Metropolitan Bar Association request the House of Delegates to adopt the above Resolution supporting the enhancement of the global environment.

Respectfully Submitted,
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1991 Annual Meeting

American Bar Association Section of Antitrust Law Section of International Law and Practice Report to the House of Delegates

International Antitrust Law*

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association makes the following recommendations with respect to international antitrust law:

1. Nations should adopt strong, clear laws against cartels. Nations should strengthen their anticartel enforcement offices, the procedures for enforcing the law and the penalties for infringing it.
2. Nations should eliminate exceptions from the anticartel principle, including:
   a. Export Cartels. Nations should enter into an agreement to repeal export cartel exemptions and they should enforce their laws against

*This Recommendation and Report was adopted by the House of Delegates in August 1991. The Recommendation and Report was co-sponsored by the Section with the Section of Antitrust Law. Former Section chair Joseph P. Griffin played an important part in the development of this Recommendation and Report.

export cartels. Exporting nations should cooperate with importing nations that seek to enforce the latters' laws against export cartels. Legitimate joint ventures should be distinguished and facilitated.

b. Import Cartels. Nations should enforce laws against import cartels and should cooperate with law enforcement of exporting nations whose exporting businesses are harmed by exclusionary cartels.

3. Courts should be reluctant to dismiss cases involving cartels that target or disproportionately affect their nationals or people or firms in their territory where dismissal is sought on grounds of allegedly conflicting foreign law or policy.
4. In the enforcement of laws dealing with transnational mergers, nations should harmonize reporting and waiting requirements and enforcers should consult, lend aid in discovery, and in appropriate cases, defer in exercising their own enforcement jurisdiction so as to facilitate and not frustrate salutary transactions.

REPORT

I. Introduction

In view of the rapid growth of industrialized nations with independent antitrust regimes and the emergence of newly democratic nations that are developing their own antitrust regimes, all with potential for inconsistency, the Section of Antitrust Law of the American Bar Association formed a Special Committee on International Antitrust (herein, the "Committee") in August 1990 to study issues of harmonization and coordination. In the fall of 1990, the Chair of the Section named the members of the Committee. The Committee deliberated throughout the year and has recently produced a 541-page report. This Report to the ABA House of Delegates is an abbreviated version of the findings in the Committee's full report, a copy of which may be obtained from Candy L. Simons, Section Director of the Section of Antitrust Law, (312) 988-5605.

At the outset of its deliberations the Committee reviewed the array of issues in the field of international antitrust. It identified two problems: (1) There are serious disharmonies in the substantive law and in the enforcement procedures of the various nations and these disharmonies impose high costs on business as it confronts the global economy. (2) While virtually all industrialized nations and many others have anticartel laws, many of these nations are extremely lax in the enforcement of these laws. Lax enforcement of laws against cartels, government toleration and encouragement of cartels and adoption of governmental trade restraints that create cartel effects seriously undermine the market system and impose high costs on the world. The Committee studied harmonies and disharmonies in these two areas with the view towards suggesting more aggressive enforcement, coordination, cooperation and harmonization.

In the late 1980s the European Economic Community commissioned a project on *The Costs of Non-Europe,* which identified barriers to competition and free movement within the European Community and counted the costs of non-Europe.[1] Events of the early 1990s underscore the "costs of non-world" on the one hand and the promise of free and open competition and trade on the other. Western Europe aspires to a single market by the end of 1992. Eastern Europe has awakened to the extraordinary human costs imposed by the suppression of private enterprise and the Eastern European nations have taken spectacular steps to democratize and to adopt market systems. Western European integration, German unification, the Uruguay Round, the North American Free Trade Zone and democratization of Eastern Europe all drive towards common goals that will be enhanced by dismantling cartels, coordinating enforcement and freeing competition.

The Committee studied costs of non-world through the lens of competition policy. It often focused on United States law but generally in the context of United States as example rather than United States as prime beneficiary. The basic premise of the Committee's findings is that people are better off if cartels are dismantled and the obstacles to freedom of enterprise are, first, understood, and second, removed unless justified by transparent, non-protectionist goals.

Friction from multitudinous enforcement is an obstacle to freedom of enterprise. Therefore the Committee also proposed reduction in the costs of duplicate enforcement by consultation, coordination, aid in enforcement and dialogue to produce greater uniformity in substantive standards.

II. Reasons for Recommendations

1. The Importance of Deterring Cartel Behavior

Cartel behavior is the core anticompetitive restraint.[2] Cartels virtually always harm the competitive process, undermine free enterprise and harm the consumer. Condemnation of cartels should be a fundamental principle of all antitrust regimes. The Committee surveyed the cartel laws and enforcement records of eight jurisdictions, Australia, Canada, the EEC, France, Germany, Japan, the United Kingdom, and the United States. It found that while most nations embrace the anticartel principle, there is enormous variation in the clarity and scope of cartel prohibitions, in the procedures available for enforcement, in the remedies available for violation and in the intensity of the enforcement efforts undertaken by the various jurisdictions.

1. *The Costs of Non-Europe* became the working document for the Cecchini Report, *The European Challenge—1992: The Benefits of a Single Market (1989).*

2. "Cartel" or "cartel behavior" refers to an agreement among competitors to fix prices, allocate markets or customers, or otherwise to limit competition without any substantial possibility of countervailing competitive benefit.

The ineffectiveness of the cartel law of various nations poses serious problems. If this wide variation is allowed to persist, international conflicts arising from cartel prosecution are likely to multiply. Competition is becoming truly international in an increasing number of significant industries. Accordingly, the harmful effects of cartel conduct are increasingly likely to affect international business. As improvements in transportation and communications reduce barriers to trade, this problem may be expected to increase. This possibility is also enhanced as additional nations make the transition from state monopoly, state enterprise and central planning to private ownership and free market competition.

Significant reform of enforcement institutions, procedures and penalties is needed to address this problem. That reform should include aggressive government prosecution of cartel conduct as an economic crime, as well as ensuring the availability of effective remedies (including multiple damages and liberal discovery rights and standards of proof) for private parties injured by cartel conduct.

2. No Exceptions to Anticartel Policy

a. *Export Cartels*

Many industrialized nations exclude from their antitrust coverage certain collective action directed solely into or within foreign markets ("export cartels"). The export cartel immunity typically extends both to arrangements that may promote efficiency as well as to practices that would be unlawful, and in some cases, criminal in the home country. This grant of immunity is not surprising, because for any individual country, it would seem to be in its national interest to immunize export cartels: their benefits inure to its national exporters and to the country's balance of payments, and their anticompetitive harms are suffered by other countries' consumers and firms.

However, there is significant indication that export cartels commonly have spillover anticompetitive effects in domestic markets and that they can restrain international trade. In addition, even if any individual nation were to benefit from its export cartels, these benefits may be outweighed by welfare losses to that country's consumers resulting from export cartels of its trading partners directed against that nation. That conduct may take the form of short-term higher prices or of predatory practices that may injure or eliminate local industry, allowing supracompetitive prices in the future.

Moreover, on a global basis, the anticompetitive effects of export cartels can be no better than a zero-sum game—one country's exporters' gains from monopoly rents are another country's consumers' losses. And, because there is a demonstrable possibility of anticompetitive domestic spillover effects, export cartels seem to be on balance detrimental to public welfare. Finally, export cartels can cause significant trade friction, and can result in lawsuits that can raise a host of legally and politically sensitive issues.

For these reasons, the Committee concluded that there is no good reason to exempt export cartels. To the contrary, the growing practice of reciprocal exemptions fosters international cartelization and makes all nations worse off. Accordingly, the Committee recommended that all countries should repeal immunity for export cartels and condemn them to the extent that the conduct would be unlawful in the country legislating the immunity. Countries should also develop a multinational mechanism for the referral and prosecution of export cartels that unreasonably restrain trade in any participant country. However, export associations that are not cartels can and should be distinguished and facilitated.

b. *Import Cartels*

Private firms sometimes conspire to exclude imports into their own nation ("import cartels"). For example, in recent years as the U.S. trade deficit has grown, greater attention has been paid to the problem of foreign buying cartels and other anticompetitive arrangements or conduct in foreign markets that have the effect of restricting U.S. exports. That conduct may have no impact on U.S. consumers but may nevertheless have an impact on U.S. "commerce" to the extent that U.S. exporters are harmed in their efforts to sell abroad.

That kind of conduct obstructs and distorts trade and competition because it hurts firms abroad that are trying to reach markets in the excluding nation and consumers in that nation. While the conduct is often illegal in the home nation, the authorities there may simply not take action against it. If the home nation does not take the initiative, the exporter may be able to take action under its own antitrust laws or the trade laws. However, the exporter may have substantial hurdles to overcome in prosecuting claims under those laws. Some of those problems include obtaining jurisdiction over and enforcing remedies against foreign defendants, and in the case of trade laws, showing that the foreign government actively participated in or tolerated an illegal cartel.

Thus, from a legal and policy perspective and from a practical point of view, the government of the country where the import cartel is based and operates is best situated to deal with it through enforcement of the country's national antitrust laws. The Committee concluded that the best long-term solution lies in the harmonization of national laws and the adoption (and reliable enforcement) of national laws prohibiting these cartels. Private and public efforts to reform national laws to mandate strong action against such arrangements therefore warrant strong encouragement. In the meantime, import cartels should remain subject to antitrust enforcement by the exporting nation where the appropriate substantive and jurisdictional tests are satisfied, and nations should cooperate with such enforcement efforts by the exporting countries.

3. Minimizing Dismissals of Cartel Cases Due to Alleged Conflicts with Foreign Law or Policies

In the arena of international litigation where acts abroad comprise all or most of the allegedly illegal acts, defendants often seek dismissal on grounds that the

court lacks subject matter jurisdiction. A direct, substantial and reasonably foreseeable effect on the regulating nation's commerce is normally a condition of subject matter jurisdiction, but considerations of comity or reasonableness could warrant dismissal. One traditional comity consideration is "conflicts of foreign law and policy."

However, numerous cases in which defendants assert such conflicts are hard core cartel cases. Since cartels are so serious an interference with free competition and trade, courts should be cautious in accepting such claims of conflict to dismiss actions against foreign cartels, especially ones that are targeted at or have a substantial impact on the regulating nation. When the offending acts significantly affect the regulating nation, conflict can often be avoided instead by judiciously tailored relief. Especially in cartel cases, restraint at the relief stage should be preferred to dismissal.

4. Harmonizing the Law of Transnational Mergers

Mergers between firms in different countries present a potential for multiple and conflicting investigations by different agencies in the countries affected. Such multiple investigations may not only unduly burden the parties to the transaction but also run the risk of presenting direct conflicts between the policies of sovereign states. The Committee examined the conflicting practices and procedures of the investigating agencies of those countries with developed systems of merger control, focusing in particular on reporting requirements for mergers, extraterritorial enforcement and conflicts of jurisdiction, and access to information outside of the jurisdiction of the agency. The existence of multiple enforcement efforts aimed at merger control has imposed high costs on transnational mergers and has had a chilling effect on procompetitive transactions.

However, despite the many differences in the various nations' merger control practices and procedures, there are indications that these nations generally regard themselves as politically obligated to respect the interests of other states and to exercise moderation and restraint accordingly. Therefore, these nations would likely be receptive to a proposal which advocated an approach of moderation and restraint in the exercise of prosecutorial discretion with respect to transnational mergers.

As a result, the Committee recommended harmonization of reporting and waiting requirements, immediate interagency consultations regarding mergers that cross jurisdictional lines, moderation of private actions against mergers under government review and improved access to information abroad necessary to evaluate a merger. Such steps would greatly help to minimize the current problems with multiple and conflicting international merger enforcement regimes.

J. Thomas Rosch
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