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QUESTION, *Professor King*: We have a joint R&D exemption under our antitrust laws. It is always the question of whether there should be an exemption for joint manufacturing efforts on the part of manufacturers.

Do you have any comment on proposed legislation that would carve out of antitrust laws an exemption for joint manufacturing? Congressman Campbell, of California, at one time was talking about it.

ANSWER, *Mr. Rosenthal*: I am very fond of Tom Campbell and his bill. I think that some version of it will pass [It now has.]. I have been told that if there had not been a clarification, in effect a business review letter given to Semetech, that a couple of smaller semiconductor companies would have sued and challenged the Semetech joint venture. There have been a couple of recent reports that, counter to the Chicago School, Semetech may actually accomplish some constructive innovation and that it may end up being a competitive enterprise, even though it violated many rules of entrepreneurial innovation at the time of its founding.

We may now go through a period of more collaboration among competitors on research and development, and even on bringing products to production. There was a newspaper report recently about the seriousness with which the United States Government is considering collaboration with the Big Three American auto manufacturers in producing an electric car that would go greater distances at greater speeds, to be a substitute in big cities for the internal combustion engine. That, of course, used to be unimaginable. In fact, the only case in the history of U.S. antitrust enforcement where a research joint venture was sued by the Justice Department was a joint venture in the auto industry to develop jointly a catalytic converter. That was twenty years ago. What a difference twenty years makes. I think those kinds of collaborations will take place.

I would trust there will continue to be skepticism about the need for collaborative joint ventures among competitors in the pricing and marketing of products that may have been brought to the marketing stage by collaboration. I do not think there is any economic justification for that kind of collaboration; but I also do not think anybody is presently calling for it.

QUESTION, *Mr. Stayin*: The Export Trading Company Act was passed in the early mid 1980s, and to this day there are very few companies or trade associations that have taken advantage of it. Do you have any thoughts as to why?

ANSWER, *Mr. Rosenthal*: I have two ideas. One is that it has been possible to do collaborative joint ventures between competitors during this entire period, and you have not needed the safe harbor of the Export Trading Company Act to do that.

Only one case has been brought to challenge horizontal collaboration of this kind, and the law was explicitly changed in 1982 to make it very clear that collaboration, even collaboration giving market power in the export market, was not a violation of U.S. antitrust law. This was something as to which there had been some doubt and some contrary cases of the lower court levels before then. That change in the law, two years before passage of the Export Trading Company Act, made it largely redundant.

The other problem is that export trading companies, which are truly just trading companies, are probably less necessary as American businesses become more and more sophisticated. There are ways of learning how to get into foreign markets without necessarily forming an export trading company. An export trading company is a cover for an export cartel. The development of European Community law, and other competition laws, make that a more perilous enterprise. To identify yourself with an export cartel opens you up to antitrust enforcement in the jurisdiction where you are targeting your goods.

QUESTION, *Mr. Elliott*: I had a question about your very interesting idea that the sort of Kuhnian paradigm of noninterventionism that you attribute to the Chicago School is coming under increased pressure intellectually. I was clear about the inconsistency that you saw between the management philosophy of Demming and Geneen. However, were you suggesting that there were some inconsistencies between Demming's philosophy and the Chicago School of government nonintervention? Could you elaborate a little bit more on that inconsistency because I was not clear that Demming's management philosophy spoke to or called into question the principles of the Chicago School with regard to the role of government as opposed to the role of management innovation quality? Is there really the inconsistency that you see between the Chicago School of philosophy and Demming's management philosophy.

ANSWER, *Mr. Rosenthal*: I am glad you asked that question. I was cut off before I could try to close the gap. I do not think this has been articulated by anybody yet, but I do see some inconsistencies. I am not opting clearly on Demming's side. I am only asking questions.

Let me give you one topical issue where I think there is a potential inconsistency. Demming suggests that in terms of your long-term productivity and competitiveness you should establish secure supply relationships with a single supplier; you should not worry about that supplier taking advantage of you because you are his captive customer; and you should not worry that he is going to get lazy in dealing with

you. You should build a relationship of trust; show him that his interest is in your succeeding; sit down and work with him on constantly improving the product, cutting the costs, both for him and for you, and see this as a collaborative effort. Demming would say this is one of the ideas that has led to the power of some so-called vertical Keiretsu relationships in Japan.

The Chicago School would not say that the vertical relationships with the Keiretsu is particularly an antitrust problem. The basic notion of the market that the Chicago School suggests is that one should be concerned about being the captive of a supplier. It stresses trying to broaden your supplier relationships every few years, by taking quotes and bids to try to get alternative suppliers.

QUESTION, *Mr. Elliott*: Just to follow up, let me say that I think somebody would debate you on that. I think the impetus of, say, Robert Bork's ideas in antitrust have been precisely that the government ought not to interfere with the formation of those kind of relationships if they are efficient in pursuit of some sort of etiology but, rather, the formation of such relationships ought to be a private matter.

ANSWER, *Mr. Rosenthal*: I did not say Bork would say he wants to attack the Keiretsu. What I said is Bork is suspicious of monopolists and would be suspicious of your vulnerability in that circumstance. Now, I do not know if Bork would be or not. I think many people who would follow a Chicago School motive analysis would be. That is an example where they might be wrong.

Take another example. The suggestion of Chicago School economics would be that you want a free labor marketplace as much as possible in which you do not have the higher social costs of long-term, lifetime employment or high costs to provide job security for workers. Even encouraging competition within an organization is healthy for the competitiveness of the organization.

Now, again, I would agree that this is not central to Chicago School thinking now. Part of the issue is whether the Chicago School has thought about how this relates to international markets and international situations. I would suggest that some of the ideas of Demming are open to empirical investigation and should be treated as empirical questions, not as theoretically-given questions. Certain kinds of job security may make a worker less insecure, better able to be a productive and efficient worker. It is not clear to me what the tradeoffs are vis-a-vis these kinds of lifetime employment and social welfare programs.

QUESTION, *Professor King*: I had a question for Cal Goldman concerning the use of predatory pricing as a means of attacking dumping problems. First you have the suggestion in the Canada-U.S. context that this device replaced anti-dumping. Is this a device that would be usable throughout the world or is it just in a context where you have two friendly parties?

ANSWER, *Mr. Goldman*: The suggestion of replacing anti-dumping laws by competition laws is only in the NAFTA context at this stage. John Coleman of the Canadian International Trade Tribunal made it clear that he was only talking about a Canada-U.S. or Canada-U.S.-Mexican arrangement under NAFTA. That assumes, of course, that Mexico's competition law is up and running and operating in an effective fashion vis-a-vis other countries. The anti-dumping laws would still remain. That is also the reason why representatives of the steel industry and other industries in Canada for the first time are moving over to the side of competition law, at least as between Canada and the U.S. We would get rid of the kind of ridiculous situation we now have where both sets of steel companies are pointing the finger at each other.

Let me comment briefly in regard to that question of R&D joint ventures. I saw in the Wall Street Journal recently that GM, Ford and Chrysler have actually announced their first joint patent for a lightweight material that could replace steel in car bodies. The comment was made that it would have been unthinkable just a number of years ago under the antitrust laws. That is just a start on the R&D side. If you follow up on the Joide and Teece model, you get into much more exchanges of information on technology and cost effectiveness.

QUESTION, *Mr. Potter*: I do not think the question has been answered, though. Why is it that the suggestion of the competition law replacing anti-dumping could not be applied between two other countries or between Canada and another country besides the U.S.? And, in theory, what is wrong with it?

ANSWER, *Mr. Goldman*: Let us go back to Premise No. 1. The issue at the moment, as between Canada and the U.S., is not in my view the lack of feasibility of doing so; rather it is just a question of political will. I think that is a real issue. It is a real world issue. We have got to walk before we run. From my perspective, I do not see any reason why you cannot say trade that is between Canada and the EC, where you have a similar provision in the Treaty of Rome, would not be replaced by those competition law provisions. There is no reason you could not establish a mechanism either by reciprocity or treaty to do the same thing. You have to deal with a country that has competition laws that are largely similar. They do not, in my view, have to be identical. I see no reason for that. I do not think they have to be harmonized perfectly, but they have to be similar just like our merger laws are somewhat similar today between Canada and the U.S. I think it can be done between Canada and the EC. I do not think it is likely to happen in the near future, but I see no fundamental obstacle to that occurring as well. I am not sure about any other jurisdictions, but certainly not the Far East.

ANSWER, *Mr. Rosenthal*: I think the other answer is market ac-

cess. It is something of a shibboleth. If you perceive you are not going to truly have access to the other person's market, then you want the protection of the dumping law. The rationale of applying the antitrust laws is that there truly is competition in trade between the two markets. If a company were dump selling in the United States from Japan at a substantially lower price than it was selling in its home market, the American competition could retaliate by going into the Japanese market and selling at a substantially lower price. However, if the United States firm is excluded from the Japanese market, virtually regardless of price, then the rationale for getting rid of the dumping law does not work.

QUESTION, *Professor King*: I have a question in looking at the EC laws and the way they are administered. I notice there is an exemption for small companies under the EC rules. It is a matter of a regulation. We are interested in small companies and entrepreneurs. Do you want to comment on the need or desirability of such an exemption in Canada and the United States?

ANSWER, *Mr. Goldman*: If I am not mistaken, Henry, the EC provisions that you are referring to are the ones that were brought in in the merger control regulation.

COMMENT, *Professor King*: Right.

ANSWER, *Mr. Goldman*: All they say is, in a nutshell, that mergers over a certain size of annual turnover have to go to Brussels. However, it is still the case in Europe that as a result of the merger control regulation that was passed, there is no loss of jurisdiction for mergers under that threshold. There is even some duplicate jurisdiction. There are special rules to sort it out in certain circumstances, but there is certainly no loss of jurisdiction for national antitrust agencies in Germany, France, England and so on, for the smaller mergers.

I happen to believe that mergers which involve acquisitions of relatively small amounts of five million or ten million dollars, call it what you will, usually reflect instances of very low barriers. If someone can walk in and spend minimal amounts of money, those usually should be swept by the antitrust agency without blinking an eye, but I think it is very hard to establish a level under which any fixed merger within the jurisdiction otherwise of a national agency would not be looked at because there are some industries that are not global that involve regional markets and you could, in fact, gain market power over a regional part of the country with a relatively small merger but, by and large, those are rare.

QUESTION, *Professor King*: I was talking about the rule that exempts companies if the volume of the two companies is fifty million or less.

ANSWER, *Mr. Goldman*: Germany has that.

QUESTION, *Professor King*: Right. It is probably covered by na-

tional law. Doug, do you want to comment on that?

ANSWER, *Mr. Rosenthal*: Remember that our law is much less intrusive than the European Community Law in the sense that any collaborative agreement, any joint venture agreement, has to be notified under EC law if there is any restriction of competition by the collaboration. This is almost inevitably going to be the case. In the United States most collaborations do not have to be reported. It is a question of private counseling when you have a problem. There are small business block exemptions also on structures such as exclusive distribution, and joint selling; but we already give exemptions for these. There would not be sufficient market power arising from joint arrangements subject to block exemption to raise problems under either U.S. or Canadian laws. The only area where you are not going to get either an exemption under EC law or under our law is price fixing between two small competitors. This is still a violation of both laws.

COMMENT, *Professor King*: I think it makes for good work for lawyers to interpret what the situation is, and I think we got the answer.

COMMENT, *Mr. Goldman*: One addendum to that. There are jurisdictions, such as Germany and Australia, by way of example, that have fixed thresholds. They do not have concentration issues under a certain level. You do not have to worry about the transaction. You gain certainty in that process. I think certainty is very important. There is a tradeoff. The tradeoff is you may have a debate over whether your concentration level is properly measured, whether its concentrated nationally or in a regional market. These are very difficult issues.

What the Canadian merger guidelines have done is not provide an absolute green light for anybody to walk through a merger which is under thirty-five percent concentration, but what they have said is if you are in a realm of thirty-five percent chances are you are not going to have a problem. It is good work for the lawyers. It provides some certainty, but it tries to strike this balance.

QUESTION, *Mr. Robinson*: Following up on one of the comments about limitation on market access, it occurs to me, from my simplistic point of view, that, although everybody is discussing what a wonderful thing it would be to abolish dumping between Canada and the U.S., unless predatory pricing laws are very sophisticated, what prevents the large manufacturer in the U.S. with the huge economy of scale from dumping to wipe out what is left of, let us say, the Canadian furniture industry because he would like to control the North American furniture industry. If there is no dumping law, there is no way that the Canadian manufacturer is going to be able to retaliate because it does not have the scale to crank up to make enough furniture to dump back into the U.S. market and absorb the huge loss that would be necessary for it to really compete.

It is not just market access, it is comparative market sizes and small size of the Canadian participants. That is why I can never understand Trebilcock and everybody else who have this simplistic approach that we will just eliminate them and predatory pricing will stop it.

Cal, would that amount to predatory pricing which could be prevented?

ANSWER, *Mr. Goldman*: Let me just try this out on you. In a free trade zone you have great opportunities in antitrust analysis to establish a singular market. It may be a single antitrust market for geographic purposes between Canada and the U.S. as a whole, or on the Eastern Seaboard, or the other side of the Rockies, and if you have a player such as one based in — take the furniture industry — North Carolina, shipping huge amounts into Canada with minimum difficulty, you have a very real likelihood, for antitrust purposes, that there is one singular antitrust market. Within that market if that player has the potential to exercise market power to artificially raise prices beyond the competitive norm and has, in fact, the ability to price and does price below not just cost but below average variable costs, that is where the Canadian predatory pricing guidelines have now gone, taking the Areeda-Turner model. That would be examined and could be constrained. So your smaller player in Canada, who would otherwise be squeezed out, after which the one with market power would raise prices to super-competitive levels, would be allowed to survive.

What you have got is a test that has to do with competition in the marketplace within the market and not a test that is simply based on some artificial notion of a border and a barrier that no longer really exists in the free trade zone.

COMMENT, *Mr. Rosenthal*: All I wanted to say is that you did not say, as an essential element of your hypothetical, that he was selling at a loss for the purpose of driving them out of the market. If he was not selling at a long-term loss, that is what competition is about. Competition is the guy who has the economies of scale winning in the marketplace over the little guy who does not. If we want a free market between Canada and the United States it means we want the efficient producer selling everywhere in North America. We want this even if that is going to hurt a firm in Tennessee or a firm in Ontario.

QUESTION, *Mr. Robinson*: Can the steel manufacturers in Canada have this then, too?

ANSWER, *Mr. Rosenthal*: The Canadian steel manufacturers would love to have this now.