneous parallel investigations run the risk of inconsistent remedies.

3. The frequency of parallel investigations in the concentration control area is increasing. Because of the proliferation of concentration review controls many concentrations need to be notified to a number of enforcement bodies, each with different notification thresholds, review processes and substantive approval criteria.

4. There is increasing pressure —particularly from the United States— to apply competition law extraterritorially to resolve problems of market access. The application of United States competition law to protect U.S. exporters remains controversial, particularly because alternatives exist which touch less diplomatic nerves, such as the positive comity principle.

In a nutshell, uncoordinated parallel competition enforcement activity from multiple competition authorities addressing the same conduct which allegedly has effects in more than one jurisdiction is ever more frequent and zealous.

The mentioned problems are not theoretical. Real-life examples of the described problems are the Boeing/McDonnell Douglas case, the WorldCom/Sprint matter, and the GE/Honeywell affaire. Each will now be summarized.

1. Boeing/McDonnell Douglas

The landmark case Boeing/McDonnell Douglas has important legal, economic and political ramifications.

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83 Brusick at 23.

84 Bangkok Declaration, Global Dialogue and Dynamic Engagement, para. 4.

85 These trends are: (a) the increasing globalization of business; (b) the increasing proliferation of new competition laws around the world; (c) the increasing acceptance of the principle that foreign conduct may fall within the scope of a nation's competition law and within the jurisdiction of that nation's courts if that conduct has adverse "effects" on consumers in that country; and (d) the increasing liberalization of government-sponsored trade-barriers, which has had the effect of exposing private sector conduct that frustrates market access by foreign-based competitors.

86 Larry Fullerton and Camelia C. Mazard. INTERNATIONAL ANTITRUST CO-OPERATION AGREEMENTS. World Competition, Vol. 24, No. 3, 2001, pgs. 410-412.

Both Boeing and McDonnell Douglas were the two remaining U.S. producers of commercial jet aircraft and jointly represented 70% of sales worldwide. Their only competitor was Airbus, a European consortium, which had Spanish, Italian, German and British firms. Hence, the market was very concentrated but could not be qualified as without competition since intense rivalry existed among competitors and each sale is generally big and important. In 1997 Boeing purchased McDonnell Douglas. The reactions of the competition authorities involved (U.S. and EU) are worth mentioning.

The U.S. Federal Trade Commission determined that McDonnell Douglas was no longer a competitive force in the market and cleared the concentration. In the FTC's opinion, the effect on competition would be negligible since McDonnell Douglas adding to Boeing's high market share had little effect on future sales increase potential. Also, it was esteemed that banning the deal would have deleterious effects on U.S. security interests.

The EC took a different stance. The former Directorate-General IV found the transaction unlawful under EC law since: (a) it enhanced the dominance of Boeing both on a worldwide and European basis and vested an unfair competitive advantage over the only competitor: Airbus; (b) the fact that Boeing had exclusive long-term supply and maintenance arrangements (for 20 years) with many airline companies would lead to an anticompetitive environment; and (c) the possibility of cross-subsidies would provide Boeing the opportunity to benefit from government aids McDonnell Douglas received for military R&D programs. In a nutshell, the concern raised by EC authorities was that Airbus might be squeezed out of the market. The EU Merger Control Task Force used its broad jurisdictional authority, particularly the extraterritorial jurisdiction potential which sustained that, as long as the parties fell within their jurisdictional turnover thresholds, the Merger Control Task Force was legitimated to review the concentration. As a result, it almost blocked the US$ 40 billion deal *even though both firms were based in the US and had no productive assets in the European Union!*

The matter became politicized. Authorities on both sides of the Atlantic alleged that the companies involved were in receipt of illegal subsidies. The result was a destructive theater of wrangling and questioning the quality of competition analysis in the decisions of each other. The matter almost lead to a trade war. However, a deal was struck. Boeing agreed to: (i) waive its right to exclusivity on the supply contracts; (ii) to license patents derived from defence R&D funding at a reasonable royalty; and (iii) agreed not to sign additional exclusive deals.

2. WorldCom/Sprint

A more tragic example is the concentration of the telephone groups WorldCom and Sprint. The deal collapsed as a result of the failure of competition regulators to accept the concessions put forward by the parties.

The positions of the respective authorities were as follows. The U.S. (Janet Reno — Attorney General— and Joel Klein —Head of the Antitrust Department of the U.S. Department of Justice—) alleged that WorldCom and Sprint ranked second and third in the U.S. long-distance telephone market, just behind AT&T. All three of them control 80% of the market. Hence, the proposed merger would result in dominance in the long-distance and internet markets. The fear, as may be observed, was horizontal consolidation. Also, the risk existed that the transaction would lead to higher prices, lower service quality and less innovation for millions of residential and business customers. Finally, dominance in the internet would be achieved since WorldCom had the largest internet backbone in the U.S. (with 37% of the data traffic) and Sprint had the second-largest (approx. 16%). Therefore, the U.S. Department of Justice sought the extraction of important concessions asking that Sprint's long-distance and internet backbone be sold as a condition to clear the merger.

The EU (Mario Monti —EU's Competition Commissioner) objected to the deal on the following grounds:[87] (a) concern of the market power over EU internet services WorldCom would acquire with the merger; and (b) for the deal to be cleared it was indispensable that Spring divest its long-distance telecoms network believing that it would become a strong competitor putting a check to the otherwise obtained market power.

The US$115 billion deal fell through as a result of not being able to satisfy the competition concerns of the U.S. and EU authorities involved notwithstanding the belief of the parties that a US$2.1 billion cost-saving would have ensued. The concern of power in the internet traffic market outweighed such envisaged benefits.

[87] The merger plans had been withdrawn by the time the stated unofficial concerns were made public.

3. GE/Honeywell

The GE/Honeywell saga is another (sad) example of the problems already described. While the General Electric Company/Honeywell International Inc. merger was, inter alia, authorized in the U.S.[88] and Mexico,[89] but banned in Europe.[90] This led to a watershed of criticism from the U.S. antitrust agencies, senior administration officials,[91] leading economists,[92] competition legal scholars,[93] editorial writers[94] and the business community generally.

The EU based its resolution on two theories of competitive harm: that (a) the merger would strengthen GE's already dominant position in the market for large jet engines; and (b) the merger would enable Honeywell to gain a dominant position in the small engine, avionics and non-avionics markets in which it competes.

The U.S. disagreed with the foregoing findings inasmuch as it believed (a) that GE and Honeywell operated in a highly competitive market; (b) the dominance finding was questionable;[95] and (c) relying on the "range effects" theory of competitive harm[96] was inappropriate.[97]

As per the latter ground, the EU concluded that GE Capital would offer GE businesses enormous financial means enabling it to take more risks in product development than its rivals and to offer customers heavy discounts on the initial sale of engines, recouping those discounts through sales of spares and repairs, moving —in the EU's view— the breakeven point of an engine project further into the future, thereby forcing rivals to rely on external financing at a higher cost of capital than GE (which has AAA bond rating). The the U.S.'s position on this argument was that it was unsupportable inasmuch as (a) mergers are a means by which firms can improve their ability to compete; (b) the size of GE's market capitalization is irrelevant; (c) the increase in the aggregate firm resources does not mean that any one division of a firm will obtain capital more readily or more cheaply than its rivals;[98] (d) cheap capital is a source of efficiency since it serves to lower prices and promote innovation; (e) the reasonsing that, inasmuch as lower prices of the merged firm will enable Honeywell to outrun rivals since they will be unable to cover their fixed costs for the

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88 GE announced its proposed acquisition of Honeywell on October 22, 2000. On May 2, 2001, the U.S. Department of Justice announced that an agreement to resolve the limited competitive concerns with the transaction had been reached and hence would allow the deal to proceed.

89 File Number CNT-04-2001, Competition Gazette, April 2001, Year 4, No. 9, at 189. My firm handled the concentration notice procedure.

90 Case No. COMP/M.2220 – General Electric/Honeywell. 03/07/2001. Regulation (EEC) No. 4064/89 Merger Procedure, Article 8(3). The conclusion of the Commission was that (para. 567 of the July 3 decision):

"… the merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine, as a result of which effective competition in the common market would be significantly impeded. The proposed merger should therefore be declared incompatible with the common market pursuant to Article 8(3) of the Merger Regulation."

91 John R. Wilke. U.S. Antitrust Chief Criticizes EU Decision to Reject Merger of GE and Honeywell. Wall Street Journal, July 5, 2001, at A3.

92 Hal R. Varian. Economic Scene; In Europe, GE and Honeywell ran afoul of 19th Century thinking. N.Y. Times, June 28, 2001.

93 George L. Priest. THE GE/HONEYWELL PRECEDENT AND FRANCO ROMANI. Wall Street Journal, June 20, 2001, at A1.

94 EUROPE TO GE: GO HOME. Editorial, Wall Street Journal, June 15, 2001, at A14. Also, OBSTRUCTIONIST EUROPE. Editorial, Washington Post, June 22, 2001, at A24.

95 The EU's finding of dominance was premised on GE's share of 65% of the market which was growing because it increasingly obtained a portion of the outstanding orders for aircraft engines still in production. The U.S. believed this to be a weak indicator of competitive conditions in the market inasmuch as GE's large share was almost completely dependent on a single sole-source contract with Boeing for the 737. Excluding those sales would result in fairly balanced market shares, even if 100% of the remaining sales of CFM's were assumed to go to GE: GE: 44%, Pratt &Whitney: 23% and Rolls Royce: 27%. (Deborah Platt Majoras. GE-HONEYWELL: THE U.S. DECISION. Remarks of the Deputy Assistant District Attorney General, Antitrust Division, U.S. Department of Justice, before the Antitrust Law Section, State Bar of Georgia, November 29, 2001, at 5.)

96 Which, in a nutshell, states that mergers could be condemned if they strengthen an already dominant firm through greater efficiencies or gives the acquired firm access to a broader line of products or greater financial resources thereby making life harder for smaller rivals.

97 Although such theory had at some point been relied on by the U.S. Supreme Court (*FTC v. Procter & Gamble* —386 U.S. 568 (1967)), it raised concern since such theory had been eliminated as a basis for challenging non-horizontal mergers in 1982 with the new Merger Guidelines and the Statement on Horizontal Mergers of the Federal Trade Commission.

98 Even if GE is a large diversified company, it has many alternatives for its capital. Hence, committing capital to one project involves opportunity costs since the capital is no longer available for other —perhaps more lucrative— ventures. Once opportunity costs are factored, GE's cost of capital with respect to any particular project should equal that of competitors.

development of new products, is a species of "ruinous competition argument" which is anathema to healthy competition notions; and (f) the GE Capital theory espoused by the EU is dangerous since it is limitless. Under the same any concentration involving any company with a leading position in any capital intensive business with entry barriers could be stricken.

As it may be observed from the summarized decisions, the international competition landscape is far from befitting optimal regulation, and, as a result, practical problems have ensued in high profile cases.

III. Efforts to co-operate in competition law and policy

A. Historical Aspect

1. The Havana Charter

Following World War II the United Nations sought to establish mechanisms to coordinate international trade and avoid the repetition of events that led to the occurrence of the conditions of the 1930's. To such end, efforts focused on establishing multilateral institutions in economic co-operation fields, amongst which the creation of an International Trade Organization ("ITO") took mayor relevance.

A United Nations Conference on Trade and Employment took place in Havana from November 21, 1947 to March 24, 1948 where fifty-seven nations sought to create what became know as the "Havana Charter"[99] which was to create the ITO as a specialized agency of the UN. The fields encompassed by the ITO were diverse and comprehended not only governmental trade disciplines but also rules involving restrictive business practices. Even though no specific competition law chapter was included, provisions having a positive impact on competition as related to international trade permeated through the entire document. For instance, Article 46.1, in Chapter V of the Havana Charter read:

"Each Member shall take appropriate measures and shall cooperate with the [ITO] to prevent, on the part of private or public commercial enterprises, business practices affecting international trade with restrain to competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives [of the Charter]."

In providing for the above, the Havana Charter established a rebuttable presumption that certain practices would have harmful effects on international trade.[100] In addition to such clear and specific referral to competition matters, other provisions indirectly addressed competition topics.[101] Therefore, the Havana Charter indirectly, but clearly, established principles of effective competition in inter-State trade.[102]

Unfortunately, the Havana Charter was unable to muster sufficient number of ratifications.[103] However, not all was lost. Although the Havana Charter formally failed, it made a visible contribution to the development of theory and practice of competition regulation. It laid the foundation for a dual system of international regulation of competition by establishing rules for inter-State trade and rules for State control on restrictive business practices in international business transactions. The foregoing established the beginning of a long and bumpy process of establishing an international system of regulation on competition.

2. GATT

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99 Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).

100 Price fixing, market allocation, boycotts, technology suppression, unauthorized extension of patent monopolies. Article 46(1)-(3)

101 For instance, canons concerning trade liberalization obligations were established which included the reduction of tariffs and the elimination of trade barriers, subsidies as well as the most-favoured-nation principle as the corner-stone of the proposed trade rules. Relevant provisions were Articles 16, 20, 26, and 34 of the Havana Charter.

102 Nataliya Yacheistova. THE INTERNATIONAL COMPETITION REGULATION. A SHORT REVIEW OF A LONG EVOLUTION. World Competition Law and Economics Review, Vol. 18, No. 1, September 1994, at 99.

103 In the case of the U.S., approval was rejected because of the Senate's concern that it would infringe too deeply on U.S. sovereignty.

Although the Havana Charter was unable to elicit international acceptance, the trade policy chapter survived.[104] It was amended and transformed into the General Agreement on Tariffs and Trade ("GATT") which, although originally conceived to be of provisional application, has effectively managed to survive where others have perished and has remained as the only multilateral institution governing international trade for the second half of the XXI[st] Century. It became known as GATT 1948 to contrast it with later versions.

Like the Havana Charter, GATT did not directly proclaim principles of competition. Nonetheless, the market-oriented competitive character of GATT, with its provisions seeking to eliminate artificial barriers and discriminatory practices,[105] paved the way for the establishment of a code of international competition applicable to inter-State trade.

Since the GATT's inception diverse rounds seeking to improve trade liberalization and elimination of trade distorting practices have taken place, from which the Tokyo Round (1973-1979) and the Uruguay Round (1986-1994)[106] are deemed significant improvements in the international trade landscape.[107] In fact, and borrowing Mr. Peter Sutherland's[108] words, the conclusion of the Uruguay Round is a "*defining moment in modern economic and political history*". The foregoing, coupled with the trade liberalization agreements and codes created in the context of the several rounds and international efforts under the auspices of GATT, has resulted in an internationally agreed-upon set of rules and codes of conduct which have been put in place which, although not directly targeting competition, have indirectly enhanced competitive outcomes because of their market oriented character. To begin with, rules and procedures closely connected to competition were put in place.[109] Also, new areas where included in the scope of the GATT 1994 such as agriculture,[110] textiles,[111] clothing,[112] investment,[113] intellectual property rights,[114] services.[115] But also, a broader application of competition rules has been established. Of particular importance is GATS which establishes multilateral regulation of restrictive business practices by firms which include Article VIII (Monopolies and Exclusive Services Suppliers)[116] and Article IX (Business Practices). In fact, GATS Article IX resembles the Havana Charter.

The importance of the foregoing cannot be overstated. It is the first time in history that mandatory —in contrast to hortatory— rules applicable to restrictive business practices have been put in place.[117]

3. *The EU*

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104 Which applied to dumping and trade-distorting subsidies.

105 MFN treatment (Article I), elimination of quantitative restrictions (Article XI), condemnation of dumping (Article VI) and export subsidies and subsidies to non-primary products (Article XVI).

106 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature on April 15, 1994, Marrakesh, Morocco, 33 ILM 1140-1272 (1994)

107 To a great extent because of the tariff cuts implemented during the Tokyo Round, the weighted average tariff on manufactured products in the world's nine mayor industrial markets has fallen from 7 to 4.7 percent. Contrast this with the weighted average of 40 percent in 1947.

108 The GATT Director General.

109 Antidumping, countervailing duties, import licensing systems, technical barriers to trade, etc.

110 Agreement on Agriculture, Agreement on Bovine Meat and the International Dairy Agreement.

111 Agreement on Textiles and Clothing.

112 Agreement on Textiles and Clothing.

113 Agreement on Trade-Related Investment Measures ("TRIMS").

114 Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").

115 Particularly finance, insurance, transport, and telecommunications. This was done through the General Agreement on Trade in Services ("GATS").

116 Pursuant to which participants have to ensure that a monopoly supplier of a service does not act in a manner inconsistent with the principle of MFN.

117 Although it could be said that such outcome existed only after the Tokyo Round, since the "*GATT à la Carte*" mechanism greatly diminished its effectiveness. The reader will recall that *GATT à la Carte* was the mechanism whereby Member States would cherry-pick the post-Tokyo Round agreements it wished to enter in. Because of such voluntary approach, the outcome was that the undesirable situation where few countries accepted only some commitments resulting in a less then uniform nor coherent regime.

Competition related efforts have also been channeled on another front: the European Union. The European Coal and Steal Community ("ECSC") Treaty prohibited:[118]

"(a) import and export duties … and quantitative restrictions on the movement of coal and steel;
(b) measures or practices discriminating among producers, among buyers, or among consumers … as well as… practices which hamper the buyer in the free choice of his supplier;
(c) subsidies or state assistance, or special charges imposed by the state…;
(d) restrictive practices tending toward the division of markets or the exploitation of the consumer."

Also, Article 65 of said treaty prohibited agreements and concerted practices that tended to "*prevent, restrict, or distort the normal operation of competition*" within the Community. Furthermore, Article 66 established provisions restricting "*unauthorized concentrations*".

Later, the 1957 Treaty of Rome[119] was more definite in its competition measures. It included the establishment of a system to ensure that competition is not distorted in the Common Market (Article 3) and considered inconsistent with the common market "*all agreements between firms … and all concerted practices likely to affect trade between Member States*" (Article 85), particularly agreements that directly or indirectly fixed prices or other trading terms, limited production or investments, and shared markets. Also, abuse of a dominant position was prohibited by Article 86.

B. Ongoing Efforts

The historical efforts described before have created an inertia on several international fronts which merit independent mention.

1. Governmental Initiatives

In 1953 a committee comprising delegates from six industrialized nations and four developing ones[120] elaborated a United Nations Draft Convention on Restrictive Practices that received UN Economic and Social Council endorsement and which was sent to UN member nations for ratification. Seven nations endorsed the Draft Convention. However, the U.S. did not ratify it because of strong opposition from the U.S. business community.[121] This led to its demise because of the requirement that at least the nations accounting for 65% of the world import and export ratify it to enter into force.

Developed countries have displayed a lack of agreement on the question as to how to address competition issues raising international concern and, hence, most efforts have been, to a great extent, independent.

Although the American Bar Association's Special Committee on International Antitrust concluded in 1991 that no worldwide standards for competition law are feasible,[122] in 1994 the U.S. Congress passed the International Antitrust Enforcement Assistance Act[123] which authorizes the Attorney General and the Federal Trade Commission to enter into mutual assistance agreements with foreign competition authorities, to exchange confidential information and the issuing of subpoenas by the Justice Department so as to obtain evidence in assistance of competition authorities in other countries even if the alleged behavior does not violate US law. Under the authority of the said law, the U.S. has entered into many such international agreements, including one with Mexico on July 2000.[124]

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118 Article 4 of the formative treaty of the European Coal and Steal Community between France, West Germany, Belgium, Holland, Italy and Luxembourg—1951.

119 Treaty Establishing the European Economic Community, opened for signature Nov. 23, 1957, pt. 3, tit. 1, ch. 1 §1, arts. 85-86, 298 U.N.T.S. 11 (entered into force on January 1, 1958).

120 India, Mexico, Pakistan and Uruguay.

121 The argument was that implementation would fall discriminatorily heavily upon companies which reside in the U.S. which already have strong antitrust policies. Also, the one-signatory one-vote provision meant that this UN program would thus stimulate all anticapitalistic participating nations to instigate harassing complaints against the United States and other participating nations whose nationals have the most extensive world trade and will so imperil them in their most vital operations.

122 American Bar Association, Section of Antitrust Law, Special Committee on International Antitrust Report 294 (1991).

123 Publ. L. 103-438, 108 Stat. 4597.

124 Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws, July 11, 2000. (4 Trade Reg. Rpt. (CCH) ¶13,509). Available at www.usdoj.gov/atr/icpac/5145.htm.

On another front, the then U.S. Attorney General, Janet Reno, and Assistant Attorney General, Joel Klein, on November 1997 created the International Competition Policy Advisory Committee ("ICPAC") with the purpose to address the following topics (i) multi-jurisdictional merger review; (ii) interface of trade and competition issues; and (iii) the future directions in enforcement co-operation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts. The ICPAC produced a Final Report on Competition Policy on 2000 with important recommendations in all competition fields warranting international concern.

Across the Atlantic, in 1992 Sir Leon Brittan, the then-EC Competition Commissioner suggested that GATT have a strong role in drafting and enforcing international competition minimum rules covering subsidies, cartels, merger policy and public monopolies. This proposal has been taken up by Mr. Karel Van Miert (another former EC Competition Commissioner) and Mr. Mario Monti (the current EC Competition Commissioner).[125]

2. The OECD

The Organisation for Economic Co-operation and Development ("OECD") has the mission of promoting policies designed to achieve the highest sustainable growth and employment and a rising standard of living in Member countries while maintaining financial stability and thus contributing to the development of the world economy, contributing to sound economic expansion in Member countries and the expansion of world trade on a multilateral non-discriminatory basis.[126]

In 1967 the OECD issued recommendations for its Member States on the treatment they should give restrictive business practices. The effectiveness of such effort may be questioned to the extent said body lacks enforcement capacity. Nonetheless, the OECD initiatives constitute steps forward in the tackling of international behavior representing competition issues.

Amongst the diverse efforts of the OECD, the following standout:

a) The initiative to elaborate an International Antitrust Code Working Group, and a Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement which was received with skepticism by the OECD.

b) The OECD Competition Committee report adopted on 2001 on leniency programs to fight hard core cartels.[127]

c) The several conferences and recommendations of the OECD's Joint Group on Trade and Competition.[128]

3. UNCTAD

The United Nations Conference on Trade and Development ("UNCTAD") approved on April 1980 the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the "UNCTAD Set")[129] which was adopted on December 5, 1980 by the General Assembly of the United Nations.[130]

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125 Mr. Monti has even stated that the he is confident that the "…*Multilateral Competition Agreement can see the day in 2005*". The statement was made during the first conference of the International Competition Network at Naples, Italy. See MONTI PUSHES FOR WTO COMPETITION AGREEMENT BY 2005. Emma Barraclough —Legal Media Group/Euromoney, September 22, 2002. On another forum Mr. Monti spoke of the necessity of creating a multilateral framework to govern the application of competition laws internationally stating that "*in my view, it is now time to go beyond* [the study of this issue within the WTO Working Group]. *I am convinced that the time is ripe to commence negotiations on the development of a multilateral framework of competition rules, as part of the next Round of trade talks*." (Mario Monti. CO-OPERATION BETWEEN COMPETITION AUTHORITIES—A VISION FOR THE FUTURE. Remarks before the Japan Foundation Conference , Washington, D.C., June 23, 2000.)

126 Article 1 of the OECD Convention.

127 Organisation for Economic Co-operation and Development. FIGHTING HARD-CORE CARTELS. HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES. OECD, 2002.

128 For instance, see the OECD's document: TRADE AND COMPETITION POLICIES. EXPLORING THE WAYS FORWARD. OECD Proceedings, 1999.

129 Document TD/RBP/CONF/10/Rev.1. It can be obtained in the UNCTAD Competition website: www.unctad.org/en/subsidies/cpolicy/index.htm.

130 Resolution 35/63.

The main objective of the UNCTAD Set, which is largely based on the Havana Charter, was to make sure that the liberalization of tariffs and non-tariff barriers pursuant to GATT was not impinged upon by restrictive business practices.

Importantly, the UNCTAD Set takes a double approach. On the one hand, it addresses government action by means of its "Principles and Rules for States at National, Regional and Sub-Regional Levels".[131] On the other, it targets private action through its "Principles and Rules for Enterprises including Transnational Corporations"[132] in accordance to which firms must refrain from engaging in restrictive business practices.[133]

The adoption of the UNCTAD Set, even if not expected to lead to full harmonization of laws, was expected to facilitate the adoption of rules at national and regional levels, establish common approaches and converge views which could help in the better understanding of competition issues and set the groundwork for co-operation among States in this field.

In accordance with the 35th General Assembly of the United Nations, an Intergovernmental Group of Experts on restrictive business practices was created within the UNCTAD framework which basic purposes are providing a forum for multilateral consultations and discussions, research, addressing matters involving the UNCTAD Set and making recommendations to States. Although this Intergovernmental Group of Experts has carried out certain activities, on its Eleventh Session it states that the UNCTAD Set was not being adequately implemented.[134]

During the Tenth UN Conference on Trade and Development held in Bangkok on February 2000, the UNCTAD was given the mandate of acting as facilitator for developing countries and economies in transition. Such broad mandate included assisting developing countries in the creation of a competition law and policy framework, promoting a competition culture, examining issues related to competition which are particular to development and the relationship between competition and competitiveness and trade-related aspects of competition and the possibility of international agreements on competition.[135]

Importantly, UNCTAD is also working on the elaboration of a model law or laws on restrictive business practices.[136]

4. Academic Initiatives

In 1993 a private group of professors and experts,[137] headed by Professor Wolfgang Fikentscher of Munich, elaborated a proposal for an international agreement they called the "Draft International Antitrust Code".[138] The document was conceived as an international agreement to be concluded within the aegis of GATT or WTO as a Plurilateral Trade Agreement and under the

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131 As per government conduct, it establishes that States should enact appropriate legislation with effective enforcement procedures that seek to eliminate private action which could restrain competition.

132 With regards to firms, the UNCTAD Set includes provisions addressing price fixing, collusive tendering, market, customer or sales/production quota allocation agreements, refusals to deal, and practices which dominant firms must abstain from (predatory pricing, discriminatory pricing and certain terms involving transactions, mergers, takeovers, resale price maintenance, etc.).

133 "Restrictive business practices" are defined as "means, acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position or market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade … or which through formal, informal written or unwritten agreements or arrangements among enterprises have the same impact".

134 TD/B/39(2)/7.

135 In doing so it declared that "…the international community as a whole has the responsibility to ensure an enabling global environment through enhanced co-operation in the fields of trade, investment, competition and finance… so as to make globalization more efficient and equitable." (Bangkok Declaration, Global Dialogue and Dynamic Engagement, para. 4.)

136 The latest version, entitled Model Law on Competition, is available in document TD/RBP.5/7 at UNCTAD's competition website.

137 The International Antitrust Code Working Group was comprised by J. Drexl, W. Fikentscher, E.M. Fox, A. Fuchs, A. Heinemann,U. Immenga, H.P. Kunz-Hallstein, E.U. Petersman, W.R. Schleup, A. Shoda, S.J. Soltysinski and L.A. Sullivan.

138 Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), published and released on July 10, 1993, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supplement).

conviction that private activity that clogs markets has often been outside the realm of regulation. Hence, given the foregoing, the best manner to encourage adequate enforcement to pry-open world markets was through the said initiative.

The Munich Draft sets forth certain minimum standards believed essential to any competition law system. The Munich Draft has eight parts[139] and twenty-one articles. Three pivotal fields of competition were provided for: horizontal and vertical restraints, mergers and abuse of market power. Also, the Munich Draft contemplates the creation of two institutions: the International Antitrust Panel (an adjudicative body to hear disputes stemming from the Code) and the International Antitrust Authority (with administrative and prosecutorial functions). Amongst the functions of the Authority were to appeal national cases, commence actions against national competition authorities believed to be failing in their competition duties under the Code, bring actions before the International Antitrust Panel, seeking injunctions against private companies and assisting States with the development and enforcement of their competition laws.

A minimalist approach was adopted where 15 principles were chosen as those according to which States would progressively harmonize their competition policies. Aside from the foregoing, a lot of discretion was vested on States.

The Munich Draft was presented before the OECD in 1993. Unfortunately, it was not received with enthusiasm.[140] The U.S. take on it is that it is heavily influenced by European approaches and that it tends to identify prohibited behavior through conceptual, rather than economic approaches, in addition to being overbroadly prohibitive. Also, procedural flaws were deemed to exist and it is thought confer too much power to a group of officials holding office for too many years. Additionally, the ability of exploiting ambiguities inherent in the Code's provisions was feared.[141] As a result, the WTO Charter did not include an international competition law agreement.

Notwithstanding the above, the code is a historic event. It constitutes yet another step towards international enforcement of free and open markets.[142]

5. *Bilateral and Regional Cooperative Initiatives*

A number of initiatives have taken place to minimize the jurisdictional conflicts between countries in their competition investigations and proceedings and to increase cooperation between competition authorities. Such initiatives have gone from mutual recognition of competition laws and the application of the negative comity principle,[143] to advanced bilateral and regional arrangements whereby Members agree to promote cooperation in the application of competition laws and even contemplate the positive comity principle.[144]

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139 Part One deals with the General Provisions and Basic Principles; Part Two addresses Horizontal and Vertical Restraints; Part Three relates to Control of Concentrations and Restructuring; Part Four regulates Abuse of Dominant Position; Part Five includes Remedies and the procedural provisions; Part Six concerns Public Undertakings and State Authorization; Part Seven provides for the Institutional provisions; and, finally, Part Eight sets forth goals as to the Future Development of the Draft Code.

140 Daniel J. Gifford. THE DRAFT INTERNATIONAL ANTITRUST CODE PROPOSED AT MUNICH: GOOD INTENTIONS GONE AWRY. Minnesota Journal of Global Trade, Summer 1997, vol. 6, issue 2.

141 Gifford, pgs. 4-5.

142 Gifford at 4.

143 The negative comity principle provides that each party will consider the interests of the other party at all stages of competition enforcement. It seeks to minimize conflict by agreeing not to take action that will unnecessarily interfere with the interests of the other party.

144 Which establishes a duty of cooperation and assistance. In six competition cooperation agreements entered by the U.S. with different countries (European Union, Brazil, Canada, Israel, Japan and Mexico) the positive comity principle has been included as allowing a country (the "requesting country") worried that anticompetitive conduct taking place abroad with effects in its jurisdiction may harm its important national interests, to request the country where the conduct is taking place (the "requested country") to take action against the said conduct. The requested country is not obligated to take action but to "carefully consider" the request and inform the requesting country of its decision. Under the above mechanism, the conduct should be illegal under the requested country's laws. However, such requirement has been relaxed. Under the *Draft Agreement between the European Communities and the Government of the United States of America on the Application of their Competition Laws* (of January 24, 1997) the positive comity principle allows a party to request the other party's competition authorities to take action against anti-competitive conduct taking place in the latter's territory even if does not violate the requesting party's competition laws or whether the requesting party plans to take any enforcement action.

On September 23, 1991 the European Community and the U.S. signed a cooperation Agreement. Also, on July 2000 Mexico and the U.S. signed a similar cooperation agreement,[145] which, as stated, provides for the positive comity principle.

Also, NAFTA Article 1501 requires each party to "*adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto*" and requires the parties to co-operate on "*issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws in the free trade area*".

6. *The WTO*

The WTO marks the beginning of a new era of global economic co-operation. Within the WTO context it has stated been that "*The issue is not whether competition policy questions will be dealt with in the WTO context, but how, and, in particular, how coherent will the framework be within which this will be done*".[146]

At the 1996 Ministerial Conference several parties sponsored an international competition law within the WTO framework.[147] Even though no consensus was achieved, a working group was created with the goal to examine the interaction between trade and competition policy so as to identify areas that may be addressed within the WTO framework.[148] The first report of the working group was presented before the WTO General Council on November 1998 and the matter is to be kept in the WTO agenda.[149]

C. Balance of International Competition Regulation Efforts

From the preceding discussion it may be observed that the issue of how to effectively address international competition related activity has attracted the interest of many international actors. Unfortunately, no single effort has attracted sufficient persuasion to pass international muster or to gain acceptance as *the* venue of choice.

Notwithstanding the foregoing, efforts continue to take place. To understand the issues involved, the next section will comment on each topic meriting international attention and the problems involved.

IV. Fields of competition law raising international concern

In order to analyze the complex issues raised by conduct meriting international competition law attention as well as the possible solutions, I will dissect the topic in the following parts: (a) concentrations; (b) cartels and other horizontal restraints; (c) vertical restraints; (d) anticompetitive practices; and (e) the interface between competition and trade policies.

A. Concentrations

Concentration review has been characterized as the most important application of competition policy.[150] Contrary to the approach towards cartels and other restraints, which are directed at *conduct* of competitors, concentration policy targets *market structure*, which purpose is the maintaining sufficient sellers so as to create the atmosphere for the taking place of competitive conduct. The foregoing is implemented in two manners: (i) breaking up existing consolidations of monopoly power; and (ii) preventing such consolidations in their incipiency. The second is carried out by scrutinizing concentrations.[151]

145 Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws, July 11, 2000. (4 Trade Reg. Rpt. (CCH) ¶13,509). Available at www.usdoj.gov/atr/icpac/5145.htm.

146 World Trade Organization. WTO ANNUAL REPORT 1997. (1997) Vol 1, at 32.

147 Communication from the Commission to the Council, *Towards an International Framework of Competition Rules* (COM(96) 284 final, June 18, 1996.

148 1996 Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration, December 18, 1996.

149 WT/WGTCP/2, December 8, 1998.

150 Edward M. Graham. Economic Considerations in Merger Review, in Antitrust Goes Global, What Future for Transatlantic cooperation?, Simon J. Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 57.

151 Scherer – Competition Policies, at 41.

The breaking up of monopolistic consolidations (structural fragmentation) has taken place for the most in the U.S.[152] Outside the U.S. a few examples exist,[153] but they continue to be the exception rather than the rule.[154]

In contrast, a more frequently used weapon has been merger policy. Instead of waiting for consolidations to take place, merger and acquisition activity is scrutinized, and, should it pose a threat either because of the size of the transaction or because of the structural (both from the industry-side and market perspective) circumstances, the deal may be conditioned or banned. The theory is that it is better to halt consolidations in their incipiency than to carry out *ex post facto* remedies which frequently upset the entities and practitioners involved under the argument that you can't unscramble scrambled eggs.

For more than half a century, the U.S. was the only country with active merger laws.[155] Although other countries eventually developed such controls, their initial use was either weak[156] or schizophrenic,[157] and exceptionally enforced with vigor.[158]

Currently, the global merger playing field can be described as a color and tone changing kaleidoscope of merger policy approaches. This landscape ranges from the liberal to the strict, and tends to change over time as competition authorities become more savvy and as a result of the changing ideological composition of the members of both the competition authorities and the organs which review their decision.[159] The foregoing necessarily involves the need to play the same game under different—and sometimes conflicting—rules.

The foregoing describes the situation firms are put in by the current *status quo* of international concentration review. However, it does not tell the whole story. Competition authorities are also put between a rock and a hard place. A set of criteria needs to be found that allows them to find a coherent solution that avoids that they fall in either of the following two pitfalls, which are the two extremes of the same issue: On the one hand, the danger of giving a green light to a concentration which results in a combined entity that does in fact have enough market power to diminish consumer surplus, and, hence, fail to prevent an incipient monopoly or the abuse of a dominant firm position. On the other hand, the risk of granting a red light to a concentration in which the combined entities would have realized sufficient efficiencies that would have increased long-run consumer surplus.[160]

In fact, clearing a multinational merger has become a costly, uncertain, time-consuming and quixotic venture. A clear example of the above is the General Electric Company/Honeywell International Inc. merger which was authorized in the U.S.[161] and Mexico[162] but banned in Europe.[163]

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152 Although divestitures occurred in diverse industries, some of the important breakups involved Standard Oil (1911), American Tobacco (1911), du Pont (1912), The Pullman Company (1944), the most important motion picture producers (late 1940's) and American Telephone and Telegraph (1982). Other less serious divestitures, such as compulsory —and sometimes gratuitous—licensing of patents, were implemented.

153 For instance the forced spin-offs of more than ten thousand pubs in the U.K. which were owned by the six leading brewers (late 1980's). Also, Canada made an (unsuccessful) effort to have the petroleum companies divest their interprovincial pipelines and half of their wholesale distribution facilities (1986).

154 Scherer – Competition Policies, pgs. 62-63.

155 The Sherman Act (with its "*combinations …in restraint of trade*" language) the 1914 Clayton Act (which included merger control provisions, which, on technical grounds, the Supreme Court rendered ineffective in the 1920's) and the 1950 Celler-Kefauver Act, reinforced procedurally by the 1976 Hart-Scott Rodino Premerger Notification Act.

156 Which was the case with France and Japan. In France's case, the reason appears to be that a belief existed that larger companies would be better equipped to compete with foreign ones. Hence, tolerance ensued. In Japan's case, initial assertive enforcement was impinged upon by other agencies' condemnation.

157 As professor Scherer (Scherer – Competition Policies, at 64) has qualified the United Kingdom's activities after 1964.

158 This was the case of West Germany with its 1973 law.

159 For instance, the U.S. Supreme Court's approach tends to shift as its ideological composition varies.

160 This latter scenario also includes the cases where a concentration is challenged but subsequently allowed under restrictive conditions, when these conditions have the effect of reducing net long-run consumer surplus over what would have been realized in the absence of these conditions. Both of these dangers were pointed out by Edward M. Graham. ECONOMIC CONSIDERATIONS IN MERGER REVIEW. Pgs. 68-69.

161 GE announced its proposed acquisition of Honeywell on October 22, 2000. On May 2, 2001, the U.S. Department of Justice announced that an agreement to resolve the limited competitive concerns with the transaction had been reached and hence would allow the deal to proceed.

162 File Number CNT-04-2001, Competition Gazette, April 2001, Año 4, No. 9, at 189.

Cooperation to alleviate procedural complexities that will yield transaction cost saving and avoid frustrating potentially useful deals is urgently needed.[164]

The ICPAC report notes that certain practices must be encouraged to address concentrations with significant transnational or spillover effects. These are: (a) ensuring non-discriminatory treatment of firms based on nationality; (b) minimizing the imposition of remedies unrelated to competition objectives; (c) minimizing the imposition of remedies based on parochial political concerns and ensuring transparency in the process if non-competition factors play a role in the decision making process; (d) minimizing problems that may arise in competitor-driven processes by recognizing that competitor interest and consumer interests are not necessarily aligned; and (e) in the face of clash, tailoring remedies with extraterritorial effects to cure the domestic problem, taking into account procedures in the foreign jurisdiction.[165]

Also, measures should be taken to ensure that each concentration review regime is transparent and examines only those concentrations that have a nexus and the potential to create appreciable anti-competitive effects within that jurisdiction. The ICPAC suggests that notification thresholds should be amended, where necessary, to include appreciable and objectively-based connection to the reviewing jurisdiction. For instance, by targeting local activity such as sales or assets. The use of sales volume or asset value criteria over market shares is encouraged.[166]

B. Cartels and other Horizontal Restraints

1. Introduction: The Issue

Cartels are the main trade-distorting monopoly power problem currently arising from international business.[167] In fact, they have been characterized as "the most egregious violations" of competition law"[168] inasmuch as they cause billions of dollars of harm to consumers each year.[169] Although countries engage in competition and trade liberalization discourse, experience shows that they tend to erect trade barriers so as to favor cartels benefiting their domestic companies. The reason for this is simple: price fixing and other restrictive practices between exporting companies may contribute to national industrial policy goals by biasing the terms of trade in the exporting nation's favor and shifting economic rents from importing nations to sellers in the exporting nation.[170]

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163 Case No. COMP/M.2220 – General Electric/Honeywell. 03/07/2001. Regulation (EEC) No. 4064/89 Merger Procedure, Article 8(3). The conclusion of the Commission was that (para. 567 of the July 3 decision):

"… the merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine, as a result of which effective competition in the common market would be significantly impeded. The proposed merger should therefore be declared incompatible with the common market pursuant to Article 8(3) of the Merger Regulation."

164 Curiously, although the possibility of divergent outcomes has been noted, by and large, multijurisdictional concentration review has resulted in consistent and compatible remedies. (Janow and Lewis at 7.)

165 Janow and Lewis, pgs. 7-8.

166 Janow and Lewis at 11.

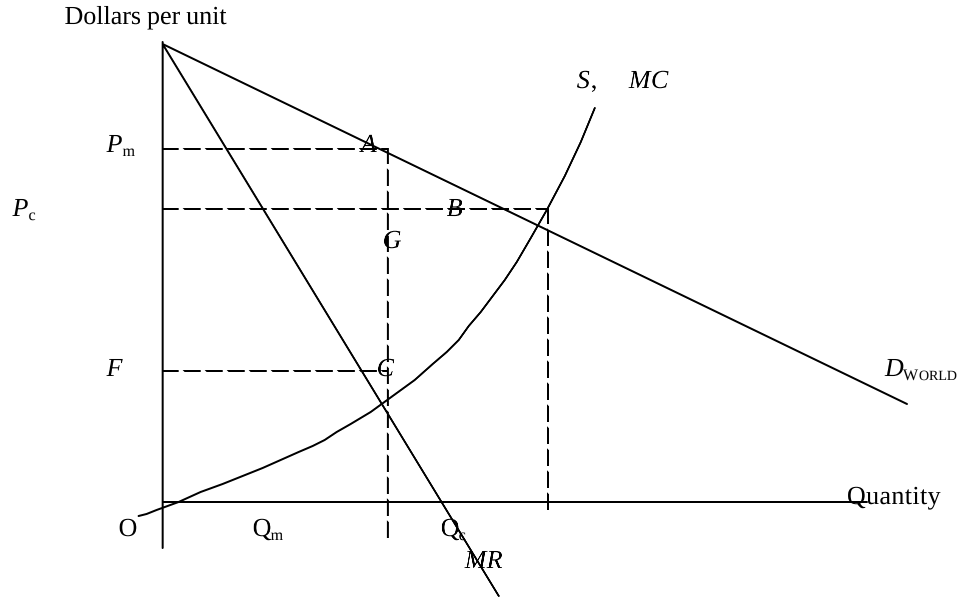
167 Scherer – Competition Policies, at 89.

168 Organisation for Economic Co-operation and Development. FIGHTING HARD-CORE CARTELS. HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES. OECD, 2002, at 11.

169 As concluded in the 2002 OECD Competition Committee report of the Nature and Impact of Hard Core Cartels and the Sanctions Under National Competition Laws. Organisation for Economic Co-operation and Development. FIGHTING HARD-CORE CARTELS. HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES. OECD, 2002, at 3.

170 Scherer – Competition Policies at 43.

The following graph depicts the point.[171]



The chart takes *S* as the domestic competitive industry facing a foreign demand curve of D_{WORLD}. If the industry is left to price competitively, the price will be P_c and the output Q_c. By cartelizing, it can appropriate the foreign market's marginal revenue curve MR, equate *S* (which reflects marginal cost) with MR and restrict output to the monopolistic level Q_m, hence selling at the inflated price of P_m. As a result, by restricting output the domestic industry sacrifices rents measured by the triangular horizontal area found between GBC, which is more than compensated by the gain comprehended in the area P_mAGP_c.

Hence a net gain exists to the exporting nation from cartelization, and it is captured by the sellers of the product.

2. Export Cartels

An export cartel is an association of exporting firms that regulates price by restricting output or competition and, although they may account for a small portion of trade, they can distort foreign markets if they have the power to influence prices. The most likely effect will be that an increase in the price paid by consumers in the foreign country and a sub-optimal volume of trade in the good or service covered by the export cartel.

Export cartels or export associations are formed frequently under the excuse of cost-savings resulting from allowing that a common sales organization handle the transactions multiple domestic products in regards to selling, financing and customs paperwork, particularly small companies which cannot mount their own export campaigns. Achieving such economies of consolidated selling has been the *raison d'être* of laws authorizing export trading associations. In the U.S. the Webb-Pomerene Act of 1918 and the Complementary Export Trading Company Act of 1982 provides of such associations. In Mexico, Article 28 of the Constitution allows for export cartels, as will be discussed later.

Doubts have surged in regards to the alleged cost-savings since the Webb-Pomerene groups have been shown to comprise namely large firms and several of them have originated in highly concentrated industries.[172]

171 Borrowed from Scherer – Competition Policies at 44.

172 Scherer – Competition Policies, at 43, citing a Federal Trade Commission Report of 1967 (Chapters 3 and 4) and similar findings on Japanese export cartels (citing Jacquemin, 1981).

Most nations exempt export associations from the prohibitions of their competition policy laws. In such cases it is frequently required that registries, filings and other continuing requirements be complied with that allow for regulatory oversight so as to prevent the competition-reducing spillover effects therein involved.[173]

Surprisingly, and despite their cost-saving and price fixing potential, only a small fraction of national exp orts seem to be registered in the form of export trade associations.[174]

Many countries exempt from their cartel prohibitions certain activities considered to be desirable. For instance, the United States exempts from the Sherman Act cartel prohibition most export cartels, agricultural cooperatives, cooperative research and development arrangements, insurance company rate-setting activities, baseball player assignment and labor union collective bargaining efforts. German law tolerates exemptions under "crisis" circumstances —such as recessions— the following: cartels, rationalization and specialization cartels, such as closing plants and reassigning production orders to improve efficiency, export and import cartels, and "conditions" cartels, which include the setting uniform rents for delivery and invoice payment.[175]

Japan allows exemptions, provided certain conditions are met, for depression cartels, rationalization cartels, small and medium sized enterprise cartels, and certain regulated industry activities including import and export cartels and cartels organized under explicit statutory mandates.[176]

In the case of Mexico, a Constitutional[177] and federal (competition) law[178] exemption exists for associations or cooperatives selling abroad, provided the following criteria is met: (a) that the said products are the region's main income source, or first necessity articles; (b) the products are neither sold nor distributed within Mexican territory; (c) membership is voluntary and members are freely allowed to join or leave the association; (d) they do not issue or distribute permits or authorizations being granted by the Federal Public Administration; and (e) that their incorporation is authorized by the State legislation of the place of their incorporation.

3. *Import Cartels*

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173 Scherer – Competition Policies at 46.

174 In the U.S., Webb-Pomerene associations handled approximately 19 percent of U.S. exports in the 1930's, this being their peak time. By 1981 less than two percent remained. In West Germany less than two percent were registered by 1980, and the Japanese also had low and with a downward trend, most cartels formed during the 1980's being in the textile industry. (OECD, 1984 at 30, cited by Scherer – Competition Policies at 46.)

175 Scherer – Competition Policies, pgs. 52-53.

176 Idem.

177 *Included in paragraph eighth of Article 28 of the Federal Constitution. Such proviso reads as follows:*

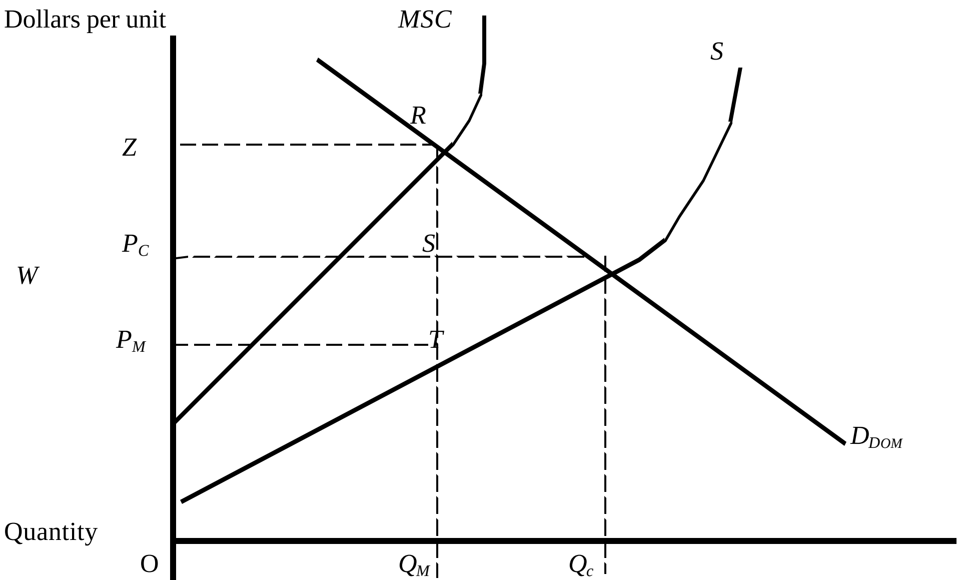
> *"Labor unions incorporated to protect their own interests and the cooperative associations of producers which purpose is the protection of their interests or the general interest, and directly sell in foreign markets the national or industrial products that are the main source of income of the region where they are produced or articles that are not of basic necessity, as long as such associations are under the surveillance or protection of the Federal Government or of the States, provided prior authorization is obtained from the respective legislatures in each case. The same legislatures, by themselves or through Executive proposal, may derogate, when the public interest so requires, the authorizations granted for the incorporations of such associations."*

("No constituyen monopolios las asociaciones de trabajadores formadas para proteger sus propios intereses y las asociaciones o sociedades cooperativas de productores para que, en defensa de sus intereses o del interés general, vendan directamente en los mercados extranjeros los productos nacionales o industriales que sean la principal fuente de riqueza de la región en que se produzcan o que no sean artículos de primera necesidad, siempre que dichas asociaciones estén bajo vigilancia o amparo del Gobierno Federal o de los estados, y previa autorización que al efecto se obtenga de las legislaturas respectivas en cada caso. Las mismas legislaturas, por sí o a propuesta del Ejecutivo, podrán derogar, cuando así lo exijan las necesidades públicas, las autorizaciones concedidas para la formación de las asociaciones de que se trata.")

178 Article 6 of the Federal Law of Economic Competition ("*Ley Federal de Competencia Económica*"– "FLEC"). The *Ley Federal de Competencia Económica* is the Mexican competition statute. Should the reader wish to elaborate on the same, I would refer to Francisco González de Cossío, LAW AND ECONOMICS OF THE MEXICAN COMPETITION LAWS, (Doctoral Dissertation), University of Chicago.

Although there are many reasons why a country may allow import cartels, a mayor one is that by allowing domestic purchasers to organize into a cartel, a buying cartel wielding monopsony power will be established restricting purchases until the marginal supply cost has fallen into equality with the marginal value of the commodity thereby appropriating a monopsony rent.[179]

The following graph should illustrate the point.[180]



The graph seeks to depict an upward sloping supply curve[181] facing a domestic demand of D_{DOM}. Under competition, the purchase price will be P_C and output Q_C. The monopsony created by the buying cartel, taking into account the effect of its purchases on price, will compute the marginal supply cost *MSC* of the different quantities purchased. Accordingly, it will restrict its purchases until the price is lowered so that the marginal supply cost equals marginal value of the commodity, i.e., the demand point at *R*. Under such scenario, the amount purchased will be Q_M which the importers will be willing to supply at the price P_M, which is less than the competitive price P_C.

The cartel will appropriate —at the supplier's expense— the monopsony rent displayed by the area included in P_CSTP_M, sacrificing a much smaller triangular surplus RWS resulting from the output restriction.[182]

Another alleged reason for allowing a buyer's cartel is the desire to keep out imports that may compete with domestic products. However, it is not clear why a group of buyers would want to do so, unless they are vertically integrated into the industry producing the commodity in question.[183]

4. *International Cooperation and Enforcement on Cartels*

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179 Scherer – Competition Policies at 55.

180 Borrowed from Scherer – Competition Policies at 55.

181 I.e., the country is assumed to be a sufficiently important purchaser of the commodity for the prices charged by competitive suppliers to rise with increased import volume.

182 Prof. Scherer notes that the plausibility of the reasons arguing in favor of a countries' establishing of export cartels raises the question as to why they are not common. To answer such query he forwards four possible reasons: (i) they might exist but not be reported so as to avoid putting exporting industries on notice; (ii) finance ministers may prefer tariffs to allowing a domestic company appropriate rents from exporters; (iii) domestic firms may find it difficult to muster monopsony power vis-à-vis exporters; and (iv) the exporters may circumvent the cartels (as done with tariffs) by establishing production facilities in the importing countries. (Scherer – Competition Policies at 56.)

183 Scherer – Competition Policies at 57.

Instead of cooperating, countries have by and large chosen to go solo on the path of fighting cartels. When researching the cases of cartel prosecution one finds that, with regards to the history of the two major competition blocks (the U.S. and the EU[184]) that the record is vacant when seeking to find instances of cases where it was joint effort, contrary to one-sidedness, what led to the punishment of a cartel which members surpassed national borders.[185] Contrary to such situation, the United States and Canada have cooperated in certain major cartel investigations. The foregoing has been done through treaty implemented competition law provisions and mechanisms which included mutual assistance in substantive and procedural matters.

As a result of the lack of cooperation, the outcomes of investigations have fluctuated from reduced effectiveness to outright failures in some cases. For instance, the lack of cooperation in the U.S. *International Food Additives Cartel* cases led to initial problems in the securing of evidence located abroad.[186] However, in the end guilty pleas were obtained as to the conspiracy to raise prices of an additive called lysine and allocate sales in the worldwide lysine and citric acid markets. Fines for US$100 million were imposed which were the largest ever at such moment. Another example is the attempt by the U.S. to punish under its competition laws an international industrial diamond producer and distribution cartel against General Electric, DeBeers and several individual defendants,[187] which ended up in failure because of lack of cooperation.

However, and to tell the whole story, lack of cooperation has not always led to negative results. The U.S. has successfully investigated and prosecuted international cartels even without the assistance of the EU. For instance, the Justice Department recently prosecuted a decade-long international vitamin cartel which conspired to increase prices of vitamins added to a wide variety of prepared foods. The Justice Department eventually obtained guilty pleas and breathtaking fines which exceeded US$1 billion for the foreign corporations and jail sentences for the foreign individuals involved.

Another example is the U.S. *graphite electrodes* cases where the conspirators fixed prices in the U.S. and other markets in meetings taking place in Europe. Eventually, the companies participating (Showa Denko Carbon, a U.S. subsidiary of the Japanese firm Showa Financing KK and UCAR International) plead guilty to violating the Sherman Act and agreed to respectively pay US$29 million and US$110 million in fines.

Outside cartels, some cooperation has existed. For instance, the Microsoft case, which has been cited as the first test of international coordination of competition activities between two jurisdictions with different competition policies.[188] Also, in the merger context, since firms need a quick decision on the feasibility of the deal they want to strike, they tend to cooperate and even waive confidentiality in order to reach a joint solution which serves both sides, or at least as a coordinated remedy.[189] An example of this is the WorldCom-MCI telecom merger involving two United States firms and which in 1998 divested MCI's internet assets to Cable and Wireless worth US$1.75 billion, the biggest divestiture in U.S. merger history. Interestingly, EU and U.S. authorities worked closely together, shared analysis, exchanged views, held joint meetings with the companies involved so as to discuss issues and assess the possible solutions, and eventually came to the same conclusions. A similar process, but with different outcome, occurred during the Boeing/McDonnell Douglas merger where the FTC and the EU Commission worked closely together although disagreed as to whether the transaction was legal.

5. *Instances of International Cartel Enforcement*

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184 Importantly, the U.S. and E.U. entered into a competition cooperation agreement on September 23, 1991 (Agreement between the Government of the United States of American and the Commission of the European Communities Regarding the Application of Their Competition Laws) (reprinted in 30 I.L.M. 1491 (1991)).

185 I am not alone on this assertion. See Spencer Weber Waller. ANTICARTEL COOPERATION, in ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 98.

186 The trouble in obtaining evidence located abroad that the U.S. Antitrust Division experienced ranged from document destruction in Japan by executives of Ajinomoto, to other less serious violations. (see International Competition Policy Advisory Committee, transcript of meeting, February 26, 1998 (www.usdoj.gov/atr/icpac/1772.htm)).

187 United States v. General Electric Co. (869 F.Supp.1285 (S.D. Ohio 1994)). See also, William M. Carley. FATAL FLAWS: HOW THE FEDERAL CASE AGAINST GE, DEBEERS COLLAPSED SO QUICKLY, Wall Street Journal, December 28, 1998, A1. Spencer Weber Waller. ANTICARTEL COOPERATION. At 104.

188 Keegan (1996) and Spencer Weber Waller. ANTICARTEL COOPERATION. At 108.

189 Spencer Weber Waller. ANTICARTEL COOPERATION. At 108.

Organized cartelization has taken one of either of the four following species: (i) cross-border cartels among national enterprises; (ii) cross-border cartels among private entities; (iii) export cartels operating from a single country; and (iv) restrictive arrangements formed to resolve international trade policy conflicts.[190] I will now briefly comment on the same.

a. Cross-border Cartels among National Enterprises

The most important cartel in modern world history is the Organization of Petroleum Exporting Countries ("OPEC") formed by national governments' oil-owning authorities.

Efforts have been made to hamper OPEC's activity,[191] however, they have run against the judicial brick-wall of the "act of state doctrine" which qualifies OPEC's activity as "acts of state" and, hence, outside the scope of judicial competence inasmuch as they relate to activity of sovereign states and are deemed better handled by other branches of government: the executive and legislative.

b. Cross-Border Cartels among Private Entities

An important precedent is the prosecution by the European Community of an international cartel of wood pulp suppliers to the EC by a group of U.S. firms registered as an export cartel under the Webb-Pomerene Act. The EC Court of Justice held that the act of state doctrine did not shield the activity since the Webb Pomerene associations merely *allowed*, but not *required*, by U.S. law. The reaction of the U.S. Department of Justice to the EC initiative was to make no objections.[192]

In this domain the act of state doctrine has also impinged upon competition law enforcement. Although, further to the "*effects doctrine*" cross-border cartels would *ab initio* be challengeable under the laws of the country whose consumers are affected by the practice, should cartelization take place under active government compulsion it is likely to be exempt from competition liability.[193] However, should it be registered with the host nations' government, *but not actively mandated*, the act of state shield will not obstacle liability.[194]

As in other topics, the issue of extraterritoriality and aggressive/exorbitant jurisdiction by certain countries based on the "effects doctrine", of which the U.S. tops the list, has become an issue to which other countries have reacted[195] —sometimes aggressively— by, among other manners, enacting laws that make it difficult to subpoena evidence or otherwise elicit the cooperation of cartel members in their home jurisdictions.

c. Export Cartels Operating from a Single Country

These have been discussed above (Section IV.B.2 of this Paper). The reader is referred to such discussion.

d. Voluntary Restrictive Arrangements

Restrictive agreements formed to resolve international trade policy conflicts have taken the form of Voluntary Export Restraints ("VERs").

VERs, also known as Voluntary Restrictive Agreements ("VRAs") or Orderly Marketing Arrangements ("OMAs"), are *sui generis* practices. They depict a scenario where a government of one State asks another to have its producers 'voluntarily' restrain their exports to the extent that they are believed to be dumped, subsidized or otherwise materially injure the importing nation's industry. Such petition is done under the (quiet) threat that not doing so would be accompanied by formal enforcement under the domestic laws of the importing country.

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190 Scherer – Competition Policies, pgs. 46-47.

191 For instance, in *International Association of Machinists and Aerospace Workers v. The Organization of Petroleum Exporting Countries* (477 F.Supp. 553 (1979), 649 F.2d 1354 (1981)), an attempt was made to enjoin OPEC's price-raising activity and obtain monetary damages.

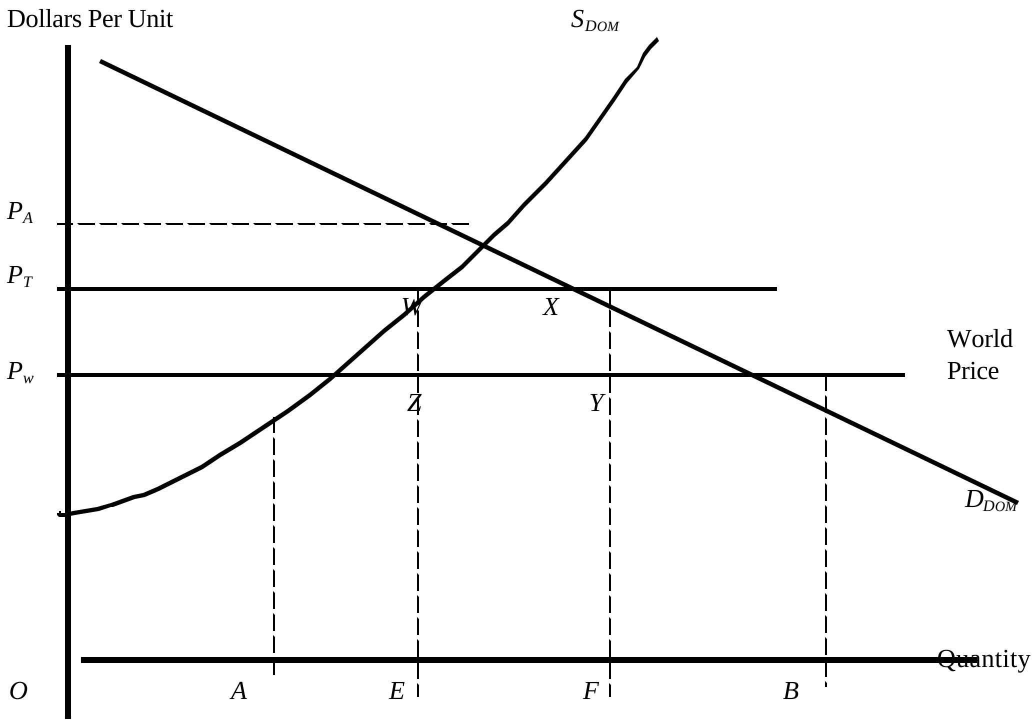
192 This position was adopted after consultation with EC competition policy officials. Importantly, the U.S. has also sued to enjoin activities of foreign export cartels under similar legal theories. (Scherer— Competition Policies at 48.)

193 Scherer – Competition Policies at 48.

194 See Antitrust Guidelines for International Operations of the U.S. Department of Justice, 53 Fed. Reg. 21595-97 (1988).

195 For instance, the United Kingdom, Canada, Australia, and France. Protests have been made against the U.S. by the referred countries and have sometimes urged the settling of the matters by the Department of Justice. (Scherer— Competition Policies, pgs. 48-49.)

The following graph[196] illustrates the economics behind VRAs:



S$_{DOM}$ is the domestic supply curve and D$_{DOM}$ is the domestic demand. Without imports the market competitive price would be P_A. If demand is small relative to world supply, the domestic prices will be competed down to *PW*. Hence, domestic firms will supply *OA* and importers will supply *AB* output. Should this volume of imports be considered as posing a threat to the domestic industry, or should the applicable multilateral trading system requirements be satisfied, the danger could be rectified by imposing a tariff per unit of P_TP_W raising the price to *OPT*, reducing the quantity of exports to *EF*, and increasing domestic output to *OE*.

The amount of tariff revenue to be realized by the importing nation's treasury will be the rectangle of *WXYZ*. Therefore, an identical increase in domestic prices and output may be obtained by establishing an input quota or having the exporter's of another nation agree to 'voluntarily' limit their shipments to the quantity *EF*.

The difference, however, will be that under a VER quota system, the surplus of domestic price over world price (P_TP_W) will accrue to the exporting producers and not to the importing nation's tariff collector. Accordingly, exporters capture rents of *WXYZ* that they would not receive from selling at the competitive world price or from having a special tariff levied on the goods.

These measures were popular in the U.S. and EC in the 1970s and 1980s. The reason for their popularity seems to be that, on the one hand, although exporters lose export volume relative to the non-tariff situation, they will be much better off under the VRA scenario than they would be under an equivalent import-limiting tariff since they will appropriate the amounts that would otherwise be paid as tariffs. On the other hand, the reason why the importing nations prefer VRAs to tariffs may be puzzling since it means less revenue. The answer may be that it will minimize international friction.[197] The type of problems eliminated are those that stem from WTO complaints as well as general trading partner anger.

The problem with VRAs is that they are inflexible and hamper the type of changes in import volume that normally result from shifts in domestic demand, world supply and, hence, world price of the imported good. Furthermore, should the domestic industry be

196 Borrowed from Scherer – Competition Policies at 50.

197 Scherer – Competition Policies at 51.

competitive, the VRAs will foster greater domestic prices than tariffs eliciting the same restriction of output. This would explain the preference by domestic producers of VRAs *vis-à-vis* tariffs.[198]

An additional problem with VRAs is that, once decided upon, they must be allocated between national producers of the exporting country. A way to do so is for the exporting country's government to auction off the quotas. However, in doing so the exporting nation government will appropriate most of the quota rent (WXYZ) described in the above figure. Another way to do so would be to form a *de facto* cartel among the producers requiring each to limit its exports in congruence with its assigned share of the quota. However, and as the careful reader might already have realized, the problem with this solution is that it may run afoul of the domestic competition laws forbidding output limitations.[199]

An open question is whether VRAs violate GATT/WTO provisions. Interestingly, the answer is: "it depends". These practices fall under what has been called "gray-area" measures which implies that they may not always be clearly inconsistent with international rules (presumably "black") but, nonetheless, do not live up to the basic policy goals of the international economic system.

Although, *ab initio*, VRAs would seem a technical violation of GATT Article XI(1),[200] it may be justified under Article XIX (the "escape clause"), XX (protection of public morals and health exception), XXI (the security exceptions). More importantly, the mechanics of the same pose an enforcement dilemma: no country complains and exporters comply for fear of worse measures.[201] Furthermore, they are hard to tackle since the parties participating have no interest in complaining[202] and third parties would seem to have an uphill battle in establishing injury.[203]

C. VERTICAL RESTRAINTS

The reader will recall the explanation offered to understand "vertical restraints": they are refusals by a firm to transact with "upstream" suppliers or "downstream" customers. I.e., firms located in different levels of the production chain. Vertical arrangements range form transactions between completely independent firms, to the interaction between two or more levels within a single economic group. Between these two extremes fall contractual arrangements which restrict the freedom of action of upstream and downstream firms.[204] The competitive issue stemming from these arrangements is that, while they can be used for pro-competitive purposes, they can be used for anticompetitive purposes. The justifications and consequences of such type of practices are both complex and controversial. Hence, it is foreseeable that different laws take differing —and frequently conflicting— views on the matter. Actually, when it comes to vertical arrangements, analyzing their implications from an international standpoint raises their level of difficulty in two ways: not only are their consequences controversial and apt for abuse, but also, because they are complex and disputed, even informed and reasonable experts take divergent views on the issue of their effects. Hence, from a legal policy standpoint, the same can be —and often are— treated with dissimilar effects in different jurisdictions.

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198 This conclusion is not without challenge. Prof. Scherer cites the conclusion of Messerlin (1989b) in the sense that high tariffs may be preferred over VRAs by importing producers. (Scherer – Competition Policies, at 51.)

199 The matter has been litigated. In *Consumers Union of U.S., Inc. v. William Rogers et al*, 352 F.Supp. 1319 (1973) (vacated on appeal in *Consumers Union of U.S., Inc. v. Henry Kissinger et al*, 506 F.2d 136 (1974), cert. den. 421 U.S. 1004 (1975)), which dealt with a VER adopted by the Japanese and European steel producers under instigation of the U.S. government, a federal court analyzed the legality of the restraints under the Sherman Act. The appellate court found that negotiating such restraints was comprehended in the executive foreign policy powers.

200 Which states that "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation … or on the exportation … of any product…".

201 John H. Jackson. THE JURISPRUDENCE OF GATT AND THE WTO. INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS. Cambridge University Press, 2000, at 66.

202 Why should the imposing country complain against its own activity?, and the government of the country to which the restrained products are destined could see them as a "safeguards" measure to alleviate "injury".

203 Although they could challenge it under the Article XXIII theory of nullification and impairment, shifting the burden of proof against the defending country to show that no nullification or impairment existed.

204 Competition and Trade Effects of Vertical Restraints, in Trade and Competition Policies for Tomorrow. Organisation for Economic Co-operation and Development, 1999, at 43.

In fact, the differences can be great.[205] Take, for instance, the U.S. and European cases. In a nutshell, whereas European competition policy will strike an arrangement down as anticompetitive upon proof that it may significantly restrict one or more competitors' ability to access or expand its operations in a market, the U.S. view will require more. Likelihood that the arrangement will 'substantially lessen competition' will need to be established. What is more, the U.S. approach will require that the 'substantiality of any lessening of competition' be characterized by either an absence of offsetting efficiency benefits or proof of actual harm to efficiency.[206]

As per the Mexican case, and as already dealt with before,[207] a vertical arrangement will be stricken down as illegal and trigger competition liability when the firms engaged in it have market power in a relevant market and any of the following three results occurs: (a) displacement of a competitor from the market; (b) substantially impede the access of competitors into the market; or (c) establish exclusive benefits in favor of one or several persons.[208]

The Mexican approach to verticals seems to be congruent with the approaches taken by both the U.S. and the EU although two circumstances should be noted. To begin with, the standard is lower than that of the "substantially lessen competition" threshold of the U.S. as well as the EU's "significantly restrict competitors' ability to access or expand its operations in a market". However, practice shows that negligible displacements of competitors, or those derived from efficiencies, will generally not trigger sanctioning by the FCC. A second point to note is that, compared to the U.S. and E.U., the circumstances which may trigger vertical restraint liability are clearer. This is both advantageous and disadvantageous at the same time. On the one hand, firm's and practitioners know what to expect and be wary of in investigations. On the other, limiting such causes of action could eventually prove to fall short of business dynamic reality.

Whatever the threshold of acceptance of a vertical restraint is, the concern is that they can exclude interbrand competitors and these competitors may be foreign firms. Combating these practices has thus far generally been made from a unilateral standpoint. Initiatives exist for a multilateral coordinated effort to combat them,[209] although their feasibility is still subject of debate.

Vertical arrangements are a field of competition law and policy that, because of the complex, changing, case-sensitive and controversial nature of their effects, are a neuralgic point inviting disagreement and contradicting approaches in the international level. Uniforming —or at least harmonizing— their effects has been tried (e.g., the Munich Code) but no acceptable solution has been reached.

D. ANTI-COMPETITIVE PRACTICES

The issues raised by practices of competition relevance exceeding a single jurisdiction can be analyzed in the following categories: (1) anti-competitive practices occurring in multinational markets; (2) anti-competitive practices in one country affecting markets in other countries; (3) anti-competitive practices in one country affecting market access; and (4) extraterritoriality issues. Each will be discussed.

1. Anti-Competitive Practices Occurring in Multinational Markets

Because of trade liberalization a relevant geographic market for a particular good or service will frequently exceed the domestic borders of one country. The consequence of this is that a practice by a firm in one country will have effects not only within such borders but within the relevant market which, as stated, exceeds said country. Hence, more than one competition law —assuming all

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205 So great that an author has qualified the differences as a "Great Divide" (Philip Marsden in ANTITRUST GOES GLOBAL. WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil editors, 2000, at 98).

206 The differences in approach are the result of a different philosophical backdrop as regards economic freedom. In the U.S. competition policy is conceived as an instrument of economic liberty, free market access, as well as a means to foster efficiency. The European take, on the outset, agrees with the preceding assertions, but is also supported on the notion that competition policy is an engine of market integration. Hence, whereas in the European Union the guiding test to assess the legality of a practice is whether it is consistent with the Common Market —which is used as a proxy for their competition impact—, U.S. competition law looks at the overall effects of a practice on the efficient operation of the market as a whole, measured by output. (Marsden, pgs. 118, 122 and 127.)

207 Chapter Four this study.

208 FLEC Article 10.

209 As described in Section IV of this Chapter.

affected countries have competition regulation[210]— will be applicable, which may lead to inconsistencies in the tackling of the said practice. These inconsistencies may involve simple differences in consequences, to outright conflicting outcomes. Although both scenarios are inconvenient, while the former is regrettable, the latter is tragic and may even lead to a regulatory tug-of-war or beggar-thy-neighbor scenario where a destructive cycle of sanctions, retaliations, trade barriers, blocking statutes,[211] clawback statutes,[212] or other measures will exist in the enforcement of competition laws.

2. Anti-Competitive Practices in one Country Affecting Markets in Other Countries

Uncoordinated competition and trade regulation sow the seeds of anticompetitive practices. For instance, export cartels injuring foreign markets, anticompetitive practices (e.g., exclusionary practices) organized and implemented in one market but aimed and foreign markets, and mergers of firms in one market that allow for market power in another.[213]

Lack of co-operation provides the opportunity for firms to act unlawfully. In a way, a "regulatory market failure" provides the ingredients for international competition delinquency. Should once market provide for less stringent competition regulation or enforcement, it could become a "competition-heaven" from where anticompetitive practices may be orchestrated.

3. Anti-Competitive Practices in One Country Affecting Market Access

Firms in one market may engage in practices that affect foreign competitors and which effect resembles import tariffs or other measures impinging upon trade liberalization in that they erect trade barriers in the domestic market so as to obstacle the possibility of entry by foreign competitors. For instance, vertical restraints such as exclusive dealing arrangements, allocation of geographic territories, resale price maintenance, franchise agreements or even vertical integration.[214] All of the foregoing could be implemented to foreclose a market from foreign competition.

4. Extraterritoriality Issues

Concerned with practices generated abroad which affect a domestic market, a country may seek to enforce its domestic competition laws extraterritorially on firms that operate in foreign markets but have some impact on the local economy. A prominent example is the "effects test" followed by U.S. competition authorities which is satisfied when a firm engages in anti-competitive conduct in a multinational market that encompasses the United States.[215] This approach runs several risks, such as generating international friction,[216] that under the cloak of legitimate competition enforcement a country may seek to protect its domestic firms from foreign competition, and less than optimal enforcement.[217]

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[210] Should one of the countries lack competition regulation, the scenario will be worse. It will in all likelihood magnify the international frictions from applying extraterritorially the competition regulation of one country on another. Hence, the absence of competition laws or inappropriate enforcement of the same is a matter of international concern in the case of multilateral markets. (Alan O. Sykes. EXTERNALITIES IN OPEN ECONOMY ANTITRUST AND THEIR IMPLICATIONS FOR INTERNATIONAL COMPETITION POLICY. 23 Harvard Law Journal of Law & Policy, 2000, pgs. 92-93.)

[211] Designed to prevent foreign countries —notably the U.S.— from collecting evidence and testimony on foreign soil.

[212] Which authorize local suits to recover multiple damages already paid in connection with a foreign judgment.

[213] Andrew D. Mitchell. Broadening the Vision of Trade Liberalisation. International Competition Law and the WTO. World Competition, Vol. 24, No. 3, at 348.

[214] Andrew D. Mitchell. Broadening the Vision of Trade Liberalisation. International Competition Law and the WTO. World Competition, Vol. 24, No. 3, at 349.

[215] *United States v. Aluminum Co. of America* (148 F.2d 416,444, (2d Cir. 1945); US Department of Justice and Federal Trade Commission. ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS, April 1995, para. 3.1; Karl M. Meessen. ANTITRUST JURISDICTION UNDER CUSTOMARY INTERNATIONAL LAW, in JURISDICTION IN INTERNATIONAL LAW, W. Michael Reisman (editor), Ashgate, Dartmouth, 1999; and Joseph P. Griffin. EXTRATERRITORIALITY IN U.S. AND EU ANTITRUST ENFORCEMENT. Antitrust Law Journal, Vol. 67, Issue 1, 1999.

[216] Again, the beggar-thy-neighbor approach with the ensuing cycle of sanctions, retaliations, trade barriers, blocking statutes, clawback statutes, etc. For instance, during the 1989 US/Japan Structural Impediments Initiative, the U.S. threatened to use its antitrust weaponry to pry open the Japanese market as a result of perceived anti-competitive conduct, including foreign good boycotts. (Department of Justice Releases of April 3, 1993, 7 Trade Reg. Rep., CCH, para. 50,084, April 3, 1992.)

[217] Difficulties can stem from practical problems involving obtaining evidence from abroad, tailoring appropriate remedies and enforcing judgments.

Furthermore, it is quite likely that competition authorities acting independently and uncooperatively may fail to detect and take appropriate action against border-exceeding anti-competitive conduct which concerns both.

Finally, and giving place to more undesired scenarios, it is possible that conduct tolerated under one competition system is repudiated under another. Or, it could happen that conduct in one jurisdiction is deemed per se sanctionable whereas on another it is subject to a rule-of-reason standard.

5. A Digression on Price Discrimination, Dumping and Predatory Pricing

Competition and trade policy have an overlapping (or, perhaps more appropriately qualified, related) topic which I would like to address: price discrimination, dumping and predatory pricing. In all fairness, because of the scope of this work I would probably be well advised to abstain from discussing this matter. However, the flesh is too weak.

a. Relation between Economic Price Discrimination, Predation and Dumping

Price discrimination in the economic sense occurs when a seller realizes different rates of return on sales of the same product to different purchasers. Put differently, a seller who discriminates charges different purchasers prices that are proportionally unequal to his marginal costs. A price difference does not necessarily involve price discrimination and price identity does not rule out discrimination. When a law sets as the triggering event price differences[218] it ignores economic discrimination when prices are the same.[219]

Price discrimination has traditionally been attacked under competition and foreign trade statutes notwithstanding the fact that economic reasons support and justify their existence. When firms operate in different (multiple) markets (whether product or geographic), they will ordinarily maximize profits in each market separately. Their prices will be discriminatory when different markets display different demand curves or rate-of-return schedules. This situation per se should not be a matter of concern. Particularly because price discrimination schemes often increase output and rarely exclude rivals.[220] It is a fact of life, and an economically accepted phenomenon, that different firms with different amounts of market power charge different prices. Furthermore, price discrimination can be socially beneficial insofar as it moves output closer to that obtained under perfectly competitive markets.

Notwithstanding its initial economic attractiveness, economic analysis advices that we should also be weary of price discrimination, for price discrimination can make predatory pricing less costly,[221] more profitable, and, hence, more plausible.[222] As usual, the trick lies in distinguishing the good from the bad. I.e, predatory from non-predatory price discrimination. Conceptually, a method to do so is the same as for identifying any price as predatory: the challenged price must be below the relevant measure of cost and structural characteristics of the low-price market must show plausible recoupment.[223]

In this sense, price discrimination is like any other tool, it can be used to serve lawful or unlawful goals. Hence, blanket rules prohibiting price discrimination are likely to do more harm than good since they tend to over-prohibit conduct which might or might not be anticompetitive. Worrisomely, and as Judge Bork points out, most of the time that a law orders that discrimination be ended, it is ordering a misallocation of resources.[224] Judge Bork states that a law that makes persistent price discrimination unlawful is not a bad idea provided the following is feasible: (i) identifying the existence of price discrimination with precision; (ii) accurately

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[218] Like the Robinson Patman Act which, although it speaks of price discrimination, in reality it means price differences.

[219] Bork at 383.

[220] Hovenkamp. Federal Antitrust Policy. At 401.

[221] Price discrimination reduces predation costs most effectively when the predator is able to target precisely those customers served by the victim. Also, price cutting in one market can be used to "send a message" to rivals selling not only in the predated market but in other markets as well.

[222] The types of injuries unlawful price discrimination is said to create are: (i) "Primary-line injury" which is injury to competition between the discriminating seller and its competitors; (ii) "Secondary-line injury" which is injury to the seller's disfavored purchasers (those paying the higher of the two prices) when compared with other downstream firms not disadvantaged by the price increase. (Areeda and Hovenkamp. ANTITRUST LAW Vol. III, at 431.) and (iii) "Tertiary-line injury" concerns injury to consumers of the disfavored buyers. (TRADE AND COMPETITION POLICIES FOR TOMORROW. Organisation for Economic Co-operation and Development, 1999, at 41.)

[223] Areeda and Hovenkamp. ANTITRUST LAW. Vol. III, at 430.

[224] Bork at 399.

predicting the long term effect upon the seller's rate of output of a prohibition on discrimination; and (iii) doing these things at a cost in enforcement resources lower than the benefits derived. Because of the impossibility of meeting the three precautions pointed out, in Judge Bork's opinion, price discrimination law should be repealed.[225]

Dumping is a species of *price discrimination*. As will be further elaborated, dumping consists of selling at prices below "normal value".

Having mentioned the above, which is by no means exhaustive, I will now turn to the relation between price discrimination, predatory pricing and dumping.

b. Difference between Predatory Pricing and Dumping

Although both are part of the same "price discrimination family", predatory pricing and dumping differ in their origin, goals and economic foundation.

Simply put, price discrimination means different prices or selling at different rates of profit, dumping means selling at prices under "normal value" and predatory pricing means prices below cost. I shall elaborate on each in the order mentioned.

i). Price Discrimination

To the extent an entire chapter[226] of this study has been devoted to the analysis of the practice of price discrimination and when it raises competition concerns, at this juncture I shall only recall that a firm engages in price discrimination when it sells a product in different markets at different rates of return, even if prices are the same.

ii). Dumping

1. Introduction

Although dumping and competition law are two branches of the same family tree,[227] their constituencies, goals and underlying policy differ.

The political constituency of antidumping law is not an antimonopoly constituency but one for the protection of industries facing weak markets or long-term decline.[228] Contrary to the concern that most modern competition law has displayed with the deadweight costs of market power, antidumping law has shown no movement in such direction.[229] Rather, it has chosen to stick with the good old "fairness" argument and "leveling the playing field" policy it was equipped (or, I should say, cursed) with from its inception.[230]

Both disciplines have different geographical origins. Whereas competition (antitrust) law is by and large a U.S. invention, antidumping came about in Canada in 1904.[231] The first Canadian antidumping law provided that an imported article also manufactured in Canada would be assessed a duty whenever the price charged for the article in Canada, less the costs of shipment, was less than the price of the article in the home market (the "fair value").[232]

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225 Idem.

226 See Chapter Four, supra.

227 Alan O. Sykes. ANTIDUMPING AND ANTITRUST: WHAT PROBLEMS DOES EACH ADDRESS? Brookings Trade Forum 1998, Robert Z. Lawrence Editor, Brookings Institution Press, Washington D.C., 1998, at 42.

228 Sykes. Antidumping and Antitrust. At 2.

229 Idem.

230 I speak of "cursed" since it seems to me that speaking of "leveling the international playing field" is both unrealistic and wrong. Unrealistic because of the obvious practical limitations to doing so. Wrong because of the comparative advantage paradigm first developed by David Ricardo as the economic justification of international trade (international trade occurs *because of* differences among nations–e.g., natural resource endowments, labor skills, consumer tastes/preferences– which makes it worth the while of each country to divide labor and specialize). Hence, cross-border trade is valuable precisely because the playing field is *not* leveled.

231 Sykes. Antidumping and Antitrust. At 14.

232 The special duty was capped at one-half of the duty ordinarily payable under the tariff schedules with some specific exemptions and exceptions. (Sykes. ANTIDUMPING AND ANTITRUST. At 14.)

Although close relatives, competition and antidumping law were designed to pursue fundamentally different ends, despite the antimonopoly rhetoric surrounding both. As stated earlier, Competition law is mostly concerned with avoiding the "antitrust injury" resulting from the deadweight loss inherent in the exercise of market power. In contrast, antidumping law was intended to create a politically popular form of contingent protectionism that has little to do with the prevention of monopoly.[233]

Although competition law is concerned with a vast array of practices which may be catalogued into three general categories (collusionary practices, exclusionary practices and mergers[234]) dumping is only of two types:

i) <u>Price-Discrimination Dumping</u>: which occurs when the price charged to customers in the home market (e.g., FOB price) is above the price charged to customers in the importing country (adjusted to FOB basis); and

ii) <u>Sales Below–Cost</u>: sales below a "cost" benchmark constructed from accounting data that includes an allocation of all fixed costs, general selling and administrative expenses, etc.[235]

Since its inception, competition law has developed a rather robust economic and legal theory which more than justifies its existence.[236] Contrary to such situation, antidumping law is missing a concrete sound economic foundation which withstands serious and unbiased economic scrutiny.[237] Notwithstanding the lack of serious and convinving theoretical backbone, antidumping continues to spread even to the highest and most modern international laws.[238]

2. Definition of Dumping under the Mexican Foreign Trade Law

The Mexican Foreign Trade Law ("FTL")[239] includes two types of "unfair International Trade Practices":[240] price discrimination and subsidies. What the FTL legally denominates "price discrimination" is what is commonly known as "*dumping*". The elements of dumping under the FLT are:

i) <u>Pricing</u>: Prices below "normal value". Normal value is defined as the comparable price of an identical or similar good destined to the internal market of the country of origin in the ordinary course of business.[241]

ii) <u>Injury</u>: That imports of the dumped product cause, or threaten to cause, injury to domestic production. Injury is defined as the economic loss or deprivation of any licit and normal profits that the domestic industry[242] of the goods in question may suffer, or the obstacle to the establishment of new industries. Threat to injury is the imminent and clearly foreseeable danger that the domestic industry will suffer injury.[243]

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233 Sykes. Antidumping and Antitrust. At 2.

234 Or *concentrations* under the Mexican legal argot.

235 The "cost" benchmark (know as "normal value") for dumping is very different from (and usually higher than) the marginal cost or average variable cost benchmark that is generally used to test allegations of predatory pricing under the competition laws.

236 True, pitfalls have existed where certain policy-makers and courts have tripped. Nonetheless, by and large the worldwide trend displays deadweight loss as the core concern of competition laws. (see in general, James J. Garrett (General Editor). <u>WORLD ANTITRUST LAW AND PRACTICE</u>. A Comprehensive Manual for Lawyers and Business, Little Brown and Company, Boston/New York/Toronto/London, 1995.)

237 Granted. Some economic analysis has taken place in regards antidumping and its definition (e.g., Viner, <u>DUMPING</u>; Dale, <u>ANTIDUMPING LAW</u>; Deardoff, <u>ECONOMIC PERSPECTIVES ON ANTIDUMPING LAWS</u>, in Jackson and Vermulst, <u>ANTIDUMPING LAW</u>.). However, it is not nearly as serious and abundant as that of competition law in general or predatory pricing in particular.

238 It has even reached WTO levels. See Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994, usually referred to as the "Antidumping Agreement".

239 *Ley de Comercio Exterior*, Published in the Federal Official Gazette on July 27, 1993.

240 Article 28 of the FTL.

241 Articles 30 and 31 FTL. "Ordinary course of business" is defined as the commercial transactions that reflect market transactions in the country of origin and that are habitually made or within a representative period within independent buyers and sellers (Article 32 of the FTL).

242 "*Domestic Industry*" is defined as at least 25% of the domestic production of the goods in question (Article 40 of the FTL).

243 Article 39 of the FTL.

c) Link: A causal link between the pricing and the injury.

In other words, for an imported good to be characterized as dumped, its price must be below the normal value of the country of origin, causing (or threatening to cause) an injury to the industry of the importing country, and the establishment of a causal link between the price and the injury or threat thereof to at least 25% of the industry of the domestic market.

iii). Predation

Under Mexican law (the FLEC), predatory pricing is a rule of reason practice which premises liability on pricing below one of two measures of cost[244] by an economic agent with market power which purpose or effect is the driving another economic agent out of the market so as to engage in supra-competitive pricing once the objective has been achieved.[245]

Hence, the Mexican ingredients for a predatory pricing recipe are:

a) Pricing below either (i) average variable cost for secular sales or (ii) average total cost for habitual sales;
b) By a firm with market power; and
c) Which has the purpose or effect of driving a competitor out of the market.

iv). Dumping and Predation: Two standards, One Reality

Interestingly, the concurrent existence of both dumping and predatory prices means that a related phenomenon will have effects in two legal realms (competition and trade law) but under two different sets of criteria. The following table should illustrate the point:

TABLE C
Comparison of Price Discrimination,
Dumping, and Predation Cost Thresholds

PRACTICE ➔ ELEMENT ↕	PRICE DISCRIMINATION	DUMPING	PREDATION
Price	Different Prices (with same costs) or Same Prices (with different costs)	Below Normal Value	Below: ATC: habitually AVC: occasionally
Effect	Different Profits	"Injury" (or threat thereof) to domestic industry	Driving competitors out of the market
Other requirements		Causal Link	1. Market Power 2. Anti-competitive results outweighing pro-competitive results 3. Recoupment[246]

The fact that different thresholds exist should not raise too many eyebrows. After all, each law seeks to protect different legal concerns. However, I am more concerned with the substantive point.

244 Either pricing below either (i) average variable cost for secular sales or (ii) average total cost for habitual sales.

245 I must confess to the reader that I am a serious skeptic of the soundness of the predation theory, the standard chosen, and its application by (amongst others) Mexican competition authorities. For a discussion on the subject, *confere*, Francisco González de Cossío, LAW AND ECONOMICS OF THE MEXICAN COMPETITION LAWS, Chapter five.

246 I include recoupment for thoroughness reasons but would qualify that the Mexican theory and practice of predation does not necessarily require it.

Some believe that antidumping law should be substituted by competition law[247] following the experience of the European Union,[248] ANCERTA[249] and the Canada—Chile "Cease Fire Agreement".[250] Others feel the relation between competition policy and trade policy extends well beyond the issue of replacing domestic antidumping laws with harmonized predatory pricing laws.[251]

In my opinion, the entire dumping discipline should be scrapped. It runs against current international trade and welfare theorems/paradigms, lacks a solid economic foundation, and is the result of a protectionist constituency.

Only predation should receive any serious regulation, and, as stated before,[252] in my opinion, for the conduct to be deemed existent and unlawful, it should be required to meet a high legal threshold (not average variable cost nor average total cost), a high standard of proof, and the underlying backdrop be non-interventionist (i.e., competition authorities should intervene in the market only in circumstances of clear and unambiguous existence of the practice).

E. INTERFACE BETWEEN COMPETITION AND TRADE POLICIES

Competition and international trade law share an interesting relation. On the one hand, they are complementary (1) and, on the other, they diverge (2). Each facet will be addressed in the order posed.

1. The Theory of Complementarity

The "Theory of Complementarity" was coined by the WTO Working Group on the Interaction between Trade and Competition Policy[253] and posits that trade law and competition law are complementary and mutually enhancing in that both have the inherent objective of promoting efficiency and consumer welfare in making markets more competitive.[254] Hence, welfare economics theorems indicate that efficient economic outcomes will occur when both free trade and competitive behavior are maintained. Therefore, they can be considered two approaches necessary to the same end.[255]

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247 Gabrielle Marceau. Anti-Dumping and Anti-Trust Issues in Free Trade Areas, Clarendon Press, Oxford, 1994, at 133 and 310. Also, Marco Horacio Hernández Tracey, pgs. La Sustitución del Derecho Antidumping por el Derecho Antimonopolios-Competencia en la Zona de Libre Comercio. Professional Thesis, 1992, pgs., 154-155. I should mention that this research is outdated since it was elaborated before the FLEC or the FTL came to being. Nonetheless, the underlying premises still hold.

248 The Treaty of Rome excludes the application of antidumping actions between Member States of the European Union. As a result, antidumping law is now only relevant to imports from outside the European Union. (See, Gunnar Niels and Adriaan Ten Kate. TRUSTING ANTITRUST TO DUMP ANTIDUMPING —ABOLISHING ANTIDUMPING IN FREE TRADE AGREEMENTS WITHOUT REPLACING IT WITH COMPETITION LAW. Journal of World Trade, Vol. 31, No. 6, December 1997, at 39.)

249 In 1990 Australia and New Zealand eliminated antidumping actions on goods originating in each other's market. This formidable step was implemented through the Protocol on Acceleration of Free Trade in Goods within the framework of the 1983 ANCERTA. (Niels and Ten Kate at 40.)

250 The Canada-Chile bilateral Free Trade Agreement provides for a mutual, phased-in exemption from the application of antidumping duties. The instrument came into force on July 1997. (Niels and Ten Kate at 41.)

251 Michael J. Trebilcock and Robert House. THE REGULATION OF INTERNATIONAL TRADE. Routledge, London and New York, 1995, at 122.

252 Section III of Chapter Five of this study.

253 Established on the basis of the Singapore WTO Ministerial Declaration adopted on December 13, 1996 (WTO Focus No. 15, January 1997, at 7) and responding to the initiative of the European Commission. Paragraph 20 of the Ministerial Declaration (WT/MIN(96)/DEC) reads, in the relevant part: "*Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMS Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to establish a working group to study issues raised by Members relating to the* ***interaction between trade and competition policy, including anticompetitive practices****, in order to identify any areas that may merit further consideration in the WTO framework. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations*." (my emphasis)

254 WTO Working Group on the Interaction between Trade and Competition Policy, Report to the General Council, WT/WGTVP/2, 1998, para. 24 et seq.

255 Andrew D. Mitchell. Broadening the Vision of Trade Liberalisation. International Competition Law and the WTO. World Competition, Vol. 24, No. 3, at 346.

The starting point of trade liberalization is the theory of comparative advantage. According to the same, a State has a comparative advantage in the production of a good or service if the relative cost of production of the same in that State is low compared to the cost in other States. The rationale is that if each State focuses production on the particular good/service in which it has the comparative advantage, global output will increase and we will all be better off. Hence, by means of trade, consumers can access more goods and services and thus increase their standard of living.[256] Additionally, efficiency improvements are likely to result from the increased competition. For instance, specialization encouraged by the theory of comparative advantage and economies of scale.[257]

The starting point of competition law is that free market behavior is desirable and, even though some interference is necessary to maintain competitive pressures and promote competition amongst producers, it will obtain an efficient allocation of resources. In this context, efficiency refers to *productive efficiency* (whereby the cheapest producers undersell and replace less efficient producers) and *allocative efficiency* (whereby transactions in the market-place direct production away from goods and services that consumers value less and towards goods and services that consumers value more). By limiting private market power, competition law aims to protect consumers from anti-competitive behavior of firms seeking to raise prices for their products above the prices that would prevail in a competitive market.

Although both disciplines have a different origin and economic backbone, they are mutually reinforcing in that the economic effects of both are aimed at the same bulls-eye: *an undistorted, competitive and accessible market*.

Both disciplines play a crucial role in the pro-consumer welfare drama. On the one hand, trade law complements competition law in that the former reduces market power by increasing contestability as a result of its market access provisions. Market access assists in the goals of competition law in that market power is scarcely present when entry is easily achieved inasmuch as a positive correlation exists between the height of entry barriers and market power. Put simply, where contestability exists, market power is questionable —at best. Once market power is eliminated, the possibility of anticompetitive practices is taken out of the equation since market power is a precondition of the same. I.e., by eliminating market power, the possibility that firms wielding market power engage in anticompetitive practices is nullified.

On the other hand, competition law complements trade law by disallowing that private conduct replace the preexisting governmental measures clogging market access. The foregoing may be particularly important since, when government measures limiting market access are removed, collusion to engage in anticompetitive practices is likely since the concentrated market structure created by the pre-existing government measures is fertile soil for such types of collusionary conduct. Hence, in the absence of adequate competition law enforcement, the success of trade liberalization efforts may be frustrated by private collusion seeking to split the market-cake in the same —or even better— manner than the market had before the tariff or non-tariff measures shielded the same from external competition.

Competition and trade policy are also complementary in that competition policy promotes market entry where a mere reduction or elimination of border barriers would be insufficient. This may happen under different situations.[258] Hence, *when markets are imperfectly competitive, it cannot be presumed that preferential trade liberalization will achieve its stated objectives*.[259]

2. *Conflicting Side to the Competition Law/Trade Law Interface*

Although, for the most part, trade and competition policies are broadly compatible or at least mutually supportive,[260] some differences exist: (a) the territorial scope; (b) their personal scope; and (c) their source of regulation. Each is now briefly discussed.

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[256] To elaborate on the Theory of Competitive Advantage, the following are suggested: Paul Samuelson and William D. Nordhaus. ECONOMICS. McGraw-Hill, Inc., Fifteenth Edition, 1995, pgs. 678-701; Steven Husted and Michael Melvin. INTERNATIONAL ECONOMICS. Addison-Wesley Educational Publishers,Inc. Fourth Edition, 1998, at 66; Paul R. Krugman and Maurice Obstfeld. INTERNATIONAL ECONOMICS. THEORY AND POLICY. Addison-Wesley, Fourth Edition, 1997, at 14; and Miltiades Chacholiades. ECONOMIA INTERNACIONAL. McGraw Hill, México, D.F., Second Edition, 1992 at 14.

[257] When the marginal increase in the cost of supplying a good or service is less than the marginal increase in production.

[258] For instance, the elimination of border barriers may only reveal the existence of further barriers, even if distant from the border. This could happen because a cartelized home industry or monopoly enjoys trade protection as well or a cartelized distribution network.

[259] Nicolaides, Phedon. For a World Competition Authority. The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy. Journal of World Trade, Vol. 30, No. 4, 1996, at 135.

a) "Border/Non Border"

Trade negotiations have traditionally focused on the liberalization of "at the border" governmental measures that may, or actually do, distort trade flows or impinge upon the general "market access" goal of international trade laws. In contrast, competition policy has traditionally focused on "behind the border" competitive conditions and attacking practices which effects are felt in national markets.

The foregoing distinction is a general one. However, examples blurring said apparent clear distinction can be found. For instance, since 1947 GATT has provided for the principle of national treatment obligating governments to maintain conditions of competition between "domestic" and "foreign" goods.[261] Another example are domestic subsidies which could affect competition and have been recently addressed in the 1994 WTO Agreement on Subsidies and Countervailing Measures.

b) Public/Private

Another distinction between trade and competition relates to the entities which conduct it targets. Whereas trade law addresses public conduct (governmental measures) competition law addresses private conduct (firms or economic agents).

Again, the initial distinction is valid on a general basis, but it cannot be said to be all-applicable. For instance, competition law does address public entities when their measures are anti-competitive. Likewise, private conduct is also addressed by trade law. Take, for instance, the "injurious sales below normal value" by firms which concern motivates anti-dumping discipline. Also, the GATS Agreement on Basic Telecommunication Services deals with private conduct in addition to government measures.

c) Domestic vs. International Regulation

While trade liberalization has thus far been implemented through multilateral agreements, competition law remains by and large the realm of domestic law. The parochiality of competition regulation has resulted in conflicts in the international sphere since different States have overlapping, conflicting or no competition laws.[262]

V. Regulation of competition on an international level

A. INTRODUCTION

The concept, goals and regulation of competition vary significantly. Even though a consensus exists that competition law should stick to welfare and efficiency considerations, each country adds its own spice to the competition recipe. For instance, while the United States and Mexican approach policy is predominantly consumer-oriented —and, hence, a predominant factor in competition analysis will be output—; in the EU the same analysis will include protection of small and medium-sized enterprises and integration of the internal/common market[263] (inter-State trade).[264]

A brief comparison between U.S. and EU competition laws may prove useful. While both laws aim at improving economic efficiency, they differ substantially in the way they attempt to achieve it. For instance:[265]

- Both laws define different activities as per se illegal;
- Each law applies different thresholds for the size of the firms that fall within their scope;
- Each law exempts different industries from the scope of its application;

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260 TRADE AND COMPETITION POLICIES FOR TOMORROW. Organisation for Economic Co-operation and Development, 1999, at. 31

261 Article III, GATT 1947.

262 Approximately 60 members of the WTO have no competition regulation.

263 For instance, see *Consten & Grundig v. Commission*, Case Nos. 56 & 58/64, July 13, 1966, ECR, 299; *Commercial Solvents v. Commission*, Case Nos. 6 & 7/73, March 6, 1974, ECR 223.

264 The foregoing assertion could be qualified in the sense that even the U.S. antitrust policy has, at some point, entertained small business protection notions. See, for instance, *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (359 U.S. 207, 79 S.Ct. 705); *Business Electronics Corporation v. Sharp Electronics Corp.* (485 U,S, 717m 108 S.Ct. 1515); *Federal Trade Commission v. Morton Salt Co*. (334 U.S. 37, 68 S.Ct. 822).

265 Nicolaides at 137.

- Each law allows different defences to infringements;[266]
- Each law attaches more or less importance to different infringements of competition law;[267]
- Competition authorities tend to develop their own ethos, tradition, preferences and working practices. Hence, it is unlikely that two authorities will analyze the same case in the same fashion;
- Some competition authorities may be allowed —or required— to factor in their reasoning non-competition considerations such as national interest;[268]
- Acts of State may fall completely outside the scope of competition law, as is the case in the U.S.

The foregoing has given way to varying approaches to international aspects of competition law which range from congruent approaches to incongruent ones. Within such horizon, diverse scenarios appear, such as overlapping solutions,[269] conflicting solutions, and scenarios creating loopholes where anticompetitive activity may occur and remain unaddressed.[270]

The foregoing discussion argues in favor of cooperation. However, cooperation is not a monolithic or single concept. Rather, it comes in different shapes, flavors and forms, as I will now explain.

B. DEGREES OF COOPERATION

The Brookings Project on Integrating National Economies has identified six levels of cooperation which I will now summarize so as to provide a framework upon which the reader will be able to assess the ensuing discussion.

a). National Autonomy: This scenario depicts decentralized decision-making by national governments with little or no consultation and no explicit cooperation. It is the extreme case of zero cooperation which reflects political sovereignty at its strongest unaffected by international management of convergence.

b). Mutual Recognition: This level of cooperation involves exchanges of information and consultations between governments to channel the formation of national regulations and policies. It involves explicit acceptance by each member nation of the regulations, standards and certification procedure of other members.

c). Monitored Decentralization: This level of cooperation involves agreeing on rules that restrict the freedom to set policy or that promote gradual convergence in the structure of policy.

d). Coordination: This scenario contemplates a more advanced and ambitious scheme than the previous ones in that it involves jointly designed mutual adjustments of national policies and promoting intergovernmental cooperation. It includes coordination and bargaining where governments will agree to behave differently from the approach they would otherwise have taken without the agreement.

e). Explicit Harmonization: This degree of cooperation entails high levels of intergovernmental cooperation and requires the agreement on regional standards or world standards. It involves greater departures from decentralization in decision-making and more strengthening of international institutions.

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266 For example, the EU provides for block exemptions.

267 For instance, in the U.S. a more relaxed view of vertical restraints is adopted by case law whereas in the EU the opposite happens with respect to control of mergers and acquisitions —at least until very recently.

268 Although this is not the case in Mexico, the EU and the U.S.

269 For instance, merger control laws provide for competition notifications in an important number of countries. These laws frequently overlap and become burdensome and costly to companies and sometimes frictions to states. As an example, recall the Boeing McDonnell Douglas merger (EU-Commission, Boeing/McDonnell Douglas Decision, IV/M 877 of July 30, 1997, OJ L336 of December 8, 1997), and the GE/Honeywell saga.

270 Export cartels are the prime example of anticompetitive behavior which escapes control since, to the extent that the domestic market of the export cartel is unaffected —or even benefited— by the same, domestic competition authorities have neither competence nor interest in pursuing them. On the other hand, the importing country where the harm occurs may only have competence to address the same if national legislation allows the national competition authorities to apply the law extraterritorially. Should this be the case, interstate frictions could ensue. Should it not be the case, a loophole will exist leaving the conduct and its anticompetitive effects unaddressed. (Grewlich, Alexandre S. GLOBALISATION AND CONFLICT IN COMPETITION LAW. ELEMENTS OF POSSIBLE SOLUTIONS. World Competition, Vol. 24, No. 3, 2001, pgs. 377-378.)

f). Federalist Mutual Governance: This level of development entails a continuous bargaining and joint centralized decision-making as well as robust supranational institutions. This is the end of the spectrum.

C. APPROACHES THUS FAR SUGGESTED

In general, the following approaches are identifiable concerning the regulation of competition law at an international level:[271] (1) Cooperation; (2) The Minimum Standards Approach; (3) Parochial Regulation with an International Check; (4) The Beginning-from-the-Bottom Approach; (5) Harmonization; (6) Plurilateral Approach; and (7) Universal Regulation Approach. Each will now be summarized.

1. Cooperation

Cooperation seems unproblematic and has taken place between competition authorities in matters such as providing information. Without some form of cooperation it would be impossible for competition authorities individually to effectively address transnational anticompetitive conduct.

Cooperation has been the approach that has gained more acceptance and has been followed the most in practice. Important progress in increasing cooperation between competition authorities has been made particularly in fields such as international cartel enforcement and cooperation in concentration review.

Although cooperative efforts may take place without formal commitments, several competition cooperation agreements have been entered into which extent varies significantly. Whereas some merely restate each party's commitment to apply their competition laws and provide information,[272] others have gone as far as providing for positive comity duties.[273]

2. The Minimum Standards Approach

The minimum standards approach encourages following the steps of the Paris and Berne Conventions on the protection of intellectual property.[274] Under such approach, minimum standards create only an obligation to protect foreign firms and markets according to certain standards. However, the national legislator may go beyond said minimum standards and provide additional protection. To implement the foregoing a limited number of core principles and approaches (minimum standards) would need to be agreed upon. Having done so enforcement would be effected through moral persuasion (by, for instance, "soft sanctions" such as mandatory consultations or publication of questionable measures) or even a more zealous granting of standing to private individuals to sue for damages and injunctions, or the creation of an "international antitrust agency" with authority to initiate domestic procedures (the "principle of international procedural initiative").

This initiative has even suggested that WTO dispute settlement procedures could be opened to complaints by and against private enterprises and persons. This revolutionary idea is believed appropriate with regard to large economic actors that may escape the influence of national authorities. This is still very controversial and part of the reluctance to give WTO competence over competition matters seems grounded on concerns about the WTO panels dealing with the substance of competition decisions.[275] Some believe quite fervently that not all competition issues of a global nature are trade matters and, hence, WTO is not the natural home for all global competition policy initiatives.[276]

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[271] Although I have borrowed the categorization provided by Alexandre S. Grewlich (GLOBALISATION AND CONFLICT IN COMPETITION LAW. ELEMENTS OF POSSIBLE SOLUTIONS. World Competition, Vol. 24, No. 3, 2001, pgs. 397-398) the characterization is mine. Hence, any disagreement as to the manner in which I have chosen to baptize the same is solely my responsibility.

[272] For instance, as provided for in Chapter VIII of the Mexico-Israel Free Trade Agreement (signed on April 10, 2000 and published in the Daily Official Gazette on June 30, 2000), and Chapter 14 of the Mexico-Chile Free Trade Agreement (signed on March 23, 2000 and published in the Daily Official Gazette on January 1, 1995).

[273] As is the case with the Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws, and the Mexico-Europe Free Trade Agreement (signed on March 23, 2000 and published in the Daily Official Gazette on July 1, 2000).

[274] Alexandre S. Grewlich. GLOBALISATION AND CONFLICT IN COMPETITION LAW. ELEMENTS OF POSSIBLE SOLUTIONS. World Competition, Vol. 24, No. 3, 2001, at 400 et seq.

[275] Grewlich at 402.

[276] Janow and Lewis at 14.

3. Parochial Regulation with an International Check

Another current of thought rejects supranational centralistic courses of action and prefers to put the onus on a careful evolution of substantive law. It puts the burden on nations to assure that their markets are free from artificial private and public restraints (including export cartels).

The pivotal reasoning supporting this approach is that an internationalized competition system should not entail international rules as such but rather principles that should be transposed into national law through national formulations that carry out the stated objectives. The proposal may remind the reader of the EC directives framework in that each nation would be responsible for implementing the principles in its national law.

The scheme would be developed as a "plurilateral framework" in the framework of the WTO. Binding "positive comity" and a dispute resolution instrument could be added to the framework principles. Nations would also agree to the principle that there should be no market blockage by public or private action since the goal will not be one nation's welfare over or versus another but national welfare versus global welfare.[277]

4. The Beginning-from-the-Bottom Approach

This approach reflects skepticism about the ability of multinational efforts reaching an effective bargain-based solution. Rather, it believes that a "bottom-up" approach is more desirable where enforcement agencies are more important to supranational or international institutions or the prospective "constitutionalisation" of international law and diplomacy.[278] This position is included in the majority opinion report of the International Competition Policy Advisory Committee (ICPAC).

5. Harmonization

The harmonization of national competition laws has also been suggested in a manner similar to the U.S. Uniform Commercial Code or the "Model Law" approach that has succeeded in other fields.

An evident problem with this solution is that the international discussion about harmonizing competition laws has the challenge that participants are likely to approach the subject with preconceptions arising out of their differing cultural experiences.

6. Plurilateral Approach

This proposition advances the creation of a set of international competition rules envisaged as a Plurilateral Agreement in the WTO framework which includes a combination of minimum standards and a mechanism called "international procedural initiative" whereupon a supervision mechanism to oversee the enforcement of domestic competition laws by an independent "International Antitrust Authority"[279] is envisaged

Examples of initiatives included in this approach are the (already discussed) Munich Code and the work of the 1995 EU Expert Group Report on Competition Policy in the New Trade Order advocating the creation of a Plurilateral Agreement on Competition and Trade ("PACT").

7. Universal Regulation Approach

An ambitious initiative relates to a public international law agreement on a binding and universal code with a supranational world antitrust authority enforcing the same.

An interesting proposal has been made by Eleanor M. Fox for the internationalization of competition law advocating a "borderless" conception of the world where "*the treatment of a market problem* [is] *as if there were no national boundaries, or conceived differently, as if all harms and benefits fell within the geographical boundaries of the same polity*".[280]

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277 The theory is advanced by Professor Eleanor Fox in NATIONAL LAW, GLOBAL MARKETS, AND HARTFORD IN EYES WIDE SHUT. 68 Antitrust L.J., (2000), at 73.

278 Anne-Marie Slaughter. Governing the Global Economy through Government Networks. in Michael Beyes (ed.) The Role of Law in International Politics—Essays in International Relations and International Law. New York, 2000, at 177.

279 A proposal also endorsed by F.M. Scherer as an "International Competition Policy Office" within the WTO, albeit with less powers. (See, Scherer —Competition Policies at 92.)

280 Eleanor M. Fox. ANTITRUST LAW ON A GLOBAL SCALE-RACES UP, DOWN, AND SIDEWAYS. School of law, New York University, 1999 (Cited by Simon J. Evenett, Alexander Lehmann, and Benn Steil. ANTITRUST POLICY IN AN EVOLVING GLOBAL MARKETPLACE, in ANTITRUST GOES

D. DEVELOPMENT OF ACCEPTANCE OF THE APPROACHES

Although all the approaches mentioned above are valuable, their acceptance—as might be expected— differs importantly.

1. The Divide

To begin with, no consensus exists as to what steps should be taken. By and large, the route preferred to date has been cooperation either under the auspices of treaties executed to such end, or without such framework, simply out of the desire to effectively address conduct of international transcendence. Nonetheless, and as explained before, efforts to edify a more solid and effective international competition framework continue to take place. At his juncture, the question is: what course of action to pursue?

Interestingly, while the EU is a strong defender of WTO-related efforts on international competition, the U.S. has been adamant to such initiative (a WTO competition code). The foregoing has raised many eyebrows inasmuch as the U.S. has been trying to export the notion of competition for quite some time, and U.S. negotiations have pushed hard to create competition codes at the UN and the OECD. Furthermore, it is the U.S. who brought the first two competition matters before the WTO: the *Auto* case and the *Kodak* case.

The U.S. reluctance in establishing the WTO as the appropriate international competition forum is apparently grounded on the following reasons:[281] (a) nations continue to differ too much in competition policy or expertise to produce a coherent, meaningful code or system; (b) to the extent that U.S. enforcement is the toughest and most extraterritorial and, hence, the most controversial, it might well be the most likely subject of WTO dispute settlement proceedings; (c) a WTO code is not needed to set a TRIPS-like floor for competition law since World Bank/IMF pressures are doing that anyway; (d) the topic of using multinational competition as a substitute for anti-dumping laws, though adopted in the EU, ANZCERTA[282] and favored in Japan is politically unpopular in the U.S.; (e) European Competition law —which is highly regulatory—is the most copied law, not that of the U.S.; (f) market access impeding cases, particularly vertical practices, are more liberal in the international realm than in the U.S.; and (g) monitoring systems would be close to impossible.[283]

2. Cooperation as the Path of Choice

Because of the above, the cooperation route has been the venue of choice. Several bilateral competition cooperation agreements have been entered into.[284] From these, two instruments merit particular mentioning because of the importance of the agreements provided for therein:[285] (a) NAFTA; and (b) the Mexico-US Competition Cooperation Agreement.

a) NAFTA

Chapter XV of the North American Free Trade Agreement[286] includes commitments by its members to establish and maintain a competition framework that prohibits anticompetitive business practices,[287] recognizes the importance of cooperation and

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GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, Simon J. Evenett, Alexander Lehmann, and Benn Steil, editors, 2000, at 22.) Apparently, and as discussed later on, several important fora, including the OECD, have dismissed this alternative as unrealistic. (Organisation for Economic Co-operation and Development. TRADE AND COMPETITION POLICIES. OPTIONS FOR A GREATER COHERENCE. OECD, 2001, at 15.)

281 Joel Davidow. UNITED STATES ANTITRUST DEVELOPMENTS IN THE NEW MILLENNIUM. World Competition, Vol. 24, No. 3, 2001, at 439.

282 Under the Australia New Zealand Closer Economic Relations-Trade Agreement ("ANZCERTA") Australia and New Zealand eliminated anti-dumping actions on goods originating in each other's markets. They also reviewed their competition laws so as to extend to prohibiting certain anti-competitive behavior by firms in one country that have market power in the other country or in the combined Australia/New Zealand market. Importantly, they also agreed to give each country's enforcement agency the power to obtain information and documents in the other country and to allow each country's court to sit in the other jurisdiction. (Organisation for Economic Co-operation and Development. TRADE AND COMPETITION POLICIES. OPTIONS FOR A GREATER COHERENCE. OECD, 2001, at 77.)

283 Reasons (a), (e), (f), and (g) have been put forth by Judge Diane Wood, conference on international antitrust, University of Chicago Law School, 1999.

284 To date, Mexico has entered into eight competition cooperation treaties: with Venezuela and Colombia, with Chile, two with Europe, and two with the U.S. and Canada.

285 Obviously, concentrating on the Mexican perspective.

286 Published in the Mexican Daily Official Gazette on December 20, 1993 and which entered into force on January 1, 1994.

coordination between authorities and agree to act accordingly,[288] that, should a state monopoly[289] or enterprise[290] be created, notice shall be given (where possible), and it is agreed that such monopolies should not constitute an annulment or impairment of benefits,[291] nor shall they act in a manner that is incompatible with other NAFTA obligations.[292] Also, a working group is established to inform and make recommendations to the NAFTA Commission.[293]

b) Mexico-US Competition Cooperation Agreement

The Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws[294] has established a detailed cooperation and mutual assistance regime which regulates the following disciplines: (i) notification, (ii) enforcement cooperation, (iii) coordination with regard to related matters, (iv) cooperation regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party, (v) avoidance of conflicts, (vi) technical cooperation, (vii) consultations, and (viii) periodic meetings.

As per notification,[295] the parties agreed to notify each other when any enforcement activities affect "important interests of the other party"[296] with sufficient time so as to allow the home-country competition authorities to provide their views and the notifying competition authorities to take them into account. Also, notice must be provided when requested information, documents, records, are located in the territory of the notified country or oral testimony is to be provided by a person located in the said territory. Also, notice shall be given when competition authorities visit the other country or when they intervene or publicly participate in proceedings where the issue addressed may affect the other party's important interests.

Enforcement cooperation[297] requires that parties assist in obtaining evidence and witnesses, provide information, and/or provide enforcement activity information. Also, parties agreed to coordinate with regard to related matters so as to take into consideration enforcement activities, objectives, capabilities and effectiveness of relief sought as well as cost reductions of the other party's enforcement activities in their own activities.[298] With regards to the avoidance of conflicts compromise[299] parties acknowledge that the other party's important interests may be affected by enforcement activity by the other party and agreed to consider the same so as to minimize any adverse effects.

Of particular interest is the agreement to cooperate regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party.[300] A positive comity commitment has been provided for. Hence, in the event a party to the Competition Cooperation Agreement believes that anticompetitive activities are taking place in the territory of the other party that adversely affect the former's important interests (the "Requesting Party") it may request that the latter (the "Requested Party")

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287 NAFTA Article 1501(1).

288 NAFTA Article 1501(2).

289 NAFTA Article 1501(2).

290 NAFTA Article 1503(2).

291 NAFTA Article 1501(2)(b) and Annex 2004.

292 NAFTA Article 1502(3)(a).

293 NAFTA Article 1501(4).

294 Published in the Mexican Daily Official Gazette on January 24, 2001 ("Acuerdo entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre la aplicación de sus leyes de competencia" —the "Competition Cooperation Agreement").

295 Article II of the Competition Cooperation Agreement.

296 Topics considered to be "important interests of the other party" are anticompetitive practices, mergers and acquisitions carried out in whole or in substantial part in the territory of the other party, concentrations where either one of the parties to the transaction or the controlling entity is incorporated in the country other than that instituting the enforcement action, relate to conduct required, encouraged or approved by the other party; involve remedies to take place or be directed at conduct of the other party; or involve seeking information located in the territory of the other party. (Article II(2)(a)-(f) of the Competition Cooperation Agreement).

297 Article III of the Competition Cooperation Agreement.

298 Article IV of the Competition Cooperation Agreement.

299 Article VI of the Competition Cooperation Agreement.

300 Article V of the Competition Cooperation Agreement.

initiate enforcement activities.[301] The Requested Party's competition authorities have the duty of carefully considering whether to initiate enforcement activities or expanding ongoing ones as identified in the request, promptly informing the Requesting Party of the former's decision and keeping the latter abreast with any developments as to the same, should the answer be positive. A qualification is in place, the duty extends to carefully analyzing and informing. The discretion inherent on whether to commence performance proceedings remains unaltered.

3. The Result

When compared with the analytical framework provided for by the Brookings Project, the current level of competition development falls in the "Mutual Recognition" category. I.e., exchanges of information, consultations, assistance and the acceptance of each member's regulations, standards and procedures takes place by means of the notification, positive comity, and no-conflicts commitments. However, the next level of cooperation ("Monitored Decentralization") is not reached simply because no restriction to the freedom to unilaterally set policy without factoring other countries' interests, has been achieved nor is there a convergence in the structure of policies.

E. MY OPINION

I confess allegiance to the Plurilateral Approach, but with a few qualifications or extras which I will discuss. Thereafter, I will provide the reasons behind the approach I suggest.

1. My Take on the Plurilateral Approach: An Enriched Plurilateralism

I have stated that I am persuaded by the Plurilateral Approach. However, and to be more accurate, I believe the best approach is actually one where elements of the Plurilateral Approach are implemented with the following adjustments: (a) that certain fields must be sanctioned by all domestic laws (core principles); (b) that certain areas be considered as discretionary but subject to the scrutiny of the International Competition Authority; and (c) that a dispute settlement mechanism, such as the DSU, review the enforcement activities of domestic competition authorities in cases where either externalities exist or the matter is an international one.

a) Core Principles

The plurilateral instrument (which I shall henceforth call the "Multilateral Agreement on Competition") would specify certain areas or activities which must be regulated in a specific manner, and where once determined to exist, competition authorities would have little discretion in whether to sanction or not. The enforcement level of analysis would stop at the factual determination of whether a specific conduct occurred or not. Once proven, a sanction must ensue. Some leeway could be provided for in the severity of the sanction (e.g., the amount of the fine) in domestic laws since countries differ on such regards, and such margin of maneuver does not seem to create any problems nor contradict the general plurilateral scheme.[302]

Behavior apt to be considered within this category are practices considered *per se* illegal by all or substantially all modern competition laws. For instance, horizontal price fixing, horizontal output restrictions, bid rigging, horizontal market divisions.[303]

The level of scrutiny by the International Competition Authority ("ICA") would be a *rational basis test*. In other words, the ICA would determine whether the factual evidence supporting the findings is by a preponderance of the evidence, and whether no unreasonable situation existed which militated against such measures, such as discrimination.

b) Discretionary Fields

The Multilateral Agreement on Competition would also provide for other areas where differences in treatment exist in different jurisdictions. Instead of wrangling over what practices should or should not merit competition repudiation and what sanction should be established for the same, in my opinion *competition authorities should agree that they disagree*, and tailor an agreement that is tolerant of their differences. After all, the fields in question are controversial inasmuch as economic experts and —one could add— reasonable minds differ as to whether certain practices are pro- or anti-competitive. Hence, authorities should be allowed to differ as to the same and address them in the manner they believe most appropriate given the circumstances. To do so, the

301 Article V(2) of the Competition Cooperation Agreement.

302 The fact that certain conduct, although sanctioned everywhere, may be more harshly sanctioned in some jurisdictions than in others is not anathema to the Plurilateral Approach, current state of affairs nor should it raise any material issues.

303 This laundry list is not exhaustive, it is merely suggestive. I would not forcefully advocate that all be included, nor that more should not be included.

Multilateral Agreement on Competition would establish certain matters where States (through regulation) or competition authorities (by means of the margin of discretion inherent in enforcement proceedings) are allowed to be more or less liberal as to the manner in which they address the conduct, provided a legal and economic rational basis exists for the sanctioning of the conduct and the severity of the sanction.

Candidates for these types of practices are vertical restraints, conditions imposed upon international entities concentrating, tie-ins, conditioned sales, exclusive arrangements, refusals to deal, cross-subsidization, predatory practices, price discrimination, discounts conditioned on exclusivity, etcetera.[304]

The level of scrutiny by the ICA would be restricted to whether the factual findings were reasonably supported by the evidence and whether the economic and legal arguments supporting the sanctions imposed are rationally related to the severity of the sanction.

c) The International Competition Authority as an Appellate Organ

The International Competition Authority, either functioning independently or benefiting from the WTO Dispute Settlement Understanding, would be restricted to assessing whether, from the facts and the file, the competition authority's decision is, as to its facts, reasonably supported by the evidence produced, and whether the legal arguments are rationally related to the conclusion, including its sanction.

i) <u>Conditioned Jurisdiction</u>

The ICA's jurisdiction should be conditioned on the following: (1) that the conduct in question be "international", or (2) the practices generate externalities which raise concern on other jurisdictions.

I would propose that "international" mean that the economic agents have places of business in different States or that the country which competition authorities are involved be other than the country where the economic agents have their places of business.

As per "externalities", I would not define the same but reduce the concept to its economic definition and qualify it to mean "*material* externalities". Not doing so could leave out externalities which should be factored in. I realize that plenty of litigation would ensue since claimants anxious to have the case fall under the ICA umbrella would surely find arguments or speculations they would call "externalities". It is to address this concern that I suggest that the externalities be "material".

ii) <u>The Level of Scrutiny of the International Competition Authority</u>

A word on the level of scrutiny is warranted. In arguing in favor of the foregoing architecture, I have borrowed the United States Constitutional theory of the levels of scrutiny.[305] Under U.S. Constitutionalism three levels of scrutiny exist to determine whether a law is constitutional:[306] (i) rational basis test; (ii) intermediate scrutiny; and (iii) strict scrutiny. Under the rational basis test, a law will be upheld if it is *rationally related to a legitimate government purpose*. Under intermediate scrutiny a law will be upheld if it is *substantially related to an important government purpose*. Under strict scrutiny, a law will be upheld if it is *necessary to achieve a compelling government purpose*. The foregoing levels of scrutiny are put in an order of increasing levels of scrutiny. Hence, the first is the less demanding and the last is the most intense.[307]

Although my summary is simplistic it need not be more detailed. The point in the discussion is that I have taken the lowest level of analysis as the scrutiny benchmark for analysis of domestic competition law activity. The reason for my doing so is to provide a great deal of deference to findings and decisions of domestic competition authorities. Only where the domestic measures are questionable as to their factual underpinnings, legal basis or reasons for implementing them,[308] should they be stricken or rejected by the ICA.

304 Again, as before, the list is propositive.

305 Although U.S. attorneys are familiar with the concept, I will summarize the concept for the benefit of non-U.S. readers.

306 The source of the theory is the famous footnote four of the case *United States v. Carolene Products Co.* (304 U.S. 144 (1938)).

307 Chemerinsky, Erwin. <u>CONSTITUTIONAL LAW</u>. Principles and Policies. Aspen Law and Business, 1997, pgs. 414-417.

308 For instance, that they be an excuse for protectionism. Another example would be discrimination, i.e., that the measures implemented on their face have economic justifications, but that in reality are an elaborate excuse to discriminate against foreign economic agents.

Perhaps coupling the foregoing with a "sliding scale" approach could prove useful. The higher the sanction, the higher the threshold of scrutiny the ICA will be vested with and the economic and legal reasons the measure in question would need to be grounded upon.

2. *Reasons*

The reasons motivating my arguing in favor of a Plurilateral Approach are that: (a) other more ambitious approaches seem unrealistic; (b) a common ground exists on sufficient basic points; (c) by providing for only minimum or core elements, nations are allowed to be more or less liberal as to their position on competition without impinging upon the multilateral architecture*;* (d) a dispute settlement mechanism is indispensable; and (e) the WTO scheme is an adequate and convenient infrastructure to address international competition law. I will now elaborate on each reason.

a) Other more Ambitious Approaches seem Unrealistic

Competition law is too sensitive a topic, commanding too many differences as to its concepts and paradigms, and too politically influenced, to realistically believe that an agreement of the type proposed by the Universal Regulation Approach will be reached, at least in the near future.

Unlike other fields of law[309] which have achieved a uniform regulation either by international treaties[310] providing for uniform provisions and/or Model Law[311] methods of their implementation, competition law has displayed an enormous ability to touch upon sensitive nerves of (sometimes powerful) constituencies. Hence, the feasibility of said field of law commanding the same level of acceptance as international commercial arbitration[312] is (at best) questionable in the near future.

History shows us that other treaties, with less obstacles and with a more palpable need of achieving global regulation, have failed to be ratified by crucial Members of the international community. For instance, the 1969 Vienna Convention on the Law of Treaties[313] has been in the U.S. Senate docket since 1971 notwithstanding that the U.S. Government has always recognized said Convention as a correct statement of customary international law on the subject.[314] Other more politicized examples are the U.S. failure to become party to the Kyoto Protocol and the ICC Rome Statute[315] as well as the denunciation of the 1972 Anti-Ballistic Missile Treaty.[316] As it may be observed, the U.S.'s attitude *vis-à-vis* treaties is disturbingly unfriendly.[317] In all fairness, the United States is not the only country that can be criticized for said type of undercomings. The Mexican government also has such type of misfits[318] and I am sure other countries can also be cited for the same naught.

309 For instance, international commercial arbitration.

310 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, published in 330 United Nations Treaty Series, pg. 38, no. 4739 (1958). To date, the New York Convention has been approved by 132 jurisdictions.

311 The UNCITRAL Model Law on International Commercial Arbitration, adopted by the General Assembly of the United Nations on December 11, 1985, where said organ recommended that all States give due consideration to the said model law in view of the desirability of uniformity of the law of arbitral procedures (General Assembly Resolution 40/72, 40 GAOR Supp. No. 53, A/40/53, at 308). To date, the Model Law on International Commercial Arbitration has been approved by at least 40 jurisdictions. I say 'at least' since such data is hard to verify because of the lack of obligation upon States to notify the enactment of the same, contrary to the situation of treaties.

312 Or, for that matter, other fields of law achieving international levels of uniform regulation, such as, to some extent, electronic commerce, private international law (in general), law applicable to international agreements (in particular), etcetera.

313 Vienna Convention on the Law of Treaties, opened for signature on May 23, 1969, 1155 U.N.T.S. 331, 339.

314 President Nixon transmitted the Vienna Convention to the Senate for its advice and consent on November 22, 1971. See Message to the Senate Transmitting the Vienna Convention on the Law of Treaties, Public Papers of the Presidents: Richard Nixon 1132 (Nov. 22, 1971), reprinted in 65 Dep't St. Bull, 684 (1971).

315 Rome Statute of the International Criminal Court, available at www.un.org/law/icc.

316 See Kyoto Protocol to the United Nations Framework Convention on Climate Change in www.unescap.org/enrd/energy/compend/ceccpart5chapter2.htm.

317 The comment applies to the Executive Branch and Congress alike.

318 For instance an (embarrassing —in my opinion) failure of the Mexican government to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Although the reader may wonder the source of my comment since said treaty is not an *essential* international law instrument, my criticism stems from the fact that Mexico, in over 19 investment protection treaties and several free trade agreements, has established the ICSID Mechanism as an option for arbitrating investment disputes. However,

Given this backdrop, it is difficult to realistically foresee that measures of the robustness of the Universal Regulation Approach will be materialized in the near future. However, I would love to be proven wrong.

b) Common ground exists on sufficient basic points

In my opinion, an *opinion iuris communis* does exist with regards to a cataloging certain practices as meriting outright repudiation, in contrast to others which must be analyzed in light of the circumstances so as to gauge their competitive effect before sanctioning the firms involved. The foregoing because the same conduct, given certain circumstances, may be pro-competitive, and, when faced with others, may be anti-competitive. The first type of practices refer to *per se* illegal practices. The second are subject to the rule-of-reason litmus test.

Given such (almost unanimous) legislative policy,[319] elements exist for countries to build on the same and to construct an international competition scheme where the internationally-repudiated practices are universally cataloged as core principles or minimum standards, and the remaining practices are left to domestic (legislative or judicial) discretion.

Of course differences would exist. However, the same should not be comprehended as part of the core points. Rather, they should be amongst the areas where differences would be tolerated.

c) By Providing for Only Minimum or Core Elements Nations are Allowed to be More or Less Liberal as to their Position on Competition without Impinging upon the Multilateral Architecture

Although, as explained before, a glance at the different domestic laws shows that a tendency exists to regulate certain behavior as untolerable (*per se* anticompetitive) in contrast to other conduct which acceptance may depend on the circumstances (rule of reason analysis), no all-applicable categorization of which-is-which exists. Hence, instead of allowing that such difference constitute an obstacle for the implementation of an international regime, each jurisdiction's concerns and preferences may be catered by elaborating a limitative list of disciplines meriting *per se* sanction. The rest, by definition, would be considered activities which different countries can treat as they prefer, either by including as subject to rule of reason analysis or per se illegal.

The benefit of taking the above step is that a problem is turned into an opportunity. What constituted a source of discrepancy becomes the bridge of (what used to be) an unsurmountable gap.

d) A Dispute Settlement Mechanism is Indispensable

It is an axiom of legal theory that naked rights amount to little. In other words, a right, without a measure to procure its respect, amounts to the non-existence of the same.

I do not envisage an effective scheme without some method of adjudicating differences. Recent experience shows us that the differences should be channeled to arrive to a legally-grounded final, binding, decision resolving the same. In this regard I believe

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such commitment is, to a great extent, nullified in practice since the Mexican government has failed to ratify the ICSID Convention (it has not been totally nullified since the ICSID Additional Facility still remains as an option, even if a diminished one). The contradiction is absurd and unexplained. (For an analysis on the matter, see Francisco González de Cossío. THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES —*THE MEXICAN EXPERIENCE*. Journal of International Arbitration 19(3): 227-244, 2002; and Francisco González de Cossío. THE MEXICAN EXPERIENCE WITH INVESTMENT ARBITRATION. *A COMMENT*. Journal of World Investment, Vol. 3, No. 3, June 2002, at 473.)

319 From the review of the following competition regimes it follows that, albeit with varying degrees and methods, each of the following countries establishes a different approach and severity of sanction for some practices than for others, under the theory that some merit outright prohibition whereas others need to be carefully assessed as to their competitive effects taking into consideration other factors, particularly economic ones: the Argentina, Australia, Brazil, Canada, Chile, Denmark, Czech Republic, the European Union, France, Germany, Hong Kong, Hungary, Indonesia, Italy, Japan, Korea, Malaysia, Mexico, New Zealand, Norway, The People's Republic of China, the Philippines, Poland, Russia, Singapore, Spain, Sweden, Taiwan (Republic of China), Thailand, the United Kingdom, United States of America, Ukraine, and Venezuela. (See James J. Garrett (General Editor) WORLD ANTITRUST LAW AND PRACTICE. A Comprehensive Manual for Lawyers and Business, Little Brown and Company, Boston/New York/Toronto/London, 1995.)

that the efforts already invested in designing the WTO Dispute Settlement Understanding, coupled with the success it has commanded, militate in favor of not reinventing the wheel but rather using the DSU as the forum for competition law disputes.

e) WTO Scheme is an Adequate and Convenient Infrastructure to Address International Competition Law

I believe the multilateral trading system is an adequate and convenient infrastructure for sowing the seeds of international competition law. Although including competition regulation in a framework dealing with a different subject (trade law) might seem inappropriate, I believe it isn't and that doing so is advantageous because: (i) competition related provisions already exist in the WTO-scheme; (ii) the efforts invested in the WTO-scheme and its success should be taken advantage of in establishing a multilateral competition framework; (iii) the interface between competition and trade law warrants doing so; (iv) the differences between competition and trade law do not persuasively argue against such measure; and (v) the characteristics of the current international adjudication system would prove useful in the envisaged international competition scheme. I shall elaborate.

i) Competition-Related Provisions already exist in the WTO Scheme

The architects of the multilateral trading system have already provided for competition-related regulation in several of the instruments supporting the international trade edification. I will now mention them.

1. GATT: The General Agreement on Tariffs and Trade has several provisions relating to competition: Articles II:4,[320] *III,*[321] *XI,*[322] *XVII,*[323] *XX,*[324] *XXIII,*[325] *and XXIII:1(b).*[326]

2. Agreement on Safeguards: The following provisions of the Agreement on Safeguards have competition implications: Articles 11:1(b)[327] *and 11:3.*[328]

320 Which provides that *"If any contracting party establishes, maintains or authorises, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule."*

321 Article III:2, first sentence, obligates contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other GATT provisions, it does not refer to trade effects.

322 Article XI prohibits governmental use of most quantitative import and export restrictions and prohibitions. As such it does not discipline purely private actions or measures. However, it would be interesting to see whether there are any possible implications of this discipline for how certain private practices are treated.

323 Article XVII which deals with State-Trading Enterprises, imposes certain obligations with respect to the conduct of firms that are either state-owned or state-controlled or have been granted by the State "exclusive or special privileges".

324 Article XX(d) sets out the general exceptions to the GATT 1994. It provides that, as long as governmental measures are not applied in a manner: (1) constituting a means of arbitrary or unjustifiable discrimination; or (2) a disguised restriction on international trade, then WTO Members may adopt or enforce them where *"necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to … the enforcement of monopolies operated under (Articles II:4 and XVII)…"*.

325 The concept of non-violation nullification and impairment, based on Article XXIII of the GATT, may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. It has been argued that it is not precluded that restrictive business parties could be a factor in such situations.

326 Article XXIII:1(b) may be deemed to have competition implications inasmuch as when it deals with the scope of governmental "measures", a "*…Member's industrial policy could in some circumstances upset the competitive relationship in the market place between domestic and imported products in a way that could give rise to a cause of action…*" as was the belief of the 1998 Panel Report on Japanese Measures Affecting Consumer Photographic Film and Paper as it considered the competitive relationship of the market so as to arrive to the meaning of government measures.

327 Which provides that *"… a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar* ***measures on the export or the import side****."* Furthermore, the concept "similar measures" are specified to include: *"export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection"* **to the importing country's industry**.

328 Article 11:3 provides that *"Members shall not encourage or support the adoption or maintenance by public and private enterprises or non-governmental measures equivalent to those referred to in paragraph 1."*

3. The General Agreement on Trade in Services: The General Agreement on Trade in Services ("GATS") establishes general obligations and disciplines binding all Members from which the following bear on competition matters: Article 7 ("Recognition"),[329] Article 8 ("Monopolies and Exclusive Service Suppliers")[330] and Article 9 (Business Practices")[331] contain a number or competition-related provisions. Articles 7 and 3 on Domestic Regulation and Transparency may also be relevant.

4. Understanding on Commitments in Financial Services: The Understanding on Commitments in Financial Services provides for a framework that supplements GATS with respect to measures on financial services. Competition-related provisions in this text are:

a) Paragraph 1 requires each member to list in its schedule existing monopoly rights, which members "*shall endeavour to eliminate … or reduce*".

b) Paragraph 10.1 states that each Member "*shall endeavour to remove or to limit any adverse effects*" on other Members of a range of non-discriminatory measure, including restrictions on the range of services a given entity may provide, territorial limits on expansion into the entire territory of the Member, and, very generally, "other measures that … affect adversely the ability of financial service suppliers of any other Member to operate compete or enter the Member's market".

c) Paragraph 10.2 obligates Members to ensure that self-regulatory bodies, securities or other exchanges or markets, "*or any other organization or association*" accord national treatment to foreign financial service providers, whenever membership in these bodies is *required* in order to deliver financial services within the Members state in question.

5. Annex on Telecommunications: The Annex on Telecommunications contains an obligation to allow service providers of other Members access to public telecommunications networks "*on reasonable and non-discriminatory terms and conditions*" for the supply of any service included in the Member's schedule.

6. Reference Paper on Basic Telecommunications: This document establishes a general commitment of Members to maintain adequate measures to prevent anti-competitive practices of major suppliers. It gives several specific examples of anti-competitive practices, such as: (i) Anti-competitive cross-subsidization; (ii) use of information obtained from competitors; and (iii) withholding technical and commercial information.

7. Agreement on Trade-Related Intellectual Property Rights: TRIPS Article 8 provides that: "*Appropriate measures provided they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology*."

8. Agreement on Technical Barriers to Trade: This Agreement includes rules to ensure that the preparation, adoption and application of technical regulations, standards and conformity assessment procedures *by non-governmental bodies* are not more trade restrictive than necessary (e.g Articles 3, 4, 8).

9. Agreement on Preshipment Inspection: This instrument includes detailed rules for the activities of preshipment inspection entities (Article 2).

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329 Article 7 has the objective of preventing the use of licensing, certification or related requirements as a barrier to entry for foreign providers. It *permits* recognition of another Member's licensing or certification on a bilateral or plurilateral basis provided that "adequate opportunity" is afforded to other Members to negotiate their accession, and that the arrangements are not used as a means of discrimination between countries. Article 7 also states that "wherever appropriate" multilaterally agreed criteria are to be employed for recognition and harmonization of these requirements.

330 Article 8 requires that monopolies, whether public or private, respect, *inter alia*, the Most-Favoured-Nation obligation in Article 2 of the GATS. Also, with respect to sectors covered in a Member's schedule, Article 8 requires the Member to ensure that a monopoly supplier does not "abuse its monopoly position" when it competes in the supply of services outside its monopoly rights.

331 Article 9(1) requires that "*Members recognize that certain business practices of service providers, other than those falling under Article 8, may restrain competition and thereby restrict trade in services.*" Article 9 mandates Members to accede to any request for consultation with any other Member concerning such practices "with a view to eliminating them". It also imposes a duty to co-operate in the provision of non-confidential information of relevance to the matter in question.

10. Agreement on Subsidies: This Agreement regulates "market displacement", "price undercutting" and "voluntary undertakings" by exporters in detail (Articles 6 and 18) and explicitly requires the examination of "trade restrictive practices and competition between foreign and domestic producers" in determinations of "injury". (Article 15)

11. Agreement on Trade-Related Investment Measures: Competition policy rationales may be invoked for other provisions/agreements. For example dumping, which is "condemned" under Article VI, and against which anti-dumping duties may be imposed subject to conditions defined in the Agreement Implementation of Article VI of the GATT 1994, may reflect, in some instances, a strategy of predatory pricing.

This Agreement provides for a review by the Council for Trade in Goods of its operation not later that five years after the entry into force of the WTO Agreement. In the course of this review "…[t]*he Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy*."

12. Agreement on Government Procurement: This Agreement may be relevant when it comes to certain anti-competitive private practices. For instance, by requiring transparency in government procurement decisions.

ii) The efforts invested in the WTO-scheme and its success should be taken advantage of in establishing a multilateral competition framework

The multilateral trading system is the result of more than 50 years of negotiations, concessions, legal and political victories over protectionism, discrimination, and other practices which run against current economic and welfare paradigms. In my opinion, instead of re-inventing and constructing from zero a new infrastructure, the multilateral trading system edifice should be taken advantage of. In doing so, two benefits would ensue: the competition regulation to be implemented will benefit from the legal and political inertia behind the WTO scheme, and economies of scale can be secured from taking advantage of such theoretical (and physical!) structure.

iii) The Interface Between Competition and Trade Law Warrants Competition Regulation in the WTO-Scheme

The already discussed interface between competition and trade law also militates in favor of addressing both disciplines in the WTO. Independently regulating each on different fora invites less than optimal solutions which could easily diminish the effectiveness of each other. Coordinated joint regulation is not only possibly but plausible. The Theory of Complementarity can lead to fruitful results if the said complementarity is taken advantage of instead of tripping over the same.

iv) The Differences Between Competition and Trade Law Do Not Persuasively Argue Against Competition Regulation in the WTO-Scheme

The fact that certain differences exist between competition and trade law do not persuasively obstacle the envisaged scheme. The fact that the latter has focused on "without-border" measures, whereas the former has traditionally sought to address "within-border" measures does not pose any problems, nor does the fact that the former usually addresses private conduct and the latter governmental measures. The same comment applies to the domestic vs. international source of regulation.

v) The Characteristics of the current International Adjudication System would prove useful in the envisaged International Competition Scheme

An important elite of professionals trained in international law, trade, dispute resolution and economics has emerged on several fronts[332] which could nurture the DSU on competition (as well as other) matters, which should be taken advantage of, particularly given the fact that the said milieu is premised on the following qualifications which have commanded almost global acceptance, and which could prove useful in the ICA scheme: expertise, independence and impartiality.

332 For instance, the rosters of arbitrators in the Hague Permanent Court of Arbitration; the International Court of Arbitration of the International Chamber of Commerce; the London Court of International Arbitration; the American Arbitration Association; the Regional Centre for Arbitration of Kuala Lumpur; the International Centre for Settlement of Investment Disputes, to state a few.

The international dispute resolution practice has trained certain highly qualified professionals in the (complicated) ins-and-outs of dispute resolution of an international dimension. The human capital inherent in such phenomenon should be tapped into to solve disputes of an international dimension. Because it would work as a reputational market, and because such professionals are not elected, designated nor form part of a bureaucracy, they need not be sensitive to political or other influences which may (and frequently do) impinge upon their quality of judgment. Their guiding star would be correctly solving the dispute, not being reelected. Hence, the chances of the said adjudication system from working would improve.

3. Conclusion: An apparent —but favorable— Paradox

As the careful reader has certainly noticed, my arguing in favor of the Plurilateral Approach poses an interesting paradox which I do not want to leave unaddressed: by militating in favor of a Plurilateral scheme where differences are tolerated and a lot of deference is left to the determinations of domestic authorities, the outcome would seem to resemble the current state of affairs: *lack of uniformity*. Hence, the reader could ask: what is gained? Why go to the trouble to establishing the envisaged regime if, at the end of the day, different approaches *will* continue to exist?

The answer, although not immediately apparent, is conclusive: *the end of dislocative effects*. Although differences would continue to exist on the details and outer coatings of international competition, the core aspects and infrastructure erected would iron-out current wrinkles between law and policies of different jurisdictions. They would now be congruent with each other. To elaborate, I foresee the following benefits from the adjusted Plurilateral Approach:

a) A spinal cord will finally be established on a (thus far) legally spineless international topic.

b) The most egregious practices will be outlawed on a world-wide basis.

c) The dislocative effects stemming from the fact that different (and frequently conflicting) approaches are taken by different domestic authorities will be eliminated and replaced by a cooperative and congruent scheme.

d) A regime where countries come to terms as to certain agreed behavior meriting joint international rejection will pave the way for further understanding to occur and will allow for the cooperation and measures required to efficiently address other activities having externalities.

e) Conflicts between competition authorities will be channeled and handled in a constructive manner. This will eradicate the wrangling displayed in past sensitive cases.[333]

Therefore, the outcome, albeit apparently the same, would be fundamentally different. In a way, it would resemble the international financial regime which goes unnoticed to the average citizen unless and until something goes wrong. It is at such point —when the international financial regime fails— that the benefits of a well-oiled and efficient international financial machinery become apparent.[334]

In the same fashion, the benefits of a well tailored and functioning Plurilateral Approach I have defended would initially seem not too different than current state of affairs. However, as time passes and as universal problems begin to be given congruent solutions fostering mutual enrichment and encouraging uniformity, the results will become notorious.

[333] For instance, the GE/Honeywell, *Boeing/McDonnell Douglas and WorldCom/Sprint* (in)famous cases.

[334] If not, ask an Indonesian citizen after the 1996 crisis or an Argentinean after the 2001-2002 financial debacle.

BREVES NOTAS SOBRE LA INCONSTITUCIONALIDAD DEL ARTÍCULO 10 FRACCIÓN VII DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA

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I. Introducción

Como consecuencia de diversos cambios ocurridos a mediados de 1980 en la política económica de este país, en México se optó por ingresar a la ruta de la globalización o internacionalización. Este hecho, aunado a la privatización, desregulación, apertura de fronteras a servicios y productos, y al inicio de la creación de una amplia red de tratados comerciales internacionales, provocó que nuestro país se viera obligada a reconocer una nueva cultura en materia de competencia. Bajo este contexto se entiende la promulgación de la Ley Federal de Competencia Económica ("LFCE") publicada en diciembre de 1992 y cuya vigencia comenzó el 22 de junio de 1993.

La LFCE es reglamentaria del artículo 28 de la Constitución Política de los Estados Unidos Mexicanos y tiene por objeto proteger el proceso de competencia y libre concurrencia en los mercados. Su naturaleza hace que la LFCE siempre esté subordinada a la Constitución. Es decir, este ordenamiento fue creado para asegurar, a través de la Comisión Federal de Competencia (como órgano encargado de la vigilancia y ejecución de dicha ley), que los participantes en el mercado tengan reglas claras de juego para competir en el ofrecimiento de bienes y servicios y, en caso de que las violen, sean castigados severamente (carácter disuasivo de su catálogo de sanciones). En otras palabras, la LFCE busca que exista un "campo parejo de juego" o "*level playing field*". Ciertamente era una ley necesaria para el nuevo contexto internacional en el que a partir de dicha época se desempeñaba nuestro país.

A diferencia de las leyes que abrogó (entre otras, la Ley Reglamentaria del Artículo 28 Constitucional en Materia de Monopolios de 1934, mejor conocida como "Ley de Monopolios"), la LFCE es una ley no sólo reactiva sino también preventiva. Es decir, busca revisar -bajo ciertos parámetros económicos- que ciertas operaciones de adquisición de activos y fundamentalmente de control, no generen o incrementen el poder de mercado de los agentes económicos como un elemento facilitador para incurrir en prácticas monopólicas. Además de sus funciones de escrutinio previo a las concentraciones, el estudio de consultas y opiniones en materia de competencia, y las declaratorias de prácticas de comercio interestatal, entre otras, la LFCE establece, en su función reactiva, las conductas que pueden ser sancionadas como prácticas monopólicas absolutas y relativas, así como concentraciones prohibidas.

Las prácticas monopólicas absolutas (también llamadas horizontales o prohibidas "*per se*"), son aquéllas que se cometen entre competidores entre sí y que tienen por objeto o efecto fijar precios o intercambiar información con ese propósito, dividir mercados, restringir abasto o concertar posturas o abstenciones en licitaciones o subastas públicas. En otras palabras, dichas prácticas son contrarias al propósito de la LFCE en el sentido de que cada agente económico fije eficientemente la forma en que competirá en el mercado, motivo por el cual son las más perniciosas para el proceso de competencia y libre concurrencia, ya que en ese caso los agentes económicos se comportan como lo haría monopolista. Así, los agentes económicos eliminan la rivalidad que existe entre ellos (presupuesto básico del proceso entre competidores) y la sustituyen por una cooperación artificial e indebida en perjuicio del proceso de competencia y del público consumidor. La lista establecida en el artículo 9º de la LFCE es exhaustiva y limitativa. Por su gravedad, este tipo de prácticas son las más severamente sancionadas y pueden ser denunciadas ante la Comisión Federal de Competencia por cualquier persona; inclusive, dependiendo de las circunstancias del caso, pueden ser objeto de responsabilidad penal bajo el tipo específico establecido en el Código Penal Federal.

Por su parte, las prácticas monopólicas relativas (también identificadas como verticales o sujetas a un escrutinio "caso por caso" o "*rule of reason*"), no están prohibidas por sí mismas sino requieren del cumplimiento de los siguientes supuestos: i) requisitos de atendibilidad o procedibilidad de la acción (existencia de poder sustancial en el mercado relevante del(os) agente(s) económico(s) en cuestión); ii) análisis del encabezado del artículo 10 de la LFCE (existencia de actos unilaterales o plurilaterales que su objeto o efecto *sea o pueda ser*, desplazar *indebidamente* a otros agentes del mercado, impedirles sustancialmente su acceso o establecer ventajas exclusivas); iii) análisis del tipo o figura administrativa específica (las fracciones I a VI de dicho artículo establecen prácticas específicas, entre las que se encuentran los contratos de distribución, cláusulas de restricción a la competencia, imposición del precio final de venta, ventas atadas, exclusividades, denegación de trato o boicot); y, iv) el juicio de valor si los efectos anticompetitivos de la práctica supera sus efectos pro-competitivos. Estas prácticas se sancionan de manera menos severa que las absolutas.

Ahora bien, el artículo 10 de la LFCE contiene una última parte, la cuestionada fracción VII, misma que también es considerada como práctica monopólica relativa: "*En general,* ***todo acto que indebidamente*** *dañe o impida el proceso de competencia y libre concurrencia en la producción, procesamiento, distribución y comercialización de bienes o servicios*". En otras palabras, si bien es cierto las fracciones I a VI de dicho artículo establecen una lista de prácticas y elementos típicos más o menos precisados en las mismas, la fracción VII establece una fórmula general que al ser o constituir una especie de "tipo abierto" provocaba una tensión entre el abogado y la autoridad de competencia. Igualmente, dicha fracción induce al análisis entre el medio y el fin. Nuestra postura ante dicho supuesto genérico o abierto -al igual que frente a otras disposiciones de la LFCE- es que es inconstitucional, como lo explicaremos más adelante.

En noviembre del año pasado, producto de casi 10 años de contienda ante la Comisión Federal de Competencia y otras muchas instancias en el terreno del poder judicial federal, y después de 7 años de espera frente a la Suprema Corte de Justicia de la Nación, su Pleno declaró la inconstitucionalidad de la fracción VII del artículo 10 de la LFCE [Recurso de revisión promovido por Grupo Warner Lambert México, S.A. de C.V. en el Toca 2589/96]. La votación del Pleno a favor de la inconstitucionalidad fue de ocho votos a favor por dos en contra, mayoría que resulta idónea para integrar jurisprudencia en un futuro cercano.

No es materia de esta breve nota explicar las vicisitudes desde el punto de vista procesal y sustantivo que tuvieron que sortearse para llegar a dicho resultado, sin embargo, podemos afirmar que tales circunstancias fueron complicadas y fueron muchas. La espera fue larga y llena de incertidumbre. Si bien es cierto, la quejosa y recurrente impugnó otros artículos que consideraba inconstitucionales, la materia de esta nota versará únicamente sobre el análisis de la declaración de inconstitucionalidad de la fórmula genérica establecida por el artículo 10-VII de la LFCE. Igualmente, cabe destacar que recientemente, nos fue notificado el "engrose" de la sentencia y el par de votos particulares de la minoría, uno de ellos respecto de tal artículo, por lo que posteriormente a los antecedentes del caso, analizaremos brevemente lo resuelto por la Corte.

II. Antecedentes

La resolución de la Corte tiene sus antecedentes en una denuncia realizada por un competidor de la quejosa y recurrente por la presunta realización de una práctica de depredación por precios, así como en una investigación de oficio iniciada por la propia Comisión Federal de Competencia por la misma práctica. La práctica respectiva fue fundada en la fracción VII del artículo 10 de la LFCE.

De una manera sencilla, podemos afirmar que la depredación por precios es conocida en la literatura económica y jurídica de otros países como "*venta por debajo de costo*". Sin embargo, dicha literatura no es contundente en cuanto a los elementos que integran tal práctica, e incluso varias escuelas de pensamiento económico se inclinan por no condenarla, en virtud de que no es una estrategia racional. Adicionalmente, la tradición o método jurídico de otros países hacen que sus interpretaciones sean realizadas por jueces mediante el método del precedente y construcción jurisprudencial. De esta manera, la forma en que otros países abordan el principio de legalidad y de seguridad jurídica es distinto al nuestro. En otros lugares, la construcción jurídica es más jurisprudencial o de precedentes [país de jueces], mientras que en los que tienen una tradición romano-civilista como la nuestra, prevalece la legislación sobre aquélla.

Por otro lado, la legislación de otros países no es uniforme en cuanto a si la venta por debajo de costo debe ser objeto de condena, y de serlo, cuáles son los elementos que deben integrar la descripción típica. Recordemos que la rivalidad en precios es la más natural entre agentes económicos y la práctica de ventas por debajo de costo pueden estar justificada en casos de promoción o ingreso a un mercado. Este no es un tema fácil porque muchos tratadistas cuestionan que al menos los siguientes temas deben ser considerados: i) ¿cuál es el costo que debe tomarse en cuenta? (vgr. de producción, medio variable, medio total o totales); ii) ¿debe ser costo de corto, mediano o largo plazo?; iii) ¿debe ser la intención parte del tipo o acreditada como elemento de responsabilidad?; iv) ¿debe tener el depredador la posibilidad razonable de recuperar sus pérdidas?; y v) ¿deben existir daños al depredado, depredador y al proceso de competencia?[335]

En nuestro país, la tradición y cultura en materia de competencia es relativamente reciente comparada a la de otras naciones. En el año de 1931 se expidió la Ley Reglamentaria del Artículo 28 Constitucional en Materia de Monopolios, la cual se encontraba inserta

[335] Sobre este punto, la Comisión Federal de Competencia en algún momento del procedimiento administrativo llevado en un caso relacionado del que nos ocupa (DE-11-94), pretendió absolver a nuestro cliente de la práctica depredatoria imputada por ausencia de daños al depredador.

en un contexto histórico y económico muy distinto al actual. El artículo 8º de dicha ley prohibía la "depredación por precios" o "venta por debajo de costo" de la siguiente manera:

"*Quedan prohibidos por considerar que encaminan al monopolio:*
[…]*II. La venta de artículos o la prestación de servicios al público a menos del costo de producción, calculado por unidad en cada empresa, cuando se haga en forma regular o permanente y no se trate de la introducción en el mercado de un producto o servicio nuevo*".

Posteriormente, en 1934 se emitió la Ley Reglamentaria del Artículo 28 Constitucional en Materia de Monopolios, la cual abrogó a la anterior. A pesar de sus problemas de constitucionalidad, esta nueva ley establecía lo siguiente en materia de ventas por debajo de costo:

"*Artículo 3º.* [Monopolio] *es toda concentración o acaparamiento industrial o comercial, y toda situación deliberadamente creada, que permiten a una o varias personas determinadas imponer los precios de los artículos o las cuotas de los servicios, con perjuicio del público en general o de alguna clase social*".

"*Artículo 5º. Se presumirán tendientes al monopolio:*
[…]*La venta de artículos o la prestación de servicios a menos del costo de producción, a no ser que concurran las siguientes circunstancias:*

a) que se trate de introducción en el mercado de un producto o servicio nuevo y se haya obtenido autorización del Ejecutivo Federal.
b) que los artículos o servicios se encuentren depreciados en el mercado, salvo que la depredación haya sido provocada por los mismos vendedores o por los que prestan el servicio;
c) que se trate de remate, quiebras o de otras circunstancias justificadas que obliguen a realizar esas operaciones".

Finalmente, al abrogarse la ley de 1934 mediante la emisión de la LFCE, encontramos que el legislador omitió una descripción típica o infracción administrativa que prohibiera expresamente la venta por debajo de costo o depredación por precios. Por el contrario, la fracción VII del artículo 10 de la LFCE estableció una fórmula genérica, a manera de "fusible genérico" o "*catch all provision*", que señala que será una práctica monopólica relativa, sujeto a los requisitos del encabezado del mismo artículo: "*En general, **todo acto que indebidamente** dañe o impida el proceso de competencia y libre concurrencia en la producción, procesamiento, distribución y comercialización de bienes o servicios*".

La justificación genérica de dicha fracción seguía argumentos como los siguientes:
"[…] *tipificar en detalle cada conducta que pudiera tener un efecto dañino sobre la competencia es prácticamente imposible, no sólo por el gran número de casos que se presentan, sino también porque la evolución constante de las conductas comerciales implicaría que la ley estuviera siempre retrasada con respecto a esta evolución. Por esta razón es necesaria esta disposición general. Esta generalidad debe, sin embargo, entenderse en el contexto de la ley: no es una carta blanca para la discrecionalidad de la Comisión Federal de Competencia, ya que, cuando se aplique, las evaluaciones que exige la ley son rigurosas y deberán probar que se trata efectivamente de conductas anticompetitivas. Dentro del proceso legislativo que llevó a la expedición de la ley se concluyó que las seis prácticas monopólicas relativas, anteriormente listadas, incluyen las actividades más comunes e importantes. Sin embargo, como existe la posibilidad de que se realice una práctica novedosa o peculiar, ésta debe ser contemplada por la legislación, cuidando al mismo tiempo de minimizar el riesgo de incertidumbre de la actividad económica por la actuación de la autoridad, de ahí que el legislador haya determinado menores sanciones para este supuesto. Cabe mencionar que en los países con una activa política antimonopolios, como es el caso de nuestros principales socios comerciales, también se establecen disposiciones de carácter mucho más general sobre las conductas que pueden violar la ley, por lo que de ninguna manera esta ley coloca en desventaja a los agentes económicos que realicen sus actividades en el territorio nacional*". [Comisión Federal de Competencia. Ley Federal de Competencia Económica. Enero de 1994].[336]

[336] Cabe resaltar que desde la propia concepción de la LFCE se vislumbra el conflicto entre el principio de legalidad y el dinamismo en la materia de competencia económica, en donde tanto el legislador como la autoridad le otorgan una preferencia a esta última, en el sentido de tipificar caso por caso las prácticas relativas, lo cual va en contra del principio de legalidad, como se explicará más adelante.

Tal como lo expresamos anteriormente, existe un conflicto entre una autoridad en materia de competencia económica y los juristas, derivado de la percepción que tengan del principio de legalidad y de seguridad jurídica, en relación con los fines que se persiguen. Tal dicotomía no debiera existir, precisamente por el principio de supremacía de la Constitución. Previamente a la declaración de inconstitucionalidad, el conflicto se podría haber resuelto modificando la Constitución o la LFCE[337]. Por ello, el problema de constitucionalidad de la fracción VII del artículo 10 de la LFCE ameritaba la intervención de la Suprema Corte de Justicia de la Nación para determinar si nuestra Carta Magna estaba o no siendo violada en virtud de dicho precepto.

Genéricamente, los argumentos que en su momento se expusieron para considerar a la fracción VII del artículo 10 de la LFCE como inconstitucional, se resumen en los siguiente incisos:

i) Dicha fracción (y, en general, todo el artículo 10 de la LFCE) no establece ni define el mandato constitucional del artículo 28 respecto de lo que constituye una ventaja exclusiva indebida a favor de una o varias personas determinadas y con perjuicio del público en general o de una clase social.
ii) El artículo 28 constitucional establece la necesidad de que exista un daño comprobable y real y no una mera posibilidad.
iii) La LFCE es una ley administrativa y, por lo tanto, sus principios de interpretación deben ser acordes a tal naturaleza. Es decir, las infracciones que allí se contienen deben ser interpretadas bajo un rígido principio de legalidad consistente en un análisis de sus elementos para ver si la conducta se adecua a la hipótesis normativa, ya que de otra forma, se vulnera el principio de legalidad y certeza jurídica.
iv) El particular debe conocer -desde la propia descripción de la norma-, aquellas hipótesis normativas que le puedan acarrear una sanción por parte de la Comisión Federal de Competencia, ya que de lo contrario, la autoridad determinará los elementos de la infracción en cada caso particular y el afectado no habrá tenido la oportunidad de conocer **previamente** (principio de previsibilidad) aquellas conductas que le pueden acarrear una sanción.
v) Al ser la LFCE una ley administrativa comparte los principios del derecho sancionador, punitivo o de las infracciones. Así, la hipótesis normativa debe ser clara para que el particular tenga la capacidad de "autodeterminar" los elementos de la infracción y no sea la autoridad la que "caso por caso" haga esa determinación. Esa facultad arbitraria de la autoridad puede dar lugar a excesos como los ocurridos en el caso que nos ocupa, en el que la Comisión Federal de Competencia aumentaba o disminuía requisitos de la infracción en el proceso, dejando siempre al agente económico en estado de indefensión.
vi) Los precedentes de la propia Suprema Corte de Justicia de la Nación y Tribunales Colegiados de Circuito permiten establecer que aquellas fórmulas vagas e imprecisas que dejan un margen discrecional amplio a las autoridades para sancionar a los particulares son inconstitucionales.[338] En concreto, de dichos precedentes se confirman los siguientes puntos: a) la naturaleza sancionadora de las infracciones administrativas y, por lo tanto, su similitud con el derecho penal; b) la precisa definición de la infracción en la hipótesis normativa, por lo que no cabe una interpretación elástica de la misma; c) la interpretación estricta de la norma administrativa sancionadora, en donde no aplica la analogía o mayoría de razón; d) la ausencia de previsibilidad en la aplicación de una norma coloca a los particulares en un estado de indefensión; y e) la autoridad administrativa sólo puede hacer lo que la ley le faculta.
vii) En cuanto a la aplicación de la disposición que nos ocupa, la Comisión Federal de Competencia reúne funciones que le corresponden a los tres poderes de la Unión, como son: a) la facultad de investigar de oficio o a petición de parte (actividad administrativa); b) investigar y desarrollar los procedimientos y resolver los recursos de revisión (funciones jurisdiccionales en primera y segunda instancia); y c) integrar y definir el contenido de la norma al caso concreto (función legislativa).

Derivado de lo anterior, es claro que el elemento normativo contenido en la fracción VII del artículo 10 de la LFCE en el sentido de que es una práctica monopólica relativa "*en general, todo acto que indebidamente dañe el proceso de competencia y libre concurrencia*", es un concepto indeterminado y vago que le permite a la autoridad -en este caso la Comisión Federal de Competencia- actuar de manera arbitraria, en contravención de la garantía de legalidad y seguridad jurídica.

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[337] Nunca la modificación de la ley debe realizarse para aplicarla de manera retroactiva, lo cual acentuaría a un grado máximo la violación del principio de legalidad, como en algún momento existió el riesgo en caso que nos ocupa.

[338] Como ejemplo se citan los siguientes rubros: "MULTAS E INFRACCIONES. GARANTÍAS CONSTITUCIONALES"; "MULTAS. DEFINICIÓN DE LA INFRACCIÓN"; "MULTAS FISCALES, APLICACIÓN DEL PRINCIPIO DE TIPICIDAD"; "MULTAS. TIPICIDAD DE LA INFRACCIÓN"; "FACULTADES IMPLICITAS Y EXPLICITAS. MULTAS"; "IMPUESTOS, PRINCIPIO DE LEGALIDAD QUE EN MATERIA DE, CONSAGRA LA CONSTITUCIÓN FEDERAL"; "METROLOGÍA Y NORMALIZACIÓN. EL ARTÍCULO 112 DE LA LEY FEDERAL RELATIVA, QUE CONTEMPLA LAS SANCIONES QUE PUEDEN IMPONERSE POR LAS INFRACCIONES QUE SE COMETAN, VIOLA LAS GARANTÍAS DE LEGALIDAD Y SEGURIDAD JURÍDICA CONTENIDAS EN EL ARTÍCULO 16 CONSTITUCIONAL (DIARIO OFICIAL DE LA FEDERACIÓN DE PRIMERO DE JULIO DE MIL NOVECIENTOS NOVENTA Y DOS)"; "AUTORIDADES ADMINISTRATIVAS, LIMITE DE LAS FACULTADES DE LAS".

III. Los razonamientos de la Suprema Corte de Justicia de la Nación

Previamente al análisis del fondo de las disposiciones impugnadas, la Corte tuvo que resolver el aspecto procesal consistente en la procedencia del amparo contra ley y las causales de improcedencia invocadas por las autoridades responsables. De hecho, gran parte de la sentencia del recurso de revisión se ocupó de levantar el sobreseimiento previo decretado por un Juez de Distrito. En nuestra opinión justamente gran parte de la valía de esta sentencia, deviene de los argumentos y análisis respectivos para superar el sobreseimiento. Una vez superada esta cuestión, el amparo en revisión número 2589/96 interpuesto por Grupo Warner Lambert México, S.A. de C.V., no sólo versó sobre la inconstitucionalidad del artículo 10 fracción VII de la LFCE, sino también respecto de la inconstitucionalidad de los siguientes artículos[339]:

(i) 11, 12 y 13 de la LFCE (reglas para la determinación de un agente económico con poder sustancial en el mercado relevante);
(ii) 31 de la LFCE (la facultad de la Comisión Federal de Competencia de requerir información en el curso de sus investigaciones); y
(iii) 24 fracción VII, 25 fracción VIII y 28 fracción VII del Reglamento Interior de la Comisión Federal de Competencia (atribuciones del Presidente, del Secretario Ejecutivo y de la Dirección General de Asuntos Jurídicos y Contenciosos, en relación con la facultad contenida en el artículo 31 de la LFCE).

Como señalamos, sólo nos detendremos en los argumentos expuestos por el Pleno de la Suprema Corte, en relación con la fracción VII del artículo 10 de la LFCE, contenidos en el considerando Décimo Noveno de la sentencia que se analiza. Así, el Pleno consideró principalmente lo siguiente:

i) Las facultades atribuidas a las autoridades encargadas de la aplicación de la ley, para la imposición de sanciones derivadas de su incumplimiento, **deben estar determinadas en ley** y deben estar previstos los parámetros necesarios para la imposición de la sanción, a fin de no dejar elemento alguno al arbitrio de la autoridad. Sólo de esa manera los gobernados pueden saber de antemano a qué sanciones se harán acreedores por voluntad del legislador, por qué motivos y en qué medida, y a la autoridad sólo le queda aplicar la sanción respectiva.
ii) No es permitido que se afecte la esfera jurídica de una persona por actos de autoridades no facultadas expresamente por la ley para realizarlos, ya que en salvaguarda de las garantías individuales de seguridad jurídica y legalidad, la autoridad sólo puede hacer lo que la ley le autoriza, pues de otro modo, se les dotaría de un poder arbitrario, incompatible con el régimen de legalidad que constitucionalmente no puede aceptarse en virtud de que se afectaría el sistema de separación de poderes, por lo que cualquier disposición que tenga ese efecto, tendrá que ser declarada inconstitucional.
iii) El principio de legalidad significa no sólo que el acto creado de la norma sancionadora deba emanar del Poder Legislativo, sino que los caracteres esenciales de la conducta y la forma, contenido y alcance de la infracción, estén consignados de manera expresa en la ley, de tal manera que no quede margen para la arbitrariedad de las autoridades encargadas de su aplicación, sino que el gobernado pueda, en todo momento, conocer la conducta que constituya una infracción a la ley y a qué sanción se hará acreedor.
iv) La arbitrariedad en la imposición de sanciones por imprevisibilidad de la infracción que no tenga un claro apoyo legal debe considerarse absolutamente proscrita en el régimen constitucional mexicano, sea cual fuere el pretexto con que pretenda justificársele.
v) La fracción VII del artículo 10 de la LFCE no señala con precisión el marco a través del cual la autoridad administrativa puede ejercer la facultad que le fue otorgada para imponer sanciones a quienes incurran en una práctica monopólica relativa, pues dicha fracción se concreta a señalar criterios genéricos referentes a que se dañe o impida el proceso de competencia y libre concurrencia, pero no se establecen los parámetros necesarios para determinar el tipo de infracción que da lugar a la imposición de las sanciones especificadas, de manera tal que se deja a la autoridad encargada de la aplicación de la ley, la facultad de determinar la infracción a la ley que se da en un caso concreto.
vi) Dicha indeterminación produce inseguridad jurídica y viola el principio de legalidad previsto en el artículo 16 constitucional, ya que el gobernado ignora los motivos por los que se hará acreedor a dicha sanción y a la vez, permite a la autoridad respectiva, al carecer de la orientación necesaria para imponer la sanción aplicable, el ejercicio absolutamente discrecional de sus facultades.

Ahora bien, los ministros Olga Sánchez Cordero y Juan Díaz Romero emitieron un voto minoritario en el que no comparten la declaración de inconstitucionalidad de la fracción VII del artículo 10 de la LFCE. La principal argumentación que exponen consiste en que dicha fracción no debe analizarse de manera literal y aislada, sino que debe interpretarse en correlación con las demás normas que configuran su verdadero sentido y alcance. Lo anterior constituye un marco jurídico de actuación que obliga a la Comisión

[339] El análisis de lo resuelto por la Suprema Corte respecto de dichos artículos amerita un análisis por separado.

Federal de Competencia a tipificar la falta, así como a determinar la sanción de manera fundada y motivada, de modo que siguiendo dicha normatividad no se propician resoluciones arbitrarias, ni se deja al particular en estado de indefensión.

En términos generales, dicho voto minoritario hace referencia a que la autoridad no puede actuar a su libre arbitrio, ya que se encuentra obligada a delimitar el mercado relevante y el poder sustancial del agente económico en cuestión. Sin embargo, en nuestro concepto, esa circunstancia es errónea, por lo siguiente; (i) esos requisitos son de procedibilidad para cualquiera de las prácticas previstas por el artículo 10 de la LFCE; (ii) aún existiendo la determinación de dichos requisitos, la Comisión Federal de Competencia define la conducta que es "*indebida*"[340]; y (iii) el dinamismo económico no justifica que se viole el principio de legalidad.

IV. Conclusiones

Una de las más importantes lecciones de este caso, sino es que la más trascendente, fue que se pudieron superar todas las vicisitudes del procedimiento que se presentaron a lo largo de su tramitación, hasta llegar a la sentencia de la Corte que ahora comentamos. Se pidió lo más para al menos aspirar a lo inobjetable. Al final de cuentas, el Pleno de la Corte fue consistente con los precedentes que existían al respecto y simplemente confirmó lo que ya había resuelto en distintas ocasiones: las infracciones administrativas deben estar debidamente determinadas por el legislador a efecto de no dejar al arbitrio de la autoridad la creación del tipo. En este supuesto, se dejaría en estado de indefensión a los particulares, en contravención de las garantías de seguridad jurídica y legalidad.[341]

Asimismo, es importante señalar que el legislador debe tener mucho cuidado al pretender introducir en nuestro sistema jurídico fórmulas o mecanismos que no se ajustan o adecuan a nuestro régimen constitucional. La tensión entre las necesidades del derecho de competencia y el régimen constitucional debe acortarse, dado que el fin no puede justificar los medios. Muchas áreas del derecho han afrontado el paradigma de que su legislación vaya siempre atrasada pero en el derecho sancionador se debe resistir la tentación de darle más atribuciones al Estado en menoscabo del particular. La autoridad debe estar limitada por la norma expresa, base fundamental sobre la cual descansa nuestro régimen constitucional y muy particularmente los artículos 14 y 16 de la Carta Magna.

Efectivamente sería deseable que en materia de competencia fuéramos un país donde la labor interpretativa fuera más rica, de tal forma que la norma legislativa tuviera no solamente vigencia sino "vivencia", en virtud de la labor del intérprete judicial. Desgraciadamente, en materia de competencia esa posibilidad se ve mermada cuando la Comisión Federal de Competencia investiga y juzga en primera y ulterior instancia. Luego, si la intervención del poder judicial federal es hasta la materia de amparo es poco probable que se cree una cultura interpretativa de la LFCE que nutra a los destinatarios con precisiones y criterios ejemplificativos.

Por último es importante destacar que existen otros temas que deben ser analizados a la luz de nuestra Constitución y ameritan una revisión a fondo de la materia de competencia. La sentencia del 25 de noviembre de 2003, evidentemente hará que las fracciones I a V del artículo 7º del Reglamento de la LFCE deben quedar sin efecto,[342] dado que el precepto que pretenden reglamentar está basado en un precepto de ley declarado inconstitucional. No obstante, dado el principio de relatividad de las sentencias de amparo, esta circunstancia deberá ser invocada por el particular afectado en el momento procesal adecuado.

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[340] Recientemente la Corte ha declarado inconstitucional el tipo penal de ejercicio *indebido* de funciones, así como la palabra *esencial* en la Ley de Fomento y Protección de la Propiedad Industrial, en virtud de que ambos términos propician la interpretación arbitraria de la autoridad.

[341] Aún cuando no fue invocado expresamente como parte de la argumentación, creemos que la Corte indirectamente había tratado dicho tema al resolver la inconstitucionalidad del artículo 132 de la Ley del Impuesto sobre la Renta. En dicha sentencia se hizo alusión expresa a la proscripción de las "fórmulas escopetazo" o normas genéricas de aplicación en el derecho administrativo-fiscal.

[342] Sobre el particular, es importante destacar que la Corte recientemente ha declarado la inconstitucionalidad de dos fracciones de dicho artículo reglamentario en sendos amparos interpuestos por una compañía refresquera.

LA INCONSTITUCIONALIDAD DEL ART. 10, FRACC. VII DE LA LEY FEDERAL DE COMPETENCIA ECONÓMICA Y EL CONTROL DE LA LEGALIDAD.

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El 25 de noviembre de 2003 la Suprema Corte de Justicia de la Nación (SCJN) en una decisión de Pleno, que dio a conocer parcialmente el pasado mes de febrero (Amparo en revisión 2589/96) aunque la decisión definitiva y los votos que se pronunciaron en contra (el engrose) aún no se entrega, declaró la inconstitucionalidad del Art. 10, fracción VII de la Ley Federal de Competencia (LFCE) La importancia de este pronunciamiento la analizamos brevemente a continuación.

El Art. 10 de la LFCE establece en su primer párrafo:

> *"Sujeto a que se comprueben los supuestos a que se refieren los artículos 11, 12 y 13 de esta ley, se consideran prácticas monopólicas relativas los actos, contratos, convenios o combinaciones cuyo objeto o efecto sea o pueda ser desplazar indebidamente a otros agentes del mercado, impedirles sustancialmente su acceso o establecer ventajas exclusivas a favor de una o varias personas, en los siguientes casos:"*

Y, a continuación, la Ley menciona en sus diferentes párrafos las conductas anticompetitivas sancionables como prácticas monopólicas relativas. El primer párrafo antes citado remite a tres artículos de la propia Ley que, como lo advierte el precepto, son elementos que habrán de analizarse para la procedencia de este tipo de prácticas; esos artículos son: el 11 que establece que el agente económico sujeto a investigación tenga Poder Sustancial dentro del Mercado Relevante y que, las conductas que lleve a cabo, correspondan precisamente al Mercado Relevante de que se trate. El Art. 12 establece por su parte los parámetros para determinar al Mercado Relevante y, finalmente el Art. 13, se refiere a los elementos que deben ser considerados por la Comisión Federal de Competencia (CFC) para determinar el Poder Sustancial del agente económico en cuestión, en el Mercado Relevante.

Por su parte, la fracción VII del Art. 10 es una disposición de orden general que pretende englobar a todas las demás conductas anticompetitivas no contempladas en las seis primeras fracciones del Art. 10, en los términos siguientes:

> *"VII. En general, todo acto que indebidamente dañe o impida el proceso de competencia y libre concurrencia en la producción, procesamiento, distribución y comercialización de bienes o servicios."*

Como puede apreciarse, la disposición otorga a la CFC, facultades generales para la definición de las conductas anticompetitivas, no previstas en la Ley, así como para su análisis y en su caso, para su sanción. La SCJN se pronunció en contra de esta disposición, por las razones siguientes:

Esa norma tan general, "no señala con precisión el marco a través del cual la autoridad administrativa puede ejercer la facultad que le fue otorgada para imponer sanciones a quienes incurran en una práctica monopólica relativa pues...( ) se concreta a señalar criterios genéricos...( ) lo cierto es que no especifica la conducta infractora que provoca la sanción administrativa, de manera tal que se deja a la autoridad encargada de la aplicación de la Ley, la facultad de determinar la infracción a la Ley que se da al caso concreto. Esa indeterminación produce inseguridad jurídica y viola el principio de legalidad previsto por el Art. 16 constitucional, ya que al no estar establecida en la Ley la conducta infractora que da lugar a las sanciones, el gobernado ignora los motivos por los que se hará acreedor a dicha sanción y, a la vez, permite a la autoridad respectiva, al carecer de la orientación necesaria para imponer la sanción aplicable, el ejercicio absolutamente discrecional de sus facultades."

El control de legalidad que llevó a cabo la SCJN en este caso, impide que la autoridad administrativa exceda las facultades que estrictamente le han sido otorgadas, sobre todo si entre esas facultades, como es el caso, esta prevista la definición de la conducta que debe investigar y, en su caso, sancionar.

Debido a que la SCJN ha declarado inconstitucional la fracción VII del Art. 10 que nos ocupa en este análisis, esta declaratoria puede tener un "efecto de cascada" con respecto al Reglamento de la Ley ya que en éste, el Art. 7° reglamenta a la citada fracción y

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define cinco tipos de conductas que constituyen prácticas monopólicas relativas. La pregunta que queda en el aire es: ¿esta disposición y consecuentemente, las conductas definidas en ella, correrán la misma suerte de la fracción que reglamentan?

Independientemente de lo anterior, el tema sigue siendo novedoso para nuestros tribunales al grado que la propia SCJN a pesar de estar convencida de que en la fracción VII del Art. 10 hay una violación del principio de legalidad, reconoce que no es fácil determinar previamente todas las conductas que se puedan presentar en materia de competencia económica, y así nos dice en la misma decisión:

"La tarea interpretativa desarrollada en esta materia -y con relación al Art. 28 constitucional, específicamente- revela que el concepto constitucional de monopolio, desde su elaboración original, no debía entenderse de manera estricta, a modo de designar únicamente el aprovechamiento exclusivo de alguna industria o comercio, sino que debía designarse con él a las prácticas, acuerdos y procedimientos descritos por el propio Constituyente.....cuando prohibía cualquier acto que en general evitara la libre concurrencia...'' (el subrayado es nuestro) Las leyes reglamentarias de la Constitución precisamente tienen el cometido de desarrollar, precisar y detallar a las normas constitucionales pero en materias que tienen su origen en un sistema jurídico como el del Common Law, el acotamiento de sus conceptos y de sus funciones, como nos dice la SCJN, no siempre es fácil.

Esta decisión de la SCJN por otra parte, pone en evidencia un problema de sistemática jurídica ante la aplicación de normas cuyo origen es el Common Law, como es el caso específico del derecho mexicano de competencia económica, sistema jurídico aquél en el que los criterios de legalidad y de constitucionalidad son distintos a los del derecho mexicano. El problema que se presenta en este caso consiste en que la SCJN utilizó el criterio tradicional de control de legalidad conforme al cual un órgano administrativo, que en el caso que nos ocupa fue la CFC, no debe tener facultades para sancionar conductas que no estén expresamente tipificadas en la ley. Sin embargo, hoy en día se han incorporado al derecho mexicano una amplia serie de materias que le permiten a México su transición hacia la modernidad (energía, medio ambiente, telecomunicaciones, competencia económica, garantías mobiliarias, etc.) pero que, sin embargo, no se acoplan en todos los casos a los criterios tradicionales del derecho mexicano. Es probable que este conflicto normativo acabará por resolverse a favor de la modernidad pero llevará muchos años sobre todo porque la noción tradicional de la legalidad no sólo está enraizada en la cultura jurídica mexicana sino que obedece a la necesidad de evitar el abuso de las autoridades.

La cuestión que nos permitimos señalar aquí y que resulta particularmente sensible a la luz de la decisión de Pleno que se comenta, puede formularse en los siguientes términos:

Entre las nuevas materias que se han incorporado en la última década al derecho mexicano, el derecho de la competencia es un ejemplo de un tema interdisciplinario, anclado en una amplia tradición jurídica (en Canadá y en los Estados Unidos, desde el siglo XIX) pero dependiente también, en gran medida, de la economía, lo que hace que tenga una evolución constante. Conductas que en un momento se consideraron debían ser objeto de análisis por parte del derecho de la competencia, por representar un presunto daño a los mercados, como puede ser el caso de la depredación de precios, sobre la que dice Bork: hoy en día no existe un empresario lo suficientemente insensato que esté dispuesto a tener una pérdida constante en su empresa en el afán de ganar un mercado. Se trata de prácticas que ya no reclaman la misma importancia, al menos cuando esas conductas se presentan en el ámbito interno. De la misma manera, otras conductas aparecen hacia futuro como conductas potencialmente dañinas de los mercados sin que antes necesariamente hayan estado previstas, como es el caso de los subsidios cruzados o la discriminación de precios, pero que deben ser analizadas y en su caso, sancionadas. Se trata del avance de la técnica en la producción de bienes y servicios, del empleo de nuevos métodos en la administración de negocios, en el manejo de la distribución, en la evolución de la economía, etc. que ahora se tienen en cuenta porque eventualmente pueden afectar a los mercados, cuando antes, esa preocupación no existía.

En estas condiciones es importante reenfocar el tema de la legalidad en aquellas disciplinas como la de la competencia económica, en donde el concepto de la legalidad debe centrarse en las normas que permiten a la autoridad administrativa determinar la existencia de nuevas conductas que puedan afectar los mercados y una vez que se hayan llevado a cabo los análisis, las mediciones e investigaciones correspondientes conforme a los parámetros establecidos por las normas, la autoridad administrativa podrá declarar que esa conducta determinada es sancionable y si se desea llevar más allá el control de la legalidad, que a través del amparo, los tribunales verifiquen si la determinación de conductas elaborada por la CFC fue correctamente hecha y, en su caso, la corrijan pero que no se plantee en estas materias el control de la legalidad a partir de suprimir cualquiera posibilidad de determinación de conductas por la autoridad administrativa en áreas específicas del conocimiento jurídico como las antes mencionadas, cuando para el avance del derecho en México y para la integración de este derecho y del país al comercio internacional, se necesita lo contrario.

¿COMPETENCIA JUSTA EN UNA ECONOMÍA GLOBALIZADA?

Autor: Dra. Hernany Veytia (México) y Dra. Flora Gancia (Italia).

Hoy en día a nadie le llama la atención que en las principales avenidas de las principales ciudades se vean las mismas marcas: los mismos negocios ofreciendo los mismos bienes o servicios. En los cines se exhiben en gran medida las mismas películas. Por las calles de diversos países rara vez circula un vehículo tan diferente que merezca prestarle atención.

Los grandes grupos trasnacionales han cobrado una fuerza increíble. No solo porque se encuentran presentes en todo el mundo, sino también porque poco a poco han cobrado conciencia de que existe el Darwinismo en la economía. El más fuerte se impone siempre y cuando conozca y se adapte a los mercados locales. Cualquier espectador de este nuevo mundo globalizado puede identificar varias características de lo que no dudaría en llamar “nueva economía”:

a) Imponente poder de la tecnología, especialmente el de la información tecnológica. La tecnología electrónica ha alcanzado pequeñas poblaciones en países en vías de desarrollo.
b) Países asiáticos han logrado un desarrollo en décadas equiparable al de los Estados Unidos o Europa.
c) La política no marca el ritmo de la economía, sino en muchas ocasiones por razones económicas se toman decisiones políticas.
d) El ritmo del cambio se ha apresurado.
e) La economía más que en la producción de bienes se centra en la aplicación del conocimiento, es decir en un aumento de prestación de servicios y gran desarrollo de la propiedad intelectual.
f) Las economías emergentes de Asía y Latinoamérica compiten por atraer inversión norteamericana y europea.

En suma: Vivimos en un nuevo mundo. Como el hombre del renacimiento, presenciamos no solamente una época de cambios, sino los albores de un cambio de época.

Los economistas han demostrado que el mercado tiene sus leyes. Por consecuencia si el mercado es global, tales leyes económicas también tienen un impacto global. En la última década han proliferado leyes en materia de competencia económica, pero casi todas ellas, se quedan dentro del ámbito de validez territorial de la autoridad que los emanó. La interrelación entre las autoridades en materia de competencia es una necesidad, pero hoy por hoy es una meta difícil de implementar. ¿Se puede seguir regulando localmente un mercado global? La Carta de la Habana dedicaba su capitulo Quinto a la represión de las practicas anti competititvas. Limitaba las practicas comerciales, privadas o publicas con carácter monopólico, sobretodo respecto a ciertos efectos negativos en el desarrollo y producción del comercio. Como se sabe nada se logró sobre la materia en las diversas rondas del GATT.

Pensar que dado que la Organización Mundial del Comercio (OMC) ha tenido éxito en el derrumbamiento de las barreras arancelarias y que también ha asumido responsabilidades en materia de agricultura, practicas desleales de comercio, “dumping”, propiedad intelectual e inversión pudiera ser el órgano adecuado para vigilar la interrelación de las diversas leyes en materia de competencia económica y los alcances de la interrelación de las autoridades locales[343] ha sido fuente de grandes críticas, particularmente porque se estaría constituyendo un organismo supranacional con demasiado poder y sin los debidos controles.

En varias legislaciones existe la figura de “posición predominante en el mercado”, sin embargo el tratamiento que se le da a la producción de bienes, a la distribución y las figuras de *joint venture* es diferente. Recuérdese por ejemplo el caso de *Microsoft*[344] en los Estados Unidos o la detallada regulación para los agentes y distribuidores en Europa, o el alcance de la palabra “efectos” respecto a las fusiones y adquisiciones.[345] Respecto a los organismos reguladores en materia de economía en todo el mundo, es decir quienes tienen en sus manos la interpretación, aplicación y muchas veces también vigilancia de las leyes de competencia es evidente una gran diferencia respecto al presupuesto con que cuentan, la capacitación y experiencia de sus miembros.

[343] No pasa desapercibido el papel que hasta la fecha ha realizado el *Internacional Competition Network (ICN)*

[344] En 1994 Microsoft fue acusado de abusar de una posición dominante y monopolio tanto en los Estados Unidos como en Europa . Particularmente por la obligación de los fabricantes de computadoras de incluir por largos periodos el software de Microsoft.

[345] Véase la opinión del juez Learned Hand en *Alcoa* en 1945.

El problema en materia de competencia económica es tan serio, que pudieran utilizarse, como de hecho ya sucede, procedimientos administrativos o judiciales iniciados con el único propósito de eliminar a los competidores o por lo menos de utilizar el marco relativo a la competencia o a de figuras similares como la del "dumping" para distorsionar un sano mercado de libre competencia, levantando con esto nuevas barreras no arancelarias que limiten, el libre flujo de bienes, servicios y capitales ocasionando con ello, a fin de cuentas, un perjuicio a los consumidores finales. En otras ocasiones la iniciativa puede no venir de los directos competidores sino de un particular gobierno de un país. encontrar a través de las normas de competencia económica una medida no arancelaria que evite el libre flujo de bienes y servicios en un determinado país.

¿Cuál es el modelo de economía que sería ideal para el siglo XXI? Hasta ahora los mercados mundiales únicamente parecen abiertos y libres para las grandes trasnacionales, sin embargo en la medida de que con el acceso a medios electrónicos se fortalezca la comunicación es de esperarse que las pequeñas y medianas industrias no solo alcancen a competir sino que incluso pudieran llegar a desplazar a las grandes empresas. Sin embargo para que esto suceda se requiere de bastante tiempo, que puede ser un plazo tan largo o breve como las condiciones jurídicas, sociales y políticas lo permitan. Es de esperarse que las reglas de competencia y todo el derecho económico jueguen un papel muy importante en esta transición.

En materia de competencia económica, como en casi todo el derecho económico, se ha dicho que lo mejor es otorgar tanta libertad como sea posible y solo tanta reglamentación como sea necesaria, sin embargo al concretar estos principios puede haber diversos criterios. Por ello consideramos que la clave está en definir por lo menos ciertos lineamientos para todo el mundo. El problema no es elegir al organismo, instituto, o personaje que tenga la *auctoritas mundial* para hacerlo, sino en logran primero un acuerdo sobre qué es lo deseable y hasta donde conviene regular lo que posiblemente requiere de libertad para poder desarrollarse. Por otra parte si no se cuenta con ciertas normas pueden desaparecer las pequeñas o medianas industrias por el canibalismo económico de los grandes grupos que hoy por hoy tienen la posibilidad de adquirir los activos, fusionarse o simplemente hacer tal competencia que los saque del mercado.

Principios

Hoy por hoy en todo el mundo aún continúa vigente el principio de soberanía e independencia de las autoridades locales, así hasta la fecha nadie ha cuestionado los principios e Territorialidad, (Ámbito espacial de validez), Personalidad (Las decisiones solo vinculan a las partes involucradas), Protección, (Se "teme" a las concentraciones y a los monopolios, pero pocas veces existe una estrategia de "iniciativa" para lograr que la industria nacional logre estándares mundiales) y Universalidad.[346]

Sin lugar a dudas en estos últimos años han aparecido otros valores a tutelar en el marco de la competencia económica. Por ejemplo hoy nadie pondría en duda la **transparencia**. Hoy por hoy en varios países son accesibles las decisiones de las autoridades en materia de competencia. El Principio de Transparencia exige que las leyes sean claras y la interpretación de la autoridad sea adecuadamente motivada y fundada. Es decir reglas que otorguen confianza a la comunidad empresarial y otorguen un trato nacional a los países a quienes se le deba tal tratamiento.

Otro principio es el de analizar **caso por caso** dedicando el tiempo que sea necesario a los hechos, esto podría pensarse que sería peligroso otorgarle tanto grado de **discrecionalidad** a la autoridad, sin embargo si se contara con personal capacitado, responsable y ético sería lo ideal. Cuando no se cuenta con personal adecuado, entonces se "burocratiza" el procedimiento y surge el **super-reglamentarismo**, de tal forma que se convierten en simples "aplicadores" de un criterio, si el volumen de transacciones fuera tan elevado y el sistema para su implementación funcionara sería esto preferible a la discrecionalidad, pero nosotros consideramos que lo mejor sería confiar en la autoridad. En varios países la autoridad solo puede hacer lo que está expresamente facultada, así que la cuestión se torna en detallar cuales serían las atribuciones de la autoridad. Dicho en otras palabras lo deseable sería que la autoridad no interviniera, salvo en casos notoriamente relevantes.

La diligencia al llevar a cabo sus funciones, Hay países donde una fusión o una adquisición queda sujeta a la autorización de la autoridad y esta no estudia el asunto con diligencia. De hecho en muchos casos se aprueban por *afirmativa ficta*, en el sentido de que al no haber decidido en el tiempo reglamentario se entienden aprobadas. Esto me parece adecuado, pero sería mejor que sí se evaluaran las consecuencias de cierto acto.

[346] Sobre el tema puede verse ACTES ET DÉBATS DE COLLOQUE (Lyon 2, marz 2001), L´Organisation Mondiale du Commerse: Vers un Droit Mundial du Commerse?, The World Trade Organisation: Towards a World Trade Law? Bruxelles 2001.

Respecto al tiempo también sería deseable que las decisiones se analizaran con miras no solo a resultados presentes sino al impacto que tendría a mediano o largo plazo.

Presupuesto, En muchos países el hecho de no contar con los recursos necesarios les impide aplicar su legislación, particularmente en los lugares donde no existe "cultura de sana competencia". Llama la atención por ejemplo que Francia, Alemania, Suiza, Japón, dediquen menos porcentaje de su GDP que México y este que Estados Unidos, Reino Unido o Australia.

Personal capacitado.- La materia de competencia económica es relativamente nueva en muchos países. Los expertos generalmente se "han formado" dentro de la autoridad administrativa encargada de hacer cumplir las reglas de competencia económica. Nuevamente las estadísticas demuestran que notoriamente los Estados Unidos superan con mucho el número de personas involucradas en materia de competencia económica, más de 1800, mientras que la Unión Europea cuenta menos de 600, y México no llega a los 200. Generalmente en los organismos dedicados a la competencia económica se dividen en antimonopolios y fusiones. En el primero de los casos llama la atención que Estados Unidos dedica unicamente el 14% de sus empleados a esta tarea, La Unión Europea el 35%, México el 21%. En cambio en Fusiones y Adquisiciones llama la atención como es Inverso: En Estados Unidos es el 38%, mientras que la Unión Europea el 16% y México tan solo el 5%.[347]

Encontrar el **equilibrio entre la libertad contractual y la regulación** requerida. Deben existir parámetros mundiales muy similares en todo el mundo, sin embargo no debe caerse en la ingenua postura de que basta emanar reglas para evitar problemas en las fusiones y adquisiciones. Citemos algunos casos muy sonados: el primero *GE/Honeywell*, donde Estados Unidos la aprobó pero en Europa no se aprobó la fusión y ocasionó que la transacción no se llevara a cabo. El segundo el caso de la fusión Boing-Mc Doncel Dougles a finales del 1996 Boing anuncia su fusión con Mc Doncel Douglas y obtiene la autorización americana en julio de 1997. El grupo asi creado detentaba las dos terceras partes del mercado de la aviación civil, y el proveedor del ochenta por ciento de las compañias aereas lo que la colocaba en una situación de monopolia respecto a la fabricación de aparatos en ciento veinte lugares. Esta fusión de colosos amercianos ponía en peligro la situación de Airbus por la dimensión adquierida del nuevo grupo, tanto para la aviación militar como para la civil. Por tal motivo la Comisión Europea se mostró reticente y se opuso a tal fusión. Por acuerdo del 30 de julio de 1997 se autoirzó la fusión en virtud de que se habían dado por terminado los contratos de exclusividad celebrados co las tres grandes compañías aéreas americanas (American Airlines, Delta y Continental). Manteniendo separados los servicios comerciales de las dos empresas.

Otro caso donde la creatividad jurídica y estrategia comercial lograron un buen final fue en el caso de Vivendi y Canal + respecto a la distribución de catalogo cinematografico de Universal. La operación fue exitosa porque se logró separar los derechos cinematográficos de la empresas Universal que corresondian al grupo canadiense Seagram, de los portales internet, otorgando a todos los usuarios un trato no discriminatorio y a la misma tarifa. La Comisión Europa pudo declarar que así la operación era perfectamente compatible con el mercado europeo.[348]

También tuvo éxito la concentración que se llevó a cabo entre AOL y Time Warner, dando por terminado el vínculo que le unía a Bertelsmann. La Sociedad de Medios más importante en Europa y convirtiéndose en su competencia directa.[349]

A la fecha en que estamos redactando este artículo en Estados Unidos uno de los accionistas más importantes de lo que fue Chrysler está demandando a DaimlerChrysler por haberle engañado respecto a que se trataba de una fusión de iguales y no una adquisición del Grupo alemán. (lo que hubiera generado el pago de una prima adicional por cada acción). No se sabe todavía cuál sería el resultado de este litigio, pero la realidad es que las megafusiones no siempre resultan en la materialización del sueño original y en nada hubiera servido que la autoridad reguladora americana o europea dictara normas, cuando existían –si fuera el caso- intenciones o "estrategias de negociación" poco transparentes por una de las partes.

Al redactar este artículo no nos pasó inadvertida la labor del International Competition Network of Governments, pero consideramos que todavía no es el momento de evaluar sus resultados, sino animar a los diversos gobiernos a participar activamente en dichos trabajos. En muchos organismos internacionales, suele suceder que se limitan los recursos en tiempo y fondos para la participación

[347] Todas las estadisticas están tomadas de Ky P. Swing Jr. : Competition ruoes for the 21 Centruy, Principles From America's Experience. Kluwer 2003.

[348] JOCE 31/10/00, C 311, P3; Caso no Comp / M. 2050-Vivendi/Canal+/Seagram; en http://europa,eu.int/Comm/dgs/Compétition/index-eu.htm; *Le Monde* 15-16 octubre 2000, p. 1, 19, 17

[349] Bulletin de L'UE, octobre 2000, p. 25 DN: IP/00/634; DN: IP/OO 1145

activa. Es valida la crítica de que el trabajo urgente es el peor enemigo del trabajo importante. El caso de México, la verdad sea dicha, es un satisfactorio ejemplo de que cuando existe voluntad política se pueden alcanzar resultados en poco tiempo. Cualquier abogado mexicano o quien se encuentre al interno de la Comisión Federal de Competencia Económica percibe que hay mucho que hacer, pero comparado con el resto del mundo es increíble todo lo que se ha logrado en tan solo una década. Esperemos que se siga evolucionando y corrigiendo los errores cometidos, desde la nada clara redacción de la ley hasta la aplicación de los criterios para la investigación que lleva a cabo la CFC.

EUROPEAN COMMISSION'S PROPOSAL FOR A REVISED TRANSFER OF TECHNOLOGY BLOCK EXEMPTION REGULATION (TTBER) AND ACCOMPANYING GUIDELINES: ICC COMMENTS

Prepared by the Commissions on Competition and on Intellectual Property

Introduction

ICC believes that innovation is an essential motor for sustainable economic growth and an open and competitive market economy. Innovation is fostered through both an effective intellectual property rights system which allows the protection and dissemination of intellectual assets, as well as a competition framework which allow competitors to compete fairly.

In the area of licensing, it is essential that the two policies work together to encourage the dissemination of technology, which is of critical importance for growth. Competition law should therefore encourage pro-competitive licensing. Unjustified regulatory constraints on the transfer of technology are likely to result in a sub-optimal level of consumer welfare, an inefficient allocation of resources and stifled innovation. These factors are particularly important, given the nature of technology licensing in the international competitive marketplace.

In view of the importance placed on innovation in the European Union's strategy to become one of the most dynamic economic regions in the world, it is essential that the competition framework in the EU takes the above considerations into account.

In doing so, it should adopt a sympathetic view of the dynamic efficiencies associated with the licensing of intellectual property, and recognize business requirements to integrate complementary intellectual property and to avoid costly infringement litigation. This is especially true in view of the ongoing reforms to "modernise" and decentralize the application of EC competition law.

General principles

ICC is of the opinion that the Commission's future policy in the field of technology licensing should be solidly based on the following principles:

1. The mere possession of an intellectual property right should not give rise to a presumption of the existence of market power. Instead, the existence of such market power should be determined by evaluating the availability of, for instance, close substitutes. In doing so, the Commission should take account of both current and likely potential participants in the relevant product or technology markets.

2. The Commission should recognize that exclusivity, field of use, territorial and other intrabrand limitations in intellectual property licences normally serve pro-competitive ends in allowing the licensor to exploit its intellectual property more efficiently. This is particularly relevant for SME's that need to be able to exploit their technologies through licensing.The focus of the Commission's approach should be the question of how the arrangement may affect interbrand competition, i.e. on whether the licensing agreement may be a sham horizontal cartel, and if not, whether the licensing agreement is likely to significantly suppress competition in competing technologies or related markets, or is likely to significantly raise barriers to entry without resulting in sufficient compensating efficiencies. The assessment under Article 81 should concentrate on the ex ante situation (i.e. the economic situation at the time the licensing agreement is concluded) and on whether, at that moment in time, the licence was likely to have a negative effect on competition that would have existed in the absence of the licence. This principle should also be applicable to the question whether parties are (potential) competitors or not, as in Article 3 of the TTBER presently in force. To avoid deterring pro-competitive licensing, a competition authority or a court should not be allowed to second-guess, maybe many years later, whether an alternative licensing arrangement might have (had) a less restrictive effect on competition.

3. The future block exemption should provide adequate legal certainty for licensing arrangements that have been legitimately concluded. It should preferably include rules which are simple, clear and relatively easy to apply, both for the companies involved, as well as for courts. By the same token, it is of the utmost importance that the Guidelines provide a clear and simple framework for assessment which allows situations which are non-infringing at first glance to be filtered out. In this respect the Guidelines should be clearer about - and provide more examples of - situations where contractual provisions included in intellectual property licences are, upon superficial inspection, restrictive but objectively necessary and inherent to a licence agreement in a specific situation and therefore not infringing Article 81(1). They should also explain by specific examples how the agreement at issue may significantly affect competition in the relevant markets concerned.

With the entering onto force of Regulation 1/2003, the need for legal certainty, in particular for SME's, has become even more important than in the past, since formal legal certainty for specific cases as a rule can no longer be obtained from the Commission.

ICC's fundamental concerns

1. The market share thresholds of Article 2 fail to recognize the nature of dynamic competition and will often be an incorrect parameter for the measurement of market power in the market(s) affected by intellectual property licences. The application of market share ceilings as a "hard and fast" rule in markets where dynamic competition is key is likely to result in an unreliable assessment of market power, as the test in itself focuses on actual market positions rather than the competitiveness of the markets concerned over a longer period of time. This applies in particular in technology markets where market shares are to be calculated on the basis of existing product markets. A closely related concern is that the continuous application of a market share test is likely to "punish" companies which have successfully developed and introduced new technologies by taking away the benefit of the exemption in the event their markets shares increase so as to exceed 20% or 30% of the relevant technology or product markets. While the Commission acknowledges that the non-applicability of the exemption does not imply that the agreement at issue infringes Article 81, the sanction of being expelled from the safe harbour of the TTBER and exposed to legal challenges in court is disproportionate, and potentially discourages licensing of technology and innovation in general. Account should be taken of the fact that under Regulation 1/2003, Article 81 will mostly be applied when conflicts have emerged many years after the conclusion of the licence agreement at issue. A more realistic approach under the future regulation would be to allow authorities to withdraw the applicability of the TTBER if after e.g. 7 years, a sufficient number of viable R&D centres does not effectively restrain the use of any market power achieved by a party as a result of the licence agreement concerned (cf. Article 4(1) of the R&D BER).

2. The proposal fails to acknowledge that intrabrand restrictions may bring about a number of efficiencies. This concern is particularly pertinent with respect to licence arrangements with non-competitors. Here, the Commission seeks to simply apply its methodology developed in the framework of vertical restraints under Regulation 2790/1999 by listing a number of territorial restrictions as hard core restrictions. However, there are a number of reasons why this approach is not justified. First, this approach does not take account of the fact that licence agreements enabling non-competitors to use a technology (e.g. to manufacture a novel product) are generally pro-competitive. The Commission's reasoning in paragraph 23 of the Guidelines concentrates on the fact that licensees are selling their own product which implies that there may "thus" be more competition to protect. However, ICC respectfully submits that the key observation is whether such competition would have existed in the absence of the licence. The increased emphasis on intrabrand restriction in Article 4(b) also conflicts with the Commission's own observation in the Evaluation Report that the future exemption should be less focussed on intrabrand restrictions than Regulation 240/96. Furthermore, the Commission does not seem to acknowledge that, as a rule, licensees need to invest more than mere distributors, and hence need more protection .

3. Obligations of the licensor not to exploit the licensed technology himself seem to be blacklisted by the Guidelines and the proposed TTBER . Presently, such an obligation is exempted. No evidence is being adduced that the same should not be the case in the new TTBER (unless the obligation is reciprocal and concerns competing technologies). This blacklisting particularly would impede licensing by SME's.

4. The proposed TTBER blacklists asymmetrical field of use restriction (and running royalty) provisions in cross-licences between competitors under Article 4(1)c. It is however widely acknowledged that cross-licences between competitors may result in a variety of efficiencies, in particular the elimination of reciprocal potential blocking positions, and are

necessary to cut through patent thickets that are increasingly prevalent in many sectors of industry. Such cross licences allow companies continued freedom to design their products, and generally do not restrict competition that would have existed in the absence of the licence. Any restrictions on the licensee's ability to design and manufacture new competing products do not arise from the cross- licensing as such, but from the patent system and rights it legitimately creates. Asymmetrical cross-licensing and running royalties often cater for imbalances in the patent portfolios of the parties. Making such arrangements "hard core" may inhibit procompetitive cross-licensing. Only where a cross-licence agreement between competitors would put an end to the use of its own technology by any of the parties, e.g. by locking it into the technology licensed from the other party, should this be considered hard core and excluded from.the safe harbour of the TTBER. Furthermore, the delimitation in the Guidelines between output restrictions, customer restrictions, product market restrictions, and field-of-use restrictions is not clear and needs further elaboration.

The draft regulation excludes mere non-assertion agreements from the TTBER by definition. The Guidelines also take a negative approach to field of use provisions in settlement agreements (See paragraphs 196-201). Such provisions however are commonly used to achieve "patent peace "because they help balance the parties' exchange of value. Settlement of patent disputes would be much more difficult under the proposed Guidelines.

5. In dealing with package licensing in the proposed Guidelines, the Commission does not appear to appreciate that the number of essential patents of a patentee participating in a package licence actually used by a licensee generally is not a relevant or even practically workable criterion for setting royalty levels. A licensee is interested in access, not in the number of reasons why he does not have access.

6. The Commission proposes replacing the current Commission Notice on subcontracting agreements with a corresponding framework of analysis in the Guidelines. ICC supports this approach. However, the text as currently suggested is significantly harsher than the existing Notice in that it requires that ".. the licensed technology or the supplied equipment is necessary for the purpose of producing the goods…". As in the current Notice, the Guidelines should only require that the subcontractor receives designs, other proprietary information or tools without which he would not be able, under reasonable conditions, to manufacture the contract products. Moreover, the draft Guidelines make the non-applicability of Article 81 dependent on a number of circumstances which so far have not been taken into account, in particular the reduction of the subcontractor's incentive to innovate, possible foreclosure effects and increased potential for collusion (para 39). The emphasis on these "effects", which are hardly verifiable for companies wishing to outsource the production of goods, may have a chilling effect on subcontracting arrangements. It would be better to emphasize that, in view of the nature of the market for subcontracting services, competition problems will only arise in exceptional circumstances.

7. The scope of the future TTBER for know-how licence agreements should be aligned with Regulation 240/96 to cover know- how licensing agreements which involve "substantial" know- how (meaning information which must be "useful" i.e. can reasonably be expected to be capable of enabling the licensee to manufacture the contract products), rather than requiring that the information must be "indispensable" for the manufacture or supply of the contract products.

8. The proposed TTBER should include an explicit safe harbour for second-sourcing licensing agreements. Such agreements are important and frequent in practice, and have never been a reason for concern to competition authorities.

9. The transitional period proposed in Article 9.2 of the draft TTBER (ending 31 October 2005) is far too short, and agreements exempted under the present TTBER should remain exempted for their lifetime as long as the new TTBER will apply (similar to the transitional rule under the present TTBER). The proposed transition rules would cause many disputes between licensees and licensors with respect to current licensing agreements.

ICC's Position

ICC appreciates the Commission's efforts to replace the current block exemption Regulation 240/96 by a new, less formalistic regulation which takes economic insights into consideration. ICC however believes that the current proposal unnecessarily limits pro-competitive licensing arrangements and does not meet the international business community's need for clear and easy-to-apply rules. ICC suggests that it might be better to maintain the present TTBER until its expiry in 2006, allowing for more time to consider the difficult issues at stake, as it hardly seems possible to change the present draft TTBER and Guidelines in time to adequately improve the conditions for assessment of licensing agreements by the numerous decision makers competent after the entering into force of Regulation 1/2003.

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La organización mundial de las empresas

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