Economic Perspectives

Volume 4 — An Electronic Journal of the U.S. Information Agency — Number 1

INTERNATIONAL ANTITRUST AND COMPETITION POLICY

AN INTERVIEW WITH ASSISTANT ATTORNEY GENERAL JOEL KLEIN: EXPANSION OF INTERNATIONAL COOPERATION

WHY COMPETITION LAW — ESPECIALLY FOR DEVELOPING COUNTRIES

APPLICATION OF U.S. ANTITRUST LAWS TO FOREIGN CONDUCT

PLUS: ANTITRUST POLICY ... AND TRADE ... AND REGULATION ... IN BRAZIL ... WITH THE EUROPEAN UNION

February 1999

ECONOMIC PERSPECTIVES

An Electronic Journal of the U.S. Information Agency

ANTITRUST AND COMPETITION POLICY

Current events — the Microsoft antitrust case, the mergers of giant oil companies — demonstrate how the competitive behavior of transnational companies affects countries far beyond their borders.

Not long ago some countries were unhappy with what they viewed as the extraterritorial application of U.S. antitrust law. Now, however, as more countries embrace market economics and as more markets become global, cooperation among antitrust authorities is expanding.

A Justice Department advisory committee is working hard to recommend 21st century U.S. policy on a number of international antitrust issues: multijurisdictional merger reviews, the interface between antitrust and trade policy, and enforcement cooperation.

Meanwhile, Clinton administration officials and others remain skeptical that a multilateral agreement on competition policy and antitrust enforcement can be reached any time soon in the World Trade Organization.

But they do expect more convergence among governments on antitrust and competition issues in years ahead as they build up experience working together on cases. And some observers suggest that elements of existing trade and capital standards agreements could be adapted for competition policy agreements.

CONTENTS

❏ COMMENTARY

❏ FACTS AND FIGURES

❏ INFORMATION RESOURCES

ECONOMIC PERSPECTIVES

An Electronic Journal of the U.S. Information Agency *Volume 4, Number 1, February 1999*

USIA's electronic journals, published and transmitted worldwide at three-week intervals, examine major issues facing the United States and the international community. The journals — *Economic Perspectives, Global Issues, Issues of Democracy, U.S. Foreign Policy Agenda, and U.S. Society and Values* — provide analysis, commentary, and background information in their thematic areas. All issues appear in English, French, and Spanish language versions, and selected issues also appear in Arabic, Portuguese, and Russian.

Current or back issues of the journals can be found on the U.S. Information Agency's International Home Page on the World Wide Web at http://www.usia. gov/journals/journals.htm. They are available in several electronic formats to facilitate viewing on-line, transferring, downloading, and printing. Comments are welcome at your local U.S. Information Service post or at the editorial offices.

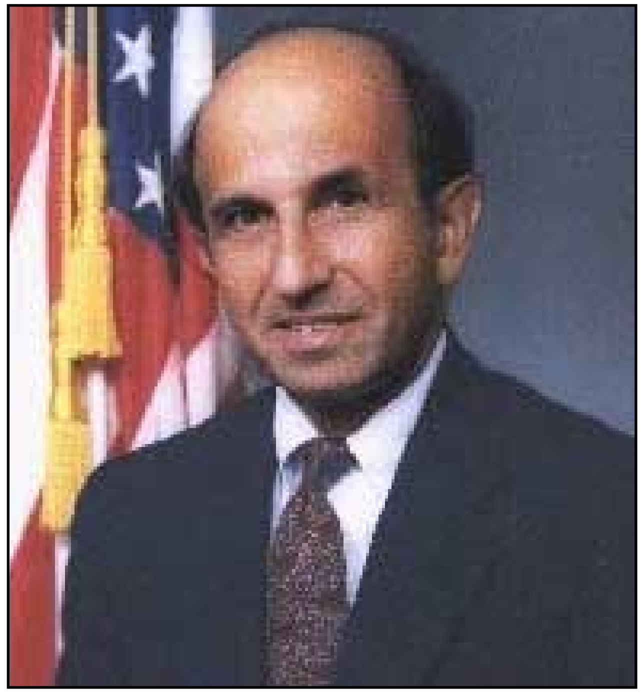
Editor, Economic Perspectives
Economic Security - I/TES
U.S. Information Agency
301 4th Street, S.W.
Washington, D.C. 20547
United States of America
E-mail: ejecon@usia.gov

U.S. Information Agency
Bureau of Information
February 1999

❑ EXPANSION OF INTERNATIONAL COOPERATION AGAINST ANTI-COMPETITIVE BEHAVIOR

An Interview With Joel Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice

As the United States discovered, deregulation of the economy requires more vigorous enforcement of laws against anti-competitive practices, says Joel Klein, assistant attorney general. And as more countries open their markets and as more markets become global, he says, antitrust regulators will have to engage in more and more cross-border cooperation. This interview was conducted by USIA Economics Writer Bruce Odessey.


Assistant Attorney General Joel Klein

Question: What's the difference between antitrust and competition policy?

Klein: Competition policy is a much broader field than antitrust enforcement. Competition policy encompasses all the areas of deregulating regulated segments of the economy. In the United States we went through deregulation with surface transportation, air transportation, and other sectors. Now we're going through it with telephony. We favor less regulation, more free market competition.

A necessary concomitant of that world is effective antitrust enforcement; otherwise, the market participants would re-regulate themselves in a way that protects sellers of goods and services and operates against consumers. Antitrust is there basically to ensure that the market remains free, open, competitive, and robust.

Q: Why don't markets regulate themselves in line with demand and supply?

Klein: Just think of the obvious reason. If you have only two gas stations in a town, and they have to compete with each other, that could drive down prices pretty low. If there were no antitrust enforcement, the two gas stations could get together and say, "Look, we're operating on rather thin margins. There's not another gas station for 100 miles. Let's raise the price from $1.09 to $1.50, to $1.80," or whatever.

People who have market power want to increase their prices, want to make sure they get a monopoly profit. And that's what would happen in our markets without antitrust.

Q: Some administrations enforce U.S. antitrust laws more vigorously than others. Is there evidence that more vigorous enforcement has had positive effects for the U.S. economy?

Klein: The best evidence is in Michael Porter's book *The Competitive Advantage of Nations.* He goes through a lot of case studies showing that countries that pursue competition policy, including antitrust enforcement, don't have the domestic champions — powerful domestic firms whose survival depends on their being protected by government industrial policy — that some other countries have. I think that's a pretty compelling case.

Look at what's going on in the world. The U.S. economy is as strong as it is because it's as competitive as it is. While you could argue about the merits of any particular antitrust case, it's quite clear that you need effective antitrust enforcement.

I'm sure enforcement ebbs and flows a bit. To the extent that regulators focus on protecting competitors rather than protecting competition — and there was some of that in the 1960s — I think that was a mistake. On the other hand, in the early 1980s, there was a view that markets do just fine and that government should stay out — I think that was a mistake. Now I think we're at a middle point.

There are two or three other things I think are important. First, we in the United States are moving toward a very deregulated economy. When you had regulation of airlines, regulation of surface transportation, regulation of telephones, regulation of electricity, regulation broadly of energy, you didn't need as much antitrust enforcement in those sectors. As those markets were deregulated, you had a much stronger need for antitrust enforcement.

Second, as we move toward an increasingly global economy, there's no question that we're seeing mergers the like of which we never saw before. Most of those mergers are pro-competitive or at least don't raise antitrust concerns in a global economy, but there are some that do. It used to be a big deal to see a billion-dollar merger. Today a $10 billion merger is routine. You're seeing some $40, $50, $60, close to $100 billion mergers. So that is also pushing some of the limits of antitrust enforcement.

Q: How has international antitrust policy evolved in the Clinton administration?

Klein: In 1988, the Justice Department said it would not challenge anti-competitive foreign conduct if the only U.S. impact was on exports but not on U.S. consumers. Assistant Attorney General Jim Rill, during the Bush administration, reversed that policy. He said that when you can show a foreseeable impact on U.S. exports, the Justice Department will consider bringing such cases. We have certainly looked at cases like that. My predecessor, Anne Bingaman, brought a case involving Pilkington glass company, which raised some of those issues.

We've also been cooperating more intensively with foreign antitrust enforcement authorities, especially the Europeans and Canadians. We've developed what we call a "positive comity" referral mechanism, where, if we think there is a problem with market access in the European market, we do a preliminary assessment and send the case to them for review.

Q: What's the record so far with positive comity?

Klein: It's a new concept that's just beginning to work. We had a pretty effective working relationship with the Europeans in an investigation of point-of-sale market information services — how Nielsen's practices in Europe affected IRI, the U.S.-based competitor to Nielsen in the U.S. and Europeans markets. Essentially, we let the Europeans take the lead on that. We stayed informed. They brought their case to a successful resolution, and we essentially endorsed their results without duplicating their work. I think that was efficient for the parties.

We referred to the European Commission a case on airline reservations involving complaints about computer reservations systems in Europe. They're still investigating it now, but the process has been reasonably effective so far.

Q: Have you observed any broader trend toward international cooperation?

Klein: The international community is coming to recognize that, with markets increasingly global, antitrust enforcers must be able to work on a global basis. As a result, we are seeing cooperation among antitrust enforcers throughout the world.

At the OECD (Organization for Economic Cooperation and Development), all the members have agreed to cooperate against hard-core cartels.

Also, more countries are looking at mergers that take place outside their borders. The Europeans took a very hard look and put some significant conditions on the Boeing-McDonnell Douglas merger, even though that involved two U.S. companies. Because they sell into the European market, the Europeans scrutinized it. The Japanese just passed a law for reviewing mergers of non-Japanese companies affecting Japanese markets.

What you see is an increasingly global focus characterized by global investigations and significant cooperation by the agencies.

Q: Does the rest of the world have an extraterritoriality problem with the way the United States handles international antitrust cases?

Klein: Increasingly less so. There was some concern expressed over past decades, but in recent times very little. That's not to say none. There are two reasons. First, as the global economy becomes more and more predominant, people understand that you need a global reach, and more and more countries are doing that in their own antitrust enforcement. Second, we have looked for mechanisms like positive comity to try to work cooperatively with foreign enforcement authorities rather than do the enforcement here.

This has shown that we are looking for ways, consistent with our obligation to enforce the law, to be sensitive to the territorial concerns of other countries. We're getting enormous cooperation from other countries with respect to worldwide cartels. We've really begun to see, over the last two or three years, far more cooperation. We have had very close cooperation in this area with Canada for some time. More recently, the Japanese have been tremendously cooperative, and so have a number of European countries. Recently, the authorities in Germany conducted a search for us in one of our cases, and that's becoming much more commonplace. So I think the shared-mission view rather than the separate-island view of antitrust enforcement is clearly in ascendance.

Q: The Justice Department has an advisory committee — the International Competition Policy Advisory Committee — looking at three issues connected with international antitrust: the interface between antitrust and trade policy, multi-jurisdictional merger reviews, and enforcement cooperation. What's the status of that work?

Klein: The global market more and more will characterize our economy. That's not to say there won't be local or national markets, but there are going to be relatively few national markets because the barriers to trade are coming down. In that world, the questions that we face are: How do you get evidence, information that enables you to do a job worldwide? How do you do it without stepping on the toes of foreign enforcement agencies? And when a number of countries have a similar interest in a particular transaction, how do you make sure the process works efficiently so that businesses that want to merge can do so when there is no competition problem?

All of those issues have been out there, but there's been no world court that you could bring these cases to. This prompted the attorney general of the United States, upon my recommendation, to appoint the advisory committee to take an outsider's look at how to deal sensibly with the issues you mentioned.

My hope is that some time in late fall 1999 the committee will make its proposals. They're looking at ways to minimize frictions in multi-jurisdictional merger reviews. We've had a real success story in that respect with the WorldCom-MCI merger, the single largest divestiture in the history of U.S. merger enforcement. We and the Europeans worked on it especially effectively.

The committee is looking at the implications for timing, costs, as more and more countries start reviewing mergers of companies based outside their borders.

I think they are going to press very hard for even greater cooperation. They're looking at the problems of transmitting confidential information from one agency to another. And they are trying to define the appropriate boundaries between trade policy and competition policy — when can antitrust enforcement agencies work effectively in the area of trade and competition.

Q: Does the Clinton administration prefer any multilateral forum over others for considering international competition issues?

Klein: I think such consideration ought to take place in whatever fora are available — the OECD, the WTO (World Trade Organization). However, I am quite skeptical about a world court at the WTO that could decide these issues — that U.S. antitrust cases having global impact would be decided at the WTO instead of in the United States. I don't think we're at that point in history where the WTO can be a successful dispute resolution forum in this area.

On the other hand, there's clearly a lot of work for the WTO to do with respect to developing the culture of competition policy, the culture of antitrust enforcement. There are many countries coming into the global economy with increasing enthusiasm but without a history of commitment to competitive markets and antitrust enforcement.

Q: The WTO basic telecommunications agreement was the first multilateral agreement on regulation. Some time far off, do you see any prospect for such an agreement on antitrust?

Klein: Some time far off — events between now and then will affect what kind of negotiations people will ultimately consider, but I really don't think that's on the horizon. What concerns me is that people focus on those issues prematurely. The really hard work that needs to be done in the WTO to build the culture for competition policy and antitrust enforcement could get swamped in the arguments about the forum for dispute resolution. That would be a big mistake.

Q: How do you characterize the differences in approach between the United States and the European Union (EU) on antitrust?

Klein: The principal difference has to do with the fact that the Europeans are trying to break down national barriers for a single market. As a result, they take a look at some vertical issues such as exclusive distributorships somewhat more aggressively than we do. For example, if you have a company that sews up all the distributors in its country, it may create barriers to entry to a company from another country. We wouldn't have that kind of problem in the United States because our markets are all open nationally. You wouldn't have somebody in Texas or Mississippi who is in the position to bar entry to competitors from other states.

But these differences are on the margin. We do a lot of day-to-day work now, a tremendous amount, with our colleagues in DG-IV (EU antitrust regulators). The vocabulary, the analysis are remarkably similar. I don't foresee a big divergence between us and the Europeans over the fundamental consumer welfare principles that are the basis of antitrust.

That kind of de facto convergence will take a lot more time for countries that have had a lot less experience with antitrust enforcement.

Q: Are there any countries pointedly not cooperating?

Klein: There are places that either for resource reasons or for policy reasons are less willing to do the searches, to find the witnesses for us. But I wouldn't say it's affirmative non-cooperation. A lot of times countries just don't have the resources or don't view the issue to be as important as we might.

Q: Do you see convergence as likely?

Klein: This is an enormously exciting time in international antitrust enforcement because countries throughout the world are moving toward increasing participation in the global economy, toward increased deregulation. What we're going to see in the next 10 to 20 years is greater emphasis on competition policy, and antitrust enforcement will be a chief part of that. I look forward to the day when the recognized legitimate form of government intervention in markets is consumer-based antitrust enforcement. That paradigm is beginning to take hold. ❑

❑ WHY COMPETITION POLICY — ESPECIALLY FOR DEVELOPING ECONOMIES

By Russell Pittman, Chief, Competition Policy Section, Antitrust Division, U.S. Department of Justice

In some circumstances market forces fail to preserve business competition and the benefits to consumers of that competition, says Russell Pittman, the Justice Department's competition policy chief. Such circumstances are common in developing countries, he says, where formerly state-run enterprises often dominate an industry and where managers in privatized sectors often prefer to cooperate than to compete. He says antitrust and competition policies need to be part of the legal infrastructure in all market-based economies. The views expressed are not necessarily those of the U.S. Department of Justice.

Competition is the force that most free-market economies rely on to make sure that businesses satisfy consumer wants and needs. When competition works, no government entity needs to dictate to businesses what products to produce or at what quantities, qualities, and prices: Competition dictates these matters to businesses directly.

What is competition? All it really means is that buyers have choices. These buyers, of course, may be other enterprises or individual consumers. Whether we consider an oil refinery buying crude oil, a chain of petrol stations buying petrol, or an individual driver needing to refill his tank, if these buyers have choices among different suppliers, it is much more likely that they will get high-quality products at reasonable prices.

How does competition work? The idea is fairly simple, really. We begin with two observations:

• Businesses want to make money.

• Consumers have money and want to spend it to satisfy their wants and needs.

We add three fundamental government policies:

• Health and safety regulations, to ensure that products are not dangerous to consumers, workers, or the environment.

• Protection against unfair or deceptive or "unscrupulous" competition, so that buyers really know what it is that they are buying.

• Protection against monopolistic practices — agreements among competitors to charge high prices, enterprise mergers that destroy competition, abuses of dominant positions in the marketplace — to ensure that businesses really compete.

Then we stand out of the way and let competition in the market operate. In most markets, most of the time, this is just about all the government regulation necessary to ensure that buyers are well served.

How do we know that prices are not higher than they should be? Competition among suppliers to sell to customers will keep prices down. How do we know that costs are as low as they could be? If suppliers can sell to more buyers and earn more profits by taking actions to lower their costs, they will do so. How do we know that technological progress will be as high as it should be? Competition among firms forces them to be more progressive than their rivals to attract buyers. How do we know that product quality will be as high as it should be? If buyers want improvements in quality, sellers will try to discover this and make more money by satisfying the desires of buyers.

NONCOMPETITIVE MARKETS

Before I am accused of thinking like Dr. Pangloss — the incurable optimist in Voltaire's *Candide* who thought that everything he saw demonstrated that we live in "the best of all possible worlds" — let me acknowledge some blemishes in this portrait that I have been painting. Let's consider three of the most important.

First, there are some markets in which competition makes no economic sense. We don't want competing water companies digging parallel pipelines down residential streets so that individual consumers can have a choice among water providers. There are several sectors like this that are usually called "natural monopolies," where, as this term suggests, the benefits of competition are not worth the costs involved. These sectors are often either owned by or regulated by government as a result. It should be noted, however, that:

• There are far fewer true natural monopolies than was once believed. For example, railroads have been commonly considered natural monopolies requiring heavy government regulation in many countries, but many commodity shippers are better protected by competition from truck and water carriers than by government regulation.

• For those sectors that continue to require regulation, we've discovered that regulation may be much less intrusive and expensive than it used to be and still protect the public from monopoly abuses.

Second, one country cannot always support a competitive market in particular sectors by itself. Perhaps Costa Rica will never have three independent steel manufacturers, or Croatia three independent television manufacturers. For many products, however, imports can provide buyers with choices and keep local "monopolists" from taking advantage of their positions. Sometimes, especially for a small country, free trade is the best competition policy. (It is important to remember, however, that, for some products, imports cannot provide effective competition, and for the rest, government regulators may need to watch for actions by local enterprises that place competing importers at a disadvantage.)

Finally, as suggested above, business enterprises will often try to keep competition from working. They love to see competition when they are acting as buyers in the marketplace and seeking the best products and prices for themselves, and they will often cooperate with the competition authorities to protect such competition. But they tend to prefer an easier, more solitary existence when they are selling their own product to buyers. As British economist J.R. Hicks once noted, "The best of all monopoly profits is a quiet life." Thus they may try, for example, to:

• Reach agreements with their closest competitors as to what prices will be charged, or who will sell to which customers, or who will sell in which territories.

• Merge operations with their closest competitors.

• Force exclusive contracts on their suppliers or distributors that protect their own dominant position in a particular market.

It is the job of the competition authorities to prevent these kinds of actions from taking place, so as to protect the choices of consumers and the unfettered operation of competition in a free market.

THE GLOBALIZATION OF COMPETITION LAW

Most competition laws around the world are structured so as to prevent and prosecute exactly these three kinds of anti-competitive actions. In the United States, section 1 of the Sherman Act prohibits agreements among enterprises that would harm competition. Section 7 of the Clayton Act prohibits mergers or other combinations among enterprises that would significantly reduce competition. And Section 2 of the Sherman Act prohibits "monopolization" — the attempt by a single enterprise to control a market through unfair practices.

A similar example from a very different country is the Romanian competition law, where article 5 prohibits agreements whose effect would be "the restriction, prevention or distortion of competition." Article 13 prohibits mergers "which, by setting up or consolidating a dominant position, cause or may cause" harm to competition. Article 6 prohibits "any misuse of a dominant position ... by resorting to anti-competitive deeds having as object or as effect the distortion of trade or prejudice for the consumers."

Those countries whose competition laws lack one of these three components have generally taken action to try to correct the situation. In the United States, one reason for the enactment of the Clayton Act in 1915 was to add merger enforcement to the bundle of responsibilities of the Justice Department. Argentina's competition law has no merger enforcement provisions, but there are currently amendments before the parliament to add them.

One of the most important changes in competition law enforcement in recent years has been the adjustments made for the gradual globalization of many markets. Just as in the United States more than 100 years ago the coming of the railroads turned many local and regional markets into national markets, the continuing lowering of transport costs in recent years — along with the growing importance of products with very low transport costs relative to value — has turned many national markets into world markets.

Competition law enforcers have taken this development into account in two principal ways. First, when examining whether a particular merger would significantly harm competition or whether an enterprise is truly in a dominant or monopolistic position, enforcers take into account all the economic choices facing buyers, whether these come from domestic producers or from imports. This, like other aspects of competition law investigations, requires an extensive inquiry into the real-world facts of a particular market. For example, the existence of a certain level of current sales in a market by importers may be no guarantee of the expansion of those sales to preserve competition if there are nontariff barriers to such expansion. An action that appears to harm competition in a domestic market may be clearly innocuous if international competition is taken into account.

Second, however, the fact that some markets have become international means that some actions that would not have affected competition in earlier years may suddenly become of enforcement concern. A merger of a foreign company with a domestic company may stifle actual or potential competition in ways that would not have been relevant a generation ago. (Good examples are the controversies surrounding the proposed joint ventures of Brahma with Miller Brewing and Antarctica with Anheuser-Busch in Brazil in 1997-98.) Markets that might have been cartelized by domestic companies a generation ago may now be cartelized by domestic and international companies. (Good examples are recent U.S. Department of Justice prosecutions of international cartels among producers of fax paper, agricultural chemicals, and plastic cutlery. See the Web site of the department's Antitrust Division at www.usdoj.gov/atr.) Enforcers who are insufficiently aware of the activities of foreign firms or who lack jurisdiction to respond to them may fail to protect their economies from significant competitive harm.

DEVELOPING COUNTRIES NEED COMPETITION LAWS

Should developing countries devote scarce government resources to the enactment and enforcement of competition laws? It seems clear that the answer is yes, that such countries are as vulnerable to the kinds of anti-competitive actions described above as developed countries are. In fact, there are at least three reasons to believe that competition laws are especially important as developing countries liberalize their economies.

First, most developing countries — especially but certainly not exclusively the post-socialist countries — have economies filled with large enterprises that dominate particular industries, often because of government policies and practices of the past. As such enterprises are privatized, they will not welcome the emergence of competition to their products on the domestic market, and they may take actions designed to deter the import or distribution of such competing products. It will be up to the competition enforcers to block such actions, to ensure that the opening of borders to trade yields actual, effective competition on domestic markets.

Second, where economic liberalization has included some de-monopolization of large enterprises, there may be a tendency for the managers of the newly separated components of the old enterprise to cooperate rather than to compete in the marketplace. This cooperation may take the form of cartel agreements, and such agreements may be facilitated by the creation of industry associations whose membership consists of all the new components of the old enterprise. As with abusive behavior by dominant enterprises, if cartelization rather than competition is the result of liberalization, then many of the benefits of liberalization will not reach the citizenry. Competition authorities in a number of developing economies — Hungary, Peru, and Poland among them — have already faced the task of protecting buyers by breaking up these newly formed cartels.

The third reason is a related one. Much of the population of developing countries may face increased economic uncertainty as a result of liberalization. Perhaps the best response to such concerns is creation of an effective "social safety net" — job training, publicly supported health care, unemployment benefits, and so on — so that those who lose their jobs will be better able to find new ones and will not face dire poverty in the meantime. But a second response is the enactment, enforcement, and publication of a competition law, so that the population is aware that the coming of capitalism does not mean the abandonment of all rules and protections for small actors in the marketplace. It is probably not an exaggeration to state that, in some countries, the enactment of a competition law has been one prerequisite for the enactment of other liberalizing legislation.

New laws enacted in any country must fit into the legal, economic, and social contexts of that country; no one is (or should be) suggesting that either the Sherman and Clayton acts or articles 85 and 86 of the Treaty of Rome (the European Union's competition legislation) be transplanted root and branch into any and all foreign soils. Nevertheless, the experience so far strongly suggests that competition policy is one important component of the legal infrastructure that supports a competitive market economy. ❑

❑ THE APPLICATION OF U.S. ANTITRUST LAW TO FOREIGN CONDUCT: RECENT DEVELOPMENTS

By Randolph Tritell, Assistant Director for International Antitrust,Bureau of Competition, Federal Trade Commission

U.S. and foreign antitrust authorities are increasingly finding that cooperating with each other in merger reviews and investigations into anti-competitive behavior serves both parties' interests well and enables them to deal more effectively with the challenges posed by the increasingly global scope of business transactions, says Randolph Tritell, assistant director for international antitrust in the Federal Trade Commission. The views expressed in this article are his own and do not necessarily reflect the views of the Federal Trade Commission or any commissioner.

The globalization of international business has brought with it new challenges to the application of the U.S. antitrust laws outside the United States. Recent years have seen a sharp increase in the number and value of international transactions. Perhaps more than ever before, conduct by firms operating in one country have effects on consumers and businesses in other countries.

These developments, due at least in part to the success of trade liberalization through the World Trade Organization and various bilateral and regional arrangements, are generally beneficial to competition in that they often enable foreign entrants to compete with domestic incumbents. These new entrants frequently offer new products, better quality, or lower prices.

But more liberal and increased trade has not spelled the end of anti-competitive practices such as price fixing, group boycotts, exclusionary conduct, abuses of dominant positions, and anti-competitive mergers. Indeed, firms singly or jointly may have greater incentives to behave anti-competitively precisely to defeat the benefits that liberalized trade can offer.

Globalization has brought on a concomitant increase in the international component of enforcement by the U.S. antitrust agencies: the Federal Trade Commission and the Antitrust Division of the Department of Justice. Once a rare occurrence, cases with a significant international dimension occupy a large proportion of our dockets. For example, approximately half of all fully investigated mergers involve a foreign party, asset, or evidence, such as information about the affected market, and the Justice Department is prosecuting a record number of international cartels.

Yet there are still obstacles to effective investigation and remediation of foreign anti-competitive conduct that can arise from differences in how countries view the role of antitrust and differences over use of national investigational tools. This article discusses some steps the U.S. enforcement agencies have taken to confront this challenge, primarily through entering into cooperative arrangements with foreign antitrust authorities.

THE EXERCISE OF U.S. JURISDICTION

Long before the advent of the most recent globalization trends, the U.S. government, as well as private plaintiffs, sought to use U.S. antitrust laws to protect U.S. firms and businesses against foreign anti-competitive practices. Some early judicial decisions took a very expansive view of U.S. jurisdiction over conduct abroad with anti-competitive effects on U.S. commerce.

In the 1960s and 1970s, U.S. enforcement against anti-competitive practices, such as an alleged uranium cartel, created controversy with several countries that claimed that such "extraterritorial" enforcement was beyond the legitimate scope of U.S. jurisdiction and infringed on their sovereignty. Some countries enacted legislation making it difficult or even illegal for their nationals to cooperate in U.S. antitrust investigations.

In 1982, the U.S. Congress enacted the Foreign Trade Antitrust Improvements Act, which limited U.S. antitrust jurisdiction to conduct having a "direct, substantial, and reasonably foreseeable" effect on domestic U.S. commerce including exports. In 1988, the Justice Department limited the cases in which it would exercise jurisdiction over foreign anti-competitive conduct to those in which U.S. consumers were injured. However, this policy was repealed in 1992 so that the agencies can now challenge conduct that injures U.S. exports, whether consumers are injured or not. Most recently, in a case in which the Justice Department challenged an alleged cartel of Japanese fax paper producers, a federal appellate court upheld the department's ability to use the criminal provisions of the Sherman Act to prosecute anti-competitive foreign conduct that directly and substantially affected U.S. commerce.

Whatever the reach of the U.S. antitrust laws, there can be formidable practical obstacles to investigating and taking effective action against offshore anti-competitive conduct. To prosecute a contested case effectively, it may be necessary for the U.S. enforcement agency to serve a foreign party with process, compel the production of documents located abroad, obtain the testimony of foreign witnesses, and enforce a remedy against foreign parties and assets.

Each of these steps can be fraught with legal risks and impose burdens on the agency. Thus, it is often desirable for the U.S. enforcement agency to conduct an investigation with the active assistance and cooperation of a foreign antitrust authority.

BILATERAL ANTITRUST COOPERATION

One vehicle the U.S. antitrust agencies have used to increase the effectiveness of their enforcement is cooperative agreements with other antitrust enforcement agencies. These are "executive agreements," meaning that they are formal and binding but are not treaties that override inconsistent domestic laws. The United States currently has four such agreements — with Germany (1976), Australia (1982), the European Community (EC) (1991), and Canada (1995, revising a 1984 agreement). Japan and the United States are currently discussing the possibility of entering into such a bilateral antitrust cooperation agreement.

Our bilateral agreements generally have arisen from a combination of a mutual interest in strengthening cooperation to enhance the effectiveness of both parties' enforcement and a desire to avoid or manage disputes arising from the assertion of extraterritorial jurisdiction.

These agreements generally provide for: notification to the other party of certain investigative and enforcement actions that may affect the notified party's important interests; sharing information relevant to each other's investigations to the extent permitted by domestic law; coordination of investigations when each party is investigating the same firms or conduct; consideration of the other party's important interests under principles of international comity; and consultation regarding potential or actual disputes. The agreements with the EC and with Canada also provide for positive comity, as discussed below. All of these provisions are consistent with principles to which all members of the Organization for Economic Cooperation and Development have subscribed through their adoption of successive Recommendations dating back to 1967.

The bilateral agreements are serving their purposes well, facilitating communication and cooperation that increase the effectiveness of the enforcement efforts of the U.S. agencies. For example, many mergers and acquisitions are now reviewed simultaneously by, among others, the United States, the EC, and Canada. Our antitrust enforcement staffs cooperate closely in the review of these transactions, always within the limits imposed by domestic laws protecting firms' confidential information. This not only improves the information that each agency can use to analyze the transactions, but also allows the agencies to coordinate any necessary remedies.

For example, we were able to coordinate the relief accepted by the Federal Trade Commission and the European Commission in the mergers between the Swiss pharmaceutical firms Ciba-Geigy and Sandoz and in the merger of Guinness and Grand Metropolitan. Coordination in such cases can be good not only for the agencies but also for the parties, who can benefit from streamlined investigations, faster clearance of mergers, and compatible remedies.

Firms are increasingly recognizing the advantages of cooperation among reviewing agencies and are increasingly agreeing to waive the assertion of confidential treatment of submitted information to facilitate this process. Such cooperation, while more prevalent in merger cases, where the parties are dependent on prior government approval, also occurs in nonmerger investigations, such as in coordinated 1995 U.S. and EC cases involving the Microsoft Corporation.

Increased cooperation does not mean that the U.S. agencies will always agree with their foreign counterparts. Perhaps the most visible instance of disagreement occurred in the Boeing-McDonnell Douglas merger, in which the Federal Trade Commission did not challenge the transaction but the EC conditioned its approval on a set of remedial measures. Indeed, tensions arising from this disagreement raised the specter of a trade war between the United States and the EC.

Differences among agencies in different countries, while not desirable, should not be surprising — after all, there often are divided votes even within the Federal Trade Commission, or when the U.S. Supreme Court considers antitrust cases. Thus, one should not expect perfect harmony among agencies in different countries enforcing different laws and policies.

In any event, the Boeing case was exceptional in several respects; other cases in which the United States has reached a result different from that of a foreign agency proceeded without controversy. Nor does the Boeing case mean that cooperation is not generally productive; rather, it illustrates the potential perils of failing to work together in a global environment.

NEW INITIATIVES IN INTERNATIONAL ANTITRUST ENFORCEMENT

The benefits of cooperation of the type envisioned by bilateral agreements and equivalent informal arrangements are limited by at least two constraints — the difficulties inherent in carrying out an enforcement action beyond one's borders and the legal inhibitions on sharing confidential information. The U.S. agencies have taken steps to address these issues through the expanded application of "positive comity" and the negotiation of our first agreement under the International Antitrust Enforcement Assistance Act (IAEAA).

The term positive comity refers to the sympathetic consideration by one country of the request by another country to initiate or expand an antitrust proceeding against conduct that is harming the interests of the requesting country. For example, if a cartel among European producers is injuring not only European but also U.S. consumers, the U.S. agencies, under the principle of positive comity, could ask the EC to investigate and take action against this conduct.

Similarly, positive comity might be invoked if, for example, a group of Canadian firms divided their domestic market among themselves, excluding otherwise competitive U.S. firms from exporting there. In each case, the local competition agency is better positioned to investigate the conduct and to impose and carry out any punishment that may be due. In addition to enhancing efficiency, positive comity can avoid disputes that might otherwise arise over the assertion of jurisdiction over parties and conduct in another nation.

As mentioned above, the bilateral agreements the United States has entered with the EC and with Canada contain provisions for the use of positive comity. In 1998, the United States and the EC entered into a new agreement elaborating on the positive comity provisions of the earlier accord. An important feature of this agreement is the commitment by each party to defer or suspend its own investigation of certain conduct subject to positive comity procedures if the other party agrees to meet a set of conditions. These conditions include, for example, that the requested party devote adequate resources to pursuing the investigation, keep the requesting party apprised of significant developments in the investigation, and complete the proceeding, including any due remedial action, expeditiously. However, the agreement clearly preserves the ability of either party to initiate or reinstitute its own independent investigation.

To date, positive comity has been invoked formally on one occasion, in a request by the U.S. Justice Department to the EC to investigate conduct alleged to be impeding competition in the European market for computerized airline reservation systems. There have also been several cases of "informal" positive comity. It is too soon to judge the efficacy of positive comity, but the U.S. agencies are hopeful that positive comity, while not a panacea, will make a meaningful contribution to improving international antitrust enforcement.

With respect to the ability to exchange confidential information, in 1994, Congress enacted the IAEAA, which authorizes the antitrust agencies to enter into agreements under which they can share confidential business information with enforcement agencies in countries that have laws allowing reciprocal information sharing. Agreements concluded under the IAEAA would also provide that each agency could use its compulsory powers to obtain information for the purpose of turning it over to the other party for use in its investigation. These are potentially powerful tools that can significantly advance the ability of antitrust agencies to obtain the evidence necessary to determine whether illegal conduct has occurred.

The U.S. agencies have negotiated the first agreement under the IAEAA with Australia and look forward to signing it soon. The Canadian antitrust agency has expressed interest in entering into a similar agreement once Canada enacts the necessary legislation, and the U.S. agencies are pursuing opportunities to enter into such agreements with additional jurisdictions.

There is every indication that globalization will continue apace and that some firms will continue to engage in anti-competitive conduct. It is therefore important that antitrust enforcers have the tools necessary to protect their countries' consumers and businesses. Although some envision a worldwide antitrust code with some kind of global enforcement mechanism, such a regime is neither realistic nor necessarily desirable in the foreseeable future. In the meantime, the U.S. antitrust agencies rely on sound enforcement policies, buttressed by incremental measures such as bilateral cooperation, positive comity agreements, and agreements under the IAEAA, to meet the challenges posed by global antitrust enforcement. ❑

❑ WORKING TOWARD NEW U.S. COMPETITION POLICY RELATED TO TRADE

By Paula Stern, President, The Stern Group, Inc.

Anti-competitive practices by foreign companies can form unfair barriers to imports, says Paula Stern, president of The Stern Group, Inc., a consulting firm on international trade issues. The U.S. Department of Justice's International Competition Policy Advisory Committee, which Stern co-chairs, is considering ways to bolster U.S. policy vis-à-vis this significant problem, both in cooperation with foreign governments and unilaterally. Stern, who formerly chaired the U.S. International Trade Commission, now serves on President Clinton's Advisory Committee on Trade Policy and Negotiations.

The discussion on competition policy and trade liberalization has moved out of the ivory towers and bureaucratic hallways and into the global headlines. Commercial titans are now joining the deliberations of trade experts and antitrust specialists, but the fundamental issues still need answering.

• As international trade agreements remove government impediments to free trade, how can we ensure that those impediments are not replaced by anti-competitive schemes on the part of private firms to impede market access?

• How can we better work with foreign authorities to build an international consensus concerning the adverse effects of anti-competitive arrangements?

• In connection with our discussion on competition policy, how do we effectively and accurately measure the contestability of foreign markets?

• How do development policies in various nation-states relate to trade and competition?

In an illustrative rather than comprehensive manner, this article discusses the interface of trade and competition issues, giving special attention to the work of the International Competition Policy Advisory Committee of the U.S. Department of Justice, which I co-chair. This committee's work demonstrates that we still have more questions than answers.

THE GOALS OF TRADE AND COMPETITION POLICY

Theoretically, trade and competition policy share objectives and values, both contributing toward making domestic markets more competitive and thus improving the allocation of resources and promoting efficiency and consumer welfare. In practice, however, the goals and objectives of international trade and antitrust policy can diverge.

The principles of nondiscrimination, transparency, most-favored-nation, and national treatment applied to competitors in a liberal trading system are all central pillars of the codes of the General Agreement on Tariffs and Trade and its successor, the World Trade Organization (WTO). The principal goal of antitrust laws is the preservation and maintenance of competition and the efficient allocation of resources by prohibiting practices or transactions that restrain competition.

WTO-consistent trade laws in the United States and other member states actually spell out when counterbalancing trade restrictions in the form of duties can be imposed on firms deemed to be engaged in unfair trade or when a nation can impose trade-restraining retaliation against another nation's trade practices. In contrast, the antitrust laws focus on protecting the competitive process and consumers, not competitors.

The December 1998 report of the WTO's Working Group on the Interaction Between Trade and Competition Policy elaborates on other differences between trade and competition policies, but it emphasizes complementarity rather than tension, noting that: "Trade policy was basically concerned with governmental action, whereas competition policy focused on the behavior of enterprises. Trade policy was traditionally focused on measures at the border, whereas competition policy regulated competitive conditions and behavior of enterprises within the country. In illustrating this complementarity, reference was made to the role of competition policy in ensuring effective market access and the role of trade liberalization in facilitating the removal of governmental measures that facilitated anti-competitive behavior enterprises."

THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

Here in the United States, the formation of the International Competition Policy Advisory Committee reflects the recognition that, in today's global economy, the international dimension of antitrust enforcement plays an increasingly significant role.

During the past year, the committee — representing the business, academic, legal, and economic professions — has conducted meetings and hearings designed to generate input from experts in both trade and competition policy.

Three days of hearings in November 1998 brought together antitrust enforcement officials, professors, and practitioners from around the world to discuss issues under consideration by the committee. There was broad recognition that competition problems are increasingly transnational in character and that national responses may not be fully up to the task of effectively addressing competition issues, absent cooperation from foreign authorities. In response to this trend, deepening bilateral cooperation is important, and further consideration of international approaches to addressing competition issues is needed.

There was considerable discussion among those at the hearings regarding the form these international approaches should take. Antitrust enforcement agreements with Australia, Canada, the European Commission (EC), and Germany promote cooperation and coordination in the enforcement of each country's antitrust laws. The U.S.-EC and U.S.-Canada cooperation agreements also include provisions for "positive comity," which allows one country to request that the other country proceed against anti-competitive conduct that is harming the interests of the requesting country. These agreements are considered important steps toward minimizing disputes over the extraterritorial application of the antitrust laws and improving communication between the various antitrust authorities.

Participants also debated what role, if any, the WTO should play in competition policy and whether it should proscribe certain practices or serve only as a broad advocacy forum.

During the coming year, the committee will continue its work, culminating with an autumn 1999 submission of a report to the U.S. attorney general that contains policy recommendations for the next century in this critical area of international competition policy.

CORE OBJECTIVES

In its analysis of the interface of trade and competition issues, the advisory committee is attempting to develop policy responses that will:

- Deter anti-competitive restraints.

- Reduce barriers to effective prosecution of anti-competitive restraints with adverse effects in the United States.

- Address problems of lax or discriminatory enforcement.

- Increase transparency.

- Promote effective competition in jurisdictions that do not have competition laws.

To meet these core objectives, the advisory committee is considering policy responses in four general subject areas.

First, the committee is considering the feasibility of the unilateral enforcement of U.S. antitrust laws against foreign market access restraints.

Second, the committee is analyzing the record of bilateral cooperation agreements. We are considering whether enhanced bilateral cooperation, including through expanded positive comity and traditional comity approaches, offers a potential solution.

Under positive comity, one country requests that another country initiate or expand an antitrust enforcement action against anti-competitive conduct that is harming the interests in the country that made the request.

Third, the committee is considering the use of traditional trade policy, including enforcement of unilateral trade laws and negotiated bilateral agreements.

Fourth, the committee is evaluating the usefulness of a variety of international initiatives. As examples, the committee is considering the following proposals:

• The development of core principles advanced through international fora or agreements.

• The development of new or expanded dispute-resolution mechanisms.

• The pursuit of expanded plurilateral agreements or regional agreements, e.g., Organization for Economic Cooperation and Development (OECD), North American Free Trade Agreement (NAFTA), Asia-Pacific Economic Cooperation (APEC).

• The development of initiatives at the World Trade Organization.

Besides these policy options, the advisory committee is considering how foreign governmental restraints should be handled as a competition policy issue. The committee is not considering U.S. dumping laws, which have attracted considerably more debate at home and in the WTO, and thus could detract attention from other important agenda items of the committee.

CONTESTABILITY AND OTHER ISSUES

A threshold issue in any set of policy proposals is "contestability." Economists have struggled with developing a means to measure the contestability of markets or the barriers to entry to new sellers. This has proven to be an elusive task. In order to gain a sense of the anti-competitive barriers abroad, the advisory committee is gathering information on the experiences of U.S. companies. In particular, it is seeking to learn about the experiences of U.S. companies that have had difficulty penetrating foreign markets because of anti-competitive practices.

After the breakup of the Soviet Union's command-and-control economy and with ongoing global financial crises in Asian economies that imitated Japan's export-led industrial development policies, it is also imperative to analyze the relationship of trade and competition policies to national policies designed to encourage development and economic growth.

The recent WTO report argued that, "whereas in the past, countries could hope to achieve development through other (possibly more interventionist) tools and approaches, these approaches were no longer workable in light of the extent of trade liberalization and globalization of business activities that had taken place and the increased importance of foreign direct investment as an engine of growth in the present economic environment. As a result of these developments, anti-competitive practices of enterprises were increasingly international in scope and appeared to be relatively more significant than in the past. Consequently, according to this view, a vigorous competition policy was necessary to respond appropriately to these concerns and to establish a climate conducive to investment and economic growth."

NEXT STEPS: A SUMMARY

As the global economy continues to expand and the web of commercial relationships become even more tightly woven, the effect of the anti-competitive actions of private firms on trade flows will increase.

In recognition of the increasing importance of the interface between trade and competition policies, international and regional organizations such as the OECD, the WTO, and the EC are all considering the next steps in international competition policy.

With the establishment of the International Competition Policy Advisory Committee, the U.S. Justice Department has also signaled that it recognizes the importance of these issues. The committee is considering how the interface of international trade and competition policy should be guided by the ultimate goal of ensuring the international free flow of goods and services without anti-competitive restraints. Its work rests on the belief that improved competition leads to greater economic growth and better living standards for all actors in the global trading system. ❑

❑ INTERNATIONAL TRADE, DOMESTIC REGULATION, AND COMPETITION POLICY

By Jeffrey Lang, Partner, Wilmer, Cutler & Pickering

The likelihood of achieving international agreement on antitrust and competition policy is speculative, says Jeffrey Lang, a partner in the Washington law firm Wilmer, Cutler & Pickering. A former deputy U.S. trade representative in the Clinton administration, Lang says the U.S.-Japan insurance agreement and WTO basic telecom agreement demonstrate another way to go — including pro-competitive regulation in sectoral trade agreements.

As trade in goods and services has exploded over the past 30 years, governments have attempted through negotiation to reduce the impact of domestic regulation on that trade.

The process of extending trade policy to domestic regulation began at least 30 years ago. In some striking cases involving the sports equipment and food sectors among others, the U.S. government identified certain Japanese regulations as nontariff barriers effectively keeping U.S. suppliers out of Japanese markets.

Since then, governments from a number of countries have agreed to consider as trade barriers subject to negotiation domestic regulations that discriminate in favor of domestic over foreign suppliers.

Governments have not agreed that regulations discriminating on the basis of national origin are necessarily inconsistent with their trade agreement obligations to each other, any more than tariffs are.

They have agreed, however, that these trade barriers should be cataloged; in many cases they have agreed to reciprocal reductions in these barriers just as they have agreed to reduce tariffs on a mutual basis.

Moreover, World Trade Organization (WTO) members have agreed that certain types of regulatory barriers to trade do violate WTO obligations. For example, WTO member governments may not use technical product standards or food safety regulations in a discriminatory way. These WTO agreements do not eliminate the need for such standards but do discourage governments from using them to discriminate against foreign suppliers.

WTO agreements on regulatory discrimination have been difficult to negotiate and even more difficult to administer because they try to eliminate discrimination without infringing on the power of governments to regulate in the public interest.

The fine line for governments is how to regulate risk adequately for their citizens without discouraging trade in goods and services.

The problem is partly one of process. Often, domestic regulation is worked out in a way that is best for domestic producers, but without considering the way other countries regulate. The problem gets worse if domestic public interest advocates become committed to the domestic regulation without giving foreigners a hearing.

MUCH WORK, LITTLE SATISFACTION

The result is that regulators, trade negotiators, business people, and public interest advocates have spent a huge amount of time and energy on this problem over 30 years, yet none of them is so far particularly satisfied with the operation of negotiated anti-discrimination agreements.

At the same time, some people have proposed trade agreements against discrimination by failure of a country to enforce or to have domestic competition law. These proposals have not ripened into serious trade negotiations.

Competition regulation is complex, affecting broad areas of domestic economies, both regulated and unregulated. Indeed, even within countries people have difficulty agreeing on what principles should govern competition and how they should be enforced.

Moreover, domestic law enforcement authorities have difficulty accepting that their activity could be second-guessed by foreign governments under a trade agreement. The likelihood — and even the benefit — of reaching international agreement on such matters is speculative at this time. Of proposals to have WTO competition policy negotiations, we might say, as former U.S. Trade Representative Robert Strauss did in another context, "That sounds good if you say it fast."

THE NEED FOR "RE-REGULATION"

Nonetheless, there may be another way to think about the problem of competition policy in international trade, an idea that promotes competition without invoking competition law. It is suggested by the evolution in the way U.S. antitrust law is applied to regulated industries.

Antitrust law has been a feature of U.S. law for so long that it has almost assumed constitutional dignity. However, the application of antitrust principles to regulated industries has created some tension. In some cases, the U.S. Congress has insulated regulated industries from antitrust enforcement, but this has been regarded as an exception that has to be justified on policy grounds. In fact, where such exceptions exist, Congress has often provided the regulatory agencies themselves, such as the U.S. Interstate Commerce Commission, with authority to issue special antitrust rules for the industries they regulate and enforce those rules themselves.

Gradually, these exceptions for regulated industries have been modified in the United States to assure regulation in a pro-competitive manner, often (initially) called "deregulation." For example, Congress began to "deregulate" transportation in the 1970s, communications in the 1980s.

The transitions to a competitive environment were not smooth. A common mistake was to assume that eliminating regulation would naturally produce competition. In virtually all cases, deregulation was not itself pro-competitive; competition required "re-regulation" — my term for changing (but not eliminating) regulations so as to promote competition among suppliers.

Re-regulation seems to be particularly important where a former regulatory regime has left one or a few providers of goods or services with a dominant market position. In such circumstances, it has been necessary to fence off market segments to give newcomers time to build up the good will, capital base, and experience to take on the dominant supplier in the market.

In some instances, the United States has successfully transferred this pro-competitive regulatory thinking to trade negotiations. With regard to market access for insurance suppliers in Japan, the United States and Japan agreed in 1994 to fence off a market segment of insurance services known as the "third sector" for exploitation only by foreign companies for a temporary period. Under this bilateral agreement, domestic Japanese companies may not compete in the third sector until the primary areas of insurance services in Japan have been opened fully to foreign competition for three years.

In another, more far-reaching instance, negotiators from many countries achieved pro-competitive regulatory principles in the 1997 WTO agreement on basic telecommunications. The countries party to the agreement committed to open their telecommunications markets to foreign providers in less than 10 years; most of them also agreed to implement these pro-competitive regulatory principles in their domestic laws.

ADDING A PRO-COMPETITIVE OVERLAY

Generalizing from these rather narrow experiences is not easy. We must remember that the Japan insurance agreement and the WTO basic telecommunications agreement do not relate directly to competition law enforcement. Rather, they simply add a pro-competitive overlay to the basic international trade principles of most-favored-nation treatment and national (i.e., nondiscriminatory) treatment.

In both cases, negotiators recognized that they could not succeed without agreeing to some re-regulation. Regulators involved in the negotiations evidently recognized that promoting competition would enhance their public policy objectives. By the agreements they forged, these negotiators and regulators have opened up an opportunity for movement forward in trade negotiations.

An underlying assumption of trade agreements over the past 50 years is that when a country agrees to remove formal import barriers, imported goods can compete in the domestic economy on the basis of commercial considerations. It isn't much of an intellectual leap to apply a pro-competitive overlay to determine what else, if anything, might be necessary to assure the agreement will work as expected by both parties.

Of course, this may have to be done differently for different sectors. It may be necessary to work with specific cases for some time before general principles emerge. Nonetheless, we may be better able to realize the full expected benefits of trade agreements, without endangering domestic regulatory objectives, if governments can agree that foreign and domestic providers should be regulated in the interest of promoting competition in the domestic economy. ❑

❑ ANTITRUST POLICY IN BRAZIL: RECENT TRENDS AND CHALLENGES AHEAD

By Gesner Oliveira, Professor, Getulio Vargas Foundation in São Paulo, and President of CADE

Brazil has started to enforce competition policy more aggressively in line with its embrace of market economics, says Gesner Oliveira, president of Brazil's competition agency, CADE. Like other developing countries, he says, Brazil especially needs to build the institutions of competition and to promote the culture of competition among its businesses and consumers.

Brazil has had a competition agency, Conselho Administrativo de Defesa Econômica (CADE), since 1962. However, it was only in the 1990s that competition policy became an important issue in the public agenda. This article provides a brief overview of this process with emphasis on the recent trends and future prospects for Brazilian antitrust policy.

COMPETITION POLICY AND ECONOMIC REFORM

In contrast to the historical context of the U.S. Sherman Act, the rise of competition policy in developing countries since the late 1980s is associated with a change in the role of the state in the direction of less intervention in the markets. This has indeed been the case for Brazil, where trade liberalization, deregulation, and privatization have changed dramatically the economy since the early 1990s.

Competition law and policy are at the same time products of this movement toward economic reform and catalysts of the recent transformations. They are product of economic reform in the sense that, as a result of privatization, deregulation, and trade liberalization, there is a genuine social demand for the repression and prevention of the abuse of economic power, now more concentrated in the hands of private agents. They are factors, or catalysts, of economic reform in the sense that implementation of competition policy — especially in its competition-advocacy dimension — represents an important factor for the continuation of the liberalization process.

Thus, the advancement of competition laws is, in principle, good news for the foreign investor. Of course, one wants to make sure that the newly enacted legislations is not misused and that the right type of institutions are developed. Well implemented, the competition laws can help maintain and deepen the liberalization process. This has been the major objective of CADE in the past few years.

BRAZILIAN COMPETITION LEGISLATION

Brazilian competition law does not differ significantly from the international standards. Although the first important legislation dates back to 1962, competition policy gained importance with Law 8884 of 1994, which introduced merger control and transformed CADE into a more independent body and pioneered the format of the recently created regulatory agencies. CADE has one president, six commissioners, and one attorney-general, all of whom serve for a two-year fixed term. Decisions of CADE can be appealed only to the judiciary.

In contrast to the majority of the emerging economies, Brazil has already reached a considerable number of administrative decisions, most of them enacted after 1994 under Law 8884.

Two trends are worth noting:

- There has been a vast increase in the number of decisions after 1996, associated with the new environment created with the stabilization of the economy and the modernization of CADE. The monthly average since 1996 went up by more than 10 times the peak of the previous period since 1962.

- Conduct cases, which are a type of antitrust case, have prevailed during the whole period (77 percent of all antitrust cases), but merger decisions reached 51 percent in June-December 1998. This partly reflects the relatively more efficient analysis of the merger cases; as investigation of anti-competitive practices improves in quality and speed, one should expect a larger share of conduct cases.

In regard to conduct cases, several aspects deserve attention:

- A high percentage of cases (24 percent) are related to a type of illicit behavior called in Brazilian law "abusive price." These are practices associated with the failed attempt on the part of past Brazilian administrations to control inflation through direct intervention in the market place. This explains a good part of the high proportion of cases that have been terminated without any penalties. Such terminations are positive to the extent that previous arbitrary state actions are no longer causing uncertainty to private agents.

- Investigation has been too slow in a large number of cases, increasing public and private costs.

- The percentage of cartel cases is high, but the share of certain types of illicit practices such as bid-rigging is still low.

ASPECTS OF MERGER CASES

In regard to merger cases, six aspects are worth noting:

- There has been a clear tendency to reduce the share of transactions that are subject to preconditions for approval. In June-December 1998, almost all transactions were approved without any conditions, in contrast to none in 1994-1996.

- The frequency of the performance commitments — agreements between CADE and the merging parties establishing the conditions under which the merger can be approved by CADE — has been reduced relative to earlier periods, and the nature of the requirements has changed. Since March 1996, CADE has shown a preference for structural conditions rather than behavioral ones.

- In June-December 1998, there were no performance commitments observed. In cases of partial approval of mergers, there has been a preference for once-for-all measures, rather than agreements with the private agents that must be monitored on a regular basis.

- There has been a systematic attempt to eliminate excessive bureaucracy, especially in the simple cases.

- As in other jurisdictions, the rate of merger disapproval has remained low (less than 5 percent) and is decreasing.

- Decisions have become more detailed and have given alternatives to the private parties whenever possible.

It is important to note that CADE has emphasized its competition-advocacy function. Actions have ranged from public statements in favor of deregulation of civil aviation and of a project developing a market for generic drugs to judicial action against individuals who have tried to inhibit the practice of rebates in taxi fares in Brasilia.

An important dimension of implementation is the experience with the court system. In Latin America this might be one of the greatest challenges for competition authorities. There are currently 70 cases in the courts; one should expect this number to increase exponentially in the next few years as Law 8884 becomes more well known.

The number of appeals should also increase due to the more active stand CADE has taken and the increasing number of pecuniary penalties applied. Fines have increased in number and in value, especially for late notification.

In Brazil, as in the United States, despite the fact that the competition law is a federal law, there is a high degree of autonomy of the states of the federation that will lead to the discussion of several cases at the state level.

RECENT CHANGES

In order to adapt to a global economy, CADE has gone through major reforms:

- Internal rules were changed in order to speed up the decision process, as well as to assure strict respect for due process of law.

- A code of ethics was created, introducing simple but useful rules regarding conflict of interest and sexual harassment, among other issues.

- Merger control procedures were totally reviewed, introducing a two-stage process of analysis, harmonization with notification forms of the Organization for Economic Cooperation and Development, and simplification of the information and documentation required. CADE's review process is expected to fall from seven months to just under two and one-half months. It was 20 months before the first innovations were introduced in 1996.

• Provisional filing fees for merger control and consultations to CADE were transformed into law in January 1999, assuring complementary resources to CADE's budget.

GLOBALIZATION AND INTERNATIONAL COOPERATION

In a global economy, international cooperation in the area of competition has become of utmost importance. Given the greater degree of interdependence among national economies, very often business practices and transactions have affected several jurisdictions. In 1996, concentration occurred in the Brazilian toothpaste market as a result of a transaction involving two U.S. firms (American Home Products and Colgate), which affected the strategy of a third U.S. company (Procter & Gamble).

The application of extraterritoriality clauses of itself is insufficient to cope with the new global agenda. Harmonization of procedures and permanent cooperation among the various national authorities could certainly reduce public and private costs incurred in the application of merger control. This is one of CADE's major objectives.

As pointed out earlier, the mere enactment of a competition law is not enough to assure that markets will function well. World trade and welfare will only increase if national laws are implemented observing the principles of transparency and nondiscrimination among nations. This is why technical assistance should focus on institution-building. It is less important to write new laws than to promote new, modern, independent and transparent competition agencies. This is in line with the Panama Declaration, which resulted from the meeting of all competition agencies of the Americas in October 1998. The document expresses the participants' intention to "cooperate with one another, consistently with their respective laws, to maximize the efficacy and the efficiency of the enforcement of each country's laws, and to help disseminate the best practices for the implementation of competition policies, with emphasis on institutional transparency."

The Group on Trade and Competition of the World Trade Organization (WTO) has also proved to be very useful for benchmarking and disseminating competition policy among the developing countries.

The nature and depth of international cooperation varies according to the stage of institutional development. Most countries in the world are at very early stages and can benefit enormously from technical assistance. Indeed, there is a political market failure in terms of the amount of resources allocated to competition offices. Due to the free-rider problem, competition agencies tend to be underfunded. Equilibrium obtains at a point of institutional underinvestment.

CADE's budget is 65 times smaller than the equivalent of its U.S. counterparts although Brazilian gross domestic product (GDP) is only 10 times smaller than U.S. GDP. Since there are economies of scale and of learning for the implementation of competition laws, at the earliest stages new competition offices should have more resources, not less.

Furthermore, the competition policy agenda is now more extensive and complex than it was a decade ago. New issues such as interaction with the regulatory agencies and the WTO agenda have to be addressed at the same time as basic staff training and the acquisition of computers. The competition official in mature jurisdictions has to apply competition principles given a stable and adequate pre-existing environment. The competition official in a developing country has to help create such an environment for effective application of competition law.

As countries develop their institutions, they will engage in bilateral and/or plurilateral agreements. CADE has had an agreement with the Competition Commission of Argentina since 1996. A Brazil-U.S. agreement is expected to be signed shortly.

CHALLENGES AHEAD

Although a great deal has been accomplished in the last few years, Brazilian competition policy has a long way to go in order to reach institutional maturity. The following tasks pose the major challenges:

• Improve investigation of conduct cases.

• Create efficient forms of cooperation with the regulatory agencies.

• Intensify international cooperation through active engagement in technical assistance, benchmarking, and bilateral and regional agreements.

This will have to be done under a more adverse environment than in the past four years due to the macroeconomic difficulties faced by Brazil in the aftermath of the Asian and Russian financial crises and the more recent Brazilian exchange rate crisis, which led to a change in the exchange rate regime.

Three relevant issues for competition policy derive from the new macroeconomic picture:

• First, the budget constraints will continue to be very severe, suggesting the usefulness of the newly created filing fees.

• Second, the elimination of the exchange rate as a nominal anchor and the depreciation of the Real pose new inflationary pressures. Given the past history of monetary indiscipline and indexation, there is a risk of a resurgent price-wage-exchange rate spiral that has pressured past administrations to resort to price controls. It is important to realize that this type of policy is useless, but at the same time to move forward with new mechanisms for transition economies like Brazil.

• Third, the rate of protection will tend to be higher as a result of the new exchange rate policy as well as the trade restrictions that had to be imposed as a result of the exchange rate crisis. This means that markets will be less subject in general to import competition than before.

Regardless of the particular present circumstances of the economy, the medium-run goal is to improve CADE's three roles: repressive, preventive, and educational. In the beginning of antitrust history, the repressive role was the most salient one. During the 20th century, the development of ex-ante controls, in particular the development of merger review, has become an important complement. However, in a modern and global economy, the educational role is the most important one. Dissemination of competition culture and institution-building seems to be the most important task in terms of international cooperation. ❑

❏ A U.S. - EU ROAD TOWARD MULTILATERALISM IN INTERNATIONAL COMPETITION POLICY

By Edward M. Graham, Senior Fellow, and J. David Richardson, Visiting Fellow, Institute for International Economics

Encouraged by the success of the Basle Agreements in establishing international capital standards for commercial banks, the authors put forth their view that "similar, strategic 'cooperative unilateralism' could have the same catalytic power for integrating trade, investment, and competition policies." Edward M. Graham is a senior fellow at the Institute for International Economics (IIE) in Washington, D.C. J. David Richardson, a visiting fellow at IIE, is professor of economics in the Maxwell School of Citizenship and Public Affairs, Syracuse University.

In recent writings, we have advocated a progressive three-stage integration of competition policies with trade and investment policies. We summarize our proposal here and put forth our view that the United States and the European Union (EU) are ideally poised to begin pursuing it.

Our proposal begins with what we call "cooperative unilateralism" and advances to full-fledged multilateralism as long as performance at the earlier stages is satisfactory. This process is explicitly experimental. That means that commitments are not just incremental, but time-limited. We anticipate more than occasional backtracking from failed procedures and principles — that is, after all, the way every country's competition policies have proceeded historically.

SIMILARITIES AND DIFFERENCES

The United States and the European Union provide ample examples of this experimental process, having, along with Canada, the longest histories of competition policy of any nations. The broad goals of the U.S. and EU competition laws are quite similar — to prevent the abusive practices associated with cartels, monopoly, and market power. Both the United States and the EU deal, implicitly and explicitly, with trade and investment across subregions within their external boundaries.

But within these broad similarities, the specifics differ substantially as the result of different histories and experiences. Furthermore, these specifics have changed with time, experience, and the benefit of new analytical thinking. For example, in the United States, interpretations of the antitrust laws have shifted in recent years to reflect a growing consensus that the ultimate goal of these laws is to foster economic efficiency exclusively.

Older doctrine considered that there was some tradeoff between efficiency and fairness. While this might sound reasonable and even just, often "fairness" could be interpreted as the need to protect an inefficient seller in a market from an efficient one. Thus, a firm that was innovative or extremely cost effective might, in effect, be punished for its own good efforts. Also, under earlier doctrine, there tended to be excessive concern about market "concentration," often without consideration of the possibility that actions that increased this concentration might also create efficiencies that led to consumer benefit.

This shifting interpretation has been reflected both in the policies of the U.S. antitrust enforcement agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, and in decisions taken in U.S. courts.

For example, in past years, so-called "vertical restraints," such as exclusive dealings between supplier and user firms or the granting of exclusive territorial rights to sell a product or service, were often held to be illegal per se. But with some exceptions, these now are judged on the basis of a "rule of reason." When it can be shown that consumers gain from economic efficiencies created by these arrangements, they are held to be legal. Likewise, mergers that significantly increase the market share of merging firms and increase seller concentration were once routinely blocked by the enforcement agencies. Now such mergers likely will be approved (within limits) if they can be shown to increase efficiency such that consumers benefit. None of this changes the basic concept in U.S. law that monopolization of a market is illegal. However, different standards as to what exactly is monopolization and how to prevent monopoly in its incipient stage now prevail relative to those of 20 years ago, and there is widespread consensus among experts that the new standards make much more sense than the old ones.

Similar observations can be made about the European Union's competition policy. It has developed different standards and procedures from those of the United States, partly because of its emphasis on breaking down barriers to integration of its various national markets. Thus, for example, most vertical restraints are illegal in Europe, especially if they create barriers to intra-European trade. However, whole sectors can apply for and receive specific exemptions from the prohibitions. The granting of an exemption is done on a discretionary basis by the officials of the main EU enforcement agency, the Directorate General IV (DG-IV) of the European Commission. Although the basis for an exemption is not necessarily that a particular practice leads to efficiency, it seems to be growing as a justification. Likewise, European policy toward mergers, which rests on a determination of whether a merger is likely to lead to "abuse of a dominant firm position," is evolving toward more explicit consideration of efficiency as a positive factor in this determination. Thus, the evolution of EU policy seems to be in the same general direction as in the United States, although the specifics differ.

INTEGRATING COMPETITION POLICIES

Our three-stage proposal for competition policy builds on these common goals and the growing consensus over standards and procedures. The first stage also reflects the common U.S. and EU experience of rule-of-reason refinements. We call it "cooperative unilateralism" and purposely make it very procedural. It aims simply to build up a base of informed experience.

The first stage features fact-finding [notified to the World Trade Organization (WTO)], consultation, and mediation, all coupled with clear maintenance of national operational sovereignty. There are no cross-territorial rules and no international panels or tribunals. We envision obligations undertaken by national competition policy authorities, perhaps in concert with trade policy authorities, to investigate, if requested after consultations, specified behavior in their jurisdictions that spills over anticompetitively to others (perhaps subject to some threshold of injury), and to mediate conflicts that remain, with eventual publication of the mediator's report. Eligible practices would be those that most clearly impede "market accessibility," sometimes called contestability. Cartel practices are the clearest example in goods and services trade; investment practices would include barriers to national treatment and to evaluation of mergers and acquisitions with cross-border effects.

The procedural effort would itself be nurtured progressively. It would begin with positive comity, then advance to consultation (eventually mandatory), even among countries with little formal competition policy. It would ultimately involve a commitment to informational mediation, as nations take on more organized competition policy commitments. It would explicitly not involve dispute settlement procedures, which would flow only from our second stage.

Our second stage moves toward multilateralism. It involves a WTO TRAMs (Trade-Related Antitrust Measures) agreement that is patterned on the Uruguay Round's TRIPs (Trade-Related Intellectual Property) agreement. A TRAMs agreement would desirably establish minimal standards for market accessibility. These would concern cartel practices and other "horizontal" restrictions, national treatment for investors (subject to circumscribed exceptions), and procedural rules for cross-border evaluation of mergers and acquisitions that have important international spillovers. One attractive by-product of integrating competition policies with investment policies is that unilateral national enforcement of competition policies becomes easier when there is substantial corporate cross-penetration of markets with affiliates and assets that can be "reached" easily by policy without extraterritorial "over-reaching."

Assuming satisfactory performance at this second stage, our third stage (TRAMs-plus) would extend the coverage of the second stage to more controversial issues, including vertical practices and competition policy "safeguards" — exemptions for industries that are downsizing. An agreement on vertical practices would attempt to isolate and discipline those that are egregiously anti-competitive, ignoring those that can be argued to enhance efficiencies in contractual supply and distribution chains. Downsizing exemptions would aim at reducing exit costs on a national treatment basis. One example would be to ease restrictions on "rationalization mergers," in which domestic and foreign firms have equal opportunity to absorb weaker rivals in designated "declining sectors" as long as state aid to such sectors (subsidies and trade barriers, including trade remedies) falls below a critical threshold. The second and third stages might be initially restricted to "plurilateral" sets of first movers within the

WTO, or more desirably, phased in at different rates by different member groups, as in the case of TRIPs.

All of our stages aim at market accessibility, not market access. Market accessibility is the right to compete; market access is the fruit of successful competition. Our proposals hold sacred the competition policy credo to "protect competition, not the competitor." There is a reason for this strong distinction. Virtually every conception of market access involves a measure. Virtually every measure of market access involves a market share quota. Virtually every quota invites collusion and nonchalance and insulation against bad judgment. Exit becomes unnecessary, even for the incompetent and obsolete. Entry becomes correspondingly more difficult for those with new ideas and new products. Incumbents are coddled, entrants are kept on the fringe. Market access commitments reward mindless incumbency, mere seniority. Market accessibility commitments, in contrast, reward productive ambition and market-tested merit. Market accessibility is not hard to measure. Market accessibility is evaluated by all the new antitrust tests of entry barriers and foreclosure: effects of anti-competitive practices on prices, on competition upstream, downstream, and in adjacent regions and products, on the sunk costs of entry, and on the range of desirable attributes of a product or service.

BREAKING NEW GROUND

Until recently, there has been strong caution about proposals like ours. They were viewed as visionary at best. To critics of international competition policy, the complexities, the cultural differences, and the dangers of capture have appeared overwhelming. But we are persuaded that there is a precedent to give a more hopeful foundation and that the two most important players in our proposed process are poised to initiate it.

The precedent that encourages us is not TRIPs, but the Basle Agreements on international capital standards for commercial banks. Those agreements were equally complex. They took more than 10 years to negotiate. They involved diverse agencies. They cut across yawning cross-national differences in the "culture" of finance. They left intact a nation's sovereign power to implement the eventual agreements and to define the important "second-tier" capital assets for its banks. There is no evidence that the agreements have been "captured" by the banking industry.

But the Basle Agreements would never have become plurilateral if it had not been for a daring proposal by the United States and the United Kingdom to proceed bilaterally. That proposal (with open accession) broke the logjam in the broader Basle negotiations and became the foundation of the eventual plurilateral agreement, to the advantage of the British and the Americans.

We think that similar, strategic "cooperative unilateralism" could have the same catalytic power for integrating trade, investment, and competition policies. We think that the United States and the European Union are the ideal candidates for such bilateral policy activism. They could focus the multilateral discussion. Their competition policies have been refined far beyond any others, yet still have a lot to teach each other. A U.S.-EU initiative would be far superior to a "web of bilateral agreements" proposed by some other commentators. We say no web, no cross-cutting sticky strands in which to become entangled. Just solid, straight cooperation between the two players with the most to gain and most to teach, leading naturally, but sequentially, to a multilateral counterpart in the WTO. ❑

SUMMARY OF MAJOR U.S. ANTITRUST LAWS

SHERMAN ACT OF 1890

The Sherman Act prohibits contracts and conspiracies in restraint of trade among U.S. states or with foreign nations and forms the essential foundation of all U.S. antitrust law. It also makes it illegal for any business to monopolize, or attempt to monopolize, trade or commerce.

A company violates the law when it tries to maintain or acquire a monopoly position through unreasonable methods such as price fixing, bid-rigging, and other cartel activities. For the courts, a key factor in determining what is unreasonable is whether the practice has a legitimate business justification. Violations of the act can be tried in civil court — where fines may be imposed or a court order issued to prohibit the unfair practice — or in criminal court — where both fines and imprisonment can be imposed. The Sherman Act provides that corporations may be fined up to $10 million and other defendants up to $350,000; individuals may be sentenced up to three years in prison.

FEDERAL TRADE COMMISSION ACT OF 1914

Under the Federal Trade Commission Act, which created the Federal Trade Commission (FTC), the commission is empowered, among other things, to prevent unfair competition and deceptive practices. The FTC can require businesses to pay consumers for harm done. It does its job by writing regulations and conducting investigations.

CLAYTON ACT OF 1914

The Clayton Act elaborates on the Sherman Act and prohibits such activities as: price discrimination — selling the same commodity to different buyers at different prices; exclusive dealing — holding a retailer or wholesaler to a single supplier on the understanding that no other distributor will receive supplies in a given area; interlocking directorates — holding by an individual of directorships in two or more competing companies; and companies holding competitors' stocks. It also prohibits mergers and acquisitions where the effect is to lessen competition or to tend toward monopoly. It gives the U.S. Justice Department and the FTC authority to block any merger that would violate antitrust laws.

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

The Hart-Scott-Rodino Act amended the Clayton Act by requiring companies to notify the FTC and the Justice Department's Antitrust Division before most mergers and acquisitions are consummated. It gives the enforcement agencies time to examine the competitive consequences of the proposed mergers. They might require that the merging parties sell off some of their assets, or they might block the merger entirely. Failure to comply with pre-merger notification is punishable with penalties of up to $10,000 for each day a violation continues.

NATIONAL COOPERATIVE RESEARCH AND PRODUCTION ACT OF 1993

This act establishes some antitrust protections for certain joint research and development ventures by companies in the same industry when they file prior written notification with the Justice Department and the FTC.

WEBB-POMERENE ACT

The Webb-Pomerene Act provides a limited antitrust exemption for formation and operation of associations of otherwise competing businesses to engage in collective export sales.

INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994

This law authorizes the FTC and the Justice Department to enter into mutual assistance agreements with foreign antitrust authorities. Under such agreements, U.S. and foreign authorities may share, subject to certain restrictions, evidence of antitrust violations and assist each other in investigations. ❑

❑ U.S. AGENCIES RESPONSIBLE FOR ANTITRUST ENFORCEMENT AND COMPETITION POLICY

The historic goal of antitrust laws is to protect economic freedom and opportunity by promoting competition in the marketplace. Competition in a free market benefits consumers through lower prices, better quality, and greater choice. It provides businesses the opportunity to compete on price and quality in an open market unhampered by anti-competitive restraints.

In the United States, antitrust investigations and enforcement are managed jointly by two agencies, the Antitrust Division of the U.S. Justice Department and the independent Federal Trade Commission (FTC). Often, one or the other agency takes the lead in a merger evaluation or antitrust investigation because it has more experience in an area. For example, in the recent merger of the British Petroleum and Amoco oil corporations, the FTC took the lead because of its greater experience in managing oil company mergers. Because the two agencies have parallel jurisdiction to investigate mergers and conduct that may be anti-competitive, a clearance procedure has been developed to promptly allocate individual matters between the two agencies. Other federal agencies become involved in evaluating mergers in industries they regulate — such as the Department of Transportation for airline mergers and the Federal Communications Commission (FCC) for telecommunications mergers.

The mission of the Justice Department's Antitrust Division is to promote and protect competition through enforcement of antitrust laws, which apply to every level of business in the United States in virtually all industries, including manufacturing, transportation, distribution, and marketing. Those laws prohibit practices that restrain trade, such as price-fixing conspiracies, corporate mergers likely to reduce competition in particular markets, and predatory practices designed to drive competitors out of business.

The Antitrust Division prosecutes violations of antitrust laws by filing criminal cases that can lead to fines of as much as $10 million against corporations, $350,000 against others, and up to three years in prison for individuals, or a combination of fines and imprisonment. Under the Sherman Act the department can also seek treble (triple) damages against a corporation or individual if the U.S. government is the purchaser of the affected goods or services.

Where criminal prosecution is not appropriate, the division institutes a civil action seeking a court order forbidding future violations of the law and requiring steps to remedy the anti-competitive effects of past violations. The division's work relies on cooperation with U.S. state attorneys general and, more and more, with foreign antitrust enforcement agencies.

With a mandate for promoting fair trade, the Federal Trade Commission oversees antitrust policy for the United States by enforcing a variety of federal antitrust and consumer protection laws to ensure that U.S. markets function competitively, vigorously, efficiently, and free of undue restrictions. While the commission works in conjunction with Justice's Antitrust Division, it is an independent agency. The FTC can seek a court order prohibiting future violations of the law and may in some instances impose fines.

The FTC also works to enhance smooth operation in the marketplace by eliminating practices that are unfair or deceptive, practices that threaten consumers' opportunities to exercise informed choice. It performs economic analysis to support its enforcement of the laws and to contribute to policy deliberations by federal, state, and local governments. In addition, the commission maintains programs to educate consumers about the laws it administers. ❑

❑ U.S. INTERNATIONAL ANTITRUST ENFORCEMENT SINCE THE 1980s

The rapid expansion in global commerce since the Reagan administration led the Bush and Clinton administrations to develop a more vigorous approach to international antitrust enforcement. The priority for the Department of Justice has been challenging international price-fixing cartels, especially those that pose a broad threat to U.S. business and consumers. Massive international cartels have been uncovered in citric acid, food and feed additives, industrial cleaners, and graphite electrodes used in steel making.

The department's Antitrust Division case statistics illustrate the growth in international enforcement. In 1987-1990, the Antitrust Division brought not a single antitrust case against a foreign-based corporation. In fiscal year 1991, only 1 percent of the corporate defendants in antitrust criminal cases were foreign based. But in 1997, 32 percent, and in 1998, 50 percent, of the corporate defendants in criminal antitrust cases were foreign based.

As a result of aggressive criminal enforcement efforts against hard-core antitrust violations such as price-fixing and market allocation, the Justice Department set records in the past two fiscal years in the level of fines collected. In fiscal year 1997, the department collected $205 million in fines, five times higher than any previous year. That record was broken in fiscal year 1998 with more than $267 million collected. Of the $472 million collected during those two years, nearly $440 million — more than 90 percent — resulted from prosecution of international cartel activity. The numbers represent the increasingly international focus of U.S. antitrust criminal enforcement.

Also through the Bush and Clinton years, the Justice Department has been steadily working on international enforcement cooperation among competition and antitrust agencies. That work has resulted in a number of bilateral agreements on antitrust and competition.

In domestic as well as international cases, the Reagan administration engaged in a historically low level of antitrust enforcement in line with its economic policy opposed to government intervention in the marketplace.

Under the Bush administration, the Justice Department resumed stricter enforcement of antitrust laws, focusing on criminal price-fixing violations and merger review. The Federal Trade Commission focused on merger review and elimination of restrictive practices employed by professional organizations. The department also signaled concern about mergers in markets that historically behaved competitively, not just markets where competition problems were long evident.

A major departure occurred when the Justice Department's Antitrust Division announced in April 1992 that it was returning to a policy established in 1977 of taking action against foreign anti-competitive conduct that injured U.S. exports whether or not it had a direct and immediate impact on U.S. consumers. That policy reversed Reagan administration policy, which decided not to act against foreign anti-competitive conduct that injured U.S. export commerce unless the conduct also hurt U.S. consumers.

Bush administration antitrust officials also began the push on major U.S. trading partners toward developing common rules and procedures for handling anti-competitive business practices.

The Clinton administration continued the direction of antitrust policy from the Bush administration by increasing antitrust enforcement actions outside the United States, bringing a significant number of civil cases, and scrutinizing mergers more vigorously.

Effective international enforcement has required wider cooperation with foreign antitrust enforcement authorities on a reciprocal basis. Building on a Bush administration initiative, the Clinton administration continued the push for international cooperation in the Organization for Economic Cooperation and Development (OECD). Finally, in 1998, the OECD adopted a strong recommendation that its 29 members individually and cooperatively fight hard-core cartel activity.

Also, with the European Union (EU) the United States has been developing the practice called "positive comity" — where one side requests the other to initiate or expand an antitrust enforcement action against anti-competitive conduct that is harming the interests on the side that made the request.

During the Clinton administration Congress passed the International Antitrust Enforcement Assistance Act of 1994, which gives regulators the tools to get at antitrust evidence located outside the United States. The law helps the Justice Department and FTC obtain the assistance of foreign antitrust enforcers to obtain crucial evidence by authorizing the U.S. regulators to offer reciprocal assistance to foreign antitrust investigations.

The United States currently has bilateral antitrust cooperation arrangements with Australia, Canada, Germany, and the European Union. In addition, in 1998 the United States signed a communique with Argentina, Brazil, Canada, Colombia, Costa Rica, Jamaica, Mexico, Panama, Peru, and Venezuela calling for greater cooperation by their antitrust authorities in dealing with cartels and anti-competitive behavior. The United States is negotiating an agreement with Japan on competition policy.

Looking ahead to the 21st century, the Justice Department has commissioned an International Competition Policy Advisory Committee to report by November 1999 on three issues: the interface of trade and competition issues, multi-jurisdictional merger review, and cooperation with foreign authorities. ❑

❑ CASE STUDY: THE BOEING-MCDONNELL MERGER

The challenge by the European Commission (EC) to the merger of the world's largest and third-largest manufacturers of large commercial aircraft, the U.S. firms Boeing and McDonnell Douglas, illustrates the growing trend of transnational regulation.

Although the U.S. Federal Trade Commission (FTC) cleared the deal in 1997, the European Commission threatened to oppose it, despite a 416-2 vote in the U.S. House of Representatives warning the Europeans against "an unwarranted and unprecedented interference in a U.S. business transaction." The EC said the merger would allow Boeing to increase its share of the world market for large commercial jet aircraft from 64 percent to 70 percent. European Union merger laws can be applied to any business transaction that "constitutes a strengthening of a dominant position," the EC said in a July 1997 statement.

The EC authorized the deal in July 1997 only after extracting concessions from Boeing to increase competition. The EC had no jurisdiction over the merger of the two U.S. aircraft makers, but it was in a position to level crippling fees on sales of Boeing aircraft to European airlines. According to the EC, European airlines are forecast to account for almost one-third of future demand for new aircraft orders until 2007, and Boeing and McDonnell Douglas are positioned to capture two-thirds of the business, in the European market.

Boeing's purchase of McDonnell Douglas has left the four-nation European consortium Airbus Industrie the lone rival to Boeing in an industry that virtually excludes new participants because of the enormous start-up costs.

In order to gain the EC's approval for the merger, Boeing had to address a number of European concerns. The EC contended that:

• The merger would give Boeing enhanced opportunity to enter into long-term exclusive supply deals, similar to the 20-year arrangements Boeing had with American, Delta, and Continental airlines.

• The merger would broaden Boeing's customer base from 60 percent to 84 percent, allowing it to sell its products to McDonnell Douglas clients.

• Boeing's acquisition of McDonnell Douglas, the world's number two defense manufacturer and leading maker of military aircraft, would enhance Boeing's access to publicly funded research and development and intellectual property.

• Boeing's acquisition of McDonnell Douglas's patent portfolio would be a further element strengthening Boeing's dominant position.

• The combination of the civil, defense, and space activities of the two companies would increase Boeing's bargaining power with suppliers.

Boeing convinced the EC to declare the merger compatible with the common market after making concessions that were not demanded by the FTC:

• Boeing committed to keep the Douglas Aircraft Company, the civil aircraft division of McDonnell Douglas, a separate company for 10 years, until 2007, and to supply the EC with reports on the company's performance.

• Boeing committed not to link the sale of Boeing aircraft to its access to the Douglas fleet in service.

• Boeing canceled its exclusive supplier contracts with American, Delta, and Continental and promised to refrain from entering into such deals until 2007.

• Boeing offered its competitors nonexclusive licenses for patents arising from publicly financed research and development.

• Boeing gave assurances that it would not use its relationships with suppliers to obtain preferential treatment.

• Boeing agreed to provide the EC with annual reports for 10 years on its nonclassified aeronautical projects that receive public funding. The EC said the reports were needed to clarify the links between Boeing's civil and military activities.

With this package of concessions, the EC signed off on the merger, saying its competition concerns had been adequately addressed. ❑

❑ CASE STUDY: NIPPON PAPER COMPANY PRICE-FIXING CASE

The U.S. Justice Department is prosecuting a defunct Japanese company in a landmark case that attempts to apply U.S. criminal antitrust laws to the global market.

The prosecution of the former Nippon Paper Company on price-fixing charges marks the first time that U.S. antitrust lawyers have brought criminal charges against a foreign company for alleged misconduct that took place entirely outside the United States. In the past, the United States has prosecuted foreign companies for uncompetitive conduct on civil charges.

The alleged crimes that precipitated the Nippon Paper trial, according to prosecutors, took place when several Japanese paper makers got together three times in 1990 to discuss the falling price of fax paper in the United States. Prosecutors said the paper companies conspired to sell thermo fax paper to Japanese trading companies with the requirement that they market the paper at a specified price in the United States. The meetings, according to prosecutors, led to a 10-percent increase in the price of fax paper sold in the United States.

Nippon Paper has denied any wrongdoing. Its lawyer, Alan Cohen, said U.S. prosecutors crossed the line separating U.S. antitrust law from Japanese business culture. He said Japanese competitors regularly get together to discuss common issues in their industries. "A bunch of guys having tea in Tokyo is not a U.S. crime," he said. Two other Japanese companies, Mitsubishi Paper Mills and New Oji Paper Company, pled guilty to U.S. price-fixing charges in 1995 and paid fines totaling $3.55 million.

The amount of money involved in the alleged price rigging is not large. In 1990, North American sales of thermo fax paper by Japanese makers amounted to $120 million. Nippon Paper took about $6 million of that amount. Nippon Paper no longer exists as a separate entity. In 1993, it merged with Japan's Jujo Paper Company.

The Nippon Paper case came to trial in 1998 in a Boston courtroom with witnesses in Tokyo testifying via a video teleconference hookup. It resulted in a hung jury, with the jurors split 10-2. Justice Department officials say they are committed to retrying the case. No date for a new trial has been set.

U.S. prosecutors went all the way to the U.S. Supreme Court to win the right to try the case. In 1995, a federal judge threw out the indictment, saying U.S. antitrust law did not extend to Japan. He based his ruling on the concept of comity, the traditional respect countries give each other in allowing them to enforce their own laws against their own citizens.

The Justice Department got the ruling overturned in an appeal. "We live in an age of international commerce where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling for Nippon would create perverse incentives for those who would use nefarious means to influence markets in the United States," wrote Judge Bruce Selya of the U.S. First Circuit of Appeals.

A decision by the U.S. Supreme Court to uphold the appeals court ruling drew protests from Nippon Paper and the Japanese government. "This ruling strains relations with foreign states and invites retaliatory action against U.S. companies," Nippon Paper said.

In the view of the government of Japan, "International cooperation in a global economy requires increased respect for territorial sovereignty." The Supreme Court decision "conflicts with settled international law."

Joel Klein, head of the U.S. Justice Department's Antitrust Division, said prosecuting the Nippon Paper case is vital to fighting international cartels that harm U.S. consumers.

"We need to be able to reach such cartels no matter where the cartel activity takes place," Klein said. "Otherwise, when companies that are members of a cartel sell products in the United States, we cannot fully protect American consumers against artificially inflated prices." ❑

Sources: American Bar Association Journal, International Commercial Litigation, Los Angeles Times, Metropolitan Corporate Counsel.

❑ OECD 1998 RECOMMENDATION ON HARD-CORE CARTELS

The following is the text of a news release, originally headlined " 'Hard Core' Cartels," issued by the Organization for Economic Cooperation and Development (OECD) in Paris on March 30, 1998.

A new OECD recommendation calls for concerted action against price fixing and other anti-competitive agreements among competitors that amount to "hard-core" cartels. Such cartels are the most flagrant violations of competition laws. They hurt consumers by raising prices and restricting supply. As a result, goods and services are unavailable to buyers or unnecessarily expensive. It is important to take effective action against hard-core cartels because they distort world trade and create waste and inefficiency in countries where markets would otherwise be competitive. Member countries should ensure that their own competition laws are effective and include powerful investigative tools. There should be sanctions against those who engage in hard-core cartels, and for those who fail to comply with investigators' demands. In addition, countries should review their laws periodically to ensure that exemptions are not broader than necessary to achieve their overriding policy objective. This is consistent with the OECD Ministers' agreement last May to work towards regulatory reform by eliminating unwarranted gaps in competition law.

It is in the interest of member countries to combat hard-core cartels and to cooperate with each other in doing so. The Recommendation explains that cooperation is particularly important because the cartels operate in secret. Necessary evidence may exist in a number of different countries. Members should make every effort to enforce their own anti-cartel laws, taking into account other countries' national interests, and increase cooperation as long as it is consistent with their laws and regulations. The Recommendation calls attention to particular forms of cooperation. One example is the principle of "positive comity" relating to anti-competitive conduct in one country's borders that is harmful to consumers in another country. Another type of cooperation suggested by the Recommendation is to share documents or information that one country has in its possession and to comply with requests to gather information from relevant authorities.

Currently, most competition authorities are not authorized to share such investigatory information with foreign authorities. Such international information-sharing is used effectively in enforcing other laws (such as securities law) and has been very effective when used in competition cases. Member countries are encouraged to review all obstacles to effective cooperation against hard-core cartels and to consider eliminating them through legislation or by other means. The Recommendation recognizes that sharing confidential information would require satisfactory protection of that information and may require resolution of other issues.

With this Recommendation, the OECD will have defined and condemned a particular kind of anti-competitive conduct. The Recommendation is directed specifically to OECD members. Nonmember countries are invited to associate themselves with it. ❑

For further information please contact the OECD Communications Division or Mr. Terry Winslow, Principal Administrator, Competition Law and Policy Division, Directorate for Financial, Fiscal and Enterprise Affairs, OECD; tel. 33 (0)1 45 24 19 72 — fax. 33 (0)1 45 24 96 95. Other relevant information is available on the division's Internet site at: http://www.oecd.org/daf/clp.

❑ PANAMA COMMUNIQUE ON ANTITRUST AND COMPETITION POLICIES

In a step toward the proposed Free Trade Area of the Americas (FTAA), 11 Western Hemisphere countries issued a communique October 9, 1998, that calls for a higher level of cooperation across their borders for effective enforcement of competition laws and policies.

The communique recognizes the need for open and competitive markets, as well as the threat posed by anti-competitive behavior and cartel practices. It links the antitrust agreement among the 11 countries to the scheduled 2005 realization of the FTAA, which is under negotiation.

COMMUNIQUE
Panama City, Panama
October 9, 1998

Antitrust (or Competition) Enforcement Authorities of Argentina, Brazil, Canada, Colombia, Costa Rica, the United States of America, Jamaica, Mexico, Panama, Peru, and Venezuela:

Having regard to the increasing integration of the global economy and in particular the strong and increasing economic ties among their respective countries;

Recognizing that the effective enforcement of sound competition laws and policies is essential to ensure the proper operation of free markets;

Affirming that the benefits to all countries of open and competitive markets must not be compromised by anti-competitive behavior and in particular by cartel practices;

Anticipating the enhanced trade and economic integration envisioned by the negotiation of Free Trade Area of the Americas;

Express their intention:

1. To promote an authentic competition culture among the market participants in their respective countries;

2. To affirm their commitment to effective enforcement of sound competition laws, particularly in combating illegal price-fixing, bid-rigging, and market allocation;

3. To cooperate with one another, consistently with their respective laws, to maximize the efficacy and efficiency of the enforcement of each country's competition laws, and to help disseminate the best practices for the implementation of competition policies, with emphasis on institutional transparency;

4. To encourage the efforts by those small economies in the region that do not yet have solid competition regimes to complete the development of their legal frameworks; and

5. To seek to advance these principles in the Negotiating Group on Competition Policy of the Free Trade Area of the Americas. ❑

KEY U.S. GOVERNMENT CONTACTS AND INTERNET SITES

U.S. Department of Justice
Antitrust Division
Tenth Street and Constitution Ave, N.W.
Washington, D.C. 20530 U.S.A.
Contact: Joel Klein, Assistant Attorney General
Telephone: (202) 514-2401
Fax: (202) 616-2645
http://www.usdoj.gov/atr/index.html

International Competition Policy Advisory Committee
http://www.usdoj.gov/atr/icpac/icpac.htm

U.S. Federal Trade Commission
Bureau of Competition
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580 U.S.A.
Contact: William Baer, Director
Telephone: (202) 326-2932
Fax: (202) 326-2884
http://www.ftc.gov/ftc/antitrust.htm

Office of the U.S. Trade Representative
600 17th St., N.W.
Washington, D.C. 20508 U.S.A.
Telephone: (202) 395-5114
Fax: (202) 395-3911
http://www.ustr.gov

U.S. Department of State
Office of Intellectual Property & Competition
Washington, D.C. 20520 U.S.A.
Contact: Kent Shigetomi
Telephone: (202) 647-2291
Fax: (202) 647-1537

U.S. House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216 U.S.A.
Contact: Joseph Gibson, Chief Antitrust Counsel
Telephone: (202) 225-3951
Fax: (202) 225-7682
http://www.house.gov/judiciary

U.S. Senate
Committee on the Judiciary
Subcommittee on Antitrust, Business Rights, and Competition
SD-161 Dirksen Senate Office Building
Washington, D.C. 20510 U.S.A.
Telephone: (202) 224-9494
Fax: (202) 228-0463
http://www.senate.gov/~judiciary

OTHER KEY CONTACTS AND INTERNET SITES

American Bar Association (ABA)
International Antitrust and Foreign Competition Law Committee
750 North Lake Shore Drive
Chicago, Illinois 60611 U.S.A.
http://www.abanet.org/antitrust/home.html

Asia-Pacific Economic Cooperation (APEC)
Competition Policy Committee
438 Alexandra Point
#14-00 Alexandra Point
Singapore 119958
http://www.apeccp.org.tw/

Organization for Economic Cooperation and Development (OECD)
Competition Law and Policy Division
2, Rue André-Pascal
75775 Paris
France
http://www.oecd.org/daf/clp

ADDITIONAL READINGS ON INTERNATIONAL ANTITRUST AND COMPETITION POLICY

Applebaum, Harvey M. *The Interface of the Trade Laws and the Antitrust Laws*, 6 George Mason Law Review 479 (1998).

Baker, Donald I. and J. William Rowley, eds. *International Mergers: The Antitrust Process* (supplement to 2d edition). London: Sweet & Maxwell, 1998.

Boner, Roger Alan. "Antitrust and State Action in Transition Economies (International Competition Policy)." *Antitrust Bulletin*, vol. 43, no. 1, March 1998.

Doern, G. Bruce and Stephen Wilks, eds. *Comparative Competition Policy: National Institutions in a Global Market*. New York: Clarendon Press, 1996.

Fox, Eleanor M. "Antitrust Regulation Across National Borders: The United States Boeing Versus the European Union of Airbus." *Brookings Review*, vol. 16, no. 1, Winter 1998.

Fox, Eleanor M. "International Antitrust: Against Minimum Rules; For Cosmopolitan Principles (International Competition Policy)." *Antitrust Bulletin*, vol. 43, no. 1, March 1998.

Kolasky Jr., William J. and William F. Adkinson Jr. "Report Your Deal to FTC, DOJ, EC, Etc." *Legal Times*, November 2, 1998.

Lucentini, Jack. "Antitrust Law Enforcement Key to Global Competition." *Journal of Commerce*, November 9, 1998.

Mendel, Scott and Erik Dyhrkopp. "DOJ Goal: Assistance Abroad." *The National Law Journal*, November 9, 1998.

Porter, Michael E. *The Competitive Advantage of Nations* (with a new introduction). New York: Free Press, 1998.

Reif, Timothy M. and Gary E. Bacher. "Trade Laws, Antitrust Laws, and the Process of Economic Integration. Symposium: Free Trade Areas; The Challenge and Promise of Fair vs. Free Trade." *Law and Policy in International Business*, vol. 27, no. 4, June 1996.

Rodriguez, A.E. and Mark D. Williams. "Recent Decisions by the Venezuelan and Peruvian Agencies: Lessons for the Export of Antitrust (International Competition Policy)." *Antitrust Bulletin*, vol. 43, no. 1, March 1998.

Sampson, Cezley I. "From the Front Lines: Competition Policy — Jamaica's Experience." *Economic Reform Today*, no. 1, 1997. http://www.cipe.org/e23/sampsE23.html

Stopford, John. "Think Again: Multinational Corporations." *Foreign Policy*, no. 113, Winter 1998-1999.

United Nations Conference on Trade and Development. *World Investment Report 1998: Trends and Determinants* (WIR98). New York: United Nations Publications, 1998.

United States Congress. Senate. Committee on the Judiciary. *International Antitrust Competition: Statement of Joel I. Klein, Assistant Attorney General, U.S. Department of Justice Antitrust Division*. Hearing Before the Subcommittee on Antitrust, Business Rights, and Competition. 105th Congress, 2nd Session, 2 October 1998.

United States Congress. Senate. Committee on the Judiciary. *International Antitrust Competition: Statement of Robert Pitofsky, Chairman, U.S. Federal Trade Commission*. Hearing Before the Subcommittee on Antitrust, Business Rights, and Competition. 105th Congress, 2nd Session, 2 October 1998.

United States Department of Justice and Federal Trade Commission. *Antitrust Enforcement Guidelines for International Operations*. United States Department of Justice and Federal Trade Commission. April 1995. http://www.usdoj.gov/atr/public/guidelines/internat.txt

Weiner, Michael L. and David J. Pashman. "Global Compliance Gets Ever More Complicated." *The National Law Journal*, May 4, 1998.

Wood, Diane. "A Cooperative Framework for National Regulators (Symposium on Global Competition and Public Policy in an Era of Technological Integration)," 72 *Chicago-Kent Law Review* 521 (1996).

World Trade Organization. *Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council* (WT/WGTCP/2). Geneva: World Trade Organization, December 1998.

Economic Perspectives

Volume 4 An Electronic Journal of the U.S. Information Agency Number 1

INTERNATIONAL ANTITRUST AND COMPETITION POLICY

AN INTERVIEW WITH ASSISTANT ATTORNEY GENERAL JOEL KLEIN: EXPANSION OF INTERNATIONAL COOPERATION

WHY COMPETITION LAW — ESPECIALLY FOR DEVELOPING COUNTRIES

APPLICATION OF U.S. ANTITRUST LAWS TO FOREIGN CONDUCT

PLUS: ANTITRUST POLICY ... AND TRADE ... AND REGULATION ... IN BRAZIL ... WITH THE EUROPEAN UNION

February 1999