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# Antitrust In a World of Interrelated Economies: The Interplay Between Antitrust and Trade Policies in the US and the EEC

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ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES: THE INTERPLAY BETWEEN ANTITRUST AND TRADE POLICIES IN THE US AND THE EEC. By *Mário Marques Mendes.* Brussels: Editions de l'Université de Bruxelles. 1991. Pp. xii, 285. 1,523 BF.

In *Antitrust in a World of Interrelated Economies,* Mário Marques Mendes[1] provides an insightful account of the conflict between antitrust and trade policy objectives in both the United States and the European Community (EC).[2] His main contention is simple indeed: antitrust, which aims to promote competition, and trade policy, which aims to protect domestic industry, operate at cross-purposes. Mendes skillfully elaborates this thesis throughout his book, showing the reader how the two policies conflict and how the enforcers of trade policy might better recognize the concerns behind antitrust policy. His book is full of insights into policymaking and decisionmaking at all levels. Mendes traces the history of antitrust and trade enforcement in the General Agreement on Tariffs and Trade (GATT), Organization for Economic Cooperation and Development (OECD), and United Nations Conference on Trade and Development (UNCTAD) as adroitly as he discusses infighting between the Department of Justice and the International Trade Commission. His remarkable ability to discuss two major policies in two legal systems at once is ultimately the real strength of this book.

Mendes divides the text into three parts. The first, "International Trade and International Antitrust: An Overview," summarizes the history of trade liberalization in the GATT and trade protection despite the GATT (pp. 19-26). It then reviews the history of antitrust enforcement, noting that despite its mainly economic bases, one early political motivation for enforcement stemmed from an association of cartels with Naziism (p. 34). Mendes points up the limitations of purely domestic antitrust enforcement and decries the lack of regulation of restrictive business practices on the international level.[3] His

1. Mário Marques Mendes practices law in Lisbon and Brussels and teaches International Trade Law at the Center for European Studies of the Portuguese Catholic University. —Ed.

2. Mendes' strategy is more global than most. Many scholars have noted the interrelationship of antitrust and trade in the American setting, *see, e.g.,* Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective,* 56 ANTITRUST L.J. 409 (1987), or in the European setting. *See, e.g.,* Jacques H.J. Bourgeois, *Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective,* (pts. 1 & 2) 17 INTL. BUS. LAW. 58 (1989), 17 INTL. BUS. LAW. 115 (1989). The scholars who explore the relationship between antitrust and trade in the European context often focus on conflicts between Member State industrial policy and EC competition law, rather than examining the conflicts between the policies at the Community level. *See* HELEN PAPACONSTANTINOU, FREE TRADE AND COMPETITION IN THE EEC: LAW, POLICY AND PRACTICE 202-08 (1988).

3. Others, too, have called for greater international coordination in the antitrust area. Sir Leon Brittan, former Commissioner in charge of competition, called for the inclusion of antitrust

discussion of the lack of international antitrust enforcement is slightly out of date in that it fails to mention the 1991 agreement between the EC and the United States to coordinate antitrust enforcement.[4] While currently in force, France is presently challenging the validity of the agreement in front of the European Court of Justice.[5]

The second part of the book, "The U.S. and EEC Antitrust Systems," completes the foundation for the intricate arguments of Part III. Mendes' taxonomy of the interrelationships relevant to his inquiry begins in this part. He skillfully addresses the practical aspects of enforcement in the U.S. and the EC before finding that "all these aspects of antitrust enforcement cannot be looked at separately. They are all interrelated" (p. 68). Mendes further notes that, especially in the U.S., antitrust is not only complex in itself but also constitutes part of a broader economic policy (p. 65). The importance of economic criteria in American antitrust evaluations cannot be underestimated, while economics plays a lesser role in Community decisionmaking.[6] Mendes goes too far, however, when he characterizes the role of eco-

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on the agenda of the next GATT round. He said: "An international body with powers to seek out and destroy cartels may come one day, but the international community is clearly not ready to contemplate this possibility yet. For the time being we should think about a clear agreement as to the rules relating to cartels . . . ." *Brittan Calls for GATT Code on Competition,* AGENCE FRANCE PRESSE, Feb. 3, 1992 (Econews section), *available in* LEXIS, Europe Library, ALLNWS File.

4. Competition Laws Co-operation Agreement 1991 (EEC-USA), 4 C.M.L.R. 823 (1991). The agreement, signed on September 23, 1991, is not legally binding but sets up a formal procedure for the exchange of information about companies suspected of antitrust infringement. The arrangement does not compromise the independent decisionmaking of each legal system's authorities, but both sides have agreed to abide by the principle of international comity, whereby each side could request that its interests be taken into account by the other. Antitrust authorities from the United States and the EC first met in November, 1991. *See* Coopers & Lybrand, *Trade Relations EC-USA and EC-Canada,* EC COMMENTARIES, Apr. 15, 1993, § 5.10, *available in* LEXIS, Europe Library, EURSCP File.

5. Case C-327/91, France v. Commission (initiated on 16 Dec. 1991 (pending)). A notification of the bringing of the action is published at 1992 O.J. (C 28) 4. France argues that the agreement with the United States is *ultra vires* because it is not an administrative agreement, but an international agreement under Article 228(1) of the Treaty of Rome that must be concluded by the Council. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 228(1); *Competition: France Mounts Court Challenge to EEC-US Anti-Trust Agreement,* EUR. REP., Jan. 11, 1992, at 4 (Business Brief No. 1734), *available in* LEXIS, Europe Library, ALLNWS File; Charles Goldsmith, *EC Defends Its U.S. Antitrust Pact,* INTL. HERALD TRIB., Jan. 11, 1992 (Finance Section), *available in* LEXIS, Europe Library, ALLNWS File; *see also* Alan J. Riley, *Nailing the Jellyfish: The Illegality of the EC/US Government Competition Agreement,* 13 EUR. COMPETITION L. REV. 101 (1992) (arguing that the agreement is *ultra vires*).

6. Ascertaining the precise role economics will play in future competition evaluations in the EC is difficult because of the appointment this year of a new Competition Commissioner, Karel van Miert. The former Commissioner, Sir Leon Brittan, recognized the importance of economic efficiency criteria: "[O]ur approach is an economic, rather than a legal one. Competition law is rightly concerned with substance rather than form." SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 37 (1991). There are fears, however, that van Miert will deemphasize economics:

> In anti-trust issues, Mr[.] Van Miert says, competition should not be the only criterion: industrial, social and other factors also apply. Indeed they do, but they are not the business

nomics in the EC as "minor."[7] In support of his contention, Mendes cites to the Sixth, Ninth, Thirteenth, and Sixteenth Reports on Competition Policy, but he neglects to examine more recent reports that place a greater emphasis on economic efficiency in the EC.[8]

Having found the goals of antitrust to be superior to those of trade policy by virtue of their promotion of competition and free trade, Mendes defines the useful limits of domestic antitrust policy by commencing a detailed investigation of the vagaries of international subject matter jurisdiction (pp. 86-101). The foreign sovereign immunity, act-of-state, foreign sovereign compulsion, and other defenses may prevent a domestic antitrust policy from functioning effectively in the international arena (pp. 94-101). Mendes notes that where an industry can choose between bringing an antitrust suit or an import relief proceeding, it will invariably choose the latter because the antitrust defenses will not apply (p. 166).

Both legal systems tend to downplay international comity considerations.[9] Moreover, both the U.S. and the EC tend to encourage or approve antitrust violations abroad, as the U.S. statute exempting export cartels from antitrust suits illustrates.[10] A fuller discussion of the statutory exemptions to the U.S. and EC antitrust laws would have

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of the competition commissioner. . . . If the result is to be a productive compromise, it is above all necessary that the competition commissioner should fight his corner.

*Keep Competing*, FIN. TIMES, Jan. 15, 1993, at 13.

7. Mendes claims that, "[i]n a word, economic efficiency considerations when confronted with other concerns, be they market integration, the protection of specific industrial sectors or regions or even that of users and workers, have consistently played a *minor role* in the context of EEC competition policy." P. 83 (emphasis added).

8. *See* p. 118 nn.15-17; *see also* COMMISSION OF THE EUROPEAN COMMUNITIES, XXIST REPORT ON COMPETITION POLICY 42 (1992) (noting "one important limitation on the possibility of relying on cooperation and restructuring operations: companies can not be allowed to eliminate effective competition"). Mendes also cites to the earlier reports when he discusses the role of industrial policy in the Commission's decisionmaking. Pp. 241-43. There, he mentions the Sixth, Eleventh, and Seventeenth Reports, but it is striking that the Seventeenth Report is less openly in favor of accommodating industrial policy concerns in competition decisions than the earlier reports. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH REPORT ON COMPETITION POLICY 51 (1988); *see also* COMMISSION, XXIST REPORT at 42-43. Industrial policy is, however, receiving greater legitimation *outside* the competition area: the Single European Act of 1986 added Article 130f to the Treaty, which aims to "strengthen the scientific and technological basis of European industry." EEC TREATY art. 130f. If the Maastricht Treaty is ratified by the Member States, an entire title of the Treaty will be devoted to industrial policy. TREATY ON EUROPEAN UNION [MAASTRICHT TREATY] art. G(38) (replacing EEC TREATY Title VI with Title XIII, art. 130).

9. Pp. 86-101. The agreement between the United States and the EC takes comity into account, however. *See supra* note 4.

10. Pp. 70-71. The Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-65 (1988), grants limited immunity to export trade associations that do not restrain domestic trade or the export trade of other domestic enterprises. Webb-Pomerene associations may still be held to violate the EC antitrust laws, as in the *Wood Pulp* decision. Joined cases 89/85, 104/85, 114/85, 116-17/85, and 125-29/85, A. Ahlström Oy v. Commission, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988) (holding no foreign sovereign compulsion defense because export cartel was authorized but not compelled by the Webb-Pomerene Act).

been appreciated, especially as the U.S. exemption for export cartels[11] and the EC exemption for crisis cartels[12] seem to accommodate trade policy objectives.

At this point, Mendes attempts a preliminary comparison between the U.S. and EC antitrust systems that rings true in most respects but becomes deeply problematic when he explores it further in Part III. He asserts that "[t]he concentration one finds in the Common Market is in striking opposition to the decentralized U.S. institutional and enforcement structure" (p. 82). This is surely correct. The United States has a greater arsenal of antitrust enforcement agencies and instruments, while in the EC the Commission has greater powers than the Justice Department and the F.T.C. combined.[13] Moreover, the American approach to antitrust is more deeply rooted in concerns of economic efficiency than that of the Community, with its "objective of market integration . . . [as] the most important of the goals of EEC competition policy" (p. 74). Given the centralization in the EC, it is not surprising that "antitrust appears more obviously as one set of principles which has to be balanced against other equally relevant considerations" (p. 138). In the United States, the reconciliation of antitrust with other policies, such as trade, may be achieved through interagency negotiation rather than intraagency decision, as the author's explanation of the LTV-Republic merger case illustrates so well.[14]

The author's logical assumptions in his preliminary comparison between the two antitrust systems in Part II lead to perplexing conclusions when applied in Part III. Mendes finds that, "at least in theory," the reconciliation of trade and antitrust should be easier in the EC

11. Mendes discusses U.S. statutory exemptions. Pp. 70-73. The export cartel exception is the most important. *See supra* note 10.

12. "Crisis cartels" are organizations of producers in industries under severe economic pressure. In general, the Community has a wider and more flexible range of antitrust exemptions than the United States. *See* pp. 73-81. The Commission may grant individual or group exemptions for those restrictive practices which violate Article 85(1) of the Treaty, but satisfy the criteria of Article 85(3). *See* EEC TREATY art. 85. The Article 85(3) criteria are often met, so the number of exemptions granted is quite high. Two of the most utilized group exemptions concern specialization agreements and research and development agreements. Commission Regulation 417/85 on the Application of Art. 85(3) to Categories of Specialization Agreements, 1985 O.J. (L 53) 1; Commission Regulation 418/85 on the Application of Art. 85(3) to Categories of Research and Development Agreements, 1985 O.J. (L 53) 5.

13. *See* p. 82 (noting in particular that the Commission has the power to grant individual and block exemptions from the antitrust rules, and that its "notices" have greater weight than the Department of Justice's "guidelines").

14. Pp. 239-48. The LTV-Republic steel merger was originally prohibited by the Department of Justice. The Department reasoned that a merger between the third and fourth largest producers would increase concentration in the domestic market and likely lead to higher prices. After the President and the Commerce Department pressured the Justice Department to change its ruling, it upheld the merger, albeit with certain conditions attached. *See* pp. 239-48; Peter Bruce & Terry Dodsworth, *Republic-LTV Deal is Approved,* FIN. TIMES, Mar. 22, 1984, at 42; *Rescued Merger, Lost Opportunity,* N.Y. TIMES, Mar. 24, 1984, at A22.

than the U.S. because of the centralization of power in the Commission and the fact that all EC trade laws contain "Community interest" clauses requiring the consideration of other policies and interests before adopting trade sanctions (p. 168). He goes on to find, however, that the clauses do not really work; the Commission consistently upholds the interests of industry over the interest of the public in free competition (p. 169). Mendes becomes rather irate with the Commission:

> The rare cases in which it is said that competition considerations were taken into account do not show a change of attitude on the part of the Community authorities. The approach is confusing, if not puzzling; the motivation is poor, if at all existent; the inconsistencies are blatant if one compares such cases with usual analysis of EC institutions. [p. 171]

He finds that, "[i]n short, what EC institutions are doing is promoting Community industrial policy. . . . The risk indeed exists, then, that the promotion of an industrial policy within the Community . . . may degenerate into a clear expression of outright protectionism."[15] The U.S. situation compares favorably with that in the EC. Mendes notes:

> Conversely, and strikingly enough, it is in the United States — where "public interest" clauses in trade laws are ineffective or non-existent, and where there are not only one but several agencies involved in antitrust and trade matters — that, through the efforts of the antitrust enforcement authorities, competition arguments have been regularly submitted, sometimes successfully, in trade proceedings . . . . The fact is that much more was done, in apparently a not so favorable legal and institutional environment, than in the EEC, to bridge those differences. [p. 177]

Yet, in the final part of the book, Mendes inexplicably reverses his position again. The book begins to feel like a detective novel — the United States is "guilty" because it has no "public interest" clauses, too many agencies, and the common law tradition. No, actually the EC is at fault because its "Community interest" clauses have no real effect. Suddenly, on page 243, the United States is fingered again: "while in the EEC antitrust is understandably balanced against other policy concerns, any attempt to adopt the same approach in the United States . . . may be unrealistic." Mendes offers little support for this last reversal. He cites several of the Commission's Reports on Competition Policy and Article 130f of the Treaty of Rome, but gives no practical "in-the-trenches" advice as before on how the system really works.[16] As a result, his conclusion sounds a little hollow: "In

15. Pp. 173-74. Many scholars have accused the Community of using industrial policy to attain protectionist goals. *See, e.g.*, Derek Ridyard, *An Economic Perspective on the EC Merger Regulation*, 11 EUR. COMPETITION L. REV. 247, 252 (1990) ("[C]ompanies based outside the EC may find that . . . the Commission will be more prone to upholding Member States' public interest objections to mergers if the bidder is a US or Japanese firm than one based in the EC.").

16. Compare the author's summary conclusions about the EC's balancing of policy concerns with his earlier, more measured statement:

> Interestingly enough, it is just possible that the evolution in the system of judicial review in

the EEC, a centralized institutional system formulates antitrust rules and principles and enforces them in a flexible way . . ." (p. 265).

To be sure, Mendes' primary objective is not to compare the antitrust-trade balancing in the U.S. and the EC, but to communicate the need in both legal systems for trade protection decisions to take antitrust enforcement into account. Mendes further hopes that where the relevant authorities do not take antitrust into account, they will be made "aware of their own anticompetitive options and provid[e] those who are thereby affected with clear explanations for such policy choices" (p. 146). Nevertheless, his brief comparison between the two legal systems in Part II and further analysis of each system in Part III lead the reader to expect a more complete comparison of the pluses and minuses of each philosophy for reconciling antitrust and trade objectives.

Mendes notes that there has been and will continue to be a certain amount of "cross-fertilization" between the two approaches to reconciliation (p. 266). Complete harmonization is unlikely and undesirable, given the historical attachment of Americans to economic reasoning and of Europeans to industrial policy. Yet a more thorough account of the way each legal system balances antitrust and trade would enable the reader to decide what kind of cross-fertilization is beneficial for each system and to what extent. It would also help pinpoint what kind of international antitrust cooperation would be practical and successful. Having completed his interdisciplinary analysis, Mendes stops just short of completing a compelling comparative law analysis.

The impressive observations and analyses in this book illustrate how certain trade measures in each legal system contravene the policy goals of antitrust. Mendes' discussion in Part III of how each U.S. trade law — except countervailing duties — runs afoul of the antitrust laws is superb. Mendes coyly asks "whether there is any fundamental reason for applying antitrust rules and principles in domestic trade while setting them aside in what concerns foreign trade which is dealt with by the import relief laws" (p. 144), before quite convincingly showing that all the fundamental reasons point the other way. He reveals that the only kind of dumping that violates the antitrust laws is predatory dumping, which is also the least likely to occur.[17] He admits, however, that scrapping the antidumping laws is not feasible,

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the trade law context in the EEC — certainly not as complete and sophisticated as the one existing in the U.S. — which has been taking place (as well as the changes in the judicial structure) *may end up in a greater scrutiny* of the assessment made by EC institutions of the "public interest" element in trade cases, *which may in due time* influence the institutions' approach under that concept.

P. 197 (emphasis added).

17. Pp. 149-51. *See generally* Charles F. Rule, *Claims of Predation in a Competitive Marketplace: When is an Antitrust Response Appropriate?*, 57 ANTITRUST L.J. 421 (1988).

given the weakness of domestic antitrust law in the international arena. He finds the escape clause, too, works against competition[18] but alleges the greatest difficulties are with section 337 of the 1930 Tariff Act, which is ironically "the one most resembling the antitrust laws and yet the most criticized for the anticompetitive concerns raised by its application."[19]

Mendes' analysis of the antitrust problems arising from trade litigation in the U.S. and the EC is also compelling. He finds more similarities than differences between the two systems (pp. 193-97). Some differences persist, however, which Mendes catalogues quite elegantly. In the United States, companies tread a fine line between lobbying and unlawfully exchanging business information (pp. 179-80). Voluntary restraint and similar agreements also pose antitrust risks in the United States after the *Consumers Union* case,[20] while these risks are somewhat less in the EC.[21]

Mendes writes the first and second parts of his book casually and compactly. They are complete enough, however, to prepare the reader for the more interesting discussion in Part III, where all of the arguments previously developed finally interrelate. Unfortunately, Part III is as brief and casual as the first two parts. The plethora of exclamation points — three on page 170 alone! — can be forgiven. The author, after all, is terribly upset about the Commission's failure to take the Community interest into account when deciding on trade sanctions. Despite being impressed by his fervor, however, after patiently reviewing the history of antitrust and trade in expectation of this final synthesis, the reader wishes to explore some of his arguments in more detail. The two page conclusion is at once simplistic and cryptic.

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18. P. 158. The escape clause is contained in §§ 201-203 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2011-18 (codified as amended at 19 U.S.C. §§ 2251-54 (1988 & Supp. III 1991)). It allows the President to take action to protect an industry when increased imports are a substantial cause or threat of serious injury.

19. P. 165. Section 337 deems unlawful any unfair methods of competition that destroy or substantially injure an American industry, prevent the establishment of the industry, restrain or monopolize trade in the United States, or threaten to do any of the above. 19 U.S.C. § 1337 (a)(1)(A)(i)-(iii) (1988). *See generally* Daniel J. Plaine et al., *Protection of Competitors or Protection of Competition: Section 337 and the Antitrust Laws,* 56 ANTITRUST L.J. 519 (1987).

20. Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973). *See* p. 185. Voluntary restraint and similar agreements typically involve informal negotiations between governments or between government and a foreign industry resulting in the foreign government or industry's "voluntary" decision to limit imports. The court in *Consumers Union* upheld the President's authority to negotiate with foreign companies but denied that he had authority to give "binding assurances" of exemption from the antitrust laws. 352 F. Supp. at 1323-24.

21. [W]hile measures taken in pursuance of trade agreements between the Community and third countries, as acts of external commercial policy, are not caught by Article 85(1) of the EEC Treaty, agreements or concerted practices among foreign producers aimed at restricting exports to the EEC or at regulating their price or quality, unless imposed on such producers by the foreign authorities (foreign sovereign compulsion defense), would fall under the reach of EEC antitrust rules.

P. 195 (citations omitted).

In the final analysis, Mendes does an extraordinarily good job of isolating the conflicts between antitrust and trade policy in the United States and the European Community, but he leaves the reader somewhat baffled as to which legal system better resolves these conflicts. He also does not explain how an international agreement might best be structured for effectiveness and acceptance. Mendes ultimately raises as many interesting questions as he answers.

— *Alyssa A. Grikscheit*