



1997

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Recommended Citation

Creating Competition Policy for Transition Economies: Introduction, 23 *Brook. J. Int'l L.* 339 (1997-1998)

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SYMPOSIUM

CREATING COMPETITION POLICY FOR TRANSITION ECONOMIES

INTRODUCTION

*Robert H. Lande**

This is a symposium designed for the global economy of the 21st century. It would have served little purpose if it had been presented very many years ago. Indeed, it is doubtful that anyone in the past even would have thought to hold it.

During the last decade, however, there has been an explosion of interest in antitrust worldwide, in both developed and transition economies. The number of countries with antitrust laws has increased dramatically.¹ For example, thirteen coun-

* Professor, University of Baltimore School of Law and 1996-97 Chair, Association of American Law Schools Section on Antitrust and Economic Regulation. The author would like to thank Michael Wise for exceptionally thoughtful insights concerning many of the central topics in this article, and Neil Averitt, William Kovacic, Armando Rodriguez, and Mark Warner for stimulating and extremely helpful discussions and suggestions. The author also would like to thank Cheryl Gordon and Chin-Zen Plotner for excellent research assistance. All opinions and remaining errors are, of course, those of the author.

An oral version of this symposium appeared as a program session at the January 6, 1997 meeting of the Association of American Law Schools Section on Antitrust and Economic Regulation. Professor Spencer W. Waller's article was subsequently added.

1. There are currently countries with antitrust laws that did not even exist a decade ago. At least two new nations that were component parts of the former

tries in the Western hemisphere currently have antitrust laws,² with the majority of these laws enacted since 1990.³ Six additional Western hemisphere countries are "actively designing and debating respective draft legislation on the issue."⁴ Moreover, an increasing number of countries with antitrust laws on their books appear to be starting to take the field more seriously. In increasing numbers they are asking for advice from United States antitrust enforcers and academics;⁵ their enforcement personnel are attending conferences and training sessions around the world;⁶ and, more and more, a large number of nations are finally starting to bring antitrust enforcement actions.⁷

Soviet Union, Ukraine and Kazakhstan, now have antitrust laws. See Law on Antimonopoly Committee of Ukraine of November 26, 1993, reprinted in 3 RUSSIA & THE REPUBLICS LEGAL MATERIALS, Release 18 (John N. Hazard & Vratislav Pechota eds., 1994); Law on Freedom of Economic Activities and Development of Business Undertakings Within Kazakhstan, effective January 15, 1991, reprinted in 2 RUSSIA & THE REPUBLICS LEGAL MATERIALS, Release 1 (John N. Hazard & Vratislav Pechota eds., 1992).

2. These countries are Argentina, Brazil, Bolivia, Canada, Colombia, Costa Rica, Chile, Jamaica, Mexico, Panama, Peru, Venezuela, and the United States. See Organization of American States Trade Unit, *Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere* i, SG/TU/WG.COMPOL/DOC.1/97/Rev.4 (1997) (limited distribution document, on file with author) [hereinafter *Inventory of Domestic Laws*]; Latin American antitrust laws are compiled in 1 COMPILACIÓN DE LEGISLACIÓN DE LA COMPETENCIA, AMÉRICA LATINA (1996).

3. See *Inventory of Domestic Laws*, supra note 2, at i.

4. These countries are Ecuador, El Salvador, Guatemala, Nicaragua, the Dominican Republic, and Trinidad and Tobago. *Id.*

5. A large number of countries also are asking European antitrust experts for advice. For a superb analysis of these and related issues, see William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L L. & POL'Y 437, 437-39 & passim (1996).

6. *Id.* at 472-73. A conference on *Competition Policies and the Economic Reform Process in Latin America*—held at Lima, Peru on August 12-14, 1996—was, for instance, attended by antitrust enforcers and other government representatives from 16 Latin American nations, and also by representatives from many other nations and international organizations. INDECOPI, PARTICIPANTES DEL SEMINARIO "POLÍTICAS DE COMPETENCIA Y EL PROCESO DE REFORMAS ECONÓMICAS EN AMÉRICA LATINA" (unpublished list of seminar participants, on file with *Brooklyn Journal of International Law*).

7. For an excellent analysis that provides examples of this increasing level of enforcement, see LUIS TINEO, COMPETITION POLICY & LAW IN LATIN AMERICA: FROM DISTRIBUTIVE REGULATIONS TO MARKET EFFICIENCY (Monterey Inst., Ctr. for Trade & Com. Dipl., Working Paper No. 4, 1997) (on file with *Brooklyn Journal of International Law*).

The reasons for this explosion in interest are numerous and complex. The overriding cause, however, clearly has been the collapse of the former Soviet system. Not only did this cause Eastern European nations to move towards capitalism, but other nations around the world have become increasingly unable to resist the tide of capitalism by proposing as an alternative the now thoroughly disgraced ideas of socialism or communism.

It seems inevitable that as capitalism spreads so will anti-trust. It is difficult to predict, however, the kinds of antitrust policies that will emerge around the world. This is in large part because it is extremely difficult to determine which types of antitrust policies will prove to be most appropriate for specific nations.

As an example of the tremendous difficulties involved in finding the appropriate antitrust policy for any nation, contemplate the search that has taken place within the United States during the last century to find the antitrust policy most appropriate for it. Recall the difficult origin of the first federal antitrust statute,⁸ its controversial and troubled early interpretations,⁹ the different reasons behind the subsequent statutes of 1914, 1936, 1950 and 1976,¹⁰ and the dramatic shifts in Supreme Court interpretation of these statutes over time.¹¹ Recall the effects of such economic conditions as the Great Depression, and the dramatic effects of Presidential elections on enforcement priorities.¹² Consider the effects of the rise of the Chicago School of antitrust and the current nearly universal acknowledgement that many prior antitrust policies were mistaken.¹³ In light of our frequent changes in antitrust policy and many mistakes, it is humbling that we should be viewed as a source of antitrust wisdom for the rest of the world. Not

8. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82-106 (1982).

9. For an excellent analysis of this topic see RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992 9-58 (1996); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 48-77 (1994).

10. See PERITZ, *supra* note 9, at 61-66, 148-53, 195-99, 236. See also Lande, *supra* note 8, at 106-42.

11. See PERITZ, *supra* note 9, *passim*.

12. *Id.*

13. *Id.* at 258-62. See also Robert H. Lande, *Beyond Chicago: Will Activist Antitrust Arise Again?*, 34 ANTITRUST BULL. 1 (1994).

surprisingly, the advice that we should give is not that other nations should simply adopt our present system. It won't do to say: "Adopt the current United States antitrust system because it is the best one for us. At least, fifty-one percent of us think that it is optimal. You should adopt our system even though we must admit that we thought very differently about what kind of antitrust was appropriate ten years ago, still differently twenty and forty years ago and, depending upon the results of the next Presidential election and the next Supreme Court appointment, we might change our minds again."

Perhaps the goal of advice givers in the United States should be more modest. Perhaps we should instead say, "Here are some examples of problems that arose, our attempted solutions and their effects in their particular contexts. Here are some of our successes, but here are the mistakes that we have made and the lessons that experience has taught us. We hope that you will be wiser than we were."¹⁴

Each nation must attempt to formulate the competition policy that is best for it (after studying the United States' experience, of course). Every country must consider its own history, the strength of its local culture of competition, and the degree of faith possessed by its businesses and consumers in the optimal workings of the free market. They must consider the effects of related laws, including regulatory laws, securities laws, price controls, etc. The effectiveness of local capital markets, the general economic climate, and laws affecting foreign investment and trade are also crucial. So are a large number of institutional and political realities: does the country have, for example, a relatively neutral and non-political, non-corrupt judiciary? Does it have an enforcement agency with the necessary resources, including in particular the necessary human capital? How serious is the country's intention to have a vigorous system of antitrust laws and, indeed, a competition-based economic system? The most that United States antitrust professionals can do in this complex endeavor is to provide transition economies with information and to act as their advisors.

Consider some of the questions that each country has to decide. Should their enforcement approach be relatively inter-

14. We should remember that our experience-based expertise in antitrust is relative, not absolute.

ventionist or relatively Chicago School in orientation?¹⁵ Should enforcement be exclusively public, or should private enforcement also be allowed? Should the laws be civil, criminal, or both? Should the remedies include injunctions, divestiture actions, treble damages, jail sentences, personal fines, and/or corporate fines? Should a nation have only one centralized antitrust enforcement agency or, as in the United States, should political subdivisions within the country also be able to file suits? Should enforcement be by a part of the executive branch, similar to the U.S. Department of Justice Antitrust Division, by an independent administrative agency similar to the United States Federal Trade Commission, or by both?

Another important question is whether a nation's antitrust system should be modeled largely after the United States system or largely after the antitrust laws of the European Union.¹⁶ The general thrust of a trade regulation statute should be to support the operation of the free market in a way that ensures effective consumer choice. Free markets require two essential elements: the presence of the options that competition will bring, and consumers with the ability to choose meaningfully among these options.¹⁷ One approach to achieve these goals would be to enact a trade regulation statute or framework for statutes explicitly in these terms. The law could forbid conduct that unreasonably impairs either of these elements.¹⁸ Regardless whether a country adopts a trade regula-

15. For many of the differences between Chicago School and non-Chicago School antitrust see Joe Sims & Robert H. Lande, *The End of Antitrust—Or A New Beginning?*, 31 ANTITRUST BULL. 301 (1986); see also Lande, *supra* note 13, at 1. Regardless of which enforcement approach is most appropriate for the United States, the relevant question for each nation to ask itself is, in light of that nation's history, politics, and institutional settings, how interventionist an approach is optimal for them.

16. For articles comparing the United States and European Union antitrust systems see Symposium, *Antitrust in a Global Environment: Conflicts and Resolutions*, 60 ANTITRUST L.J. 525 (1992); see also Alexis Jacquemin, *Abuse of a Dominant Position and Exclusionary Practices: A European View*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 260-70 (Harry First et al. eds., 1991) (comparing aspects of monopolization law); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1075-81 (1990) (comparing aspects of merger law).

17. See Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713 (1997).

18. A country could draft its trade regulation statutes in terms of ensuring

tion system closer to that of the United States or closer to that of the European Union, it should do so in a way that preserves both elements of consumer sovereignty.¹⁹

The evolutionary nature of the United States' antitrust policy suggests that, at a minimum, countries should be flexible. They should regard their initial solutions as the first stage in an evolving process.

Moreover, it is possible that the preceding issues, questions and possibilities are relatively insignificant. Perhaps they are only relatively unimportant details.

One could take the view that it is crucial for transition economies to enact and enforce antitrust legislation, but that the particular features of this antitrust system are less important.²⁰ It can be argued that these nations' overriding concern should be to legitimize capitalism politically, and to show that capitalism, as opposed to centralized planning, fascism, price fixing by the government, socialism, or communism, is best for the economy and for consumer welfare.²¹ This view says, essentially, that each nation should just select and trumpet a

the availability of options and the choice among options that the free market will bring. Such a statute could be worded as follows:

It is the national policy to foster an economy in which consumers can make free choices among goods and services in a competitive marketplace. Conduct that unreasonably impairs this goal is hereby declared illegal. It is specifically illegal to engage in: (1) A, B, and C, and any other conduct that unreasonably limits the range of competitive options that would otherwise have been present in the market; and (2) X, Y, and Z, and any other conduct that unreasonably impairs consumers' ability to choose among these options.

A legislature enacting this type of statute would complete it by filling in the blanks for A, B, C and X, Y, Z with those specific items that the country was confident, in light of its own national experience, that it wished to ban. If the United States were enacting this approach, for example, it would include specific bans against such things as monopolization, mergers that may substantially lessen competition, and deceptive advertising.

For the development and a discussion of an option-oriented approach to trade regulation statutes, including many of its relative advantages and disadvantages, see Averitt & Lande, *supra* note 17.

19. For a brief discussion of how the option-oriented approach (discussed in footnote 18 *supra*) can successfully incorporate a trade regulation approach modeled after the laws of either the United States or the European Union see *id.* at 753-55.

20. Based upon a conversation with Michael Wise, Federal Trade Commission.

21. Capitalism is often thought to be desirable for non-economic reasons as well. Many believe that a capitalist system will best foster decentralized decisionmaking and a more pluralistic, democratic society.

reasonable set of antitrust rules, the clearer, more understandable and less discretionary the better, and then let them evolve. The particulars of the system—which is a more appropriate approach, for example, the United States' antitrust of the 1990s, the 1980s, or the 1960s—are less important than the fact that the system exists and is widely known. The central requirement is that businesses and consumers believe that antitrust is keeping capitalism "honest," and generally keeping corporations from exploiting consumers. Under this view businesses' and consumers' perceptions, in addition to or even instead of marketplace reality, are what count.

A nearly opposite view is that the best thing that transition economies can do is to decide not to enact antitrust laws or, at most, to just enact a simple law against hard-core price fixing.²² This view suggests that any antitrust policies at all, and certainly any policies that go beyond a prohibition against simple price fixing, would be likely to do more harm than good. Even a moderate level of antitrust enforcement can suppress hard but honest competition, discourage international investment, lower confidence in the contracting process, lead to "rent seeking" behavior, and direct attention away from more important matters. For all of these reasons antitrust can delegitimize capitalism and thereby inhibit economic growth.

Further, many of the enforcers and judges in a number of transition economies are likely to be corrupt²³ and/or in experi-

22. For the view that transition economies should adopt a minimalist antitrust policy, see generally A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209 (1994); A.E. Rodriguez & Malcolm B. Coate, *Limits To Antitrust Policy For Reforming Economies*, 18 HOUS. J. INT'L L. 311 (1996). For a different view on many of these issues see Craig W. Conrath & Barry T. Freeman, *A Response to "The Effectiveness of Proposed Antitrust Programs for Developing Countries,"* 19 N.C. J. INT'L L. & COM. REG. 233 (1994).

23. See Edgardo Buscaglia, *Corruption and Judicial Reform in Latin America*, 17 POLY STUD. 273 (1996). William Walker, former U.S. ambassador to El Salvador and author of a study of judicial reform in Latin America, lamented that this area contained so many "weak, underfunded, corruptible, executive-dominated, antiquated justice delivery systems in which the majority of those governed have scant if any confidence." Douglas Farah, *Inefficient Court Systems Plague Central American Nations' Bids for Stability*, WASH. POST, Aug. 1, 1997, at A24. See also Christopher Larkins, *On the Courts, Judicial Independence, and Judicial Reform in Latin America: A Comment* (unpublished paper presented at Caracas Venezuela for the Tercera Conferencia Anual de la Asociación Latinoamericana de Derecho y Economía, June 16-18, 1997) (on file with *Brooklyn Journal of International Law*).

enced at competition matters. Corrupt and/or inexperienced decisionmakers can be a tremendous problem because every antitrust law contains terrifying levels of discretion. How do we really know, for example, whether a particular situation involves a "contract, combination . . . or conspiracy in restraint of trade," under Section 1 of the Sherman Act,²⁴ or whether the effect of any particular merger "may be substantially to lessen competition, or to tend to create a monopoly" under Section 7 of the Clayton Act?²⁵ How could we tell whether a particular questionable enforcement or non-enforcement decision reflected bad judgment, incompetence, or corruption? These inherently ambiguous laws would lead to bad decisions even if the enforcers and judges were experienced and honest.

Similarly, this view stresses that antitrust enforcers and judges often will be tempted to (mis)use whatever laws they have been given, especially if they come from a country with a tradition of centralized planning or heavy involvement in business affairs by government bureaucrats. The decisionmakers' learning curves are likely to be slow and painful for the economy. For all of these reasons, transition economies would be unwise to adopt antitrust laws. Despite all of its flaws, the free market would do a better job of protecting consumer welfare.²⁶

A third view is that it is extremely important for transition economies to enact a comprehensive and carefully selected set of antitrust laws. Not only is the public's perception important, but the particular features of the chosen enforcement system also are crucial. For example, some believe that the United States' antitrust system tolerates monopolies unduly, and that Section 2 of the Sherman Act is interpreted and enforced in an ineffective manner.²⁷ If a transition economy also were to set up an antitrust system without an effective antimonopoly or abuse of dominant position provision, this system could allow private monopolies to succeed government-

24. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

25. 15 U.S.C. § 18 (1994).

26. Similar arguments could perhaps be made against many other bodies of civil law, including environmental regulation and food and drug regulation.

27. For an excellent collection of pieces that are critical of lax antitrust enforcement and call for more vigorous antitrust enforcement in many areas, including monopolization, see *REVITALIZING ANTITRUST IN ITS SECOND CENTURY* (Harry First et al. eds., 1991).

owned monopolies. Their renaissance under private ownership could produce a terrible backlash against capitalism. It therefore becomes very important not only to have a prohibition against monopolization or market dominance, but to have a statute, policy, and enforcement mechanism that is effective.

Among the reasons why an effective antitrust system is especially essential for transition economies is that their capital markets often will not work as effectively as those in more developed countries,²⁸ and they are very likely to have significant import restraints. Their businesses are accustomed to having government officials set prices and make other vital decisions for them, and they are more likely to want to avoid hard competition by colluding than are businesses more accustomed to a culture of competition. This third view—the view that generally prevails—is that the “details” of an antitrust enforcement system, not just its public perception, are crucial to the survival of a capitalist economy.²⁹

The topic of this symposium, therefore, is both broad in scope and of the highest importance. The symposium would not have any chance at all of producing anything significant except that we were fortunate enough to assemble a world class panel of authorities. As the first step in setting this up I made a list containing my top choices for potential speakers, consisting of some of the world’s foremost experts in the field. Everyone on my “dream team” accepted the invitation to participate. We are indeed privileged.

Eleanor Fox is the Walter Derenberg Professor of Trade Regulation at New York University School of Law. She writes extensively in the areas of competition and trade, the development of market economies, and comparative competition law.³⁰ She has held a large number of leadership positions in the ABA Antitrust Section, has served on many trade-related task forces, and has been a consultant to the Federal Trade

28. An effective capital market will help promote entry and dissipate market power.

29. Russell Pittman incisively analyzes the “fine line” that drafters of trade regulation statutes must walk, and concludes that “[s]ociety suffers when antimonopoly laws and antimonopoly enforcement are either too lax or too stringent.” Russell Pittman, *Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe*, 26 INT’L LAW. 485, 485 (1992).

30. Among her most recent articles is Eleanor Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1 (1997).

Commission. Professor Fox is the co-author of many articles and two casebooks, one on antitrust law and one on European Community Law. She is also the co-author—with John Fingleton, Damien Neven and Paul Seabright—of a book on Central European economies and competition law,³¹ from which her essay in this symposium is derived.

Armando Rodriguez is at the Price Waterhouse antitrust group. He previously was a senior economist with the Federal Trade Commission's Bureau of Economics, and a Research Professor at the Monterey Institute of International Studies. Dr. Rodriguez has had extensive experience advising and training antitrust agencies in transition economies, including those of Mexico, Peru, Honduras and Venezuela. He has also worked on competition matters with the Organization of American States, the Inter-American Development Bank, and the U.S. Agency for International Development, and has served as a member of the United States delegation to the NAFTA Antitrust Working Group. Among his recent publications are a monograph on merger analysis which, like the piece in this symposium, he co-authored with the next author.³²

Malcolm B. Coate is a Deputy Assistant Director in the Federal Trade Commission's Bureau of Economics. Dr. Coate has more than fifteen years experience as an antitrust practitioner evaluating the competitive effects of mergers and other agreements among firms. His research interests range from corporate strategy to industrial organization to antitrust policy, and he has worked on an extensive body of issues relevant to transition economies. In addition to the monograph on merger policy he co-authored with Dr. Rodriguez, Dr. Coate has recently co-edited *THE ECONOMICS OF THE ANTITRUST PROCESS*.³³

William E. Kovacic is Professor at the George Mason University School of Law, and is Of Counsel to Bryan Cave in Washington, D.C. His prior employers include the Federal Trade Commission and the Subcommittee on Antitrust and

31. JOHN FINGLETON, ELEANOR M. FOX, DAMIEN NEVEN, & PAUL SEABRIGHT, *COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE* (1996).

32. MALCOLM B. COATE & A.E. RODRIGUEZ, *THE ECONOMIC ANALYSIS OF MERGERS* (1997).

33. *THE ECONOMICS OF THE ANTITRUST PROCESS* (Malcolm B. Coate & Andrew N. Kleit eds., 1996).

Monopoly of the U.S. Senate Committee on the Judiciary. Professor Kovacic is my successor as Chair of the Association of American Law Schools Section on Antitrust and Economic Regulation. He also has been very active in the American Bar Association's Antitrust Section and Public Contract law Section, where he has served on a large number of task forces and in several different leadership positions. Among his many writings in the areas of competition law are his co-authorship, along with Ernest Gellhorn, of *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL*.³⁴ Professor Kovacic has served as an official advisor on antitrust and consumer protection issues to the governments of Egypt, El Salvador, Georgia, Mongolia, Morocco, Nepal, Russia, Ukraine, and Zimbabwe, and has informally advised many other nations on trade regulation matters.

The final author is Spencer Weber Waller, the Associate Dean for Academic Affairs at Brooklyn Law School and one of the co-directors of the Brooklyn Law School Center for the Study of International Business Law. He teaches antitrust and international trade law and explores the changing meaning of competition in both domestic and international markets in his many writings, including the recently published third edition of *Antitrust and American Business Abroad*. The essay he has contributed to this symposium is an expanded version of a presentation he made at a symposium held at New York University in memory of the late Dr. Betty Bock.

34. ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* (4th ed. 1994)