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ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor–International Trade Law and State Intervention in the Economy in the Covid Era

Blind Spot: Trade and Competition Law—the Space Between the Silos

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Abstract
Trade law and competition law have grown up in their separate silos. This means that restraints by the states and restraints by private parties are treated in separate boxes, and with few exceptions, they have been treated so through the years. Yet, some of the worst restraints that do some of the greatest damage are best characterized by the synergy between the two. These trade-and-competition, or hybrid public/private, restraints fall under the radar screen, and defendants in litigation play one set of laws off against the other, hiding behind limits and immunities. This is the Blind Spot of the Article's title – the space between the silos. This Article unearths the Blind Spot, gives examples of what we know and what we need to know, and proposes a methodology to illuminate and eliminate the Blind Spot.

Keywords: trade; competition; state; market integration; WTO

A. Introduction

This Special Issue highlights undue intervention of the state in the market and makes proposals for how state acts might be better controlled. With concerning frequency, the state is amassing special and undeserved advantages, such as subsidies and other privileges granted to state-owned enterprises. The privileged state may preempt the business of private enterprise and subvert the market system.[1] Articles in this issue highlight states' unfair advantages, often producing prices that are "too low." Moreover, artificially-granted bargaining power to state entities can distort the trading system, tilting it in favor of state capitalism. [2]

This Article addresses a companion problem; one that produces prices that are too high. High prices typically result from state intervention that creates or bolsters market power, or prevents its erosion. Moreover, this Article addresses abuses not tracable to the state or state-owned enterprise (SOE) as the single actor, but abuses that comprise an interaction between powerful private vested

[1]*See* Leonardo Borlini, *Economic Interventionism and International Trade Law in the Covid Era*, in this Issue (and the literature referred to therein).

[2]*See* Mitsuo Matsushita, *Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises*, in this issue; Ming Du, *Unpacking the Black Box of China's State Capitalism*, in this Issue.

interests and the state; private power in its symbiotic relationship with the state or state officials.[3] The Article exposes the reality that neither trade rules nor competition rules, nor FTA rules governing the state and its SOEs, attack the problem. Yet the problem is so serious that it may prevent entire continents from realizing their goal of market integration and its promised effects of lifting millions of people from poverty and making people decisively better off.

In these next paragraphs, the Article explains why this is a competition policy problem (it centrally concerns private power that harms consumers and the market) and why it is also at the same time a trade policy problem (it centrally concerns acts of the state that interfere with the free flow of trade).. The Article explains how the problem falls into a gap, which is the Blind Spot, because no one, neither discipline, is looking it "in the face" and addressing it. Our law has grown up in silos. Trade law prohibits unreasonable trade (state) restraints, as a result of long negotiations at trade rounds. Competition law (or antitrust) prohibits unreasonable business restraints, based on national statutory law and judicial interpretation of what constitutes market power and what conduct is and is not anticompetitive (—usually price-raising conduct). Each body of law nurtures its own technicians and keeps its own limits. Yet state restraints, when they are unreasonably broad and not legitimate acts of governance, are usually the brainchild of vested interests. Powerful vested interests have uncanny ways of reinventing their restraints as public ones and blandishing the shield of the sovereign for immunity or defense.[4] And sovereigns' intent on burnishing their economic and political power may facilitate private restraints to puff up their own business firms or simply aggregate sovereign and private power in ways that advantage both, to the harm of the world.[5] Meanwhile, in each of the two silos—trade and competition—the law has developed immunities, exemptions, or mere limits, sometimes for good reason such as petitioning government, but often far beyond legitimate regulation to protect a public interest. Sometimes these restraints go unnoticed simply because they are well hidden. Other times they are open and notorious. Increasingly, the effects are cross-border and significantly undermine regional and world trading systems.

This Article concentrates on the trade and competition Blind Spot, giving particular regard to state and hybrid restraints. It has two major subjects. First, competition law and policy on its own bottom: This is the underappreciated "other hand," along with trade policy, that facilitates an efficient, cosmopolitan trading system in the world. Competition law is national-only, an irony in a world where most significant business acts have essential global dimensions. Cooperation among national competition law agencies can bridge some of the gap in world coherence, but by no means all. Cooperation on competition policy entails control over private acts, mostly overlooking state and hybrid restraints. Most but not all nations' competition laws cover state-owned-enterprises and prohibit their anticompetitive abuses, and a distinct set of nations' competition

[3]This Article thus offers a complementary and fresh window to view state acts that interfere with the marketplace. While SOEs and their unfair acts are very much in the spotlight and are the subject of control by international instruments and debate about the limits of that control. *See* Matsushita and Du, respectively, *supra* note 2 (attesting the trade-and-competition interface is a neglected child).

[4]For example, the aluminum producers cut back their output and say: "[T]he government made me do it." But the government may not have made them do it. *See* Erie Norton & Martin Du Bois, *Foiled Competition: Don't Call it a Cartel, but World Aluminum has Forged a New Order*, WALL ST. J. (June 9, 1994) at A1 (State involvement defenses are overbroad); *see also* Chapter 5: Where Trade and Competition Intersect, in International Competition Policy Advisory Committee Final Report to the Assistant Attorney General for Antitrust, 201–79 (2000), [hereinafter ICPAC Report] https://www.justice.gov/atr/chapter-5.

[5]Sometimes it is impossible for an outsider to know whether the motivating inspiration for the restraint was public or private. Moreover, the motivation and its source are not treated as a justiciable issue. *See Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, 8 F.4th 136, 162 (2d Cir. 2021) (DISMISSING on comity grounds a lawsuit against Chinese vitamin producers who had fixed export prices to the US and defended price-fixing by arguing that China ordered them to do it even after a jury determined that China had not made such an order); Eleanor M. Fox, *China, Export Cartels and Vitamin C: American Second?*, COMPETITION POL'Y INT'L (Mar. 13, 2018), https://www.competitionpolicyinternational.com/china-export-cartels-and-vitamin-c-american-second/.

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laws prohibit unduly anticompetitive state and local government measures.[6] The second subject is trade and competition. Intertwined trade-and-competition restraints are mostly below the radar screen of enforcement against harmful economic restraints. They are caught in neither silo. The actors, public and private, play off one system against the other (trade rules against competition rules). Unless work is done to recognize the Blind Spot and take action to fill the gap, market integration projects of regions and whole continents will fail. This Article suggests how to approach the necessary work.

The argument proceeds as follows. First, the Article gives a short history of competition law and policy in the international arena. Second, it highlights anticompetitive state and hybrid action and describes how a number of competition law systems take on the problem – but these modalities are not thus far counted in the realm of "international standards" that inform national law. Third, to give concreteness to the Blind Spot phenomenon as a regional and international problem, it tells stories of the Blind Spot in cross-border trade. A fourth section explores a way forward and concludes.

B. A Short History

Antitrust was pioneered by the United States with the passage of the Sherman Antitrust Act in 1890 to control the raw power of exploiting industrialists. It prohibited anticompetitive agreements and monopolization and was later supplemented with law against anticompetitive mergers in the wake of fears of industry concentration that could play into the hands of fascism. In Europe, more than half a century after the passage of the Sherman Act, treaties were drafted to create the European Economic Communities. The drafters included competition law as a basic modality which, synergistically with provisions ensuring free movement of goods and services, would create a common market out of the shards of the Second World War's bitter divisiveness. The competition provisions in the EEC Treaty of Rome of 1957 developed into the European Union (EU)'s modern competition law. Today some 140 jurisdictions have competition laws. The competition laws of the US and the EU are the dominant models emulated in the world, even while the competition laws of other jurisdictions such as Germany, the UK, Australia, South Korea, Japan, China, and South Africa make their mark on the world competition law map. [7]

From early times, ever since there has been trade, there have been restraints in the course of trade. Many have been acts of business and many have been acts of states. Harmful cartels during World War II led to the draft Havana Charter, 1945-48, precursor to the General Agreement on Tariffs and Trade (GATT). The Havana Charter was never adopted, the US backed out for fear of loss of sovereignty, but it is continually evoked in recognition that private, as well as public, restraints may impair the world trading system. Much later, in the 1970s and 1980s, global economic interactions became especially intense. Business actors, often combined with states, found ways to restrain, exclude and exploit cross-border trade for profit and power. A well-known example involved US firms trying to enter the Japanese market in the 1980s. Film makers, glass producers, paper manufacturers, and others were frustrated in their efforts despite their world-class products. Why? What was the hidden barrier? The problems led to the US/Japan Structural Impediments Initiative, which ended in 1990 with Japan's agreement to remove a number of its state regulatory barriers, but US attempts to invoke Japanese antitrust law and WTO trade law failed. The artificial separation of trade and competition at the altars of the WTO and the Japan Fair Trade Commission doomed the challenge, as we discuss below.[8]

[6] *See generally*, Eleanor M. Fox & Deborah Healey, *When the State Harms Competition – The Role for Competition Law*, 79 Antitrust L.J. 769 (2014).

[7] *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140 (1981); Eleanor M. Fox & Daniel Crane, Global Issues in Antitrust and Competition Law 174 (2d ed. 2017).

[8] *See infra* Part D.III.

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At about the same time as the Structural Impediments Initiative, which brought the Japanese and US trade authorities and competition authorities to one table, a much larger group of world trading partners was negotiating the WTO's Uruguay Round. The Round was very significant. It ended in 1994, substantially reducing trade barriers and enabling businesses to ship goods around the world at a much-reduced cost. Then came the rise of digital technology in the last quarter of the twentieth century. Innovation in digital technologies fueled a revolution in cross-border trade, for digital commerce surmounted challenges of transportation. With freer world competition came more restraints of competition and—with growing numbers of nations adopting competition laws—came more jurisdictional conflicts. In the 1990s seeds were planted once more for a world competition charter. The WTO emerged as the logical home.[9] The WTO established a Working Group on the Interaction between Trade and Competition Policy at the Singapore Ministerial Conference in December 1996.[10] The Working Group did important research and conceptualization. The European Union led the effort, submitting a report on fundamentals of how a world competition competence could work. The US, however, opposed the plan, fearing it would generate world rules that would protect competitors from competition, fearing development of a bureaucracy that would give no quarter to the US efficiency-based version of good competition law, and confident that it could achieve what it wanted (compliance with US rules) on its own. Developing countries were skeptical of the effort, too, but for virtually opposite reasons. They lacked the experience and knowledge about competition laws that they needed to advance, or at least protect, their interests at the bargaining table, and they feared that any rules negotiated would squeeze the space for their own essential industrial policies, and that their markets would simply be occupied by the West.[11]

Over the decade, the ground shifted away from enthusiasm for a world competition framework. Sentiment grew for a roots-up conception. For some, the roots-up conception was a welcome alternative to a world regime; for others, it was a preparatory step. The roots-up project came to fruition in 2001. Fourteen nations formed the International Competition Network (ICN), a voluntary organization of national (and EU) competition law enforcers devoted to seeking out common ground on competition law procedures and principles and thus inducing greater convergence of national systems. The ICN has grown to 132 members and has been eminently successful in facilitating convergence and informed divergence, and in building a mutually-supportive world competition community. But the ICN does not "do" trade.[12]

Meanwhile, back in 2001, the WTO project for a world competition regime was still in play. At Doha, Qatar in November 2001, the WTO adopted a Ministerial Declaration (the Doha Declaration) which called for clarification of world competition rules on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels," [13] along with voluntary cooperation and support for capacity-building in developing

[9]*See* Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097 (1995) (arguing that because anticompetitive practices of private enterprises offset the liberalization of trade in goods and services it is necessary to construct some principles and mechanisms to promote competition policy at the international level to maintain the effectiveness of the WTO's liberalization of trade in goods and services).

[10]For one view of a world competition agenda, see Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT. ECON. LAW 665 (1999) (identifying market access and open markets as the key point of intersection of trade and competition and proposes that a WTO instrument should take advantage of the synergy).

[11]*See* Eleanor M. Fox, *Antitrust Without Borders: From Roots to Codes to Networks*, JE15 EXPERT GROUP ON COMPETITION POLICY AND THE TRADE SYSTEM (2017), https://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Fox-Final-2017.pdf. If the 1990s effort for a competition competence within the WTO had succeeded, would it have addressed and eliminated the Blind Spot? Probably not. *See* DOJ ANTITRUST REPORT, *supra* note 4 (discussing unadopted proposals for integration of trade and competition regimes within the WTO); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AMER. J. INT'L L. 1 (1997) (arguing that because the proposed competition law stayed within traditional bounds, it was simply a competition law within the vehicle of the WTO not a trade-and-competition law).

[12]Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L L. 151 (2009).

[13]World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746, 746 (2002).

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countries. But the prospect of a world competition agreement was not long lived. At the Doha Round meeting in Cancun in 2003, the task of negotiating lower trade barriers and solving core trade problems such as cotton subsidies was so contentious that the Doha agenda was shaved.[14] The competition item was jettisoned. Shortly thereafter, the Working Group on the Interaction of Trade and Competition Policy was virtually abandoned.[15] There is no ongoing effort to reach world agreement on competition policy, despite the fact that, increasingly, transactions are global, cartels cross many borders, dominant firms' abuses span the globe, and most of the top 10 business firms of the world are larger than most nations.

The path to cosmopolitanism, honed in the 1980s, 1990s, and three-quarters of the 2000s, has turned into narrow nationalism. The coronavirus pandemic has escalated the retreat of nations inwards and has fostered a growing presence of the state in the economy and a greater appetite for nationalistic economic policies, whether offensively or defensively. The defensive mode – such as leading competitors defending their merger—increasingly evokes China—a fear of its economic (and political) expansion through its version of state capitalism, built in part on expanding digital technology and control of data.[16]

C. The State and Competition Law

Even in more community-regarding times, the world trading system had a Blind Spot. The regression to nationalism simply makes the problem more urgent. It provides more incidence of and opportunity for undue state and hybrid restraints. This section addresses the extent to which competition laws of various nations and the EU reprehend state acts and measures that unduly harm competition. Projects for convergence in the ICN have not reached this space, possibly because of hesitancy to question government action, the desire to preserve checks and balances (Should competition authorities be empowered to challenge regulators?), and the fact that certain jurisdictions (perhaps the United States?),are not as threatened by excessive, corrosive statism combined with vested interest strategies as are others, including many developing countries. Nonetheless, the Organization for Economic Co-operation and Development (OECD) periodically deals with the problem in its Global Fora and in its research on "competitive neutrality,"[17] a project that overlaps considerably with the larger subject of undue and disproportionate state restraints.[18]

The competition laws of the various jurisdictions reprehend some anticompetitive state acts and measures in various ways and to various degrees. First, most competition laws cover entities

[14]*See, e.g.*, Rolf H. Heber, *Unfinished Business: Competition Law and the WTO* in INTERNATIONAL ECONOMIC LAW AND GOVERNANCE: ESSAYS IN HONOUR OF MITSUO MATSUSHITA (J. Chaisse Lugard and T.Y. Lin eds., 2016) (arguing that the multilateral cross-border trade legislation has failed to thoroughly address the key principles of competition law, the author posits that multilevel governance concept appears to be suitable to adapt competition law to deep globalization).

[15]*See* Fox, *supra* note 12.

[16]*See* Eleanor M. Fox, *POWER: Trust and Distrust*, NETWORK L. REV. (Apr. 6, 2020), https://www.networklawreview.org/eleanor-fox-power/. On the specific position of China and the rising concerns among its trading partners, see Petros C. Mavroidis & André Sapir, *China in the WTO Twenty Years On: How to Mend a Broken Relationship?*, in this Issue

[17]*See Competitive Neutrality in Competition Policy*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2021), https://www.oecd.org/competition/competitive-neutrality.htm. For a critical analysis of the concept of competitive neutrality as used in the current trade and competition policy debate, see Leonardo Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-owned Enterprises in Trade Agreements*, 35 LEIDEN J. INT. LAW 313, 320–23 (2020) (discussing the use of the notion of "competitive neutrality" by proponents of new trade rules on state enterprises to reshape the state through free market ideology without properly situating the problem within the ambit of the challenges that emerged at the conclusion of the Uruguay Round).

[18]*See* Eleanor M. Fox, *The Promotion of Competitive Neutrality by Competition Authorities – Attacking State Restraints and Assuring Competitive Neutrality,* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Dec. 7, 2021), https://one.oecd.org/document/DAF/COMP/GF(2021)10/en/pdf. "Competitive neutrality" is limited to a situation in which private firms are disadvantaged by an undue state restraint. The broader subject—state restraints—focuses more broadly on when the restraint is undue (unnecessary for the act of governance), and harmful, usually to consumers, without regard to unfairness to rivals.

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owned or controlled by the state. If SOEs do business acts that violate the competition rules, ordinarily their acts are prohibited. The competition laws of Asian and Middle Eastern countries, however, frequently exclude SOEs.[19] Second, the state may entrust private firms or SOEs with special or exclusive rights, such as postal delivery. The competition law of the European Union grants these firms an exemption only to the extent necessary to allow fulfillment of their duties to the state. Many jurisdictions adopt approximations of EU law.[20] Third, states often adopt excessive and unreasonable rules and regulations, and bodies of government may engage in monopolistic acts.

Do competition laws have a role to play in catching these hybrid acts and measures? A small but significant number of jurisdictions grant some enforcement power to the competition authority, and a large number authorize the competition authority to advocate against such restraints. A number of competition agencies have the authority to directly challenge unduly restrictive acts of municipal authorities, which often take the opportunity to expand their monopoly power to competitive neighboring markets. Central and Eastern European nations' competition authorities commonly have power to enjoin such acts and measures. In some of these nations, competition cases against acts and measures of municipal authorities comprise a major share of their enforcement.[21] A significant set of these cases challenge government deviations from procedures in procurement/bid-rigging.[22] In some jurisdictions, while the competition authority does not have power to directly challenge acts and measures of government, they have the power, or duty, to bring the case to the authorized body and seek or demand discipline or reform.[23]

Of all jurisdictions, none is more mature and foresightful on state restraints than the EU. Indeed, eliminating cross-border restraints is at the heart of the formation of the European common market. The EU model is particularly useful as a notional guide in the regional and international context of market integration through trade and competition law. The EU model begins with the constituent Treaties and the constitutional structure. When the European Communities were founded in the 1950s, Europe was Balkanized and the main idea of the Community was to tear down the barriers to free movement and free competition and to create one market—for prosperity and peace. Therefore, the template not surprisingly includes robust measures to prohibit the Member States from obstructing the free flow of goods and services,[24] requiring them not to discriminate on the basis of nationality,[25] and barring state measures that could jeopardize the achievement of the Community's objectives.[26] Under the competition rules, the Treaty addresses public undertakings and those to which Member States grant special or exclusive rights. These firms may not enact or maintain any measure contrary to the competition rules, and firms entrusted with the operation of services of general economic interest are subject to the competition rules to the extent compliance does not obstruct performance of their assigned duties.[27] Also, because the European states were in the habit of giving their own firms generous

[19]See, e.g., Royal Decree No. 67/2014: Promulgating Competition Protection and Monopoly Prevention Law, Art. 4, (Oman), http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98585/117392/F840772370/Anti-Monopoly-Law-Eng.pdf; Royal Decree No. M/75 of 29 Jumada Thani 1440 Hejra 2019 (Saudi Arabia) (exemption for public institutions and wholly state-owned companies that have been granted exclusivity by statute). For the level of coverage of SEOs by ASEAN competition laws, see, Alexandr Svetlicinii, The State-Owned Enterprises Under the ASEAN Regional Competition Policy: Insights from the European Competition Network, 11 KLRI J. L. & LEGIS., 6–46 (2021).

[20]See Fox & Healey, supra note 6, at 776–83.

[21]*See* Fox and Healey, supra note 6, at 785–86 (discussing developments in Russia and Lithuania).

[22]*Id.* (identifying cases in Russia, Lithuania, and Poland).

[23]*Id.* at 783–86, 789–90 (pointing to Chinese and Japanese examples of state action doctrines and related defenses in antitrust laws—including broad views of comity—that are not part of the solution but part of the problem by shielding private anticompetitive action and hybrid action); *see also Animal Science Products*, supra note 5.

[24]Treaty on the Functioning of the European Union art. 3037, 2008 O.J. (C115) 45–66 [hereinafter TFEU].

[25]*Id.* at art. 37.

[26]*Id.* at art. 4(3).

[27]*Id.* at art. 106

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subsidies, and subsidies distort free competition, the Treaty prohibits the granting of subsidies except as allowed.[28]

The EU set of rules and relationships is powerful. From early stages, the European Court of Justice enforced the rules vigorously and expansively, reining in Member States and by inference the vested interests within them. Under free movement rules, EU law prohibited Germany from maintaining its ancient standards for making beer the German way and barring the import of any other drink labeled "beer."[29] Likewise, EU free movement law prohibited Germany from barring brandy that did not meet its standards,[30] and Italy from barring pasta that was not made the Italian way.[31] The EU enforces its law at the juncture of trade (free movement) and competition. A good example is the case, *Italian Matches*.[32] Italy enforced an ancient law governing the match market. The law organized a match cartel. It required the minister to set the price of matches that were to be sold in Italy, and it required the Italian producers to set the market share of each market participant. When German and Swedish producers requested to sell matches in Italy, the match consortium allocated to each a miniscule market share. The Court of Justice exonerated both the competition and the trade interests. It found that the Italian match producers violated the competition law and that Italy violated the free movement law. Italy was required by the EU to disapply its law. Numerous other cases prohibit state restraints in business, as when the Slovakian Post Office observed private actors flourishing in the adjacent business of hybrid mail—receiving invoices sent electronically to the city of the debtor and delivering them locally—and decided to declare the hybrid mail market for itself. It lost. Its measure to take over the adjacent market was an abuse of dominance.[33]

EU law avoids the Blind Spot. Its law is uniquely designed to cover the territory. Free movement and free competition work hand in hand.[34] Many common markets adopt the EU architecture on free movement and competition, even word for word. But they do not make the connection. They do not draw together the threads of the free movement and the competition competences.

Free trade agreements might seem uniquely positioned to take up the challenge of integrating trade and competition in the free trade area, but they have thus far proved weak and timid. They emphasize cooperation, which of course is a good, practical, and feasible track. They keep within the silos, disavow dispute resolution for violations of competition violations (such as maintaining and enforcing a competition law), and commonly do not prohibit export cartels even within the free trade area.

D. Examples of the Blind Spot in International Trade and Competition

This section tells two stories and identifies one challenge, painting a more distinct picture of the trade/competition restraints that have no roof over their heads; they are in need of proscriptive law. First, we reference routine scenarios.

[28]TFEU art. 107–08; *see also* Fox & Crane, *supra* note 7, at 402–03.

[29]C-178/84, Commission v. Germany, ECLI:EU:C:1987:126 (Mar. 12, 1987).

[30]C-120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), ECLI:EU:C:1979:42 (Feb. 20, 1979).

[31]C-407/8, 3 Glocken v. USL Centro-Sud, ECLI:EU:C:1988:401 (July 14, 1988).

[32]C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, ECLI:EU:C:2003:430 (Sept. 9, 2003).

[33]C-293/15 P, Slovenská pošta v. Commission, ECLI:EU:C:2016:511 (June 30, 2016).

[34]Andrea Biondi & Piet Eeckout, *State Aid and Obstacles to Trade*, *in* THE LAW OF STATE AID IN THE EUROPEAN UNION 103, 109 (Andrea Biondi & Piet Eeckhout. eds., 2004) (postulating that "both sets of rules are based pursuing an identical aim, namely that of ensuring the free movement of goods under normal conditions of competition").

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I. Routine Scenarios

We would classify two principal scenarios as routine fact sets. The first is corruption and competition affecting cross-border trade.[35] Perhaps the most prominent is the case of the corrupt official who greases the wheels of a bid-rigging cartel.[36] The prosecution of the corrupt official and the antitrust challenge to the bid-rig are separate. The incentives for antitrust and prosecutors' cooperation often do not align. Yet, capability to treat the single matter as one could help establish the facts and help formulate a clear unitary offense.[37] Similarly, there are multitudinous routine incidents of business bribes by industrialists to protect their markets; to confiscate rivals' goods at customs depots. The facts might fit a charge of monopolization, or abuse of dominance, or anticompetitive agreement. But not necessarily. Often the agreement is "only" with a corrupt official and the briber is not a monopoly. It should not matter (but it does because of traditional limits to competition law). Another common practice of industry incumbents is setting standards to keep outsiders out. The standards might get a gauzy cloak of official approval, or they might not.[38] The standard-setters might leave clues of their exclusionary purpose, or they might not. If the standards are excessive or deceptive and form significant barrier to entry or expansion, it should not matter.

For the second principal area, we step into the unknown. Time and again, trade flows in suspicious patterns. For example, Malawi has been a net exporter of soya oilcake, and charges high local prices and much lower export prices. Zambian sellers were charging high domestic prices for soya oilcake until the government imposed an export ban and prices fell. Zambia imposed export bans on maize even when it had substantial surpluses.[39] Why would trade flow and not flow in these ways that defy economic logic? Private conspiracies? Vested interests co-opting governments? How can we get to the root of these apparent but hidden cross-border restraints? We need incentives for competition officials and trade officials to follow the clues. We need cross-border cooperation in uncovering the facts; cross-border cooperation between the nations' (and regions') competition authorities, nations' trade authorities, and the trade authorities with the competition authorities. The University of Johannesburg's research center, Centre for Competition Regulation and Economic Development (CCRED), is operating a project, African Market Observatory,[40] which follows price movements of agricultural products in Eastern and Southern Africa, and is trying to unearth just such facts in suspect markets. Raising the project to regional and

[35]Corruption undermines the effectiveness of markets. *See* Dani Rodrik, *Comments*, *in* CORRUPTION AND THE GLOBAL ECONOMY 109, 111–12 (Kimberley A. Elliot ed, 1997) (showing that corruption in international commerce entails significant developmental and distributive problems, these extend from the petty corruption of the bribery of customs officials to secure a lower tariff bracket for a particular shipment to the paid-for influence used to ensure non-enforcement of domestic regulations, to the grand corruption of rigged procurement decisions); Leonardo Borlini & Anne Peters, *25 Years of International Legal Cooperation Against Corruption: Origins, Evolution and Future Challenges* (on file with author) (describingfor the state of the WTO's control of corruption and pathways for strengthening it). For more on the negative influence of corruption on market performance, see MARCO ARNONE & LEONARDO BORLINI, CORRUPTION: ECONOMIC ANALYSIS AND INTERNATIONAL LAW (2014).

[36]Huge and infamous cartels rife with corruption—and corruption rife with cartels—include the "Car Wash" bribery scandal in Brazil and the TSKJ Consortium bribing officials in Nigeria. *See* Jonathan Watts, *Operation Car Wash: Is This the Biggest Corruption Scandal in History?*, GUARDIAN (June 1, 2017) https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history; Remi Oyeyemi, *Halliburton Bribery: The Timeline of a Scandal*, PM NEWS (July 20, 2015) https://pmnewsnigeria.com/2015/07/20/halliburton-bribery-the-timeline-of-a-scandal/. Both scandals involed massive bribery and cartelization on numerous procurement bids for contracts with each country's respective national oil company.

[37]Corrupt acts are often part and parcel of a conspiracy or other restraint that harms competition and causes prices to go up, or—what is the same thing—deprives the people of roads or schools or houses or even food that they would otherwise have. *See, e.g.*, MICHELA WRONG, IT'S OUR TURN TO EAT: THE STORY OF A KENYAN WHISTLE-BLOWER (2010).

[38]*See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, (1988) (holding that a private trade association is not entitled to antitrust immunity under E.R.R. Presidents Conf.v. Noerr Motor Freight, Inc., 365 U.S. 127) .

[39]*See* Simon Roberts, *Competition, Trade and Sustainability in Agriculture and Food Markets in Africa*, (working paper on file with author).

[40]*See* CENTRE FOR COMPETITION REGULATION AND ECONOMIC DEVELOPMENT, https://www.competition.org.za/africanmarketobservatory#:~:text=The%20African%20Market%20Observatory%20(AMO,of%20markets%20for%20staple%20foods.

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pan-African dimension would give it more visibility, urgency, and chance of success in surfacing the problems and molding the law to remedy them.

II. The WTO Mexican Telecoms Case: The Integration of Trade and Competition

The next two examples graphically illustrate the need for integration of trade and competition. The offense is the sum of the parts. In Mexico, Carlos Slim, a powerful industrialist, then the richest man in the world, and patron to successive Mexican presidents, owned most of Mexico's telecommunications industry—including flagship TelMex. Fees for calls incoming to Mexico, especially from the US, were a source of big profits, for many Mexican citizens found work only across the border. They would send remittances to their families and needed to stay in touch. Probably obliging Slim, the Mexican telecoms regulator commanded the Mexican telecoms companies (for a few had entered to compete with TelMex) to raise the price of receiving international telephone calls to the monopolistic level charged by TelMex. Meanwhile, Mexico had signed the GATS Telecommunications Reference Paper, under which Mexico undertook to "maintain . . . [a]ppropriate measures . . . [to] prevent[] suppliers . . . [or] a major supplier from engaging in or continuing anti-competitive practices."[41] Faced with the extortionate termination fees, AT&T complained to US authorities, and the US complained to the WTO. The US authorities alleged that Mexico organized a termination fee cartel and thereby violated its duty under the Reference Paper to maintain measures to prevent anticompetitive practices. Did Mexico violate its WTO obligation? Mexico argued that it *did* maintain and enforce its antitrust laws; that the terminating telecom firms did not violate the Mexican competition law (with Mexico just standing by) for the firms were just following the order of government; that Mexico's order to adjust prices upwards to match the market leader was simply an act of regulatory sovereignty; it would attract more revenues, which the telecoms could invest in domestic infrastructure (sorely needed in Mexico's poor southern and rural areas) and thereby advance Mexico's economic development.

The matter came before a WTO panel, chaired by Professor Ernst-Ulrich Petersmann. The panel rejected Mexico's defenses as sophistic. Mexico could not (said the panel), by ordering a cartel, free itself from its obligation to sue and disband cartels. The WTO panel decision in *Mexican Telecoms* was a triumph of integration of trade and competition. The panel did not let ambiguous words ("appropriate measures shall be maintained" against "anticompetitive practices") stand in the way of the Reference Paper's signatories' implicit assurance of open cross-border markets free of cartels, public or private.[42] But *Mexican Telecoms* may be the only good example in the world of a prohibited integrated trade-and-competition offense. Moreover, the lesson is buried in a very complicated and contentious trade case.[43]

III. Fuji Kodak: The Separation of Trade and Competition

In the 1980s, the Eastman Kodak Company was the leading producer of consumer photographic film in the world. Its biggest competitor was Japan's Fuji Film. Kodak, trying to enter the Japanese market, was convinced that it was the victim of a network of public and private restraints. To distribute Kodak film in Japan, it tried to enlist Japanese film distributors, but was always turned

[41]WTO, Telecommunication Services: Reference Paper, (Apr. 24, 1996) https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[42]*Id.*

[43]Panel Decision, *Mexico – Measures Affecting Telecommunications Services*, WTO Doc. WT/DS204/R,2 (April 2004) (finding that Mexico violated its obligations under the General Agreement on Trade in Services (GATS)). *See also* Eleanor M. Fox, *WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. Int. Econ. Law 271 (2006); Damien Neven & Petros Mavroidis, *El mess in TELMEX: A Comment on Mexico-measures Affecting Telecommunications Services*, 5 World Trade Rev. 271–296 (July 2006).

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down. It wanted to offer premiums or discounts to introduce its product and entice customers but was prohibited by Japan's Anti-Premium law. It wanted to build a retail establishment from which it could sell its product but was prevented by the Large Scale Retail Store Act. (Neighborhood stores had a veto.). Kodak complained to antitrust authorities and to US trade authorities. The US authorities eventually brought a complaint to the WTO, after bringing a US trade law complaint. They alleged that the Japanese government "built, supported, and tolerated a market structure that impedes U.S. exports of consumer photographic materials to Japan" and that facilitates private business practices that also obstruct exports to Japan. The United States challenged Japan's practices under several articles of the GATT—those regarding national treatment, transparency, and nullification and impairment.[44]

The WTO panel found no violation by Japan of its GATT obligations.[45] It found the US complaint flawed because the US had no reasonable expectation that Japan's market was free of its regulatory barriers, among other reasons. The US Department of Justice had simultaneously complained to the Japanese Fair Trade Commission (JFTC). The JFTC ultimately averred that they investigated the matter and found nothing awry; it found no agreement among the distributors or of the distributors and Fuji Film to refuse to carry Kodak's product.

The Fuji-Kodak saga is a dramatic illustration of the lack of integration of the trade and competition rules and disciplines. Toleration of anticompetitive practices that lead to significantly impaired market access is not a violation of WTO obligations when the traders have no reason to expect a freer market. Private firms might conspire to impair the world trading system, and their competition agency might turn a blind eye. Especially if the conduct is beyond the extraterritorial reach of the harmed nation, there is no recourse.

E. The African Challenge

Africa is notoriously Balkanized. Most of the peoples were colonized until the early 1960s. The colonization left the continent with overworked extraction of resources and with trade routes leading only to the colonizer. Market integration of the continent is a much desired, if daunting, goal.[46] The Agreement Establishing the African Continental Free Trade Area came into force in January 2021.[47] It has been signed by 54 of Africa's 55 nations, all but Eritrea, and ratified by 44 of them. It declares the general objective to create a single market for goods and services facilitated by free movement of persons and capital and to lay the foundation for a Continental Customs Union. It contemplates the adoption of a Competition Protocol. The Competition Protocol is in the process of negotiation.

The content of the Competition Protocol has been sharply debated. Should the competition provision resemble modern competition laws, conferring on authorities the typical range of powers and duties across the offenses of anticompetitive mergers, cartels, and abuses of dominance? Or should it be conceived as a forum for coordination of the competition authorities of Africa, including the regional economic communities, of which there are more than a few,

[44]ICPAC Report, *supra* note 4, at 214 (footnote omitted).

[45]Panel Decision, *Japan —Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, (Mar. 31, 1998); *see also Section 304 Determinations: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper*, 61 Fed. Reg. 30929 (June 18, 1996).

[46]*See* Eleanor M. Fox & Mor Bakhoum, Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa (2019); Eleanor M. Fox, *Integrating Africa by Competition and Market Policy*, 60(3) Rev. Indus. Org. 305 (2022).

[47]Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, 58(5) ILM 1028. On May 30, 2019, the Agreement Establishing the African Continental Free Trade Area (AfCFTA), entered into force for the twenty-four countries that had deposited their instruments of ratification. When the remaining thirty-one member states of the African Union ratify it, the AfCFTA is expected to cover a market of 1.2 billion people and a gross domestic product (GDP) of $2.5 trillion. That would make it the world's largest trade agreement after the WTO.

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overlapping, and at various stages of functionality and disfunction? Or should it be endowed with a bespoke structure, focusing its mandate on the "tip of the iceberg" of serious pan-African restraints, especially mergers and cross-border cartels, and giving Africa a seat at the international competition table?[48] And even if the design should be bespoke, which this author supports, would competition enforcement even according to highest international standards, but which does not attack state/private border restraints, perceptibly integrate Africa?

The most mature of the African regional economic communities is COMESA – the Common Market of Eastern and Southern Africa. The COMESA Competition Commission has been operating for a decade and is doing good work. But has its enforcement furthered the integration of the Eastern and Southern African states that it spans? This is doubtful. There is much work to be done in Africa in applying traditional competition law, tailored for Africa, particularly against cartels and mergers. But there is reason to believe that a major portion of the restraints that Balkanize Africa elude the authorities. Suspicious trade flows and stubborn high pricing have been detected, for example in cement, sugar, and transportation.[49] Prices are too high given available supply just across national boundaries. Are serious restraints under the radar screen? Is the radar screen fit for detecting the problems? An expert team at the University of Johannesburg is focused on the problem, especially as it impacts the price and availability of food.[50]

Among the many challenges for Africa is one to formulate and adopt a fitting competition protocol and to embed a structure designed to produce a close collaboration of the free movement and the competition officials. Africa needs an expert group working to understand the real barriers that prevent Africa from integrating and, ultimately, to create a trade-and-competition violation fit for the offense.

F. Working Towards Solutions

What we need to do:

1. We need to illuminate the Blind Spot. With all the "best practices" implemented in trade law, and all the "best practices" implemented in competition law, the elephant is still on the table. "Best practices" are not good enough. The experts, cabined in their expertise, continually hone and reaffirm the law of the silo. Cultivating the untended space is necessary to making markets work.

2. We need to build consciousness that trade, competition, and undue state restraints are all connected, and unless the interactive bundle is seen and attacked holistically, we will perpetuate the barriers to an economically coherent world.

3. In considering how to integrate trade and competition, EU law is a most helpful guide and referent. It does not matter that we are not striving for the European degree of integration in a region, a continent, or the world. The EU institutional structure integrating control of public and private restraints is a notional template that enlightens the task and shows what is possible and what can work.[51]

4. The evidence suggests that free trade agreements and common markets should build a structure that facilitates seamless interaction of competition authorities and trade (internal market/free movement) authorities to jointly identify restraints of trade and competition, assess what state measures are unreasonable, and enforce existing prohibitions. They should host a research group

[48]It appears at this writing that the protocol will be a complete competition law with significant duties of the central competition commission such as granting exemptions for agreements that distort competition and clearing mergers, and that it will contain both usual prohibitions plus prohibitions of abuse of economic dependence and prohibitions against specific unfair practices by big tech gatekeepers.

[49]*See Malawi Fair Trading Commission, Competition Assessment in Malawi Transport Sector, and Conclusion, in* Competition and Regulation for Inclusive Growth in Southern Africa 371, 487 (J. Klaaren, S. Roberts & I. Valodia, eds., 2019).

[50]*See supra* note 40.

[51]*See* Fox & Healey, *supra* note 6.

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that identifies suspicious trade flows—e.g. goods not flowing to the needy neighbor as one would expect—and ferrets out what underlies the obstructions. (Public restraint? Private restraint? Combination? Exactly by whom, what and how?) Do legal proscriptions cover the problem? If so, enforcement of the law is a priority. If not, formulating a new violation of law is a priority. The project should eventually foresee a bespoke trade-and-competition violation for free trade agreements, common markets, and the world – ultimately eliminating the Blind Spot.[52]

5. The world needs a home for discussions on the integration of trade and competition and on a global vision of competition restraints. It should welcome a consortium of OECD, ICN, United Nations Conference on Trade and Development (UNCTAD) and an interested unit of the WTO. Discussions should be fact-driven. The objective for the world should be, not international law, but common norms.[53] For regional common markets, discussions could produce a formulation of a new trade-and-competition violation, or, at the least, a tight integration of free movement authorities and competition authorities to share information, ferret out hybrid and under-the-radar restraints, and bring integrated enforcement proceedings against them.

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[52]*See* Fox & Bakhoum, *supra* note 46.

[53]*See* DOJ ANTITRUST REPORT, *supra* note 4 (suggesting pre-ICN collaboration of WTO, OECD, World Bank, and UNCTAD, along the model of G-7, to exchange views and attempt to develop consensus); *see also* Robert D. Anderson, William E. Kovacic, Anna Caroline Müller, Antonella Salgueiro & Nadezhada Sporysheva, *Competition Policy and the Global Economy: Current Developments and Issues for Reflection*, 88 GEO. WASH. L. REV. 1421 (2020).

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