



MEMORANDUM

From: International Working Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: December 21, 2004
Re: International Issues Recommended for Commission Study

The Antitrust Modernization Commission assigned to the International Working Group the responsibility to analyze issues relating to international antitrust law and, based on that analysis, to make recommendations to the Commission as to the issues within that category that warrant substantive review. This memorandum outlines those recommendations. The memorandum addresses first the issues the Working Group recommends for substantive consideration and then addresses those issues not recommended for further study at this time. In each instance, comments are provided to allow insight into the Working Group's analysis. The issues are listed in approximate order of priority that the Working Group believes each issue should have for Commission study.

This memorandum reflects the consensus of a majority of the Working Group members. Some members of the Working Group may disagree with a recommendation and/or with aspects of the discussion and comments associated with a recommendation. In addition, a recommendation that the Commission should not study a particular issue at this time does not constitute a recommendation on the merits of the issue, nor does it preclude the possibility that the Commission report ultimately will endorse any particular recommendation.

SUMMARY OF RECOMMENDATIONS

Issues recommended for study. The Working Group recommends that the Commission study the following issues:

1. **Should the FTAIA be amended to clarify the circumstances in which the Sherman Act applies to extraterritorial anticompetitive conduct?**
2. **Should the antitrust exemptions for exporters set forth in the Webb-Pomerene Act and Title III of the Export Trading Company Act be eliminated?**
3. **Are there technical or procedural changes that the United States could implement to facilitate further coordination with foreign antitrust enforcement authorities?**
4. **Should the antidumping laws be reevaluated?**

Issues not recommended for study. The Working Group recommends that the Commission not study the following issues:

5. **Should the United States support the creation of an international antitrust regime or body (e.g., within the WTO)?**
6. **Should private parties participating in proceedings before international tribunals be permitted to invoke the aid of U.S. courts to obtain discovery in the United States?**
7. **Should the law be changed to permit claims in U.S. courts against entities such as OPEC?**

DISCUSSION OF RECOMMENDATIONS

Issues recommended for study

The Working Group recommends that the Commission study the following issues:

1. **Should the FTAIA be amended to clarify the circumstances in which the Sherman Act applies to extraterritorial anticompetitive conduct?**

Numerous commentators have suggested that the Commission consider legislation to clarify the Foreign Trade Antitrust Improvements Act (“FTAIA”), 15 U.S.C. § 6a. The FTAIA generally excludes from the scope of the Sherman and Clayton Acts overseas conduct that does not have a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce. *Id.* § 6a(1). That provision has engendered a fair amount of litigation in recent years over the geographic scope of the application of U.S. antitrust laws, as well as debate within the Department of Justice as to its enforcement priorities. *See* Department of Justice & Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* § 3.122 & n.62 (1995) (restoring Department’s commitment to prosecute anticompetitive conduct that injures U.S. exports and rescinding the contrary policy set forth in footnote 159 of the Department’s 1988 *Antitrust Enforcement Guidelines for International Operations*), available at <http://www.usdoj.gov:80/atr/public/guidelines/internat.htm>.

Among the possible aspects of the FTAIA that may warrant clarification are those raised by the Supreme Court’s recent decision in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004). The FTAIA generally excludes from the Sherman Act’s reach much anticompetitive conduct that causes foreign injury, but creates exceptions for certain conduct that causes significant domestic injury. In *Empagran*, the Supreme Court held that the “domestic-injury exception” does not apply where the claims of foreign plaintiffs rest solely on foreign

effects that are independent of any domestic effects. *Empagran*, 124 S. Ct. at 2363, 2366.

Section VI of the *Empagran* decision, however, explicitly leaves unanswered the questions of (i) the standard to determine whether these effects are independent and (ii) whether an FTAIA exception permitting extraterritorial application of the Sherman Act applies if foreign effects are not independent of domestic effects. *Id.* at 2372.

Another issue concerning the scope of the FTAIA was raised in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004). In *LSL*, the Ninth Circuit affirmed dismissal of the government’s case, holding that the lower court properly found that the conduct at issue — an agreement between the defendant and another company that barred the other company from distributing as yet undeveloped “long shelf-life” tomato seeds in North America — did not have a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce. *Id.* at 680-83. Interpretation of the FTAIA standard for a “direct, substantial, and reasonably foreseeable effect” — and specifically when the exclusion of a potential foreign competitor would satisfy the “direct” requirement — may be another area ripe for Commission consideration.

Comments: These and other questions regarding the FTAIA are of particular importance, as cartel enforcement remains a top priority for the Department of Justice — generating numerous follow-on civil suits — and as markets become increasingly global. While the natural evolution of case law may clarify the FTAIA over time, concerns about the meaning and interpretation of this statute appear to be sufficiently pressing matters that a proposal by the Commission for a legislative solution could be a useful contribution to clarity in this area.

2. **Should the antitrust exemptions for exporters set forth in the Webb-Pomerene Act and Title III of the Export Trading Company Act be eliminated?**

The Webb-Pomerene Act of 1918 provides a limited exemption from the Sherman Act for companies that form associations with the sole purpose of engaging in export trade in goods and actually are engaged solely in such export. 15 U.S.C. §§ 61-65. Title III of the Export Trading Company Act creates an antitrust exemption for American companies that jointly export not only goods, but also services (such as licensing of technology), provided that there is no substantial lessening of competition within the United States. 15 U.S.C. §§ 4001-21.

Comments: Even though these exemptions may have limited direct effect on U.S. consumers, they have been cited as causing problems for antitrust diplomacy.

Specifically, other countries point to these statutes as notable exceptions to the United States' general policy of open competition, and sometimes use them to justify their own restraints on competition. The International Working Group concurs in the recommendation of the Immunities and Exemptions Working Group to study the issue.

3. **Are there technical or procedural changes that the United States could implement to facilitate further coordination with foreign antitrust enforcement authorities?**

Although the Commission should avoid duplicating the various initiatives underway to address broad issues of international comity and convergence with respect to antitrust enforcement (*e.g.*, the International Competition Network (“ICN”)), it should examine the efficacy of current governmental efforts and recommend, where needed, technical or procedural changes that could enhance these efforts. In particular, the following two discrete issues should be studied.

a. IAEAA. It has been suggested that there may be technical amendments to the International Antitrust Enforcement Assistance Act of 1994 (“IAEAA”) that could enhance

coordination between the United States and foreign antitrust enforcement authorities. This Act allows for the exchange of evidence and other information to facilitate cross-border investigations between jurisdictions. *See* 15 U.S.C. §§ 6201-12. To date, only one nation has entered into a mutual assistance agreement with the United States under the IAEAA. Some believe that other countries have been deterred from entering into mutual assistance agreements because Section 12(2)(E)(ii) of the IAEAA permits the use of information obtained under such agreements for non-antitrust criminal enforcement. *See* 15 U.S.C. § 6211(2)(E)(ii). The Commission should study whether elimination or amendment of this provision, as well as other technical changes to the IAEAA, would make agreements pursuant to this statute more appealing to other countries, and therefore more successfully achieve the goals of this statute.

b. Technical Assistance and U.S. Agency Spending Authority. The Commission should address the mechanisms through which funding of technical assistance to foreign antitrust agencies is provided. The private sector and the agencies both appreciate the importance of U.S. technical assistance to the proper application of economics-based antitrust principles by nascent antitrust enforcement agencies around the globe. With adequate assistance, foreign enforcers can learn from, and perhaps avoid, the mistakes that U.S. enforcement agencies have made in applying earlier antitrust theories that economic learning has since proven unsound. Certain funding allocations and budgetary constraints, however, limit the ability of U.S. antitrust agencies to provide funds to foreign agencies, for example, to participate in international fora such as the ICN. Accordingly, the Commission could study possible technical changes to the budget authority granted to U.S. antitrust agencies for the purpose of facilitating the provision of international antitrust technical assistance.

Comments: Much work has already been done in this general area of international coordination, including by previous commissions. *See, e.g.,* International Competition Policy Advisory Committee, *Final Report* (2000), available at <http://www.usdoj.gov:80/atr/icpac/finalreport.htm>. While those steps have all been of great benefit, this Commission has the opportunity to study additional aspects of international antitrust policy and make recommendations with respect to areas that have not been given full attention. Because international issues have received substantial attention from ICPAC and others, however, some believe the Commission should focus its energy on other areas. Having considered the pros and cons, a majority of the Working Group recommends that the Commission study these specific issues.

4. Should the antidumping laws be reevaluated?

The antidumping laws, 19 U.S.C. §§ 1673-1673h, are regarded by some as unduly protectionist and as harming global competition as well as the United States' image as a leading advocate of free trade. These laws generally require, in order to have duties imposed, only that U.S. companies show that the exports of like products by a foreign country are being sold below "fair value" and that, as a result, U.S. companies will suffer material injury. *See id.* § 1673. The statute does not, however, require a showing that the injury arises from anything more than reduced profits on U.S. company sales, as opposed to a more difficult showing such as that the defendant will recoup losses from below-cost sales by charging supracompetitive prices once the competition has been reduced or eliminated, as is required in a predatory pricing case under the antitrust laws. As a result, U.S. companies need not prove anything of genuine competitive consequence with respect to the "dumped" goods.

Comments: The political sensitivity of this issue makes it difficult for any executive or legislative officials to address. The Commission, in comparison, is relatively politically independent and is an expert neutral body, together making it well positioned to offer an unbiased proposal. Others might contend that the issue is outside the scope of the Commission’s intended ambit. Furthermore, many other countries also have some form of trade law affecting U.S. exports, typically similar in scope to the U.S. laws (and also without an “antitrust injury” requirement). Weakening U.S. trade laws in the absence of bilateral or multilateral agreements with other nations could have material adverse repercussions for the United States. Because antidumping law creates tension with antitrust law and free markets, its modification could promote competition. Moreover, because the Single Firm Working Group is recommending that the Commission re-examine the rationale of price discrimination domestically, it makes sense to extend that inquiry to cross-border price discrimination provisions to obtain the greatest possible consistency and logic between the two. Having taken these considerations into account, a majority of the Working Group recommends that the Commission study this issue.

Issues not recommended for study

The Working Group recommends that the Commission not study the following issues:

5. **Should the United States support the creation of an international antitrust regime or body (e.g., within the WTO)?**

Some commentators have suggested that the Commission consider proposals for the formation of an international global antitrust or competition authority. An existing institution or quasi-institution, such as the ICN or WTO, or an entirely new body could be promoted as the forum where governments and businesses would find ways to eliminate the potential burdens and inconsistencies of multiple national enforcers.

Comments: Although the goal of harmonizing international antitrust enforcement is laudable, proposals such as this one have been approached with extreme caution since they likely would require sovereign nations, including the United States, to cede some ability to influence the direction of antitrust analysis. Furthermore, regardless of the merits, this issue may be too amorphous for the Commission to address meaningfully within the next two years. Having considered the pros and cons, a majority of the Working Group recommends that the Commission not study this issue.

6. **Should private parties participating in proceedings before international tribunals be permitted to invoke the aid of U.S. courts to obtain discovery in the United States?**

Several commenters suggested that Commission should seek to overrule *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004). In *Intel*, the Supreme Court held that U.S. courts may entertain discovery requests from interested parties for use in a foreign proceeding, even if the adjudicative proceeding is not yet pending or imminent. *Id.* at 2472-73. Because the holding of *Intel* appears to be a straightforward interpretation of 28 U.S.C. § 1782(a), however, alternative legislation likely would be required to alter what some perceive to be an undesirable holding.

Comments: This issue is not appropriate for Commission study for several reasons. First, as a practical matter, the district court on remand denied AMD's discovery request (based largely on principles set forth in the Supreme Court's decision), rendering the question substantially irrelevant for the time being (all comments were submitted before the district court's decision). *See Advanced Micro Devices, Inc. v. Intel Corp.*, No. C01-7033, 2004 WL 2282320 (N.D. Cal. Oct. 4, 2004). Second, the statute applies not just in antitrust but in all federal cases. Any modification to the statute therefore would be general, rather than limited to antitrust matters, with implications reaching well beyond

just the antitrust laws. Finally, the statute is decades old, yet has not previously been viewed as problematic.

7. **Should the law be changed to permit claims in U.S. courts against entities such as OPEC?**

The Organization for Petroleum Exporting Countries (“OPEC”) is an international cartel of sovereign nations that has escaped liability under U.S. antitrust law. The U.S. government never has brought a legal challenge against OPEC and there have been only two private actions, both unsuccessful. *See Prewitt Enter. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916 (11th Cir. 2003) (affirming dismissal for lack of jurisdiction because there were no means available for service upon OPEC); *International Ass’n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981) (affirming dismissal based upon the Act of State doctrine). Since the *International Machinists* decision, members of Congress have introduced various bills to make the Act of State doctrine and Foreign Sovereign Immunities Act (“FSIA”) — another basis of dismissal by the lower court that was not addressed by the 11th Circuit — inapplicable to sovereign nations that are members of OPEC. *See, e.g.*, No Oil Producing and Exporting Cartels Act of 2004 (NOPEC), S. 2270, 108th Cong. (2004). None of these bills has passed, but recent Supreme Court jurisprudence may have eliminated FSIA and the Act of State doctrine as absolute barriers to suit. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (noting Supreme Court case law subsequent to *International Machinists* interpreting FSIA and Act of State doctrine); Spencer W. Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105 (2002) (same). Even without the FSIA and Act of State doctrine as barriers, however, there are other challenges to suing OPEC. For example, the dismissal in *Prewitt* indicates that rules of civil procedure regarding service may still bar the initiation of a federal action. In addition to the legal barriers

to commencing a lawsuit against OPEC, issues such as diplomatic considerations, the ability to conduct discovery, and the nature and enforceability of any remedy also pose challenges to subjecting OPEC to U.S. antitrust laws. *See, e.g., Solutions to Competitive Problems in the Oil Industry: Before the House Comm. on the Judiciary*, 106th Cong. 83 (2000) (Prepared Statement of Richard Parker, Director, Bureau of Competition, Federal Trade Commission), *available at* http://commdocs.house.gov/committees/judiciary/hju64736.000/hju64736_0f.htm.

Comments: Although barriers to applying U.S. antitrust laws to OPEC may remain, they are found primarily in broadly applicable laws, prudential doctrines, rules of civil procedure, and other policies relating to sovereignty. Determining whether OPEC should be an exception to each would require a substantial effort and focus on non-antitrust matters by the Commission. Moreover, this issue already appears to have engaged Congress, the antitrust agencies, and the courts. Accordingly, the Working Group does not recommend this issue for study by the Commission.