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## **Castañeda y Asociados**

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This note is intended to flesh out selected issues suggested in the MacDonald and Rude/Fulton papers from the perspective of the role of competition law and policy in agribusiness.

### **Conceptual Issues**

Competition laws and policy (CLP) are among those issues consistent with Free Trade, a “mixture of public goods and a result of market failure”, as stated by Knutson et al in the last paper in this publication. Thus, as a justification of antitrust policy, the power of the State intervenes in markets through regulatory enforcement to correct imperfections in the functioning of supply and demand.

The basic assumption of CLP is that a market with more competitors is a market that delivers lower prices, which is to admit that a monopolist extracts extra-competitive rents, thus reducing overall welfare. As commented by MacDonald, collusion - the meanest form of monopolistic conduct and undisputedly almost always an antitrust offense - attests to that. One example is the lysine world-wide price fixing scheme unveiled in 1998 which generated 40 to 70 percent price increases. Given the above principle, a more concentrated market creates incentives for collusive behavior and abuse of market power. But, are concentrated markets noxious by definition?

MacDonald identifies two basic areas of concern in agribusiness: 1) concentrated markets; and 2) contract agribusiness. In my view, neither paper provides solid evidence to conclude that agribusinesses operate in markets that are too concentrated, nor produced conclusive evidence to raise deep concerns on the contracting trend being followed by agribusiness. A particular market should not be regarded as too concentrated simply by means of a simple C4 or HHI index calculation, but rather by a thorough analysis of barriers to entry

(which both papers recognize as being very low in agribusiness). Also, efficiencies should be weighed against the alleged anti-competitive effects stemming from “excessive” concentration. Efficiencies (including innovation, economies of scale, intellectual property enhancement, among others) may be absent if markets become unconcentrated. As to the concerns raised by contractual arrangements, the MacDonald paper fails to balance anti-competitive effects against so many obvious benefits. Contracts tend to distribute risks among parties, reduce transaction costs, offer stability and may prevent free ride, so perhaps contractual arrangements may be doing more good than evil in many instances. At least in the case of Mexico, my hunch is that contract agribusiness is a feature of the more developed areas, while contractual investments are close to zero in the poorest farms.

### **The Mexican Perspective**

Over the last fifteen years, Mexico has implemented a three-pronged strategy towards structural reform: trade liberalization, deregulation of crucial economic activities, and privatization of many industries previously under government control. Competition policy was seen in 1993 as a necessary complement to structural reform, therefore a pro-efficiency antitrust statute was adopted and its enforcement was entrusted to a truly independent agency, the Federal Competition Commission.

Discussion of competition law enforcement in the agriculture/cattle/farming area must be divided into: 1) the primary sector, mainly including peasants and basic production processes up to marketing, where lots of collusive arrangements in formal breach of the statute take place but that enjoy an understandable *de facto* structural exemption; and 2) the processed goods sector, where cases have been reviewed by the Federal Competition Commission. Most relevant cases in this area include:

- market obstructions by local governments;

In 1996 there was a case where the Government of the State of Sinaloa<sup>1</sup> was found unduly impeding entry of flowers from other states alleging lack of a local permit to enter. The FCC instructed the State to cease and desist such

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<sup>1</sup> See: *Economic Competition Report*, 1995-96. Federal Competition Commission, p.72.

practice. The FCC has pursued a good number of cases of similar nature afterwards.

- price fixing;

In a 1997 case, the FCC investigated an alleged price fixing scheme in the marketing of poultry in Yucatán. The defendants were acquitted. Since then, the FCC has pursued tortilla distributors (1999)<sup>2</sup> <http://cfc.gob.mx> November 1999, and milk cooperatives (2000) for similar collusive behavior, with no condemning rules thus far.

- merger control.

The FCC cleared the merger of several mill facilities related to a vertical integration plan of the Bimbo Group (bread) in 1998<sup>3</sup>; and also the integration of similar production facilities of the Gamesa-Pepsico Group (cookies and crackers)<sup>4</sup>. The FCC also authorized Bachoco<sup>5</sup> to purchase Campi, a horizontal merger of prominent and efficient poultry Mexican firms. Finally, two technology related international transactions were reviewed by the FCC: the Monsanto/Asgrow/Cargill/Sehisa<sup>6</sup> merger, cleared with conditions, which involved certain ingredients of an international relevant market and also considered the importance of research and IP efficiency. The FCC also cleared the BASF/American Cyanamid<sup>7</sup> merger, citing research and development efficiencies.

## Cross- Border Issues And Potential Developments

As far as NAFTA is concerned, its Chapter XV contains too few provisions on competition law and policy, and they are vague.....only stating that Parties shall “adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto”, a will to coop-

<sup>2</sup> See: Federal Competition Commission Investigation of Monopolistic Practices Resolution at <http://cfc.gob.mx/cfc99i/resolutions/investigaciones/november99/TORTILLAS.htm>

<sup>3</sup> See: Economic Competition Gazette March-August 1998, p. 111.

<sup>4</sup> See: Economic Competition Gazette March August 1998, p.140.

<sup>5</sup> See: Federal Competition Commission Merger Resolution at <http://cfc.gob.mx> Dec.1999.

<sup>6</sup> See: Economic Competition Report 1999. Federal Competition Commission, p. 28.

<sup>7</sup> See: Federal Competition Commission Merger Resolution at <http://cfc.gob.mx> June 2000.

erate, some obligations as to check on state enterprises conduct and the establishment of a Working Group to report and make recommendations on the relationship between trade and competition policy. Controversies on competition matters may not be solved through the NAFTA panel mechanism.

On the bilateral front, Mexico and the United States have entered into an antitrust enforcement agreement, in force since July 2000. This agreement involves the FCC with the U.S. Department of Justice and the Federal Trade Commission, and contains the following basic features:

- a notification mechanism by which enforcement actions taken by one country that may affect important interests of the other shall be notified;
- calls for coordination of enforcement actions between agencies;
- provides positive community obligations (country A may request country B to investigate anti-competitive behavior in the latter's territory when such conduct affects interests of country A);
- agencies may share non-confidential information;
- agencies shall grant each other assistance to obtain evidence or testimony.

The United States and Canada have a similar arrangement in place.

What can we expect on this front? As investments from the United States, Canada and Mexico increase, one could expect cross-border problems to arise. Problems could arise in the area of state aid/subsidies, or in the area of protective regulation, and in antidumping procedures, due to the cartel-like arrangements organized to litigate these matters. Attention should be directed to minimize potential risks: why not eradicate antidumping in the NAFTA area (and replace it with predatory pricing regulation), especially in view of the success stories of Australia/New Zealand or, more recently, the FTA between Canada and Chile?

More has to be done to eradicate regulation that over-protects groups that abuse their power to engage in anticompetitive conduct. For example, CONPAPA, the Mexican trade organization, allegedly was used by Frito-Lay as a vehicle to fuel a "buy-Mexican" campaign designed to obstruct competitor "Pringles" from entering the market, under the claim that "Pringles" was not from Mexican potatoes. Another issue to look at: is the antitrust exemption for export cartels still justified?