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BOOK REVIEW: Mario Marques Mendes, Antitrust in a World of Interrelated Economies

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BOOK REVIEW

ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES.
By Mário Marques Mendes

*Reviewed by Spencer Weber Waller**

The studies of international trade law and antitrust law are fundamentally one and the same. They are both the study of competition. However, in theory, and in practice, the two areas have been approached from vastly different perspectives. Traditionally, antitrust has been conceived of as the study of competition within a market and international trade as governing competition between markets.

Within the United States, competition principles have been enshrined in a century old statute, the Sherman Act,[1] which has been described as a "charter of economic liberty."[2] The European Economic Community (EEC) included explicit competition provisions in the Treaty of Rome because of the centrality of a system of effective competition in building and preserving the common market.[3] The vast majority of developed market economies have their own national competition laws.[4] The newly developing nations have a growing interest in the creation and enforcement of competition norms within their economies. The nations of Eastern Europe and the Soviet Republics also have turned their attention to the legal regulation of competition as part of their movement toward a market economy and a more

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1. 15 U.S.C. § 1 - § 7 (1991).

2. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

3. *See* Treaty Establishing the European Economic Community, Jan. 1, 1958, 298 U.N.T.S. 11, articles 85-86, 90 [hereinafter EEC Treaty].

4. *See generally* J. VON KALINOWSKI, WORLD LAW OF COMPETITION (1987); ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (3d ed. 1976).

democratic and open society.

The fervor for competition has not traditionally included the regulation of international trade. Trade across national boundaries has been a privilege, not a right. Competition and consumer welfare have, at most, been a minor component in the constellation of values implemented by national and international trade policies. Tariffs, quotas, nontariff barriers, voluntary restraints, and temporary import relief measures exist in response to economic and political forces that are seemingly impervious to the overriding concern for the enforcement of competition within the domestic economy.

International trade is often beyond the reach of national antitrust law in another fundamental aspect. Most nations have never applied their antitrust laws to pure export conduct.[5] Some nations regard exports simply as beyond the jurisdiction of their national competition laws. Other nations tacitly or explicitly approve export cartels aimed at foreign markets.

The separation of international trade and antitrust law is accentuated by the specialization of the teaching and practice of these vital areas as separate disciplines. Few academics combine both fields as part of their teaching and research. The law school curriculum is split into antitrust courses and international economic law courses with a limited opportunity for overlap, and there is limited faculty and student interest to make such an experiment worthwhile from an institutional perspective.

These distinctions carry over into practice. In the United States, antitrust law is enforced by the Antitrust Division of the United States Department of Justice, the Federal Trade Commission, state attorneys general, and private litigants. In contrast, the international trade statutes are administered by the Customs Service of the United States Treasury Department, the International Trade Administration of the Department of Commerce, the International Trade Commission, the United States Trade Representative, and occasional participation from other federal agencies in the absence of a single United States Department of Trade. Unlike the litigation and counseling practice of antitrust lawyers, the practice of most international trade attorneys focuses on administrative proceedings and lobbying of the legislature and agencies which control the trade policy process,

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5. *See generally Symposium: An International Antitrust Challenge*, 10 Nw. J. INT'L L. & BUS. 1-149 (1989).

with litigation typically limited to appellate review of an administrative record. Few practitioners are conversant in both divergent bodies of law and procedure.

Each field comes complete with its own distinct language consisting of different vocabularies and different definitions of those overlapping terms. "Competition" to an antitrust lawyer will normally conjure up images of a market with a reasonable number of producers and consumers acting independently and not colluding to raise price or restrict output. To an international trade lawyer "competition" involves a complex series of distinctions between "fair" and "unfair" acts and the application of tariffs, quotas, import bans, and other forms of retaliation to combat "unfair competition" by foreign firms and governments. An antitrust purist would be inclined to applaud the majority of those foreign practices condemned under international trade law, such as most types of dumping, and condemn most of the traditional solutions against those unfair trade policies as injurious to the antitrust conception of competition. For example, part of the reason that the ongoing debate over whether United States antitrust law hurts United States export "competitiveness" is so fruitless is that both sides have radically different vocabularies and terms of reference.

There is a pressing need to unify international trade and antitrust concerns. The growth of world and regional markets has blurred the distinction between intermarket and intramarket competition responsible for the traditional division between antitrust and international trade law. The regulation of international trade has a dramatic effect on competition within national markets whenever imports are a significant actual or potential factor limiting collusion and monopoly in a market. Import relief laws can be used and abused in a manner to limit competition, and occasionally violate the antitrust laws. National antitrust law affects the operation of United States firms abroad and the operation of foreign firms doing business with the United States. Antitrust principles can themselves be misused as instruments of protection.

Fortunately, there is a growing literature on the convergence of antitrust law and international trade under the rubric of competition. Most of the literature previously has focused on the application of United States antitrust law to international trade.[6]

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6. *See generally* S. WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW (1992);

Relatively little of the bridging literature has come from the international trade community. This is not surprising given the focus of international trade scholars on the multilateral regulation of international trade through the General Agreement on Tariffs and Trade (GATT),[7] which does not address trade problems in antitrust terms.[8] There is a paucity of literature that attempts the double bridge of comparing the links between trade and competition for the United States as well as other legal systems.

The newest and most ambitious entrant in this field is ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES by Mário Marques Mendes.[9] The book's subtitle, and field of inquiry, is "The Interplay Between Antitrust and Trade Policies in the US and the EEC." The book arose out of Mr. Mendes' graduate studies at the University of Michigan Law School and his exposure to that school's outstanding faculty in both disciplines.[10] Mr. Mendes has researched widely and deeply in his chosen fields to develop his rationalization of two fields in two separate systems.[11]

The volume is divided into three parts. The first section be-

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W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (4th ed. 1991); J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981); E. KINTER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER (1974). *Cf.*, B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (1989); COMMON MARKET AND UNITED STATES ANTITRUST: OVERLAP AND CONFLICT (J. Rahl ed. 1970).

There is also an immense periodical literature dealing with the jurisdictional principles regarding the assertion of national competition law on an extraterritorial basis. *See* Waller, *Bringing Meaning to Interest Balancing in Transnational Litigation*, 23 VAND. J. TRANSNAT'L L. 925 (1991).

7. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, 55 U.N.T.S. 188, T.I.A.S. No. 1700.

8. *See* J. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989); R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975); K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

The relative lack of interest is particularly ironic given the previous attempts to incorporate competition provisions into the failed International Trade Organization and the Organization for Trade Cooperation. *See* M. MENDES, ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES 34-35 (1991) [hereinafter M. MENDES].

9. *See generally* M. MENDES, *supra* note 8.

10. Mr. Mendes had the opportunity to study international trade under Professor John Jackson, one of the world's preeminent GATT scholars, and antitrust law with Professor Thomas Kauper, who served as Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice. *See* M. MENDES, *supra* note 8, at vii-viii, 1-2.

11. The book is heavily documented with some footnotes consisting of elaborate essays. In places, the sheer volume of footnotes, which approaches a 1:1 ration of footnotes to text, and their placement gets a bit distracting.

gins with a broad overview of the development of post-World War II trade policy, primarily in terms of the development of the GATT system and the strains imposed as the GATT seeks to deal with nontariff barriers and new forms of protectionism.[12] The overview continues with a brief review of the limited attempts to regulate international competition through the GATT, its predecessors, the United Nations, the Organization for Economic Cooperation and Development, and national attempts to apply antitrust principles to international trade.[13] Part II examines the antitrust systems of both the United States and the EEC with particular emphasis on the institutional enforcement of antitrust in both systems, the assertion of extraterritorial jurisdiction, the statutory and judicial exemptions for export conduct, and the special defenses relating to foreign commerce.[14]

All of this is prelude to Mendes' real interest in the intersection of competition and trade policy from a comparative perspective. What Mendes calls the "crosscurrents" between trade and competition is really an examination of the failed opportunities for the introduction of competition principles in the import relief decisions of both the United States and the EEC.[15] Mendes convincingly demonstrates how the United States ignores or marginalizes competition concerns in restricting imports involving both fair and unfair competition.

What is most interesting to a reader from the United States is Mendes' analysis of the failure of the EEC to do any better than the United States, despite the mandates of the EEC Treaty to complete and extend a single unified community-wide market, the existence of both trade and competition provisions and legislation to further this goal, and the existence of more centralized Community institutions to implement these goals.[16] Despite the European Commission's enforcement powers over both trade and antitrust, and more stringent limitations on private rights of action and judicial review, Mendes suggests that the Commission still has engaged in ad hoc tradeoffs between competition and other values as it seeks to fulfill its mission as de-

12. M. MENDES, *supra* note 8, at 19-32.

13. M. MENDES, *supra* note 8, at 33-53.

14. M. MENDES, *supra* note 8, at 57-138.

15. M. MENDES, *supra* note 8, at 139-77. This section also includes a shorter discussion of the antitrust risks of misusing the import relief remedies. M. MENDES, *supra* note 8, at at 178-97.

16. M. MENDES, *supra* note 8, at 167-77.

fined by the EEC Treaty and the Council of Ministers.

Throughout the book, Mendes assumes a high degree of familiarity with the substance of both antitrust and international trade law. He focuses on the enforcement policies and institutions in each legal system as the key to the fragmentation of competition and trade concerns in the formulation of policy in both the United States and the EEC.[17]

Mendes is perceptive in both his description and analysis of the fragmentation of antitrust and trade policy, particularly within the United States. His thesis is that the fragmentation of enforcement of both sets of laws among various government agencies and private parties has prevented the convergence and development of a unified vision of competition and its role in international trade.

The only real shortcomings of the book are its limited and somewhat anticlimactic prescriptions and conclusions. After the thorough and methodical analysis of the tensions between antitrust and trade policy, Mendes is content to offer a relatively brief overview of the debate in the United States over the question of industrial policy as a potential solution to the divergent goals of competition and trade policy.[18] He also offers the proposal by the Reagan Administration, and the rejection by Congress in 1986, to relax United States antitrust laws to aid industries unable to compete in world markets as a further example of the many parties within the United States system which influence antitrust policy and limit the wholesale realignment of competition policy in the name of trade concerns.[19]

His conclusions for the EEC are even more general. He regards the EEC as subject to the same fundamental split between competition and trade concerns in the implementation of the EEC Treaty despite the explicit overarching goal of the creation of the internal market. He suggests that there should be greater coordination in the future based on the adoption of Article 130(f) of the EEC Treaty, added by the Single European Act, which calls for the strengthening of the scientific and technological basis of European industry and the promotion of European competitiveness at the international level, while taking particu-

17. This assumption of mastery of the substance of the two areas may be unfounded given the thesis that both areas have developed independently.

18. M. MENDES, *supra* note 8, at 239-64.

19. M. MENDES, *supra* note 8, at 239-64.

lar account of both trade and competition policy.[20] Mendes further suggests that the growth of private rights of actions, increased judicial review, and the potential expansion of the jurisdiction of the European Community Court of First Instance to include both trade and competition cases, may result in a more coherent body of law integrating both disciplines.[21]

Mendes has properly analyzed the inherent contradictions between trade and antitrust and how specific trade policies and import relief statutes conflict with competition policy in both systems. What tends to exist so far is a one way subjugation of antitrust law to the needs of trade policy, while competition concerns exist, if at all, at the periphery of most import relief decisions.

The key to unraveling the contradictions that Mendes establishes lies in an area not analyzed in the book. What remains to be done is to examine the broader question of how competition law fits into the hierarchy of values implemented in trade policy. Is competition so far down the list that it can be ignored by policy makers? Similarly, has antitrust law been coopted as an instrument of trade policy? Must it inevitably be so? These are critical questions for which Mendes has set the stage for consideration, but has not attempted to resolve.

Mário Marques Mendes is a part of a broad movement to create a new discipline which will address these challenges. Even if the trade policy process is not changed, it will be clarified and stripped of the rhetoric obscuring the real choices which have to be made. ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES is a welcome addition to the study of competition in its many and varied forms.

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20. EEC Treaty, *supra* note 3, at art. 130(f).

21. M. MENDES, *supra* note 8, at 177-78. Mendes' predictions for the EEC are somewhat undermined by his analysis that the proliferation of actors in the United States has prevented such a convergence from arising.