SECTION RECOMMENDATION AND REPORT

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

Using Antitrust Laws to Enhance Access of U.S. Firms to Foreign Markets*

RECOMMENDATION

RESOLVED, That the American Bar Association urges the Government of the United States, its representatives and designees ("Government of the United States"), in the application of competition law principles and policies in the international trade area, as follows:

I. Recognizing that competition laws have an important but nonexclusive role to play, the Government of the United States should continue to seek to eliminate private restraints that have the effect of excluding United States exports from access to foreign markets through the application of United States or foreign antitrust laws, as appropriate. In this connection, the Government of the United States should:

*The House of Delegates adopted this Recommendation and Report in August 1994. Michael H. Byowitz and Mark R. Sandstrom co-chaired the Section's Task Force responsible for the Report. An appendix following the Report lists the members of the Task Force.

A. Seek adoption and effective enforcement by foreign trading partners of competition laws that prohibit cartel behavior and anticompetitive monopolistic practices by enterprises with market power, particularly where such conduct excludes nonhost country goods or services from entering or being effectively distributed in such countries' markets.

B. Encourage and support the efforts of United States firms to obtain relief under foreign antitrust laws, including bringing matters to the attention of foreign enforcement authorities as well as bringing private actions where available, and urge foreign antitrust authorities to welcome and facilitate such complaints.

C. Use the authority provided under the International Antitrust Enforcement Assistance Act of 1994 (the "IAEAA") to enter into reciprocal investigation arrangements with foreign competition law enforcement agencies to improve the ability of the United States authorities to obtain evidence of foreign anticompetitive practices and to utilize such evidence to encourage appropriate foreign governmental action or to bring their own action where appropriate under United States law.

D. Supplement the IAEAA by seeking to negotiate bilateral and multilateral arrangements to facilitate antitrust discovery rights for nonhost country plaintiffs (governmental and private) and for the enforcement of nonhost country antitrust judgments.

II. Recognizing the limitations of the role antitrust enforcement can play to address market access barriers, the Government of the United States should:

A. Continue to focus attention on market entry barriers that involve governmental action and that are frequently not reachable by application of competition law, including local restrictions on foreign investment, inadequate protection of intellectual property rights, the grant of domestic subsidies that distort the market, and requirements or practices in government procurement that discriminate against foreign suppliers. Also seek to address discriminatory product standards, certification procedures and lack of regulatory transparency, which prevent access to local markets by providers of goods, services or investment capital. Where such government-imposed restraints are already addressed in existing multilateral agreements, continue to assert rights under such agreements in order to eliminate such restraints. Where they are not, seek to address them at the WTO and other multilateral fora.

B. Identify whether there is a category of private restraints that do not violate the antitrust laws of the United States or the host country but that significantly restrict access to foreign markets even assuming successful implementation of recommendations I A-D and II A, and if so, study whether it is desirable as a policy matter that such barriers be addressed through multilateral agreements.

REPORT

I. Introduction

In recent years, the nations of the world have made substantial progress in eliminating government trade barriers through multilateral arrangements such as the recently concluded Uruguay Round conducted under the auspices of the General Agreement on Tariffs and Trade ("GATT") and agreements creating regional free trade areas such as the North American Free Trade Agreement ("NAFTA"). As a result of a long history of multilateral trade negotiations, many trade barriers that operate at the border, such as tariffs, have been reduced or eliminated. With the removal or reduction of tariff barriers and more recent negotiations seeking to reduce certain government-imposed nontariff barriers, a genuine risk arises that the free flow of international trade will be inhibited by private restraints imposed with or without the involvement or encouragement of host country governments.[1]

With certain exceptions, private barriers are not covered by the GATT and associated multilateral trade agreements, even as amended and expanded in the Uruguay Round. Governments have not agreed in the GATT to enact laws prohibiting private actions that erect market access barriers or to enforce their existing laws against such actions. Bilateral negotiations have only begun to focus on such issues in recent years.

Competition law principles are believed by many to be capable of playing a significant role in the removal of trade barriers that arise through private restrictive actions. President Clinton, former GATT Director-General Arthur Dunkel and EU Vice President Sir Leon Brittan are among those who have identified competition policy as an appropriate subject for consideration in the newly established World Trade Organization ("WTO"). Indeed, it is anticipated that the role of competition policy in trade agreements will take on increasing importance with the entry into force of the WTO and recent suggestions that the interplay of trade and competition law be addressed by the OECD and the Working Group on Trade and Competition established under Chapter 15 of the NAFTA.

In response to the growing interest in the relationship between competition policy and trade policy in addressing barriers to the open and efficient operation of markets, the Section of International Law and Practice established a task force to study the role that antitrust laws could and could not play in enhancing

1. *See* the Report of the Section of Antitrust Law on competition law and NAFTA accompanying ABA Resolution 116A adopted by the House of Delegates at the 1994 Annual Meeting. In the present Report and the accompanying Recommendation, the term "host country" is used to describe the country in which the anticompetitive conduct occurs, "host country firm" is used to describe the firm(s) involved in the anticompetitive conduct, and "nonhost country firm" is used to describe the firms not based principally in the host country that are the victims of the anticompetitive conduct.

the access of U.S. firms to foreign markets.[2] It was the Section's hope that the Task Force, which brought together private U.S. experts on antitrust and trade policy, would provide analysis and recommendations that might be of use to trade policy makers and antitrust enforcement bodies both in the United States and abroad, and that the group's conclusions might stimulate further research and discussion.

The Task Force has completed its work on the potential use of antitrust laws as a means to enhance access to foreign markets for U.S. and other nonhost country firms, and its Report has been adopted by the Section. The Task Force concluded that competition laws have an important but nonexclusive role to play in the removal of private trade barriers.

The ABA, through approval of the accompanying Recommendation, should urge the United States government to seek enactment and effective enforcement of foreign competition laws against monopolization and cartels.[3] Furthermore, the remedies under foreign competition laws should be made available on a nondiscriminatory basis to U.S. firms. At the same time, the Recommendation urges the United States government to seek through bilateral and multilateral arrangements to enhance its ability and that of U.S. private plaintiffs to challenge foreign private restraints that create market access barriers. Finally, the ABA urges the United States government to work through multilateral fora, such as the WTO, to address government-imposed restraints—and to study the need and desirability of addressing private restraints—that are not amenable to challenge under the competition laws of the United States or other countries.

II. The Interplay of Market Access Barriers and Competition Laws

In order to evaluate correctly the important but nonexclusive role that competition laws can play in enhancing market access, it is helpful to focus on the sources of market access barriers. Many of the barriers which foreign firms face appear to arise from the conduct of governments acting in their governmental capacity, or from the actions of quasi-governmental entities, such as state sanctioned monopolies or government-owned corporations. In addition, market access barriers

2. The focus of the Task Force was upon the use of competition laws to promote market access. The Task Force determined not to address the issue of products subject to such laws as the Antidumping and Countervailing Duty statutes or Section 337. The extent to which such laws can or should be harmonized with competition laws was beyond the scope of the Task Force's work, but deserves separate study and consideration.

3. With regard to cartels, the proposed Recommendation reflects previously adopted ABA policy. Resolution 301 of the ABA House of Delegates adopted at the 1991 Annual Meeting provides, inter alia, that "Nations should adopt strong, clear laws against cartels. Nations should strengthen their anti-cartel enforcement offices, the procedures for enforcing the law and the penalty for infringing it." Resolution 301(1). Similarly, ABA Resolution 116A adopted by the House of Delegates at the 1994 Annual Meeting urges the United States, Canada, and Mexico "to work together in implementing the competition and antitrust aspects of NAFTA, with emphasis on . . . enforcing national antitrust laws [and] prohibiting hard-core cartels that harm other NAFTA nations. . . ."

may also arise from purely private restraints. Competition laws may apply to some of these actions, but by no means to all of them.

There is no doubt that, in principle, the U.S. antitrust laws apply to certain conduct abroad. Indeed, the Sherman Act applies to conduct abroad that has a direct, substantial and reasonably foreseeable effect on U.S. commerce, including U.S. foreign export commerce. 15 U.S.C. § 6a.

U.S. antitrust laws and many foreign competition laws generally are rendered inapplicable to the conduct of foreign governments acting in their governmental capacities. This immunity is conveyed through a series of defenses recognized by courts in the U.S. and certain other countries, including state action, foreign sovereign immunity, foreign sovereign compulsion, and the act of state doctrine.

In addition, the U.S. antitrust laws and most foreign competition laws do not prohibit all restraints of trade, but only certain nonexempt categories of restraints deemed unreasonable. For example, the principal restraints prohibited under U.S. antitrust laws include: certain anticompetitive actions by a firm that enjoys unilateral market power to obtain or maintain such market power (referred to as monopolization or abuse of a dominant position); agreements among direct competitors to coordinate pricing, restrict output, allocate territories or customers, or collectively refuse to do business with other entities (referred to as horizontal restraints or cartels); and arrangements whereby a manufacturer controls its distributors' resale prices (referred to as vertical price restraints). Other categories of restraints either are deemed to be legal under the U.S. antitrust laws (e.g., unilateral refusals to deal by a firm without market power) or are evaluated on the basis of an analysis of market conditions and business justifications (e.g., vertical nonprice restraints and vertical cross-shareholdings).

Unless they are amended substantially, U.S. antitrust laws and similar foreign competition laws can be used to attack only certain private restraints that impede access to foreign markets for U.S. firms. For example, competition laws may reach unilateral actions of a private foreign firm to prevent the purchase of goods or services of U.S. producers if the foreign rival enjoys market power in the buyer market and is engaging in that conduct to insulate itself from competition in downstream domestic markets.[4] On the other hand, competition laws generally will not reach such conduct if the foreign entity refusing to purchase from U.S. firms lacks market power or is a department of a foreign government purchasing for its own account.

In addition, U.S.-style competition laws generally will prohibit agreements by a group of competing private foreign manufacturers to insist upon exclusive arrangements with their respective distributors or to boycott distributors that also handle the competing product offerings of U.S. manufacturers. Conversely,

4. Our conclusion that the U.S. antitrust laws prohibit at least some private restraints that impede market access by U.S. firms is consistent with the Report of the Special Committee on International Antitrust, ABA Section of Antitrust Law (September 1, 1991).

competition laws generally will not be violated by the unilateral decision of a foreign manufacturer not to do business with distributors that deal with U.S. firms, unless that manufacturer possesses market power. Indeed, it is by no means assured that a violation would be found even if a number of foreign private manufacturers, each unilaterally, choose to adopt such restrictive policies, notwithstanding the fact that the manufacturers which adopt the practice, when viewed together, account for a large part of the foreign market.

It is not the Section's purpose in the recommendation and this report to recommend that the jurisdictional or substantive limitations of the U.S. antitrust laws be altered to permit broader challenges to foreign market access barriers. Because the various defenses that arise from foreign governmental involvement are based on respect for the sovereignty of foreign nations, unilateral elimination of these defenses would not be appropriate. Moreover, an unduly aggressive set of competition laws (which would apply in both domestic and foreign contexts) could itself lead to anticompetitive results. The core provisions of the U.S. antitrust laws, as presently drafted, generally differentiate adequately between conduct that should be prohibited because it is likely to unreasonably restrain trade and conduct that should not be proscribed because it is efficiency-enhancing or at least competitively benign.

III. Practical Problems in Obtaining Effective Enforcement of Competition Laws against Foreign Market Access Barriers

If, as we believe, a number of foreign market access barriers are amenable to attack under U.S. antitrust laws, there may be a natural tendency on the part of U.S. enforcement authorities and U.S. private parties to consider seeking relief against such conduct under those laws, rather than invoking foreign laws.

At the same time, numerous practical problems inhibit efforts to enforce U.S. antitrust laws against private foreign conduct, particularly where the parties involved are foreign entities and the effect alleged is solely on U.S. foreign export commerce.[5] In such circumstances, much, if not all, of the evidence necessary to prove an offense will be located abroad, and numerous legal and practical problems will often preclude obtaining such evidence. In addition, it is often difficult to establish personal jurisdiction over foreign entities that participate in the allegedly anticompetitive conduct.[6] Finally, even if the foreign entities can be brought before a U.S. court and evidence adduced to prove a violation of U.S. antitrust laws, it is by no means assured that effective relief can be ordered

5. Many market access barriers appear to be erected to benefit foreign concerns that operate only in their own insulated home market.

6. Our conclusion that practical problems in obtaining discovery, personal jurisdiction and effective relief impede the extraterritorial application of U.S. antitrust laws to private market access barriers is consistent with the Report of the Special Committee on International Antitrust, ABA Section of Antitrust Law (September 1, 1991).

by a U.S. court when the foreign entities and their assets are located abroad with little, if any, contact with the United States.

Private conduct seeking to impose market access barriers is undertaken for the purpose of insulating host country firms from competition and, if successful, may produce significant anticompetitive effects in the host country. In principle, such conduct should be prohibited under the competition laws of the country where the conduct occurs. Enforcement of foreign competition laws against the restraint would avoid the practical problems encountered in attempting to apply U.S. antitrust laws: evidence should be located within that foreign country and easily reachable through compulsory process; personal jurisdiction over the participants should exist; and effective relief should be readily obtainable.

Efforts to use antitrust laws to improve market access for U.S. firms thus should focus first on examination of foreign competition laws. In that regard, it should be noted that several foreign nations (e.g., Canada, the UK, Germany and Japan) and at least one multinational regional authority (the European Union) enacted competition laws many years ago. More recently, competition laws have proliferated around the world. Such laws have been adopted by countries in Eastern Europe, South America and Asia that recently abandoned more or less government directed economies and/or protectionism.

There are, however, serious problems for U.S. firms that seek to use local competition laws in foreign countries to challenge private conduct that creates market access barriers. A substantial number of countries have not enacted competition laws. Other countries have laws that are ineffective and/or that are not adequately enforced. Some foreign laws are relatively "toothless," making violations difficult to prove or establishing very light penalties. Enforcement authorities are frequently underfunded, and in many newly emerging markets, these authorities have to devote most of their time to fending off efforts by other government agencies to reimpose old elements of a closed economy. On occasion, there may be serious reasons to doubt the foreign competition authority's commitment to enforcement of its laws. In many cases, foreign competition laws make little, if any, provision for effective private enforcement.

Whatever the reasons, it appears that only a relatively small number of foreign countries regularly enforce their competition laws against host country firms in purely domestic contexts, and few of them provide for effective private enforcement. Moreover, even when competition laws are enforced in the domestic context, foreign competition law authorities may be less responsive to complaints from nonhost country firms than from their own domestic companies.

IV. The Antitrust Proposals

The foregoing practical problems must be surmounted if U.S. antitrust laws and/or foreign competition laws are to serve as effective tools to eliminate foreign market access barriers erected through private restraints. The ABA recommends

that the United States government pursue a multifaceted approach that seeks to enhance the prospects for effective enforcement against private foreign market access barriers under both foreign and U.S. laws. For reasons of efficacy and international comity, the ABA believes it would be appropriate in cases involving conduct abroad where the effects on the United States are solely on export commerce that, before invoking U.S. remedies, U.S. agencies and private parties first consider seeking relief under foreign law.

In making these recommendations, it is impossible to predict what effect, if any, increased antitrust enforcement by any particular country will ultimately have on that country's balance of trade. Nonetheless, increased antitrust enforcement against private market access barriers is a desirable goal because it will help to liberalize world trade and facilitate the efficient operation of global markets.

A. Enact and Enforce Foreign Competition Laws

Part I.A. of the Recommendation urges the United States Government to encourage countries that have no competition laws to enact laws which prohibit cartel behavior and monopolistic practices that have adverse effect on consumer welfare. The Recommendation also proposes that the United States government seek to ensure effective enforcement of foreign competition laws already in place.

Means of enhancing competition law enforcement are not specified in the Recommendation. Actions to implement this objective might include encouraging foreign countries to provide effective criminal and/or civil sanctions to encourage compliance with local competition laws, and adequate resources to provide for sufficient investigatory procedures and trained personnel to examine and take action against anticompetitive behavior. In addition, where private rights of action are recognized, foreign countries should be encouraged to provide for sufficient discovery and other procedural rights and remedies so as to create a reasonable likelihood that such rights will be pursued and attained.

In order for there to be a realistic possibility for a U.S. firm to use foreign competition laws to challenge private market access barriers, the foreign country must first have in place effective competition laws that are enforced in domestic contexts. In addition, promotion of effective enforcement of competition laws abroad will serve over time to optimize global utilization of scarce resources, and therefore should be supported as an end in itself.

Encouraging the adoption and effective enforcement of appropriate competition laws is in the United States' public interest. It is important for the United States government to continue to encourage the adoption and effective enforcement of foreign competition laws that are designed to enhance consumer welfare, and to oppose the use of unduly expansive competition laws that might inhibit U.S. access overseas.

The interests of other countries would be well served by the enactment and effective enforcement of competition laws of the sort described above. Effective

enforcement of such laws by governments against anticompetitive practices within their borders promotes consumer welfare for all of their citizens. By enacting and enforcing competition laws, countries help to assure that their markets utilize scarce resources more efficiently.

B. Nondiscriminatory Access to Foreign Competition Laws

The existence of an effective host country competition law is a necessary, but not sufficient, condition to use of foreign competition law to challenge private restraints that deny market access to nonhost country firms. No less essential is the availability of relief under the law on a nondiscriminatory basis to nonhost country firms.

Part I.B. of the Recommendation therefore urges the United States government to encourage foreign governments to make their remedies available to nonhost country firms on a nondiscriminatory basis and to assist the efforts of U.S. firms to use foreign competition laws to challenge private market access barriers. In systems where government actions are the dominant or exclusive mechanism of enforcement, the United States government should encourage foreign enforcement agencies to take action at the request of nonhost country (including U.S.) firms. Where a private right of action exists for host-country firms, it should be equally available to nonhost country (including U.S.) firms.

C. The International Antitrust Enforcement Assistance Act

In the past, the United States government has had only a limited ability to render assistance to U.S. firms that wished to pursue claims of anticompetitive private conduct with foreign competition authorities. Foreign competition enforcers have been precluded from sharing the evidence they developed in response to complaints of U.S. firms; and, because the U.S. antitrust authorities otherwise had very limited means of obtaining evidence of anticompetitive practices abroad, U.S. enforcers have been frustrated in their efforts to engage in meaningful discussions with their foreign counterparts as to why enforcement actions have not been pursued in specific cases as well as in bringing their own actions under U.S. law.

The U.S. enforcement agencies now have authority that should enable them, over time, to resolve this problem. The United States Congress recently enacted the International Antitrust Enforcement Assistance Act of 1994 (the "IAEAA"). This statute allows the Department of Justice and the Federal Trade Commission to enter into mutual assistance agreements to share with their foreign counterparts, on a reciprocal basis, information developed in antitrust investigations. Among other things, mutual assistance agreements entered into under this statute should enable the U.S. enforcement agencies to obtain access to the evidence that a foreign enforcement authority develops in response to a complaint by the United States government or a U.S. firm, or to cause the foreign authority to seek evidence with regard to such complaints where it is not otherwise inclined to do so.

The Recommendation urges the U.S. enforcement agencies to use the authority

conveyed by the statute to enter into mutual assistance agreements so that they can more effectively urge their foreign counterparts to bring proceedings against private restraints that create market access barriers. Because it is by no means assured that foreign competition law authorities will always be able or willing to bring appropriate cases, the Recommendation urges the U.S. authorities to use the information obtained through such agreements to bring their own actions under U.S. antitrust laws where foreign relief is not forthcoming, substantive violations are presented, the standards for U.S. jurisdiction are met, and effective relief can be obtained.

Many foreign countries have expressed vociferous opposition for many years to what they considered excessive extraterritorial application of U.S. antitrust laws. However, the antipathy to U.S. exterritorial application of such laws has diminished, as many foreign countries have come to apply their own competition laws to private conduct occurring outside their borders.

While the extraterritorial application of the U.S. antitrust laws to conduct abroad that affects only the foreign export commerce of the United States remains controversial in some countries, international comity concerns may be alleviated to some extent if the extraterritorial application of U.S. law is not taken in such cases until the foreign competition authority is given an opportunity to bring its own action or to advise its U.S. counterparts why bringing a case is not warranted on the merits or would adversely affect the foreign country's interests. The U.S. government should initiate such consultations where appropriate before bringing its own case. Of course, if a foreign buying cartel or boycott is achieved through acts in the U.S. as well as abroad, the grounds for foreign opposition to U.S. enforcement action are largely vitiated.

D. Negotiated Enhancement of Civil Litigation under U.S. Antitrust Laws

In seeking to challenge conduct abroad under the U.S. antitrust laws, the U.S. government and private plaintiffs presently face impediments to their ability to obtain discovery. The IAEAA is limited to mutual assistance in government antitrust investigations and does not apply to private enforcement of the U.S. antitrust laws. Even if a violation is established, foreign courts may be prohibited, or may be unwilling to enforce the United States judgment as a matter of international comity.

The ABA should therefore propose that the U.S. government seek to enhance its ability to obtain discovery abroad in U.S. antitrust cases and to improve the enforcement of U.S. antitrust judgments abroad through bilateral and multilateral arrangements.

The Recommendation also proposes that the U.S. government seek to extend such enhanced rights to private actions under U.S. antitrust laws. In the United States, although much abused and often maligned, private enforcement remains

an important and appropriate supplement to governmental enforcement of the antitrust laws. Indeed, the absence of effective enforcement of foreign competition laws may be attributable, at least in part, to the failure to provide for effective private enforcement.

On the other hand, private enforcement of U.S. antitrust laws is extremely unpopular abroad. Among other things, foreigners are often troubled by the scope of discovery permitted under U.S. law and there is great antipathy regarding the automatic trebling of damages awarded.

While efforts to negotiate arrangements to enhance the discovery and judgment enforcement rights of U.S. private parties may not be successful, the potential benefits warrant an attempt to negotiate such arrangements.

V. Other Market Access Issues

A. Continue Efforts to Combat Government Imposed Restraints

In making recommendations to improve the use of the antitrust laws to address market access barriers, there is concern that the limitations of this approach be fully understood. Many of the foreign market access barriers faced by U.S. firms are the result of foreign government actions that may not be subject to attack under U.S.-style antitrust laws.

For example, bans and restrictions on foreign direct investment limit market access directly, affect trade, and prevent nonhost country firms from developing the kind of local presence that would help them lobby successfully for elimination of other market closing practices. Such bans and restrictions, however, are the actions of foreign sovereigns acting in their governmental capacities and, as such, will usually not be amenable to attack under laws modeled after U.S. antitrust statutes.

Similarly, "buy-national" government procurement practices which favor domestic producers or suppliers deny opportunities for other countries' exports. When engaged in directly by a foreign government in its governmental (as opposed to a commercial) capacity, such actions are usually immune from attack under U.S. antitrust laws. And, such practices generally do not raise concerns, absent market power, whether undertaken by governments acting in a commercial capacity or by private parties.

Subsidies by which governments seek generally to foster the production or export of a good or service through grants or other benefits involve direct governmental action and generally cannot be reached through application of antitrust laws. It should be noted, however, that other jurisdictions may prohibit certain state aids including those which affect trade and distort or threaten to distort competition (e.g., art. 92 of the Treaty of Rome). Furthermore, the new WTO Subsidies Agreement may provide a powerful weapon against trade-distorting subsidies.

Failure to provide adequate and effective protection of intellectual property rights is, in some countries, among the most significant barriers to sales or investment by U.S. firms. However, foreign government refusal to prosecute

violations of private intellectual property rights would not be sufficient to state a claim under the antitrust laws. On the other hand, over-restriction of access to intellectual property rights creates its own distortions of trade, but such government action also would not appear to be amenable to antitrust attack.

Lack of transparency and discrimination in product standard setting and regulation are frequent sources of trade barriers, particularly in highly regulated economic sectors. Where the standard setting or regulation is done directly by a foreign government agency or gains its force through government adoption, it would appear to be insulated from U.S. antitrust attack. Government delegation to industry groups for this purpose is a particularly difficult problem in many countries.

Bilateral and multilateral means exist to address many of these government-imposed barriers. The United States has been a leader in pressing for market access under the GATT in many areas. With the new WTO and the agreements for which it will be responsible, the U.S. government has a significantly expanded opportunity to seek the reduction of government-imposed barriers such as those mentioned previously. Likewise, opportunities to improve market access exist under regional agreements, such as the North American Free Trade Agreement, and through many of the bilateral agreements which focus on trade.

Section II.A. of the Recommendation recognizes these efforts and urges the United States government to continue to seek to reduce government-imposed barriers to market access through these fora. Where international disciplines are lacking, such as the area of foreign direct investment, the United States government should as well seek the expansion or creation of agreements in the WTO, the OECD or other fora to establish principles and commitments that grant market access. Finally, the United States has in place domestic trade laws which may also be used to reduce certain of these barriers.[7]

B. Address Private Restraints that Impede Market Access but Do Not Violate Antitrust Laws

At least some of the private conduct that impedes market access probably involves unilateral refusals to deal by nonmonopolists or vertical nonprice restraints often accompanied by vertical cross-shareholdings. Such private market access barriers may not be amenable to successful attack under U.S.-style antitrust laws. In addition to the recommendations to enhance antitrust attacks on private market access barriers contained in Part I of the Recommendation, some have suggested that consideration be given to negotiating multilateral arrangements which address private market access barriers that do not violate antitrust laws.

Serious policy issues are raised by any proposal for the U.S. government to

7. The Task Force is not recommending the use or nonuse of any of these trade laws. For an analysis of the relationship between the U.S. antitrust laws and Section 301 of the Trade Act of 1930, as amended, see, the Report of the Special Committee on International Antitrust, ABA Section of Antitrust Law, September 1, 1991.

seek multilateral arrangements for measures to prohibit or remedy private restraints that do not violate competition laws but that tend to restrict market access. It is not clear that such measures would be necessary if the recommendations set forth in Sections II.A. and I.A-D. are implemented over time. There is also reason to be concerned about the desirability of any such arrangements from a policy standpoint. The idea of challenging access-restricting private conduct without an antitrust rationale raises the risk of prohibiting efficiency-enhancing business conduct. It is therefore important to consider whether developing a competition-based set of principles for differentiating among private market access barriers that do not violate the antitrust laws is feasible or desirable.

Section II.B. of the Recommendation recommends that the United States government identify whether there is a significant category of private restraints that do not violate the antitrust laws of the United States or foreign nations but that restrict access to foreign markets. If such a category exists and is found to impose significant impediments to market access, Section II.B. urges the United States government to study from a policy standpoint whether there is a principled basis to prohibit some of these restraints. Such an analysis should be informed by competition policy principles and should focus on assuring that efficiency-enhancing conduct is not proscribed.

Respectfully submitted,
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August 1995

APPENDIX

Task Force on Using Antitrust Laws to Enhance Access of U.S. Firms to Foreign Markets

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