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# The Internationalization of Antitrust Law: Options for the Future

Diane P. Wood

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*Address by*
*DIANE P. WOOD*
*Deputy Assistant Attorney General*
*Antitrust Division*
*U.S. Department of Justice*
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Over the past half-century, the world has enjoyed unparalleled economic growth and prosperity. It is generally recognized that this has come about because the world has been more or less at peace during this period, because in more and more countries democracy has taken root, and because the system for governing world trade that was put into place after the Second World War succeeded beyond anyone's wildest dreams. Today, after the successful conclusion of the eighth round of negotiations under the General Agreement on Tariffs and Trade, which has served (somewhat awkwardly) as the world's trading charter, and the launching of the new World Trade Organization, we are looking for ways to assure the same kind of growth and prosperity for the next century. In one form or another, competition policy will surely play an important role in this process. By the same token, antitrust or competition policy is not the only tool that will be needed as we work to keep markets open, free, and competitive in the 21st century.

In the time available this morning, I would like to take a closer look at the roles antitrust might play in the post-Uruguay Round world. After a brief look backward, at earlier efforts to incorporate antitrust principles into the rules for world trade, I look in some detail at the various options that are available to us that would, to lesser or greater degrees, "internationalize" antitrust law. Finally, I will discuss the ways in which the Department of Justice is working

to improve effective enforcement of antitrust rules in international markets.

## I. Evolution of Rules for the Global Market

A brief look at the history of the development of rules for the global marketplace reveals a process something like peeling an onion. Immediately after the conclusion of World War II, efforts began to construct an open, liberal world trading system, which would have had three pillars: an International Monetary Fund, to govern world financial policy; an International Bank for Reconstruction and Development (or the World Bank), for economic development in both the war-devastated countries and the Third World; and an International Trade Organization, to govern *all* aspects of world trade, including not only classical governmental trade restrictions such as tariffs, but also subjects such as investment policy and competition policy.

The first two pillars of the system were, of course, established, but the third was stillborn. Instead, the General Agreement on Tariffs and Trade, which had already been negotiated, was put into effect as a stand-alone agreement. The original GATT dealt principally with direct barriers to trade, such as tariffs and quotas, although even it had modest provisions that addressed nontariff barriers, such as discriminatory customs valuation procedures, government procurement practices, and subsidies. The GATT also had a dispute resolution procedure, under which countries could complain either about actual GATT violations on the part of other Contracting Parties, or any other measures that would "nullify or impair" benefits that had been given to the complaining party in GATT negotiations.

The initial tariff reductions that were achieved in the 1947 GATT negotiations sent an important signal to a world that still recalled the disaster of the 1930 Smoot-Hawley Tariff Act and the worldwide recession that followed it. Encouraged by their success, the Contracting Parties undertook successive additional rounds of tariff negotiations designed to achieve ever-greater cuts. This process continued until the so-called Kennedy Round of negotiations, which lasted from 1962 through 1967. What distinguished the Kennedy Round was not the absence of tariff negotiations. Efforts to reduce tariffs had become, if anything, even more serious. Instead, it was the realization that barriers to world trade apart from tariffs needed serious attention. So, for example, the Kennedy Round resulted in a

more elaborate Anti-Dumping Code than had ever been adopted, which attempted to clarify the rules with respect to this type of unfair trade practice. (The Congress of the United States never approved this Code.)

Attention to non-tariff barriers to trade accelerated during the Tokyo Round of negotiations, which concluded in 1979, and these issues took center stage in the Uruguay Round. Going further, the Uruguay Round negotiators took on the extraordinarily difficult issues of agricultural trade, trade-related investment measures, and trade-related intellectual property rules. It is to their great credit that the Round concluded with agreements on all these topics, and to the great credit of the President and the Congress that the Uruguay Round implementing legislation was passed and signed into law last December 8th.

Each step along this road — from high tariffs to lower tariffs, from tariffs in any form to other direct trade restrictions (such as quotas), from direct restrictions to the innumerable non-tariff barriers, and finally to government policies that affect the international trading system (such as intellectual property rules and investment regimes) — has had one thing in common. Each one has dealt with governmental rules and regulations, that are subject to negotiation by governments, and that can be monitored. As these have been addressed, however, it has become apparent that private restrictions can also have an important effect on the openness of the international trading system. And one natural place to look for rules relating to private restraints of trade is the antitrust laws, which are designed to assure that markets operate competitively.

As Assistant Attorney General Anne Bingaman has made clear, antitrust law right now is being enforced in the United States with full awareness of the relevance of international competition. We define global, regional, hemispheric, or North American markets when the evidence shows that they exist. Our jurisdiction extends, according to the 1982 Foreign Trade Antitrust Improvements Act, to restraints overseas that have a "direct, substantial, and reasonably foreseeable effect" on U.S. import or domestic commerce, or on the export commerce of U.S. exporters. The question for today is what, if anything, do antitrust rules have to contribute to the problem of private restraints affecting international trade?

The short answer is that antitrust laws, used properly and effectively, have a lot to contribute. As the economic world shrinks, it

will be vitally important to ensure the effective enforcement of competition laws that are designed to maximize consumer welfare and economic efficiency. The effect on the global trading environment, over the medium to long term, will be to create a strong basis for efficient transactions and arrangements, open competitive opportunity, and global prosperity. About this, I believe there is little dispute. The debate has rather been over the best means to that end. I will describe five different approaches that have been advanced in various fora, and in the course of doing so, I will indicate which ones appear to be the most promising at this time from my own perspective.

## II. Options for the Next Steps

*The first option* for achieving this kind of improved global competitive regime is simple: continued strong enforcement of the U.S. antitrust laws, whenever the necessary effects on U.S. commerce are present. As the draft Antitrust Enforcement Guidelines for International Operations issued last October 13th state, both the Department of Justice and the Federal Trade Commission are committed to appropriate enforcement when we have jurisdiction to do so, but also to take full account of considerations of international comity and the possibilities of cooperating with our counterpart agencies in other countries when that is an option. The U.S. antitrust laws are there to protect U.S. consumers, U.S. businesses, and U.S. markets, and we take our enforcement responsibilities very seriously.

However, as my reference to our counterparts in other countries suggests, we cannot and should not be the only ones with this kind of commitment to strong enforcement. We welcome the same attitude on the part of our sister enforcement agencies around the world, and the opportunities for cooperation that this creates. Markets are interrelated — we would be like King Canute ordering the tides to stop if we thought that the business environment could be ordered to operate strictly within particular national boundaries. Countries that urge the "strict territoriality" approach toward antitrust enforcement are simply not in touch with this reality of today's markets. Worse yet, such a view can be positively harmful when those countries are used as "antitrust havens" by conspirators who seek to cartelize the U.S. market or other foreign markets, by scheduling key meetings or incorporating entities outside the jurisdiction of countries that are committed to strong and effective anti-

trust enforcement. If cooperation with the legitimate investigations of the countries where the effects of such conspiracies are felt is not forthcoming, the general cause of strong antitrust enforcement is harmed.

*A second option*, which complements the first, focuses on bilateral cooperation efforts. The United States and Canada have recently enjoyed successes in several cases that were made possible by the Mutual Legal Assistance Treaty, including the plastic dinnerware actions and the joint investigation in the thermal fax paper industry. These successes demonstrate that cooperation works, for the most serious kinds of antitrust violations — those that are prosecuted criminally in both Canada and the United States.

The United States also has a number of cooperation agreements that do not supersede existing laws on either side, and thus do not permit the sharing of confidential information, including those with Germany, Australia, and (again) Canada. These agreements are helpful both for more general exchanges of views on approaches to antitrust enforcement matters, and for preventing conflicts from arising when both parties have an interest in a particular case.

The Department of Justice and the Federal Trade Commission have sponsored very successful bilateral antitrust technical assistance programs in Central and Eastern Europe, and Latin America. These contacts, and similar ones with other OECD Member Countries, have helped to create a deeper understanding of antitrust law and policy in those countries, which in turn will contribute to their effective integration into the world's economy.

Finally, on July 19 the International Antitrust Enforcement Assistance Act, with the sponsorship of the Administration, was introduced in both Houses of Congress, with the co-sponsorship in the Senate of then-Chairman Howard Metzenbaum and then-Ranking Member Senator Strom Thurmond of the Senate Judiciary Committee's Antitrust Subcommittee, along with Senators Hatch, Specter, Kennedy, Biden, Leahy, Simon, Simpson, and Grassley, and on the House side with the co-sponsorship of then-Chairman Jack Brooks and then-Ranking Minority Member Representative Hamilton Fish of the House Judiciary Committee's Antitrust Subcommittee.[1] In just ten weeks, with overwhelming bi-partisan support and the strong support of leaders of the bar (including former Assistant

1. HR 4781 and S 2297, the International Antitrust Enforcement Assistance Act of 1994 (103d Cong., 2d Sess.).

Attorney General Jim Rill), the bill passed both Houses of Congress. President Clinton signed it into law on November 2, 1994.

Under the new legislation, the Department of Justice and the Federal Trade Commission are authorized to enter into antitrust mutual assistance agreements with foreign antitrust agencies. Under these agreements, the U.S. agencies will be able to receive confidential information from the files of the foreign agencies, as well as assistance in gathering information located in the foreign country, and the U.S. agencies will be able to reciprocate with the same kind of assistance in appropriate cases. This legislation is an important step toward the internationalization of antitrust enforcement, which we believe will contribute substantially to efforts to ensure a global market in which competition is free to operate.

*Third on the list of options* are multilateral efforts that are regional in scope. The pioneers of this approach, of course, are the Europeans, who went far beyond regional efforts to harmonize competition law when they created the fully integrated market of the European Union. It is unlikely in the extreme that the United States will become party to a regional organization whose laws would take precedence over U.S. law, and which has its own fully independent set of courts, as is true in the EU. More realistically, the United States has already begun to work with its North American partners in the Competition Working Group established by the North American Free Trade Agreement (NAFTA), to bring about closer cooperation among the three antitrust agencies in North America. Mexico, as the newest Member Country of the OECD, has an impressive new competition law, which took effect in June 1993. The Federal Competition Agency in Mexico is up and running, under the outstanding leadership first of Dr. Santiago Levy, and more recently of Dr. Fernando Sanchez Ugarte. The strong competition rules in place in all three NAFTA countries, coupled with the cooperation and coordination that the Working Group will foster, will surely complement the free trade rules spelled out in the NAFTA agreement itself. This may be a promising model for the way in which competition rules can and should take their part in the trading system.

*The fourth option* can be termed "targeted multilateralism," meaning a multilateral approach toward groups of countries with common interests of any kind. Regional efforts are a subset of this category, but an important enough one to be treated separately.

Here I focus on efforts to bring about a better integration of competition principles and trade principles in fora like the Organisation for Economic Co-operation and Development, or OECD, which is the group of now 25 (since Mexico's April admission to full membership) industrially advanced democracies, plus the European Union which participates as an observer.

The OECD Competition Law and Policy Committee has been working for many years with the Trade Committee to find new and creative ways in which both competition law and trade law can mutually reinforce the ideal of the open and free multilateral trading system. The two committees have sponsored joint roundtable discussions on topics such as cartels, barriers to access to markets, and predatory strategies, that have been very illuminating. They have revealed both the importance of these kinds of practices to international trade, but also the still-considerable gap in approach toward them under the competition or antitrust laws of the OECD member States.

We are committed to continuing these discussions within the OECD, as well as with our counterparts around the world, both formally and informally. The greatest benefits of these kinds of exchanges have been almost invisible. Through them, countries with a shorter antitrust tradition than ours (that is, most others) have seen for themselves the great benefits of effective and vigorous antitrust enforcement. They have built up, to an encouraging degree, domestic constituencies within their own societies for competition and free markets. As I turn to my last option, the full-blown multilateral treatment of antitrust in the soon-to-be-established World Trade Organization (or WTO), we should bear in mind the importance of this kind of grass-roots development of competition policy.

*The fifth and final option* is in certain ways the most ambitious, since it differs the most from the existing legal regime for antitrust law: an international competition code that would somehow be related to the new World Trade Organization. The first point to recall about this option is that it is far from new. While the original GATT was being negotiated, the same countries were also working on an ambitious Charter for the international trading system, known later as the Havana Charter, that would have established an International Trade Organization. Chapter Five of that Charter would have set forth rules on "restrictive business practices," or antitrust principles (as we would be more likely to term them). It is striking

today to read through Chapter Five, to see how closely it resembles some of the proposals for a multilateral antitrust code that are currently being put forward.

I will describe the gist of it in a moment for you. However, it is important to remember that a key reason why the ITO never came into being, and why the U.S. Congress in particular objected to the Havana Charter, was the feeling that the antitrust rules of Chapter Five were not adequate for the United States, and that the rest of the world was not yet ready to embrace a serious antitrust regime. Article 46 of the Charter called on each Member State to "take appropriate measures" and to cooperate with the ITO to "prevent . . . business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives [of the ITO] set forth in Article 1." Article 46 also provided that the Member States would give the ITO the power to decide in particular cases whether the practices would have had the proscribed effect, in accordance with powers spelled out in Articles 48 and 50.

The practices that would have been prohibited look quite familiar to a U.S. antitrust lawyer. They included price fixing, territorial allocations, "discriminating against any particular enterprise," limiting production or fixing production quotas, "preventing by agreement the development or application of technology or invention whether patented or unpatented," "extending the use of rights under patents [and other forms of intellectual property]" to matters outside the scope of the grants, and other practices similar to the enumerated ones. Countries that believed that a particular practice existed could consult other member countries directly, or ask for ITO consultations. If those consultations did not work, the ITO was empowered under Article 48 to investigate the matter. Affected countries could file a complaint with it, which would contain the minimum information prescribed by the ITO. Note carefully how the ITO then would have proceeded. Article 48.3 reads as follows:

The Organization shall consider each complaint presented in accordance with paragraph 1. If the Organization deems it appropriate, it shall request Members concerned to furnish supplementary information, for example, information from commercial enterprises within their jurisdiction. After reviewing the relevant information,

the Organization shall decide whether an investigation is justified.

If the ITO found the investigation to be justified, it would have been empowered to request further supplementary information from "any Member," and to conduct hearings on the complaint. (Article 48.4.) With respect to commercial information, Article 50.3 did give Member States the authority to withhold information from the ITO if *two* criteria were met: (1) the information was not essential to the Organization in conducting an adequate investigation, *and* (2) if disclosed, the information would substantially damage the legitimate business interests of a commercial enterprise.

As I said, the Havana Charter and the ITO it would have created never went anywhere, in significant part because of U.S. objections to these antitrust provisions. It stands today, however, as the most fully elaborated international precedent for an antitrust code, and as such it is well worth studying as we consider whether or not to go down this road now.

Moreover, the Havana Charter is not the only precedent that should give us pause. There is in fact a multilateral "Restrictive Business Practices Code," which was adopted by the U.N. General Assembly on May 2, 1980, almost exactly fourteen years ago. That code was negotiated under the auspices of the U.N. Conference on Trade and Development, or UNCTAD, and it therefore is oriented toward the interests of the developing countries. Importantly, it is nonbinding, and was understood throughout the negotiating process as a nonbinding document. It would therefore be a serious mistake to think that it represents the kind of language to which the United States would be willing to adhere if, at the stroke of a pen, it were to be made binding.

More broadly, the history of the UNCTAD RBP Code, as well as other negotiations that involved the full U.N. membership, teaches caution. Although there has been great progress in recent years at a world-wide level toward acceptance of the principles of market economies, there is still a long way to go. It is not clear whether or not the attitudes toward intellectual property rights advocated in those exercises (and apparent even in the Havana Charter) have been superseded completely yet. It is fair to say, therefore, that the potential exists for more harm than good in this critically important area.

In addition, it remains true today that only about a third of the nations in the world have enacted antitrust or competition laws —

perhaps 53 or so. Many of that group of 53 have had only brief experience with their law, and they are still developing both the expertise necessary for sound and effective enforcement, and the political support for the sometimes harsh competitive market.

Finally, there is no escaping the fact that any kind of enforceable and enforced worldwide competition regime would present unprecedented issues relating to the appropriate kinds of follow-up and dispute resolution mechanisms that will be required. The drafters of the Havana Charter recognized this as well, and included the provisions mentioned above that would have given the ITO access to confidential business information of enterprises in countries against which a complaint had been filed. The new International Antitrust Enforcement Assistance Act contains well-elaborated safeguards that will ensure the proper treatment of all such information that is exchanged among responsible, existing antitrust agencies — provisions that the Congress included because of the concerns expressed by the business community while the legislation was under consideration. Before the necessary national support for a vastly expanded international system can be developed, it is reasonable to assume that enforcers and companies alike will need to build significant experience under the bilateral information sharing agreements that will be developed under the new law.

## IV. CONCLUSION

The question we face today is not whether we would like to see the internationalization of antitrust law. That decision was made quite some time ago, by businesses and consumers alike: antitrust law must take its place in international markets. Instead, it is how best to go about making antitrust an effective tool to protect competition in international markets. I would like to conclude with three key points:

*First*, the relationship between effective antitrust rules and the enforcement of those rules, on the one hand, and an open and fair international trading system, on the other, is critical.

*Second*, we will be able to pursue these interests in a variety of ways: bilaterally, regionally, through the important work of the OECD, and perhaps eventually through use of the new World Trade Organization as a forum for discussions of this and other important issues. It is neither useful nor desirable to jump in feet first to a world antitrust code along the lines of the Havana Charter. We will

take this step only if and when we and our trading partners believe that it is a necessary supplement to effective national law enforcement and the cooperative arrangements we hope to develop.

*Finally*, our priorities over the short and medium term are to continue to work for strong and effectively enforced antitrust laws in all countries around the world, and to improve the tools for cooperation that link antitrust authorities. And, building on more than a century of strong bi-partisan commitment to antitrust enforcement in this country, we will continue to enforce U.S. antitrust law against conduct that harms U.S. markets to the fullest extent of our ability.