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Discussion

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Discussion After the Speeches of Joseph P. Griffin and Lawson A. W. Hunter

QUESTION, *Professor King*: I think one of the problems in the administration of the U.S. antitrust laws has been changing versions of the application of international antitrust rules: there are the 1977 guidelines and 1988 guidelines. What I am concerned with is whether there is any remedy for this problem, which affects our relations with other countries, or whether it is always going to be in flux. When one administration says one thing, and another administration says another, what is the solution?

ANSWER, *Mr. Griffin*: You are absolutely right, Henry. In fact, it is worse than you described. Look at the substantive side, for example, either in the context of intellectual property or not, vertical restraints have literally come full circle now.

One of Anne Bingaman's last speeches reads very much like it was written in the late '70's, and forgets the last 15 years of complete change in analysis. Part of it is the fashion of economics and the political realism of the day. But I think that is going to continue and that is one of the reasons I continue to be pessimistic, because antitrust is not a fixed concept. It is not like saying it is wrong to kill people unless you have one of a few justifications. You cannot get fundamental agreement among four or five countries, let alone 200, on most of the list of what, at least the United States considers to be anti-competitive activities.

In many parts of the world, not only is it not anti-competitive, but it is well accepted doctrine that you do it that way or another way. So yes, the problem of the changing fashion of economics is impacting us. There are the changing political realities in the United States of who is in power, and as our chairman was pointing out, one of the current political ideas is to use antitrust as a trade policy weapon. What we cannot achieve by negotiation, like opening markets, let us achieve by antitrust attack. And that is the current fashion in the Clinton Administration. We have failed in GATT; we have failed in several other negotiations, and we will now turn to the antitrust weapon, to open that up. So I do not see any cure for that in the short run at all.

QUESTION, *Mr. Doh*: My question goes back to the theme of this conference and several conferences that Henry has sponsored in the past, and that is this whole issue of the relationship between competition policy and dumping. Maybe if I phrase my question a little more specifically, we can get somewhere here.

Canadian industry interests, and a couple of sectors in particular, have long called for the replacement of anti-dumping duties with some

form of competition policy. Most recently the steel sector seems to think that because of the unique integrated nature of that industry, anti-dumping duties simply do not make sense and they propose instead to replace those measures somehow with the competition policy. I have yet to hear anyone describe practically, in a very mechanical way how that might work. I am wondering if our two speakers here today might give it a quick try.

ANSWER, *Mr. Hunter*: I guess I am not sure what you mean by "practically." Why could one not just eliminate the anti-dumping laws between Canada and the United States and then you would rely on predatory pricing laws or price discrimination laws or whatever, and we would let the chips fall where they may? The difficulty in trying to analyze this, and in fact I did some work for the Canadian government at the time of their free trade negotiations on this issue, is that one cannot quantify, or decide who would win or lose, if you abandoned the anti-dumping laws. But I do not know what you mean by "practically."

QUESTION, *Mr. Doh*: I mean the jurisdictional issues that you have already discussed in terms of whose law would be employed and under what circumstances. If the corporation in question were not transnational, would any of the problems that we cited here this morning about how you effectively harmonize the law not decide how the law is implemented? Would you run up against them if you pursued that?

ANSWER, *Mr. Hunter*: I am not so sure if you accept my very first thesis, which is that the Effects Doctrine now can be applied in each country, and that it will not be that difficult a problem. In the past, Canada would have been the most concerned, because we did not assert jurisdiction in an aggressive, extra-territorial manner and I still do not think we do so, certainly not anywhere near as aggressively as the United States does. But, I think the Canadian government probably is willing to take their chances, if they could get rid of the dumping laws.

I guess the analogy that I always used to make about it is that in essence what the dumping laws do is to say that, in a domestic environment, it would be illegal for someone in California to decide to enter the New York market by lowering their price for an initial period of time in order to gain minimum critical mass in that market, thereby having the effect of lowering the output or the profits or their prices in the New York market. That is clearly not illegal in the United States, and in a free trade zone, why should it be illegal between Canada and the United States?

COMMENT, *Mr. Doh*: I am not quibbling with the critique, I am just having a hard time grappling with the remedies.

ANSWER, *Mr. Hunter*: But the only difficulty with the remedy is whether each country feels it will be able to control the practices of the

other companies in their market. And if they come to the conclusion that they can, then, in my view, I think they can. I do not think it is really a serious problem there, partly because it does not happen very often.

ANSWER, *Mr. Griffin*: I think I generally agree with most of what Lawson said; let me try a slightly different tilt on it.

I do not think there is a real jurisdictional issue here, because on both the Canadian and U.S. side, as to what otherwise would be predatory pricing, you would say you are talking about imports into their country. So you are not really talking about effects and extra-territorial jurisdiction. Instead, you are talking about Canadians selling into the United States, and Americans selling into Canada. So I do not think you really would get much into issues of extra-territoriality.

I think the real problem is that it is entirely possible that conduct that would constitute dumping under various definitions and various international treaties would not be an antitrust violation. That is, there is a zone of conduct, that Lawson was talking about, where the antitrust violation is roughly equivalent to predatory pricing. But predatory pricing requires, if you will, evil intent and in fact, has certain technical definitions about average cost of production. So it is entirely possible to have prices and conduct which are not predatory, under American definitions, but which do constitute dumping, under various international definitions.

Thus, if you removed the dumping remedy, you would have no antitrust remedy. And that is one of the reasons that people want to keep both in place, because the theory is that you have added protection.

COMMENT, *Mr. Hunter*: It is, however, irrational protection, because it makes no economic sense.

QUESTION, *Mr. Brand*: Joe Griffin, in his introduction, mentioned that in the ITO Charter there were competition law rules that simply did not come into existence. When you combine that with the discussion of both speakers that WTO was going into competition law rules, it seems to me that the conclusion is that it is impractical at this point. But as a theoretical concept, it seems that if we are going to have trade rules to keep governments out of restricting trade, and the European Community realized from the start that you could not have those rules work unless you combined them with competition law rules that prevent the same kind of restriction by private parties, then even though you think it is impractical, at this point, to go that distance, is it not theoretically appropriate to look in that direction?

My second question is, is the impracticability in part, not so much related to the theoretical basis for the antitrust laws, but the feeling on the part of other countries towards the enforcement mechanisms that have accompanied antitrust laws in the United States?

ANSWER, *Mr. Griffin*: Very much the latter and not the former. That is, if you go back and read the ITO Charter or you go back and read the 1980 U.N. Model Rules, and there is now a group of academics who propose something for WTO, there is not a problem that reasonable people cannot agree on a set of rules. That is not the problem at all. Many groups of reasonable people over the last 50 years have been able to come up with drafts that were perfectly sensible. Some of them might be out of fashion now because of changing economic theories, but they made sense.

The real problem has been, back to Henry's topic, sovereignty. The ITO Charter was vetoed by the United States, not because it did not make economic sense or not because they could not understand what the concepts were. The United States was faced with a choice of do we let some sort of multi-national enforcement mechanism tell us in part how to run our economy, or do we preserve that for ourselves. And that was, as they say, a no-brainer in the Congress. They could not muster anything like a close vote, because the American Government was not willing to give up its prerogative to organize and run its economy.

If I have not been clear, let me try one other way. I do not think it is much of a problem at all with coming up at least with what I would call a minimum antitrust code. I think you could get a dozen people in a room and get it done in a weekend. There are plenty of models out there. You might quibble about whether we want to include criminal or civil, or whether we want to include vertical price fixing or not, but you could come up with a minimal list that would have virtually universal agreement very quickly.

The problem is when you come to say "How will we enforce it? Private actions, treble damages, criminal actions, government actions? Are we going to let someone else, other than our own elected officials, tell us in effect, to break up state monopolies, to deregulate, to do a different kind of pricing than we do here now?" That is where it fails, and that has been the most contentious side of the European Union's approach to this. And Maggie Thatcher's big point about subsidiarity and federalism has been exactly what was mentioned this morning. Unelected officials are deciding those issues, rather than the voting public in Europe. And that is arguably the biggest complaint against that system, not that you cannot devise the rules.

ANSWER, *Mr. Hunter*: I just want to add a little bit to that. The difficulty I have with that, Joe, is that the international trade rules clearly impose restraints on the United States, as well as everyone else, and why is this area of the law, antitrust law, so different that Congressmen or whoever have to decide?

I think what has happened is that we have seen the Americanization of antitrust law in the last 40 years and certainly in the last dec-

ade. Now most of the new laws that are passed — maybe because they are civilian, maybe because they are in Europe -- have adopted the EEC model, but by and large conceptually these laws are the same.

It would seem to me that if the law is conceptually the same; if one can see a predictability of results in the way behavior or transactions are analyzed by other antitrust authorities, then the American government should not be too concerned about ceding the possibility that someone else is going to rule on them because the result would be the same as would have happened if they would analyze it here.

ANSWER, *Mr. Griffin*: I can agree about the American politicians being the problem, but let me give you the most recent example, because I happen to be involved in it.

If you go back the European Union/American Antitrust Cooperation Agreement to which Lawson referred, it began with the proposal by Leon Britton for a binding treaty. What he did, if you go back and read the first speech, was to propose a binding treaty because he could see the conflict coming in the merger regulation, where Europeans might well prohibit a merger the Americans would permit and *vice versa*. He said, "I can see that problem coming; we have got to solve it. My proposal is that we do a binding treaty to prevent that kind of thing from happening, with a binding dispute resolution mechanism." The Americans said, "absolutely not. The only thing we will talk to you about is notification, consultation and so forth." So as recently as then, that has been the position of the American government when confronted with the opportunity of the other side saying we are willing to be bound; we are willing to go forward with some sort of international mechanism. Americans have said "no thanks." I am not here to defend that.

QUESTION, *Mr. Thomas*: Is part of the problem right now the imbalance in the remedies which were available? Would your position change, if for example, a United States corporation were to impose treble damages as a remedy? I think that there is a reciprocity element here which is still missing, and that is that the United States attitude on this issue would probably change if the U.S. private sector was exposed to the kind of remedy that foreigners are only exposed to in the United States right now.

I think you will see a change, just as it is in the trade remedy area, where United States exports are now facing anti-dumping remedies in places like Korea and countervailing duty cases in places like Brazil. The United States is beginning to encounter procedural protection and the problems that others have complained of in the United States. So, would that make any difference if you started to see more rigorous remedies in other places?

ANSWER, *Mr. Griffin*: Well, I certainly think so, but understand that this is a double edged sword. Remember that American business

has been ambivalent about that issue, in part because of what the other side of it is. American companies have said 90% of the way they protect themselves is that their lawyers bring cases against competitors who do wrong. They do not rely on our government. Our government only does 10% of the work and then they do it badly and it changes with administrations.

Most American companies will tell you "Yes, if I have got a serious problem, I want to protect myself. It is very important for me to know that I might ask my government first, but for me to know and be able to protect myself if they will not do it." So they turn around and say, "If I had the equivalent protection abroad, where not only could they sue me privately but I could sue them privately, I would be much more interested in that kind of regime."