

# DEPARTMENT OF JUSTICE

## **International Antitrust in an Age of International Deregulation**

**Address by**

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It is not news to report that we live in a global economy. International commerce and foreign trade have exploded. More than \$5 trillion in merchandise and nearly \$1.5 trillion in services were traded across national borders last year. International trade accounts for nearly one-fourth of the United States' gross domestic product, and international trade issues are at the forefront of our foreign policy concerns.

Burgeoning international commerce reflects economic changes, changes in technology, and successive reductions in government-imposed barriers to international trade. We are in what Gaddis Smith has recently and aptly called "an age of international deregulation."

Increased trade and decreased government restraints have brought to the forefront transnational issues of competition policy. Indeed, dealing with transnational competition issues -- and working with our counterparts at competition agencies in other countries -- are now a regular, everyday part of our work:

- Nearly 30 percent of the Antitrust Division's enforcement work involves international or transnational matters.
- Last year, fines imposed for criminal antitrust violations exceeded \$200 million -- by far the largest amount ever -- and most of that came from international cartel activity.
- The Division presently has 25 active grand jury investigations into possible international cartels, with potential defendants from more than 20 different foreign countries on 4 different continents.
- On the civil side, too, both the Division and the FTC regularly deal with antitrust issues of global significance:

- mergers like BT/MCI and Ciba-Geigy/Sandoz, and
- non-merger civil investigations like the now-settled parallel investigations by the EC and the Antitrust Division of Microsoft.

I

While we live in a global economy, however, we do not live in a global state. There is no international antitrust code, nor are there international rules for resolving issues of jurisdiction and enforcement procedure. A key challenge facing all of us who are interested in competition policy is how to deal with transnational competition problems in a global economy in the absence of a global state -- how, in the absence of international rules, to deal with the increasingly common phenomenon of marketplace conduct that takes place in one nation but has harmful effects in another nation.

At present, we have three basic tools available to us, all of which I am sure are familiar to you:

The first, and most obvious, is self help -- that is, simply applying our laws to reach conduct, wherever it takes place, that has an anticompetitive impact in the United States. The ADM criminal conviction, with its \$100 million in fines, was an example of self help, and there are many others. But there are limitations on the usefulness of self help:

- We are sometimes unable to obtain personal jurisdiction over the defendants;

- discovery of evidence located abroad is often both difficult and necessary to making informed enforcement decisions and successful prosecutions; and
- it is often difficult to devise and enforce effective injunctive remedies governing conduct outside the U.S.
- Moreover, self help remedies that are perceived as excessively frequent or far-reaching can engender resentment among foreign competition authorities or political agencies. We, of course, experienced this problem when the shoe was on the other foot and the EC was threatening to prevent the Boeing/McDonnell Douglas deal. While self help should always be tempered by appropriate respect for principles of international comity, there is no assurance that self help, even if so tempered, will not strain important relations among nations.

A second tool is positive comity, which has roots in a 1967 Council Recommendation of the OECD and was fleshed out and given new life in the 1991 US-EU agreement, but which has only recently been utilized. Under this approach, one nation asks another to investigate and, if appropriate, prosecute anticompetitive conduct that injured both nations but took place in, or whose perpetrators are located in, the latter nation. Often the requested nation has an equal or greater stake in dealing with the matter. We had very good success in the Nielsen investigation, in which the EC investigated and obtained a fully adequate remedy for a matter that injured competition

in this country. Other positive comity matters are in the process of investigation.

Unfortunately, however, positive comity also has its limits:

- The requested nation will of course apply its applicable substantive law, and that law could differ in material ways from the law of the requesting nation;
- the requested nation might not always be enthusiastic about pursuing a matter referred to it by another nation, especially if the defendants are influential local firms; and
- the power of foreign competition authorities to pursue positive comity referrals differs among nations.

The third, and perhaps most promising, of the existing tools for dealing with transnational competition problems is enforcement cooperation. By this I mean the collaboration of competition authorities in two or more countries, sometimes in the course of simultaneous investigations and sometimes not. The key to cooperation is that the competition authority or justice ministry of a nation in which documents or witnesses are located can share information that it has already gathered with, and can gather evidence for the benefit of, the competition authority in another nation that is investigating anticompetitive conduct in accordance with its own laws. International cooperation in the gathering of evidence has been of vital importance to us. We have had good success cooperating with Canada, a number of European countries, and Japan. But international cooperation is no panacea:

- Enforcement cooperation depends upon the willingness and authority of foreign governments; and
- cooperation can be difficult, and is sometimes prohibited by law, when confidential business information is involved.

All three of these approaches are important and valuable, and the Division and the FTC have accordingly taken steps to strengthen each of them. These steps have included:

- the nearly completed negotiation of an IAEEA agreement with Australia;
- ongoing discussions with the EC anticipating an improved positive comity agreement;
- our OECD cartel initiative seeking an OECD agreement in principle that member states should condemn cartels and should cooperate to enforce laws against them;
- our ongoing programs of technical assistance to foreign competition authorities in order to increase their understanding of and commitment to sound competition policy; and
- increased use of MLATs and other international legal assistance procedures.

While these are important steps, I think we all recognize that they cannot completely solve transnational competition problems in an age of international deregulation.

II

Recently, there has been an increasing impetus, both in the United States and abroad, to seek what might be called political solutions to these problems -- typically, by negotiating and entering into multilateral international agreements. The immediate pressure has come, I think, primarily from those who have two different and somewhat contradictory concerns. The first, often referred to under the fashionable heading "trade and competition," is the concern of those who recognize the increasing importance of trade in the world and see competition policy as a means to removing private restraints that restrict trade. The second is concern -- brought to the forefront by the recent Boeing/McDonnell Douglas merger -- about differences in substantive antitrust principles and the resulting risks from extraterritorial (or self-help) application of national competition laws.

This urge for multilateral negotiations has taken tangible form in the WTO's trade and competition initiative. Joel Klein has previously expressed reservations about that initiative. In his speech at the Royal Institute of International Affairs in London last November, Joel noted that the risks of multilateral negotiations on competition issues under the aegis of the WTO include (i) the possible legitimation of weak and ineffective competition rules through the articulation or adoption of lowest common denominator standards; (ii) second-guessing of the conclusions of national competition authorities by trade dispute panels that are ill-equipped to deal with complex economic and fact-intensive competition issues; and (iii) the danger that sensitive business confidential

information, which is essential to the proper resolution of many competition issues, will not be adequately protected.<sup>1</sup>

I should be clear: We favor study by multinational organizations of competition issues and of the link between those issues and international trade. Study and dialog about those issues can lead to a shared understanding of the components of sound competition policy.

But we do not have such a shared understanding today -- even among the most sophisticated and developed economies. And, under these circumstances, negotiation of international competition principles is fraught with peril.

### III

My concerns about international negotiations are based in part on the kinds of concerns that Joel expressed about the lack of an international consensus on what constitutes sound competition policy. But I have other, more fundamental concerns as well.

Antitrust has a huge constituency -- consumer welfare. Paradoxically, though, in ordinary times it is supported by few vocal and forceful constituents -- by which I mean politically motivated and influential participants who are interested in urging sound antitrust policy.

I am not just talking about constituents that seek antitrust exemptions in order to further some plainly different and presumably antagonistic goal. And I realize that

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<sup>1</sup>See Joel I Klein, "A Note of Caution With Respect to a WTO Agenda on Competition Policy" (November 18, 1996).



influential constituents frequently take a position about substantive antitrust matters. It is not surprising, for example, that constituent groups urged that antitrust laws should be used to stop the Boeing/McDonnell Douglas merger or that they should not be used to prevent the Bell Atlantic/NYNEX merger. But one does not often hear constituent groups urging rigorous, careful thought in the application of sound antitrust policy, regardless of the outcome in a particular dispute.

Consider, for example, the current interest in the use of competition laws to enhance market access in international trade -- typically, increased exports of U.S. products to foreign markets. The market access issue is a complicated one because, even absent public or legal barriers, there could be a variety of explanations for access problems:

First, any particular access problem might have nothing to do with private, exclusionary conduct. It could reflect simply winners and losers in the marketplace.

Second, access problems could be the result of private restraints that are used to insulate firms with market power from effective import competition. In those instances, the private restraints would seem both to violate sound antitrust principles and to undermine the trade communities' interest in increased market access.

But exclusionary practices could cause access problems under different circumstances as well. Suppose, for example, that in an unconcentrated market a number of rivals of the would-be importer tie up, in aggregate, the lion's share of the most critical inputs by independent, parallel, and efficient restrictive vertical agreements that do not create market power.

The urge for aggressive measures to increase market access is understandable in all these situations, but only the second is likely to be an occasion for the application of sound antitrust principles. To be sure, enforcement of strict prohibitions on vertical restraints in order to address the third of these access problems could increase access of the particular products in question. But embodying such prohibitions in law could be counterproductive, both from a competition perspective -- if they interfere with efficient modes of distribution -- and, in the long run, from a market access perspective -- if they prevent future would-be importers from employing similar vertical arrangements in order to enter the market.

Market access issues are complicated, and one could, by varying the hypotheticals even a little bit, reach different conclusions about the application of sound competition principles. The important point, though, is that the objectives of market access and sound competition principles are not identical.

#### IV

In any event, it is rare to find constituents urging sound antitrust policy, without regard to the particular outcome they desire. I do not find this particularly odd. I would expect that to be the case, and I think we should continue to expect it to be the case, for a couple of reasons.

In the first place, antitrust is about process, the process of competition. But politics in normal times is usually a battle over end-states.

In Locked in the Cabinet, Robert Reich's amusing allegory about life in Washington, Reich laments that the Democratic Party -- and in particular the labor

constituents in the party -- did not support his vision of education and training as a means of enabling the labor force to adapt to and flourish in a time of rapid economic change and dislocation. Instead, they constituted what Reich called the "Save the Jobs Party," which wanted to preserve the industry, the companies and the jobs that exist today.<sup>2</sup>

I think there is a similar phenomenon in antitrust. Antitrust is about process, and a particularly arduous one at that. We are proud that antitrust "protects competition, not competitors".<sup>3</sup> We say that the market has winners and losers and that that is good.

Unfortunately, process is less attractive, in the concrete world in which real disputes arise and real grievances are formed, than is a comforting end-state. And political actors, I fear, are generally more zealous in guarding the latter than in seeking the former.

So, I can imagine constituents and lobbyists and public interest groups demanding the intervention of antitrust authorities to prevent the BA/NYNEX merger, to open up Korea for more car exports, or to restrict the imports of Japanese television sets into the United States. And I can imagine constituents urging that competition authorities in the EC should leave the Boeing/McDonnell Douglas merger alone or that the antitrust agencies here should stop meddling with hospital mergers in Michigan. But

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<sup>2</sup>Robert B. Reich, Locked in the Cabinet at 137-38 (1997).

<sup>3</sup>See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

it's hard to imagine tens of thousands of people gathered on the Mall, carrying placards with pictures of Joseph Schumpeter, and demanding that the government give them more "creative destruction."<sup>4</sup>

V

There is a second basic reason for my concern about antitrust constituents. Antitrust's constituency is consumer welfare. But, even in the U.S., it is usually producers who have the greatest influence when focusing on specific, tangible issues. This is not surprising, and it is not perverse. Indeed, Anthony Downs explained 40 years ago, in the simple economics language with which antitrust lawyers are familiar, why it is predictable that, as he put it, "the economic decisions of a rational government in a democracy are biased against consumers and in favor of producers."<sup>5</sup>

It seems to me that this has important implications for those of us who believe that sound antitrust policy is important: As a general rule, because the desideratum of antitrust is protection of consumer welfare, the more that antitrust issues are turned into political issues, the less likely is sound, consumer-oriented antitrust to prevail.

VI

I do not mean to be too pessimistic about all this. In the United States, we have had a long, successful antitrust tradition. It is important to keep in mind, however, that antitrust in this country is based, not on a political or legislative code, but rather on a

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<sup>4</sup> Joseph A. Schumpeter, Capitalism, Socialism and Democracy at 83 (3d Ed. 1950).

<sup>5</sup> Anthony Downs, An Economic Theory of Democracy at 293 (1957). The point is not that this is desirable, but that it is predictable.

broad, general statute that has been sustained through what is really a common law process -- by which I mean, not only a process of federal court litigation, but more broadly a dialog among the academic and business communities, the enforcement agencies and the courts.

After more than a hundred years, antitrust commands widespread respect in this country. Other agencies of our government -- agencies whose own agendas might sometimes lead them to support policies or favor outcomes that are inconsistent with those that would be favored by antitrust principles -- are regularly tempered in what might otherwise be enthusiasm for anticompetitive policies. But, even in this country, not all policy disagreements are resolved to the liking of the antitrust community. Even in this country, those of us who are committed to antitrust need to be sensitive to the dangers of placing antitrust issues on the political agenda.

## VII

The picture, I fear, is even more perilous in the international community. Most nations have little history of competition law. Many foreign governments have only recently adopted competition laws and have little experience applying them. And some nations that have relatively mature competition laws have adopted principles that differ in some ways from ours -- in many cases, principles that we might regard at least in some circumstances as anticompetitive.

For example, the European Community imposes much stricter restrictions on vertical or distribution restraints than we do. The EC is concerned in part that restrictive vertical relationships might interfere with their overriding interest in market integration.

From a competition policy perspective, however, the EC's rules about vertical agreements probably seem to most of us to be too restrictive, at least for use in this country.

And of course, as we know from the Boeing/McDonnell Douglas matter, some of the EC's notions about merger law, and about "abuse of dominance," differ from our own notions of sound competition policy. EC law is more concerned with ensuring a level playing field, and thus protecting competitors even at the expense of efficiency, than are we.

The concerns of other nations with less experience in competition law differ from our own in other ways. At the initial meeting of the Trade and Competition group in the WTO, many developing nations made clear that they were interested in competition rules primarily to the extent that they would foster economic development. Other nations focused on the implications of competition policy for market access. Neither of these groups, it appeared, was centrally concerned with how competition policy might further what we think of as its purpose -- maximizing consumer welfare.

Therefore, I think there is great peril in putting the issue of competition policy up for discussion and rulemaking in international political forums. Not only do we run the risk of lowest common denominator rules or other compromises that would be inevitable, even in a discussion focused solely on competition issues. We also run the risk that competition principles will be deputized to serve non-competition objectives, both because other nations may have other priorities and because of the inherent

difficulties a process-oriented, consumer-oriented subject like competition policy faces in a political forum.

## VIII

Antitrust law has flourished in this country largely because it has been nurtured in a common law process. In the international community, too, antitrust law is most likely to flourish through a common law process. The steady and growing experience of other nations -- through their competition authorities, in dealing with real cases, in resolving issues of traditional and positive comity, and in cooperating with other nations in antitrust enforcement -- offers the most promising means in the near future for developing an international commitment to competition principles and encouraging their adoption and enforcement throughout the world.

There will be disappointments, and there will be disagreements among nations. But I believe that the costs of those setbacks will pale by comparison to the costs of the compromises to true, consumer-oriented competition policy that could result from any effort in the near term to codify international competition rules.