FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

THE JUSTICE DEPARTMENT EXPANDS ITS FRONTIERS

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Attorney General William Barr has just discovered the U.S. antitrust laws as a possible tool for promoting American exports—and, in the process, has opened the door to intergovernmental conflicts reminiscent of the uranium industry disputes in the 1970s. The Attorney General took the occasion of a national television interview on February 23 to announce that the Justice Department would forswear its prior devotion to U.S. consumer injury as the basis for overseas antitrust enforcement, and would now include exporter welfare in the process. When asked, "Why don't you use [antitrust law] in connection with Japan?" the Attorney General responded, "Well, in fact, we are reexamining our antitrust policies with respect to cartels overseas that restrict U.S. exports." He added, "I am making the decision, I know politics aren't playing a role. I am saying that I am interpreting the statute as I think it should be interpreted. I don't see that [injury to U.S. consumers] restriction in the statute."

In essence, the Justice Department proposes to expand the scope of its enforcement mandate not only to encompass harms to U.S. consumers resulting from anticompetitive practices of overseas sellers, but to protect the opportunity of American exporters to participate with overseas markets by bringing suits against foreign *buyers*. This reverses the Department's 1988 position and is a significant new enforcement initiative.

If vigorously carried out, any new "export promotion" antitrust program would probably encourage expansive private suits and generate diplomatic conflicts with other countries (including Canada and the United Kingdom) which have long been sensitive about extraterritorial U.S. antitrust enforcement. The problem would be doubly inflammatory if the prime targets of U.S. business hostility—the Japanese keiretsu arrangements—were treated as "cartels" and targeted for enforcement, even though they are basically long-term vertical supply arrangements.

The Jurisdictional Maze

The United States has long applied its antitrust laws to activities overseas in ways which angered believers in strict territoriality. Under the controversial "effects doctrine," it was sufficient that the restraint, wherever it occurred, had some real effect on U.S. markets.[2] By the 1970s, however, the Justice Department was faced with a rising chorus of concern within the United States that applying U.S. antitrust laws hampered the overseas activities of U.S. firms and placed them at a disadvantage *vis-à-vis* others. In addition, the Justice Department's grand jury uranium investigation raised intergovernmental conflicts to new heights by the mid-1970s.

The combination of these factors led to an attempt by the Justice Department to redefine the scope of U.S. interest, as stated in the *Antitrust Guide to International Operations* issued in early 1977. The *Guide* recognized comity to be a jurisdictional factor and cited the just-decided *Timberlane* case.[3] The Department emphasized that a major purpose of enforcement was "to protect the American consuming public by assuring it the benefit of competitive products and ideas produced by foreign competitors as well as domestic competitors."[4] It then added that:

> The second major antitrust enforcement purpose is to protect American export and investment opportunities against privately imposed restrictions. The concern is that each U.S.-based firm engaged in the export of goods, services or capital should be allowed to compete on the merits and not be shut out by some restriction

> imposed by a bigger or less principled competitor. Often, the most objectionable private restrictions involve collective efforts by one group of competitors to exclude another from a particular market.[5]

The Department's main export concern was that a group of U.S. exporters would somehow gang up on a maverick. In aid of this position, the Department cited the only case it could find which seemed to fit its position, *Pacific Seafarers, Inc.* vs. *Pacific Far East Lines.*

The position thus articulated fitted happily into the message that the Supreme Court was going to stress a few months later in *Brunswick Corp.* vs. *Pueblo Bowl-O-Mat*: "It is *competition*, not *competitors*, which the [Sherman] Act protects."[6] The fact that the trade route in *Pacific Seafarers* was reserved to U.S. carriers suggested that the competitors were relatively few and that the exclusion of the plaintiff was likely to injure competition. (There was arguably also U.S. "consumer" injury in *Pacific Seafarers* because the U.S. government was financing the carriage as part of its foreign aid program.)

Five years later, Congress modified overseas antitrust jurisdiction as part of the *Trading Company Act* of 1982. Import trade continued to be subject to the *Sherman Act* in an unchanged way. For export trade to be covered, Congress required "a direct, substantial and reasonably foreseeable effect" on either the U.S. domestic market or "export trade or export commerce...of a person engaged in such trade or commerce in the United States."[7] The 1982 *Act* seemed to suggest that only a U.S. firm, operating in the domestic market, could sue under the "export" proviso. (Of course, this is only "subject matter" jurisdiction: a U.S. plaintiff could only reach activities or foreign enterprise which did business in the United States or otherwise made itself subject to personal jurisdiction in the United States.)

In 1988, the Justice Department's *Antitrust Guidelines for International Operations* forswore exercise of whatever jurisdiction had been created in the 1982 *Act*. In what has now become the famous "Footnote 159," the Division (then under the leadership of Charles F. Rule) stated:

> Although the [1982 Act] extends jurisdiction under the Sherman Act to conduct that has a direct, substantial, and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.[8]

This is the provision that Attorney General Barr proposes to change. The flavour of it is summarized in a few exchanges in his interview with John McLauglin.

> Mr. McLauglin: So we have no legal redress against the unfairness that Japan is imposing upon [us]. Is that correct?
>
> Attorney General Barr: I wouldn't say that. What I would say is that it becomes a much more useful tool without that restriction of having to show impact on consumers...
>
> Mr. McLauglin: ...We will not be any longer victimized by Japanese Keiretsu. Correct?
>
> Attorney General Barr: I would just say that I think the antitrust laws will be a useful tool against cartels that are excluding U.S. exports.
>
> Mr. McLauglin: Are you really going to push it? That is ridding yourself of the Footnote 159, which is inhibiting the utilization of the Sherman Antitrust Act against Japan?
>
> Attorney General Barr: I expect that to be hanged. I believe the Footnote was not consistent with the statute.

This is not something wholly new which the Attorney General just made up for a Sunday morning television audience. In fact, it has been well known that the Antitrust Division under present Assistant Attorney General James Rill has been rethinking the "consumer injury only" caveat in his predecessor's *Guidelines*. For months there have been murmurings that Rill would like to do something to show that antitrust law can be helpful to export efforts.

The media focus has been entirely on Japan, as is all too consistent with the current level of American political dialogue.[9] The Justice Department assures us that the policy is broader and, in any event, whatever jurisdictional rules are applied to Japan apply equally to everybody else. Moreover, the government does not have a monopoly on U.S. antitrust enforcement, and the state attorneys general might also try to bring "export promotion" antitrust suits. "Private attorneys general" have brought many of the most diplomatically disruptive antitrust cases (including such modern landmarks as the Machinists Union suit against the OPEC governments in Los Angeles and the Laker Airways suit against the North

Atlantic air carriers in Washington). At the very least, the fact that the Justice Department is taking an expansive view will be likely to encourage state attorneys general and private plaintiffs to bring suits based on theories of export restraint, where it isattractive for them to do so.

The practical jurisdictional reality is that such U.S. plaintiffs following in the Attorney General's footsteps will frequently have trouble successfully asserting jurisdiction *even under U.S. standards* against the typical foreign purchaser in its home market. The subject matter may not meet the *Timberlane*-type of comity standards and/or the foreign purchaser may not be subject to personal jurisdiction in the United States. This leaves the troublesome truth that the most likely target for a suit by a disgruntled exporter (or state attorney general) is another U.S. exporter or a U.S. business with a subsidiary in the foreign market. That is presumably not the kind of case that the Attorney General is seeking to encourage!

Substantive Confusion: What is a "Cartel"?

Nobody quite knows what the Attorney General has in mind by way of "cartels overseas that restrict U.S. exports." Is he using "cartel" in its strict sense? Or does it mean "any agreement which forecloses exports"? The difference between the two is substantial.

In fact, "cartel" has a reasonably well-recognized meaning in competition law: it is an agreement by a group of *competitors* to raise prices, reduce output or allocate customers. A "buyers' cartel" is less common but conceptually similar: it is an agreement by *competing* buyers to limit prices that they will pay or quantities that they will take, or to allocate the suppliers with whom they will deal. Cartel agreements among competitors usually are *per se* illegal and are often punished criminally, even where they occur overseas, as long as they hurt U.S. consumers.

How many overseas horizontal "boycotts" or "cartels" directed at U.S. exports can the Attorney General and the Antitrust Division hope to find and prosecute? Not many, one suspects.

The classic case would be a major foreign company (or group) which agrees with a major U.S. competitor (or group) that each will stay out of the other's markets; the net result is less competition within the U.S. and fewer exports. This category harks back to the *ICI-Dupont* and *National Lead* prosecutions of half a century ago.[10] (However, because U.S. consumers would be injured, such a case would represent no change from the 1988 *Guidelines*.)

The Department might find an overseas buyers' cartel targeted at a U.S. market. Occasionally, the Justice Department has investigated a group of foreign buyers for having agreed to allocate bids or some commodity (e.g., Alaskan timber or fish) from U.S. sellers or not to pay more than a pre-agreed price for it.[11] Such cartels have also been the occasional subject of private antitrust suits, but they too seem to be unusual.[12] Such a "buyers' cartel" might work where foreign buyers had something of a lock on the particular market—as sometimes happens in Alaska where the protectionist U.S. shipping rules price U.S. buyers from "the lower forty-eight" states out of markets such as timber. It would not be at all difficult to apply conventional U.S. "effects" jurisdiction to such an "extraterritorial cartel" of foreign buyers, whenever the Department can find one.

The Department will have a much more difficult time if it moves offshore to home-market cartels. It may well find that some foreign distributors' or retailers' cartels exist[13] and that as part of such arrangement, participants may agree to boycott imported merchandise. However, such a cartel—even if directed primarily at U.S. goods—takes place abroad and the principal victims are foreign consumers. Government prosecution of such a "foreign market boycott" case would raise enormous comity questions and real questions under the *Timberlane* principles, and involve practical risks to U.S. firms—since the most likely variant would be a private suit against a U.S. exporter for conspiring with foreign buyers to boycott competing U.S. exporters.

A final variation would involve a home market cartel by foreign sellers who restrict output and raise prices to foreign consumers, with the necessary result that aggregate sales go down and U.S. exports into the market decline correspondingly.[14] Here, the effect on U.S. interests, even if sometimes substantial, is nonetheless incidental: the real victims are

foreign consumers. It would be a gross interference in the internal affairs of the foreign country for the U.S. government to prosecute such a foreign retailers' cartel, however blatant and effective it was (the *Timberlane* type of balancing should come out against U.S. jurisdiction, even in a private case).[15]

In any event, the real "buyers cartel" circumstances available at the Justice Department seem sufficiently rare that they would not require the televised attention of the Attorney General. Moreover, as the Department learned in the uranium grand jury investigation, calling an entirely foreign agreement a "cartel" may not make adversely affected foreign government any happier, even if it leaves antitrust lawyers feeling more comfortable.

Vertical Supply Agreements

The greatest uncertainty triggered by the Attorney General's announcement is in the vertical area. The American business community is concerned about *foreclosure* abroad and is not overly picky about the line between horizontal and vertical restraints. Attention is focused particularly on exclusive supply arrangements and exclusive distribution outlets.[16] Business ire is most intense with respect to the *keiretsu* arrangements that characterize the Japanese business community.

The Attorney General did not say he would challenge *keiretsu* arrangements but he and his subordinates have been somewhat coy and imprecise on the subject. Senior Justice Department officials indicate privately they are not interested in *purely* vertical *keiretsu* relationships. This makes sense because, during the 1980s, the Department was a consistent (and sometimes highly controversial) advocate for more flexible antitrust rules to give suppliers, distributors and retailers greater freedom to define their relationships contractually as they like.[17]

The message is never quite unambiguous. On March 13, Assistant Attorney General James Rill explained to the Senate Finance Committee:

> [W]e are finding out more—undertaking to find out more and more about the issue of keiretsu.... With respect to the practices within keiretsu, should they occur, should there be *horizontal* group boycotts with keiretsu that deprive non-keiretsu members from selling to distributors within the keiretsu...that would constitute group boycott activity that is illegal under the Antimonopoly Act in Japan, would be illegal under the antitrust laws of the United States.... As far as I'm concerned, it's the conduct within the framework that is of interest. And while some aspects of keiretsu may be benign, may be pro efficiency, other aspects of keiretsu organizations may be, depending on the facts, anti-competitive.

At the same hearing, Mr. Rill declined to discuss the Toyota *keiretsu* relationship. It appears as if Mr. Rill is leaving open the possibility of a "horizontal" boycott case of the *General Motor-Los Angeles Chevrolet Dealers* variety: there the manufacturer was charged with participating in a horizontal dealer boycott implemented by a vertically-imposed clause restricting resales to unauthorized outlets.[18] The Department may not find the line between "vertical" and "horizontal" to be all that clear, even in the context of an essentially vertical relationship.

There are thus two practical risks which flow from this confusion. The first is that the Department itself will stretch mightily and find some aspects of an essentially vertical *keiretsu* relationship that they can classify as sufficiently horizontal to label a "cartel" or "boycott." The second is that private plaintiffs and state attorneys general—less troubled by the vertical-horizontal line—will roll out a wave of anti-*keiretsu* cases.

If the Justice Department, a state attorney general or a private plaintiff ever brought an anti-*keiretsu* case on a "market foreclosure" or "market power" theory, it would have major practical as well as conceptual problems. Since the market involved would be broad enough to cover U.S. exports, it would almost certainly have to be a worldwide market; and it then becomes unlikely that any particular *keiretsu* supply arrangement would foreclose such a substantial share of that market to become an "injury to competition." In the much-highlighted automobile market, for example, there are some nine domestic Japanese manufacturers who are apparently competing vigorously,[19] and it would be unlikely that a particular manufacturer's supply arrangement would encompass a significant share of the worldwide market for any particular component.

To summarize, long-term supply and distribution arrangements do not become illegal just because they may also make it harder for a new entrant to break into the market, even a U.S. exporter trying to break into a foreign market. If the Department were, in fact, to try to redefine essentially vertical arrangements as horizontal "cartels" or "boycotts," then it would be taking steps which would be bound to have reverberations for traditional supply and distribution arrangements in the United States or North America generally.

Conclusion

It is hard to see where all of this might lead. The Justice Department might want to confine its "export promotion" attentions to Japan for political reasons, but it cannot openly say so; and in any event, private plaintiffs are unlikely to confine themselves similarly.

Moreover, it also represents a great step into a diplomatic swamp for the U.S. government even to contemplate trying to use its courts to reorganize the home market supply arrangements of foreign trading partners—especially where these arrangements are long-established and cannot be characterized as efforts narrowly targeted at U.S. exporters. This is a sensitive area that produced blocking or clawback legislation in Canada, the United Kingdom, Australia and elsewhere.[20]

Other forms of political retaliation are also possible. Any consuming country has a much more direct and less disputable interest in attacking the export cartels of its trading partners than it does in interfering with the internal supply arrangements of such markets. Others might conclude that U.S. export trading associations (which are exempt from U.S. law) are fair game under their law.

One assumes that perhaps the Attorney General and even the Antitrust Division have not fully thought out all the implications of their recent dramatic announcements. Presumably they are receiving some quiet instruction from foreign embassies and maybe even doing some quiet rethinking of their own. In any event, U.S. antitrust as an export-promotion tool is a subject to be watched with unease in the months ahead. The fact that it is an election year and Japan-bashing is popular in Washington does not contribute to the likelihood that the issue will either just go away or be rationally resolved.

Notes

1 Copyright Donald I. Baker 1992.

2 See *U.S.* vs.*Alcoa*, 148 F.2d 412 (2nd Cir. 1944), a case which concerned the aluminum market in which Canada and its leading producer, Alcan, were very much involved.

3 *Timberlane Lumber Co.* vs. *Bank of America*, 549 F.2d 597 (9th Cir. 1976).

4 U.S. Dept. of Justice, *Antitrust Guide to Internatonal Operations*, (1977), p. 4.

5 *Ibid.* p. 5.

6 429 U.S. 477 (1977).

7 15 U.S.C. ss.6a, edit by Pub. L. 97-290, Title IV, Section 402.

8 U.S. Department of Justice, *Antitrust Guidelines for International Operations* (1988), p. 89.

9 E.g., "U.S. To Aim Antitrust Laws at Japan", *Washington Post*, (Feb. 22, 1992); "Antitrust Goes to Japan" (editorial), *Washington Post*, (Feb. 25, 1992); B. Pickens, "Make Japan Play by the Rules", *Washington Post*, (March 3, 1992); "Barr vs. Consumers" (editorial), *Wall Sreet Journal*, (March 3, 1992) ("Attorney General William Barr announced last week that he plans to deploy government and private -sector lawyers as a new front line of Japan-bashers").

10 *U.S.* vs. *National Lead Co.*, 63 F. Supp. 513 (S.D. N.Y. 1945) *aff'd* 332 U.S. 319 (1947); *U.S.* vs. *Imperial Chemical Ind. Ltd.*, 100 F. Supp. 504 (S.D. N.Y. 1951).

11 *See U.S.* vs. *C. Itoh & Co. Ltd.*, 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982) (consent decree in Japanese fish-buying conspiracy case).

12 *Daishowa International* vs. *North Coast Export Corporation Inc.*, 1982-1 Trade Cas. (N.D. Cal. 1982) (preliminary injunction against alleged Japanese wood chip-buying conspiracy).

13 *See* "Japan's Next Retail Revolution", *The Economist*, December 21, 1991, p. 79.

14 *See, e.g.*, Coalition for Open Trade, *The Limits of the GATT: Private Practices in Restraint of Trade* (1992), pp. 14-16.

15 *See National Bank of Canada* v. *Interbank Card Assn.*, 666 F.2d 6 (2d. Cir. 1981).

17 A most celebrated example was the Solicitor General's *amicus* brief in *Monsanto* vs. *Spray-Rite Service Col.*, 465 U.S. 752 (1983), urging that the longstanding *per se* rule against resale price maintenance be abandoned. Congress promptly passed a unique appropriations rider to the Antitrust Division's budget prohibiting expenditure of public funds for any effort to eliminate the old rule. Assistant Attorney General William Baxter did not press the point at oral argument and the Supreme Court did not reach the issue.

18 *U.S.* vs. *General Motors Corp.*, 384 U.S. 127 (1966).

19 *See, e.g.*, "Used Cars in Japan", *The Economist*, (December 21, 1991) p. 85.

20 See Atwood & Brewster, *Antitrust and American Business Abroad* (1981 and 1991 Cum. Supp.) ¶¶ 4.17 and 4.18.

AUSTRALIAN NEWSLETTER

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Major Recommendations for the Reform of Competition Law

Australian competition law (the *Trade Practices Act*) is in the habit of being regularly reviewed by various committees of inquiry. The most recent reviews relate to parliamentary inquiries into the mergers, monopoly and unconscionable provisions of the *Trade Practices Act*, the Australian banking system and Australian print media. The latter was generated in part by some high-profile print media takeovers. One of these involved Canadian Conrad Black, namely the takeover of the Fairfax newspapers group.

Two of the parliamentary committees have recently reported and there could be major implications for competition policy. The first-mentioned committee was the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) entitled *Mergers Monopolies & Acquisitions—Adequacy of Existing Controls*. This report looked particularly at the mergers test. The Committee made the following major recommendations:

- That section 50 of the *Trade Practices Act 1974* be amended to prohibit mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods and services, and that the *Act* should outline certain criteria to be taken into account including:
  - the level of concentration in the market;
  - the likely level of foreign competition in the market;
  - the availability of product substitutes;
  - barriers to entry;
  - whether one party to the merger is a failing firm;
  - the likelihood that the proposed merger would remove a vigorous and effective competitor;
  - the extent to which effective competition remains or would remain in the market;
  - change and innovation in the market;
  - the ability to significantly increase prices following a merger; and
  - any other factors relevant to competition in a market.
- That it be obligatory for notice to be given to the Trade Practices Commission where mergers or acquisitions of a substantial nature are proposed.
- That section 46 (abuse of market power) be amended by adding a further subsection to provide that, although the Trade Practices Commission has the overall onus of proving a breach of that section, this is to be reversed when the Commission has brought forward evidence which makes it as likely as not that one has occurred, unless the defendant corporation in question shows otherwise.
- That section 52A (unconscionable conduct) of the *Trade Practices Act* be repealed. It is recommended that legislation be introduced giving the Trade Practices Commission the ability to bring proceedings on behalf of a person who has a right of action at common law arising from the unconscionable conduct of another.

- That the *Trade Practices Act* be amended to provide remedies for breaches of undertakings made between the Trade Practices Commission and another person.

The second committee is the Martin Inquiry into the Australian banking system conducted by the House of Representatives Standing Committee on Finance and Public Administration. Its report, entitled *A Pocket Full of Change—Banking and Deregulation*, had much to say about competition law and related matters and, *inter alia*, recommended the following:

- That the Treasurer, in considering proposals for mergers or acquisitions in the banking industry, refer to the Trade Practices Commission for determination of the questions of whether the proposed merger or acquisition would substantially lessen competition in a substantial market, and whether there are any public benefits which would outweigh the detriment from the substantial lessening of competition.
- That the Treasurer, in considering applications for mergers or substantial increases in cross-ownership between banks and other major financial institutions, should prohibit any which would result in a substantial lessening of competition, unless public benefit can be shown. In making this judgment, the Treasurer should seek the advice of the Trade Practices Commission.
- That a code of banking practice, contractually enforceable by bank customers and subject to ongoing monitoring by the Trade Practices Commission, be developed as a result of a process of consultation between the banking industry, consumer organizations, Commonwealth regulatory agencies and relevant state government authorities. The consultative process should take place under the auspices of the Trade Practices Commission.
- That the Trade Practices Commission be given formal responsibility for overseeing consumer banking issues at the Commonwealth level, including monitoring the recommended code of banking practice.

The third Committee, the House of Representatives Select Committee into the Print Media (the Lee Committee) has yet to report but again, it is expected that competition policy will be a major focus of that report.

The government is currently considering its response to the Cooney and Martin reports, but it should be noted that there is still no government response to the earlier 1989 parliamentary inquiry into mergers and monopolies (the Griffith Report). It may be recalled that that committee recommended against any alteration in a merger threshold. At the same time there is a review of the *New Zealand Commerce Act* which has extensive similarities with the *Australian Trade Practices Act*, and for harmonization reasons it is hoped that these two pieces of legislation will stay the same.

Airline Deregulation

Like Canada, Australia has been going through domestic aviation deregulation, albeit somewhat later. As in Canada, the major new entrant has collapsed, although it may be reborn under different management. Following the new entrant's demise on December 20, 1991, the government asked the Trade Practices Commission to prepare a report on the competition and consumer implications of the collapse, to be considered by the government as part of an overall review of aviation policy.

Exemptions from Competition Law

In the last newsletter, it was indicated that the government was seeking to review exemptions from competition policy with respect to the Australian equivalent of the Canadian "regulated conduct" defence. This was to be activated through a special conference but, due to changes in the federal government, this has been delayed. It is expected that the work will resume shortly on a review of the exemptions and how they should best be tackled on a national competition policy basis.