

FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. DEVELOPMENTS THE NEW LEADERSHIP AT THE JUSTICE DEPARTMENT: FOCUS ON INTERNATIONAL COMPETITION?

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Attorney General Dick Thornburgh is one of two cabinet members from the Reagan administration (the other being Nicholas Brady at the Treasury Department) who will retain their posts in the Bush administration. Both were appointed late in the Reagan administration. The new Assistant Attorney General of the Antitrust Division is expected to be James F. Rill, a Washington, D.C. antitrust lawyer and current president of the Antitrust Section of the American Bar Association.

Recently, both Attorney General Thornburgh and Mr. Rill have placed considerable emphasis on international competition as a factor in U.S. antitrust policy. Mr. Thornburgh is strongly advocating a proposal he made jointly with then-Secretary of Commerce William Verity late last year for an exemption from the antitrust laws for joint production ventures. Why does the Attorney General, who is responsible for enforcing the antitrust laws, propose a relaxation of those laws? The answer is international competition. He summarized his reasons in an address to the Economic Club of New York on February 22, 1989. In his view, the U.S. must address the challenges and the "realities of today," which in the main are the ever-shrinking world economy, the extraordinary costs of developing new technologies such as high-definition television and superconductivity, and the speed required of innovators in their marketing strategies and production scheduling in order to profit from their innovations in a world in which their exclusivity tends to be very short-lived.

Mr. Thornburgh noted that the Justice Department's revised guidelines on international operations "recognize the realities of the global economy and seek to permit more effective global competition by U.S. companies." However, he believes that joint production ventures must also be freed from the fear of private antitrust suits seeking treble damages and attorneys' fees. To accomplish this, he proposes either of two approaches used in the past. The first is a certificate program, such as that employed in the *Export Trading Company Act* of 1982. Under this approach, joint production ventures would be certified by the government and could not be challenged under federal or state antitrust laws in either a governmental or a private suit.

The second approach is that used recently to exempt cooperative research from the antitrust laws, enacted in the *National Cooperative Research Act* of 1984. Under that law, joint-venture participants that file notifications with the Justice Department and the Federal Trade Commission (FTC) may be sued only for actual, rather than the normal automatic treble damages, and in some cases can obtain attorneys' fees if they prevail in a private suit. Courts are prohibited from condemning joint-research ventures without first considering the competitive benefits and determining that a venture will on balance harm competition.

Mr. Thornburgh observed that the biggest change he sees at the Justice Department since he served as head of its Criminal Division a decade ago during the Ford administration is "the increasingly international scope of the Department's work."

Mr. Rill, in recent comments, has placed considerable focus on international competition and in particular the relationship between international trade and antitrust law. He said:

The problem of reconciling international trade and antitrust principles is as important as any issue that confronts the development of antitrust policy

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for the next decade. Its resolution will have significant bearing on the competition policies to be adopted by the United States in world commerce.

In Mr. Rill's opinion, the Justice Department and the FTC have been excessively hostile toward governmental import restraints. He believes that their "rigid" attachment to "free trade considerations" has caused them to ignore the existence of potential competition from abroad in their merger analysis in cases where quantitative restraint agreements with foreign exporting nations are in place. In his view, this has made them unnecessarily unfriendly to industrial collaboration that promises to improve the efficiency, and thus competitiveness, of U.S. companies in world markets.

Mr. Rill has also made it clear that he will not be interested in advocating principles of

competition and free trade before the U.S. trade industries. He believes that efforts in this respect have been ineffective and contrary to Congressional intent.

It would appear that one can expect both Attorney General Thornburgh and Mr. Rill to pay very close attention to the competitive effects of the *Canada-U.S. Free Trade Agreement*. They can be expected to take fully into account actual and potential competition from Canadian sources in their enforcement of U.S. antitrust laws. On the other side of the coin, there is no indication that they will question whether the two countries' trade laws should remain unchanged as the two national markets increasingly resemble a single market.