COMPETITION LAW AND EXTRA-TERRITORIAL ENFORCEMENT: OFFENSE OR DEFENSE?

Paul H. Karlsson*

As the last millennium drew to a close, world trade, measured in United States dollars, had long since passed the $6 trillion mark and it may not need even another century to reach $7 trillion. Competition law was a little over 100 years old. In broad terms, we are discussing at this conference the role of competition and competition law in the next 100 years, accepting that our vision may not extend much further into the future than that. An obvious complication— one that is properly an important focus of our considerations—is the fact that neither trade nor competition law has been evenly distributed. Not all countries have been able to participate proportionately in the explosion of global commerce, and not all have an equal history of antitrust; many, in fact, have no history at all. In the Caribbean Community (CARICOM), only one member state has a competition law and Protocol VIII has been so recently signed that its contributions will not be evident for several years at least.

In the new millennium, increasing trade and its associated benefits can be expected to increase the challenges to competition law enforcement. One country’s export is another’s import, and every transaction has the potential to create an anti-competitive effect in either market. Today I would like to take the substance of trade rules and competition laws as given, and concentrate on the challenge of applying the laws in the context of a $6 or even $7 trillion global economy.

Extra-territoriality can mean many things to many people. Most frequently the term has been used to characterize an aggressive application of antitrust laws, and the United States is often cited as the most vigorous practitioner. I hope to establish that extraterritoriality is essentially defensive and domestic in nature and then discuss other possible solutions to the problems that it seems to solve. When commerce first began, every transaction was of necessity face-to-face, and any rules there may have been were local. Even long-distance trade developed before national borders existed, and when nation-states appeared, they institutionalized legal regimes within their territories. The basic rule of territorial jurisdiction was quickly established: when you

*The views expressed are those of the author and not those of the Commission or any Commissioner.
play in my yard, you play by my rules. As simplistic as that formulation may appear, the principle is at the heart of the issue we are addressing.

In 1890, the US adopted the Sherman Act, the second antitrust law in the world, at a time when the absolute authority of a sovereign within its territory had few limitations. In the case of *Hilton v. Guyot*, which concerned the enforcement of foreign judgments, the Supreme Court in 1895 stated flatly: “No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.” Even though Congress had extended the substantive reach of the Sherman Act to commerce with foreign nations, early court cases followed the traditional jurisprudence and held that antitrust stopped at our borders and could not be applied to activity beyond them. All that changed in 1945 when the court in the *Alcoa* case held for the first time that the United States antitrust laws could reach wholly foreign conduct if it had “an intended effect within the United States.” And thus was born the “effects doctrine.” It seems fair to say that the focus is truly and properly domestic: the decision and the doctrine are concerned solely with preserving the competitive process within the US market. They both recognize what was true in 1945 and is even truer today: developments in transportation and technology make it possible for firms to produce and conspire entirely outside our borders and cause significant anticompetitive effects within them. No nation should be required to suffer an assault on its markets and take no action in self-defense.

An enthusiastic application of the doctrine during the 1960’s and 1970’s led to reactions by governments around the world. A number of states passed “blocking” statutes that were designed to frustrate United States investigations or, in one case, to criminalize cooperation with United States discovery efforts. A common feature of these provisions is that they challenge the procedure, not the substance. It is not the right of the US to pass antitrust laws that is the issue; rather it is the use of discovery tools to seek evidence abroad.

Perhaps in response to these developments, some United States courts began to apply what came to be called a “jurisdictional rule of reason” that required the balancing of various interests if foreign elements were important in an antitrust case. These factors, which were largely adopted in the Guidelines for International Operations published by the FTC and the Department of Justice, are:

- the degree of conflict with foreign law or policy;
- the nationality and principal places of business of the parties;
- could enforcement by either country be successful;
- relative importance of the effects in the United States and elsewhere;
- as purpose to harm or affect United States commerce;
- the foreseeability of the effect;
- the significance of the conduct within and without the United States.
Although this list seems comprehensive, it must be said that most courts that have applied the test have found that the exercise of jurisdiction in the United States was proper.

The Supreme Court first addressed these issues in the case of *Hartford Fire Insurance Co. v. California*. A number of American states and private plaintiffs sued American and English insurance companies for violations of the Sherman Act. The UK defendants were not selling directly in the United States but were selling re-insurance to United States companies. The defendants were accused of refusing to write some policies, imposing a pollution risk exclusion, and refusing to sign re-insurance contracts unless they had certain other exclusions. The foreign defendants admitted jurisdiction but argued that it should not be exercised as a matter of "comity."

The precise definition of comity in international law has challenged the courts for nearly two hundred years. The same Hilton Court that pronounced on territorial jurisdiction offered this famous formulation:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

By a vote of 5-4 the Court accepted the basic holding of *Alcoa* — the antitrust laws reach foreign conduct — but they did not answer directly the question of whether comity can or should be used because they found that the factors supported the exercise of jurisdiction under any standard. Their comity analysis has caused some controversy since it seemed to require a "true conflict" between the laws of two countries which can exist only if a company cannot comply with both. The practices at issue in the case were allowed but not required by UK law; consequently, the companies could abide by United States law without violating UK law. The minority explicitly adopted the "reasonableness" test and held that jurisdiction should not be exercised if to do so would be unreasonable.

So far we have been talking about the Sherman Act, which covers cartels and other agreements in restraint of trade. The Clayton Act, which along with the Federal Trade Commission Act was passed in 1916, has been read expansively to cover mergers, wherever they occur, that may have an anticompetitive effect in the United States. A 1976 amendment, the Hart-Scott-Rodino Act, requires foreign companies to report their merger plans to the United States authorities if they have assets in, or sales into, the United States that exceed a certain threshold amount. The analysis of a merger with international dimensions, and the attempt to impose a remedy if it is found to be anticompetitive, can present all the same problems that are faced in the prosecution of a cartel.

Perhaps at this point it would be useful to examine a few instances of extra-territoriality in action. Probably the foremost example of a price-fixing case was the vitamin cartel attacked last year by the Department of Justice. A number of European and Japanese producers of bulk vitamins were
accused of having divided markets and fixed prices for the entire world. From capsules at the drugstore to breakfast cereal, bread and milk – any product with vitamins added – consumers paid a higher price because of the agreement. The companies agreed to pay fines of over $1 billion dollars and are facing a private class action suit in the United States where the settlement is also expected to surpass $1 billion.

Some years ago Glaxo and Wellcome, two large UK pharmaceutical companies with substantial sales in the United States, proposed to merge. Of the hundreds of products they sold, there were no overlaps of concern, but each was developing a non-injectable migraine treatment. DGIV, the antitrust authority in the E.C., examined the transaction but took no action. The FTC, however, required the companies to divest world-wide research and development assets (patents, know-how and laboratories) with the hope that both products would be brought to market and migraine sufferers in the United States, and coincidentally around the world, would benefit from the resulting competition. This case is also remarkable because it is, I believe, the first time that a case was decided based on a product market where the product did not yet exist.

A few years ago Boeing and McDonnell Douglas, the only two United States manufacturers of large civilian aircraft, were allowed to merge. From the United States viewpoint there was obviously no question of extraterritoriality, but some observers found it strange that the FTC did not challenge a merger to monopoly. Despite the enormous amount of time and resources we devoted to the investigation, the explanation for the result is fairly simple. First, the market for large aircraft is worldwide and not confined to the United States: American airlines do not shop only at home. Second, merger analysis is forward-looking. An examination of past market shares is not sufficient; the possible effect of the transaction in the future is the important question. What our investigation revealed was that McDonnell Douglas did not have a future, in that market at least. Although thousands of its planes were, and are, flying, no airline expressed any interest in buying more of them. In fact, no other company in the world, including Airbus, the only other competitor, was willing to buy McDonnell Douglas.

Although neither firm had any production facilities in Europe, they had sold many planes to European airlines and Boeing, at least, was certain to do so in the future. It was therefore no surprise that the E.C. authorities examined the transaction. When they expressed early concerns, a certain amount of high-level posturing followed: members of Congress and President Clinton made various dark threats about a possible trade war if the E.C. dared to disapprove the deal. In the event, DGIV passed on the basic merger but required Boeing to cancel a number of exclusive contracts it had signed for future sales of aircraft to American airlines. The FTC had noted the contracts but decided they posed no immediate threat to competition.

The case is significant for two reasons. First, it demonstrates that not only the US is willing to act extraterritorially, and secondly, it shows that the US recognizes the right of others to do unto it as it does unto them. Despite the war of words, the power of the E.C. to investigate was never challenged. The concern voiced by some was that the E.C. might misuse its law to protect its competitor Airbus rather than the process of competition. Of course, when there are only two players
in the game, drawing that distinction may require a certain finesse.

Mahle, a German firm, and Metal Leve, a Brazilian concern, decided some years ago to merge. They both produced bearings for large diesel engines and were two of the five competitors in a world market. On the substance, the FTC required the divestiture of US assets to preserve competition. Perhaps more interestingly, the parties did not report the transaction in the US as required by the H-S-R Act. In fact, they discussed filing with their US lawyers and investment bankers, realized they would be in trouble on the merits, and deliberately decided not to. The FTC pursued them for this infraction and extracted a fine of $5.6 million.

Having mentioned a few cases where extraterritoriality has worked smoothly, if not to everyone’s satisfaction, I have saved for last the case of the International Air Transport Association. Virtually all international airlines are members of that organization and traditionally they have met periodically, under the auspices of IATA, to set the fares for all international flights everywhere in the world. Until 1984 international aviation was handled in the US by the Civil Aeronautics Board (CAB) which had the power to approve agreements among airlines and immunize them from antitrust attack by the Justice Department or private plaintiffs. The CAB had always approved IATA rate agreements but in 1978 it announced its intention to withdraw immunity and thus subject all the world’s airlines to antitrust attack in the US on a charge of price-fixing. The Show Cause Order that initiated the proceedings had the potential of turning into the largest antitrust case in history.

The response should not have been surprising but it seemed to unsettle the CAB. More than 50 nations filed diplomatic protests with the US State Department and not one could find a positive thing to say. The standard procedure at the CAB was to assign cases to an administrative law judge in the first instance, but this one was considered too complicated. The Board members themselves presided over hearings that stretched over weeks since so many parties wished to appear and express their views. Other than the Department of Justice (DOJ), which intervened to champion traditional antitrust principles, very few were in favor of the CAB’s proposed action. In hopes of gathering international governmental understanding, if not support, the US sent a delegation to South America, Europe and Africa to explain the economic wisdom and legal basis for the case. An indication of the success of that strategy is that the Asian leg of the trip was canceled when the Philippines refused to allow the delegation entry into that country.

Since US passengers can be expected to fly anywhere in the world – between foreign countries as well as into and out of the US – the original case applied to all fares everywhere. However, in the face of impassioned opposition and continued government intransigence, the scope was gradually narrowed, and the final order dealt only with flights into and out of the US over the Atlantic. Even then, there was no real enforcement and the case was essentially settled. IATA is still happily in business.

For all the excitement it caused, the IATA case may well be fading somewhat into the reaches of history, but I believe it illustrates an important point about the exercise of extraterritorial jurisdiction. However well-founded the legal theory may be, however important and reasonable it is for countries to protect their markets and consumers, the theory
often runs unhappily into practicality. The opposition of other governments, or even their failure to cooperate, can defeat extraterritorial assertions of jurisdiction. Probably no case other than IATA has encountered such unanimous hostility, but the existence of the blocking statutes I mentioned earlier is evidence that countries are still willing to challenge extraterritorial cases if they believe their interests to be sufficiently threatened.

No antitrust law or enforcement agency exists in a vacuum. All are necessarily creatures of the legal system in which they must operate. In every case the plaintiff, whether private or governmental, must be able to find and produce the evidence that supports its claim or charge. That process can be problematic in a domestic proceeding, but when there are international elements the difficulties are greatly magnified. In the US we have perhaps the strongest tools available anywhere. Discovery powers are very broad, they are controlled by the parties not the judge, and they can be used prior to the trial. We can demand the production of witnesses and documents, from other parties to the case as well as third parties, and in most instances we can serve those demands anywhere in the world. Few countries with either a civil or a common law tradition have such extravagant litigation resources.

But even in the US these powers are not necessarily enough. Some years ago the Justice Department brought a case against deBeers for price-fixing in the industrial diamond market. A number of the key witnesses were in Europe and refused to appear in the US court. Their governments were unwilling to encourage or require them to do so. DOJ persevered, but it was not a great surprise when the judge ruled that they had not proved the case. After the results of the vitamin case were publicized in the US, a number of antitrust agencies in this hemisphere began investigations of their own. Perfectly understandable, since the conspiracy affected their consumers as well as ours. Only Canada has so far been able to impose follow-on fines; all the others are struggling with a basic and crucial question: how to get evidence that their judges will accept when all of the operative events took place outside their countries.

Proving that parties are guilty of prior bad acts, or that their future plans will have anticompetitive consequences, is not enough. There must be a remedy and the agency or its courts must have the power to enforce it. Fines and orders to cease or divest are the most common remedies in antitrust enforcement. If the actors and their assets are within the jurisdiction, there is relatively little problem. But if they are not, the power to impose the remedy can scarcely be said to exist. Few if any countries will enforce another country's antitrust judgments, and few defendants will cooperate if there is no prospect of compulsion. All of the examples I mentioned earlier were settled by "voluntary" consent orders or undertakings, but parties are only willing to sign such arrangements if they believe that the agency's threat of litigation is real and that they are likely to lose if they go to court. Very few of the agencies in the world have been in business long enough to establish the sort of track record that makes such a threat meaningful.

Whenever an attempt to protect domestic markets and consumers from outside harm has an extraterritorial dimension, it is likely to encounter one or more of these practical problems: opposition by a foreign government, discovery tools that are inadequate or cannot be used effectively, and
unsatisfactory remedies when actors or assets are outside the jurisdiction. As long as we accept that it is important to protect domestic markets, we must consider what steps can be taken to reduce if not eliminate these obstacles. What hope is there for the future?

It has been quite the rage in recent years to talk of "harmonization," with the expectation that the closer antitrust laws are in text and interpretation, the fewer problems there will be internationally. Certainly, some degree of harmony is both natural and inevitable. At the time of the IATA proceeding, most of the governments that opposed it did not have antitrust laws. In the intervening years, more than 50 countries have passed new statutes or reinvigorated moribund regimes. All the new laws have taken advantage, in varying degrees, of those that preceded them. Many of the new laws, perhaps even a majority, have the effects test as an explicit provision. That does not mean, of course, that they would all support a new IATA case, but they would likely be more sympathetic to the purposes of such an undertaking, and perhaps more appreciative of the fact that the elimination of a worldwide cartel, like the vitamin conspiracy, can benefit their consumers as well as those of the acting state.

However, even if all competition laws were textually identical and enforced with lock-step precision, there would still remain the problems of absent evidence, absent actors and absent assets. Since it is not usually the antitrust agencies that complain the loudest about extraterritorial enforcement, but rather the foreign affairs ministry, or the legislature, or the president, uniform laws would not guarantee a unanimous agreement that some other law should be enforced against a national company. To overcome these problems, there have been proposals from time to time over the last fifty years for some form of global solution: either one law with an enforcement agency, or a dispute resolution mechanism that would resolve conflicting exercises of jurisdiction. Even with the assistance of the WTO, it seems unlikely that any significant progress will be made in the near future.

Some positive steps have been taken, but they have been more modest: rather than multi- or pluri-lateral, they have been bilateral. There are now a large handful of cooperation agreements between enforcement agencies and they can make some contribution to the gathering and sharing of evidence, although they are always limited by the provisions on confidentiality that constrain the actions of all agencies. All of the US agreements since our 1984 Memorandum of Understanding with Canada have incorporated the balancing factors that I discussed earlier and each side has undertaken to consider them before taking an action that might affect the interests of the other party.

The newer US agreements have added a provision that is now known as "positive comity," while the former has been dubbed "negative comity." Positive comity allows one country's competition officials to request that the other country's authorities investigate suspected anticompetitive activities occurring in whole or in part in the latter's territory. Such requests may be made when the requesting country believes that its interests are adversely affected and that the activities are illegal under the laws of the country where help is sought. A positive comity referral essentially gives the responsibility of investigating and prosecuting to those officials in the best position to eliminate the offending practice. The asking country does not,
however, relinquish the right to act if the other country is unwilling or unable to do so. The positive prospect of greater efficiency is an obvious attraction, but the amelioration of concerns about possible extraterritorial behavior by the asking country is also a benefit. There has been only one formal invocation of a positive comity provision — DOJ referred a case to the EC several years ago — but the existence of the provisions has triggered informal discussions when the proper circumstances seemed to be present.

In 1994 Congress passed the International Antitrust Enforcement Assistance Act which authorized the FTC and DOJ to enter into a new generation of what we call "hard" agreements. Under such an agreement we can share confidential information with the foreign partner and we can use subpoenas and CID's to gather evidence for use in their antitrust cases. Before we can sign such an agreement we must be certain that the other country has competition and confidentiality laws that are similar to ours, that permit them to sign an agreement, and that provide comparable protection to information that we provide.

While the ability to share confidential information can have obvious benefits, in the future a greater contribution to enhanced international enforcement may well come from the power to use investigative resources. The friction that can arise from extraterritorial discovery will largely disappear, countries with more limited investigational resources may be able to increase dramatically their ability to gather evidence, and the chances that investigations will be aborted or cases lost due to the unavailability of evidence will be reduced. To date we have only signed an IAEAA agreement with Australia, and there are very few other countries that have domestic legislation that would make it possible for their agencies to negotiate with us. Full exploitation of this potential can only come when more jurisdictions appreciate that cooperative enforcement is in everyone's best interest.

The last form of bilateral arrangement that I will mention is Mutual Legal Assistance Treaties. The US has signed a number of MLAT's and a few, most notably the one with Canada, apply to criminal antitrust cases. Each party can ask the other to use its compulsory powers to produce witnesses and evidence, and in one case we persuaded Canada to extradite an antitrust defendant. Since the FTC does not have criminal jurisdiction, that means that only DOJ can make use of the current treaties, but there is at least a possibility that civil MLAT's will be negotiated in the future.

With over 80 antitrust laws now on the books, and more than 20 in prospect, the process of creating a global spider web of bilaterals is painful to contemplate and it is impossible to predict the successful completion of such a task within any imaginable time frame. Today, the US has cooperation agreements with Germany, Australia, Canada, the EC, Japan, Israel and Brazil; a supplemental agreement on positive comity with the EC; and an IAEAA agreement with Australia. Other jurisdictions have fewer bilaterals and progress in this direction is likely to be slow.

At this point it is worth a brief mention of the Free Trade Area of the Americas. (Before I do so, I should remind you of the admonition with which I began, and assure you, or reassure you, that nothing I say should be interpreted as representing the negotiating position of the US Government or any of its constituent parts.) As I am sure you are all aware, 34 countries are
now in the process of negotiating a treaty designed to bring an open trading regime to the hemisphere. Whether such a treaty will ever come into force is far from clear, but if it does, competition policy may well be one of the areas included. The Negotiating Group on Competition Policy has been meeting in Miami since the end of 1998 and has been charged, like all the other groups, to produce a bracketed text by the end of this year. When Canada, Mexico and the US negotiated the North America Free Trade Agreement, they also dealt with competition issues. It is possible, but far from certain, that NAFTA will serve in some fashion as a model, so it might be instructive to consider its Chapter 15. That section does not create a unitary antitrust regime, nor does it solve any issues of extraterritoriality, but it does require each party to have and enforce an antitrust law, and calls upon the enforcement agencies to cooperate with each other.

Since only 12 countries in the hemisphere now have laws, and since the sub-regional regimes – Mercosur, the Andean Community and Caricom – are not fully operative, it will be a large task even to get to the stage where the NAFTA principles can be applied. If it were possible to reach that plateau by the time of signing (scheduled for 2005) or soon thereafter, there is at least a chance that the FTAA could go further. A unitary antitrust code, or even harmonized laws, are not within the realm of my contemplation, but it is conceivable that the treaty could take a gentler step and provide a framework for cooperation and coordination that might approach at least the level the US has achieved in its bilaterals. Any arrangements that approximated our IAEAA agreement with Australia would require 33 countries to amend their laws; to date, only Canada has expressed an intention to do so. And even then, the fledgling agencies, and those unborn, would have to establish a track record of effective performance.

This is not a wildly optimistic note on which to conclude, but at least it gives everyone something to work on during the next 100 years or so.