NEW YORK LAW SCHOOL

NYLS Law Review

Volume 47 | Issue 1 Article 9

January 2003

Department of Justice Experience in Reconciling Antitrust and Trade

Edward T. Hand

DEPARTMENT OF JUSTICE EXPERIENCE IN RECONCILING ANTITRUST AND TRADE

EDWARD T. HAND*

Thanks very much, Jim. Good afternoon. It is a great honor to speak to this AAI conference, in the company of this distinguished panel. It is also a great challenge to speak to a room full of people immediately after a fine lunch, and to follow so insightful and articulate a speaker as Philip Lowe.

I begin with two propositions. First, that trade is a good thing. And second, that sound antitrust laws and sound antitrust enforcement are also good things. Congress obviously thought both propositions to be true when it drafted Section 1 of the Sherman Act broadly to prohibit agreements in restraint of trade. Beyond that, the question of what the relationship between trade and antitrust should be is not a new one. As examples, we can look to the failed Havana Charter of the late 1940s and the many discussions held, and reports published, on the subject over the past 20 years by the Organization for Economic Cooperation and Development.

Generally speaking, views on the appropriate relationship between trade and antitrust have been of three sorts. One view seems to be that trade and antitrust are autonomous bodies of law and policy that ply their separate courses with little interaction, almost as if – to use an evocative Canadian phrase – they were "two solitudes." A second view is that trade and antitrust are rivals for public favor, with the advocates for each discipline imputing to advocates of other attributes of moral bankruptcy, self-righteousness, pomposity, and/or vacuousness, to mention only some of the nicer things that are said. And a third view is that the relationship should be neither of the first two, though it is harder to say affirmatively what it ought to be.

I will leave this interesting discussion to the other panelists this afternoon. What I will do instead is to provide context for that discussion by sketching the domestic antitrust and international legal

* Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice.

framework for the interactions that we see today between trade and U.S. antitrust laws. I will begin by talking about how antitrust enforcement actions may impact international trade, and will then review some of the (often esoteric) antitrust and other legal doctrines that apply to international trade matters. Finally, I will discuss the role of antitrust in bilateral and multilateral trade agreements.

A. The Relationship between Antitrust Enforcement and International Trade

Let's start with the economic impact of antitrust enforcement on international trade. U.S. antitrust laws protect the competitive process that underlies our free market economy: in the pithy phrase our courts use, antitrust laws protect competition, not competitors. A healthy domestic competitive process, in turn, enhances the worldwide competitiveness of U.S. business by promoting vigorous rivalry and encouraging efficiency. As most of you know, U.S. antitrust enforcement has had an important international dimension almost from the inception of the Sherman Act: the first major case with a significant international dimension was *United States v. American Tobacco*,[1] filed in 1907. But despite the many thousands of cases that the Justice Department and the Federal Trade Commission have brought since that time, there are no systematic data on how many of these matters might be said to have affected international trade, and if they did, *how* trade was affected. This absence of data is attributable to a number of factors, not least of which is the U.S. antitrust agencies' longstanding policy, stated in our *International Guidelines*, that we "do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do [we] employ [our] statutory authority to further non-antitrust goals."[2]

But it *is* possible to make some generalizations about the impact of different aspects of antitrust enforcement on international trade flows, including import, export and investment effects.[3] To

1. 221 U.S. 106 (1911).

2. Department of Justice & Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations 2 (1995).

3. *See generally* Submission from the United States to the WTO Working Group on the Interaction between Trade and Competition Policy (Mar. 1998), *available at* http://www.wto.org.

take the most obvious example, international cartels often have, and are intended by cartel members to have, a significant impact on all three dimensions of international trade. From at least the time of *American Tobacco*,[4] market allocation agreements have had the effect of restricting, and often totally eliminating: (a) imports into the Untied States of the affected product or service from other countries; (b) U.S. exports to other countries; and (c) the possibility of competitive U.S. investment abroad (and vice-versa).[5] Other cartel arrangements, however, like those in the *Citric Acid* cases, fix prices and limit sales overall but may not have country-specific limitations or other discernible effects on trade flows. In general, though, one effect of our vigorous actions against international cartels in recent years has been to open up U.S. markets to foreign competition, and to encourage U.S. firms to export to countries they had previously agreed to avoid.

The potential trade effects of anticompetitive mergers are more difficult to characterize with any specificity. Precisely because U.S. merger cases almost always are filed prior to consummation of the transaction, *post hoc* data about possible trade effects is largely nonexistent. Broadly speaking, however, mergers by competitors can have two types of anticompetitive effects. Translated to an international context, then, particular anticompetitive mergers might have some of the same trade effects as cartels. Then again, however anticompetitive they might be, they might have no discernible potential effects at all on trade flows.

Finally, the potential trade effects of non-cartel, non-merger practices will vary with the type of practice. The conduct in U.S. civil prosecutions involving agreements among competitors has tended to have trade effects similar to those of cartels, while the conduct in other cases, such as the Department's 1994 *Pilkington* case,[6] has involved monopolistic conduct aimed, among other things, at keeping U.S. exports out of foreign markets.

---

4. 221 U.S. 106.

5. United States v. Archer Daniels Midland Co., Crim. No. 96-CR-00640 (N.D. Ill. Oct. 15, 1996).

6. United States v. Pilkington, 1994-2 Trade Cas. (CCH) ¶ 70, 842 (D. Ariz. 1994).

Mention of *Pilkington*[7] brings me to the subject of applying U.S. antitrust laws to conduct involving restraints on U.S. exports, and to the concept of positive comity. In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act, which, among other things, provides that the Sherman Act applies to anticompetitive conduct, wherever occurring, that restrains U.S. exports, if the conduct has a direct, substantial, and reasonably foreseeable effects on exports of goods or services from the United States.[8] This jurisdictional provision did not immediately spawn any government antitrust cases (and few private ones) and, in the famous footnote 159 to the Department's 1988 *International Guidelines*, the Department stated that, despite this statutory grant of jurisdiction, it was "concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices." In other words, the Department would not bring "pure" export restraint cases despite Congress' grant of jurisdiction. When Jim Rill became Assistant Attorney General, he reviewed the footnote 159 policy and concluded that it was wrong; in April 1992, the Department announced that it would in fact bring appropriate "export restraint" cases involving anticompetitive conduct. That is the Department's policy today.

It turns out, however, that several factors, including difficulties in obtaining personal jurisdiction over export-restraining entities, difficulty of access to foreign-located evidence, and a lack of effective civil remedies for foreign-based behavior, make "pure" export restraint cases very difficult to prosecute successfully. So the U.S. antitrust agencies turned to the concept of "positive comity" as another way of dealing with anticompetitive export restraint cases.

Positive comity – and I will simplify the concept – is a process whereby one jurisdiction, though possessing antitrust jurisdiction and believing its interests to be adversely affected by anticompetitive conduct abroad, finds it difficult successfully to prosecute a case, and so asks a foreign jurisdiction that has better access to the parties, to the evidence, and to an adequate remedy, to investigate and take appropriate enforcement action. This concept has a long pedigree, but it was first used in antitrust cooperation agreement in

7. *Id.*
8. 15 U.S.C. § 62.

1991, when then-Assistant Attorney General Jim Rill negotiated our basic agreement with the European Commission. Since then, the U.S. agencies have included positive comity provisions in all of our recent cooperation agreements, and we have a 1998 agreement with the EU that refines and clarifies the positive comity process between us. On the other hand, since 1991 we have made only one formal positive comity referral to the EU, in a case involving computer reservation systems for air transport services in the EU; in that one case, the European Commission took action that led to a procompetitive resolution of the matter. It is still not clear, therefore, how broadly useful positive comity will be as a tool to deal with anticompetitive export restraints.

B. Antitrust Enforcement and International Trade Regulation

Moving to my next subject, the interaction between the antitrust laws and international trade regulation is, to put it mildly, complex. This is so in part because international issues are involved, in part because government action is involved, and in part because there is very little case law on many issues.

There are many situations in which antitrust issues may be raised by the trade regulation process. Examples include private firm participation in the government-imposed trade restraint created to resolve a trade dispute, private participation in the settlement of a proceeding under U.S. trade remedies law, and information exchanges by private parties during a U.S. trade remedies proceeding. Various antitrust doctrines and legal doctrines of more general application may come into play in such cases, including the *Noerr-Pennington* doctrine, foreign sovereign immunity, act of state, foreign sovereign compulsion, and the implied immunity for formal settlements of disputes under U.S. trade laws.[9]

The Department's views on these matters are set out in some detail in our 1995 *International Guidelines*, and in letters (which are public) to foreign governments and U.S. trade agencies on antitrust matters as varied as the voluntary restraint agreements of the 1980s involving Japanese autos, and the US-Canada softwood lumber

9. *See* the discussion in 2 ABA Section of Antitrust Law, Antitrust Law Developments 1044-63 (4th ed. 1997).

agreement in 1996.[10] I won't repeat our analyses of those issues here, but I will say that the Department of U.S. trade agencies have worked well together over the years to ensure that resolutions of trade disputes are consistent with U.S. antitrust law.

C. *The Role of Antitrust Issues in International Trade Agreements*

As with other aspects of the trade and antitrust interface, proposals to include antitrust provisions in international trade agreements have a long history. In 1947, the United Nations considered establishing an International Trade Organization (ITO). One of the provisions of this regime would have required that each member enact antitrust laws of its own to cooperate with the ITO, which itself would have had extensive powers to investigate and sanction, *inter alia*, price fixing, market allocation, abuses of intellectual property rights, and any similar measures declared by a two-thirds vote of the ITO to constitute "restrictive business practices." For various (and not always consistent) reasons, there was strong opposition in Congress to the ITO antitrust provisions, and the scheme died.[11]

Let me interject a terminological point here. Largely for historical reasons, the United States is alone in the world of calling its antitrust laws "antitrust" laws. Some countries – including Japan, Korea, and the Russian Federation – call their antitrust laws "antimonopoly" laws, and a few others refer to "restrictive business practices laws," and echo of the ITO. But the vast majority of jurisdictions, including Canada, Mexico, and most European jurisdictions, refer to their antitrust laws, either formally or colloquially, as "competition laws."

Why am I telling you this? Because it is relevant to how some people may perceive the role of antitrust and competition in trade agreements. In the jargon used by the antitrust community, both in the United States and elsewhere, "antitrust laws" and "competition laws" mean roughly the same things – substantive provisions of the sort contained in sections 1 and 2 of the Sherman Act, section 7 of the Clayton Act, and section 5 of the FTC Act, to the extent that

10. *See* International Guidelines at 23-30.

11. *See e.g.* SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 18.3 (1997).

statute applies to unfair methods of competition.[12] (For example, most Europeans would not, I think, consider the state aids provisions of the European Treaty to be "antitrust" provisions.)

But when you remove yourself to the world of trade agreements, where people are not familiar with, or committed to, our particular jargon, some funny things can happen. First and foremost, in using the term "trade and competition," one quickly discovers that "competition" can mean lots of different things to different people. Indeed, it can mean almost anything. So, we discover in some of these trade agreements contexts that some of our interlocutors do not necessarily want to talk much about antitrust, which – this will shock you – many people think is dull legal and economic *minutiae*. Instead, some people want to discuss, and to negotiate, broad provisions about non-antitrust aspects of the behavior of state enterprises, privatization, trade remedies, and burning of crops, and – a recent suggestion – accounting principles. So we have to deal with this terminology and conceptual dissonance.

The first U.S. trade agreement to contain significant "competition" provisions was NAFTA, which has a whole Chapter 15 on "Competition, Monopolies, and State Enterprises." Of the five articles in this chapter, only one substantive article, Article 1501, is devoted to antitrust law. It provides that each Party shall "adopt or maintain" antitrust laws and "take appropriate action with respect thereto. . .," that the Parties shall consult about the effectiveness of their antitrust measures, and that the Parties shall cooperate on antitrust law enforcement, "including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area."

Finally, Article 1501 provides – this is something that the U.S. and Canadian antitrust agencies insisted upon – that "No Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article." NAFTA 1501 is not unique in its aversion to dispute settlement for antitrust enforcement matters; the recent Canada-Costa Rica and EU-Chile Free Trade Agreements

12. *See* subsection (a) of the first section of the Clayton Act, 15 U.S.C. § 12(a); and section 12(5) of the International Antitrust Enforcement Assistance Act, 15 U.S.C. § 6211(5).

both have competition chapters; both are explicitly *not* subject to dispute settlement.

Since NAFTA came into force, of course, the antitrust agencies of the three NAFTA countries have developed excellent cooperative relationships. The United States has antitrust cooperation agreements and mutual legal assistance treaties with both Canada and Mexico, and we communicate with our Canadian and Mexican friends frequently, often on a daily basis, on a wide range of issues.

In addition to Article 1501's antitrust provisions, NAFTA Chapter 15 contains several provisions that govern the actions of monopolies and state enterprises. These provisions are in Chapter 15 largely because they sounded vaguely competition-related to some of the negotiators, and because there was no obviously better place to put them. Most of these provisions require the parties to deal with non-antitrust concerns like non-discrimination, "acting solely in accordance with commercial considerations," and ensuring that, in certain circumstances, their state enterprises do not take actions inconsistent with the Parties' obligations in the NAFTA chapters on Investment and Financial Services. On the other hand, Article 1502 (3)(d) requires the Parties to ensure that their state-owned or designated monopolies do "not use [their] monopoly position to engage. . .in anticompetitive practices in a non-monopolized market in [their] territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct." Only two of these provisions, *not* including the one just mentioned, are subject to dispute settlement.

The Free Trade Area of the Americas (FTAA) negotiations also contemplates inclusion on a competition chapter. As you will recall, the FTAA – which includes 34 nations in the Western Hemisphere – was launched in 1994, and it was determined at that time that "competition policy" should be an element of any agreement. An FTAA working group on competition policy met over a period of 18 months to do preliminary work. Negotiations of a competition chapter began in September 1998, and are continuing. A bracketed text was published in July 2001 and is available on the USTR and FTAA websites. An FTAA Ministerial meeting in April 2001 determined that all elements of the FTAA negotiations should

be concluded no later than January 2005, and that an FTAA Agreement should enter into force no later than December 2005.

Roughly speaking, the United States' views on the FTAA competition chapter, which are summarized on the USTR website,[13] are as follows. First, we believe that each FTAA country should have an antitrust law and antitrust agency, on either a national or sub-regional level, with adequate powers and enforcement authority. The purpose of these laws "should be to promote economic efficiency and consumer welfare." But we do not believe that it is appropriate to specify detailed provisions on the substantive coverage of antitrust laws or on how agencies should operate, although it is important that there should be independent domestic judicial review mechanisms. Second, while the principles of transparency, due process and non-discrimination are obviously important, we have not yet determined whether we need to have special provisions on these subjects in the competition chapter, or whether they should be addressed instead in the FTAA's general provisions.

Third, we believe that cooperation and technical assistance are important to sound antitrust enforcement and competition policy. Fourth, we propose to have provisions in the competition chapter on official monopolies and state enterprises; these would be modeled on the NAFTA provisions. Finally, we believe that FTAA countries should agree to consult with one another on matters relating to the competition chapter, and to create a competition policy peer review mechanism, which would review FTAA countries' overall performance in conforming to the competition chapter, and provide an organized means for discussion competition issues of interest, along the lines of the World Trade Organization's Trade Policy Review Mechanism.

This brings me to a discussion of trade and competition in the WTO. As many of you know, the general subject of "trade and competition" was placed on the WTO agenda at the 1996 Singapore Trade Ministerial, at the insistence of the European Union. A WTO Working Group on Trade and Competition, chaired by Fred Jenny of France, was created and has met regularly since 1997 to discuss issues ranging from how to build a culture of competition, to the relationship between investment and competition policy, to

13. *See* http://www.ustr.gov/regions/whemisphere/comp.

the impact of private anticompetitive behavior on international trade.

At the Doha Ministerial last November, WTO members agreed on a broad work program for the WTO, including new negotiations. With respect to competition, Members agreed "that negotiations will take place after the [next Session of the Ministerial Conference, which will occur in September 2003 in Cancun, Mexico] on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations."[14] After recognizing the needs of developing countries for enhanced support for technical assistance and capacity building in this area, WTO Members also agreed that in the period until the September 2003 Ministerial, the Trade and Competition Working Group "will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels, modalities for voluntary cooperation, and support for progressive reinforcement of competition in developing countries through capacity building."

The Working Group has scheduled a series of meetings on the Doha mandate; one of them was held today in Geneva, on the subjects of hardcore cartels and voluntary cooperation. We are committed to carrying out the Doha mandate, and we await the decision of ministers in Cancun for next steps. Of course, we do have views on these issues at the Department of Justice, and I cannot do better than to quote my boss, Assistant Attorney General Charles James, who said in Brussels on May 15 that, in his view, "convergence" is the "key concept" in international antitrust issues. "No one seriously believes that the world is ready for a global antitrust code enforced by a global antitrust agency, nor has there been nearly enough convergence to justify the imposition of dispute settlement-based antitrust disciplines in trade agreements, in the WTO or elsewhere. The risks of sterile conflict and politicization of antitrust enforcement remain too great."

Thank you for your attention.

14. The Doha Ministerial Conference provisions on trade and competition are paragraphs 23-25 of the Ministerial Declaration. WT/MIN(01)/DEC1 (Nov. 20, 2001).