TRANSNATIONAL JOINT VENTURES AND GOVERNMENT ENFORCEMENT GUIDELINES

Presentation by

James R. Atwood
Covington & Burling
Washington, D.C.

to the

FEDERAL TRADE COMMISSION
Joint Venture Project

June 2, 1997

The antitrust treatment of joint ventures has been the subject of exhaustive analysis and a voluminous literature,[1/] not to mention dozens of significant Commission and judicial decisions.[2/] The desire for more clarity in the legal rules in this area, and the challenges presented by efforts to achieve such clarity, were well summarized in last year's Staff Report from the Commission's high-tech, global competition project.[3/] Even more recent evidence is the list of topics and questions in the Commission's notice for these

---

[1/] Among the more significant studies have been Robert Pitofsky, "A Framework for Antitrust Analysis of Joint Ventures," 74 Geo. L.J. 1605 (1986); Joseph F. Brodley, "Joint Ventures and Antitrust Policy," 95 Harv. L. Rev. 1523 (1982). My own work includes 2 James R. Atwood & Kingman Brewster, Antitrust and American Business Abroad §§ 12.23 to 12.48 (2d ed. 1981); Atwood, "International Joint Ventures and the U.S. Antitrust Laws," 10 Akron L. Rev. 609 (1977).

[2/] E.g., NCAA v. Board of Regents, 468 U.S. 85 (1984); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); Associated Press v. United States, 326 U.S. 1 (1945); Chicago Board of Trade v. United States, 246 U.S. 231 (1918); Brunswick Corp., 94 F.T.C. 1174 (1979), aff'd as modified sub nom. Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Imperial Chem. Indus, Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), modified, 105 F. Supp. 215 (S.D.N.Y. 1952); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950); General Motors Corp., 103 F.T.C. 374 (1984) (GM/Toyota consent order), reopened and set aside, 116 F.T.C. 1276 (1993).

[3/] Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace, vol. 1, ch. 10 (FTC Staff Rep. May 1996).

hearings[4]; it is illustrative of the intimidating number of issues that joint ventures and other forms of competitor collaboration can present.

The subject -- in short -- is huge, and thus one challenge I have faced in preparing for this session is to identify an appropriate sub-topic -- one that is small enough to be manageable for discussion in this setting and yet still of enough general interest to offer hope of broader utility as the Commission embarks upon its ambitious Joint Venture Product.

The specific topic that I propose to address is the transnational joint venture, and in particular the transnational venture that involves collaboration by one or more U.S. firms with one or more non-U.S. firms and that has at least some substantial offshore investment by the U.S. participant(s).[5] Even this is a broad topic, embracing a large number of different types of collaborations. Moreover, it is a topic with inherent classification problems in today's

---

[4] 62 Fed. Reg. 22945 (1997).

[5] I am assuming that the foreign participant(s) are not presently significant competitors in the U.S. market -- either by direct investment or imports -- with the U.S. venture participant(s). An existing horizontal competitive overlap in the U.S. market would, of course, raise additional antitrust questions.

international and technology-rich economy. That is because today the nationality or even principal situs of a business enterprise may be very unclear. And -- with modern technology, communications, and capital flows being what they are -- even the location of an investment may be a subject for debate.

Nevertheless, one must start somewhere, and joint ventures that transcend national borders and that include the export of capital have been and continue to be an important feature of our economy. The business reasons for such ventures can mirror those of intra-U.S. ventures, but they will often include other objectives that are particular to the transnational feature of the venture: most commonly, gaining access to a foreign market, foreign productive resources, or foreign raw materials for which local participation is a necessity. This could be because of foreign legal requirements, political or cultural necessities, or the enhanced business risks of trying to enter a foreign market without a local participant.[6/] U.S. antitrust rules that operated to

---

[6/] For catalogs of such business justifications, see, e.g., FTC Staff Report, supra note 3, ch. 10 p. 3; U.S. Dep't of Justice, Antitrust Enforcement Guidelines for International Operations § 3.4 (1988) (hereinafter "1988 International

(continued...)

discourage the joint-venture approach in such situations and to limit the options for a U.S. firm to a de novo, green-field type entry into a foreign setting could delay or discourage U.S. firms from entering the international economy, and cause a higher rate of failures for those that make that plunge on a unilateral basis.

Some degree of simplicity and clarity in the legal rules applicable to such ventures is therefore desirable. I appreciate, of course, that no short list of legal considerations will ever suffice completely; the range of possible fact situations is too varied, and thus inevitably a careful case-by-case analysis of facts and law will be necessary. But I think there is one key principle, and two secondary ones, that should guide the agencies in their examination of such ventures. Even if this short list cannot answer all questions and anticipate all situations, I believe it will provide significant guidance in a very large number of cases. If this is so, the items on the list serve as a useful starting point for agency guidelines that will be beneficial to the business community. So, let me identify those three principles, and

---

[6/](...continued)
Guidelines"); Atwood & Brewster, supra note 1, § 12.24.

then I will close by offering a few narrower, more specific suggestions for possible agency guidelines on the subject of international joint ventures.

A. Three Principles for Analysis

1. The key issue: possible entrenchment of a dominant U.S. market position.

The principal, overriding issue for a transnational venture of the sort I have described should be whether the joint venture allows a dominant or near-dominant competitor in the U.S. market to enhance or solidify that U.S. market position. If the answer to this question is yes, the proponents of the venture should have a substantial burden of explaining why the venture should be allowed to go forward. If, however, the answer is no, concerns under U.S. law are likely to be present only in unusual situations, or alternatively any remaining such concerns can probably be addressed by prophylactic steps that do not go to the heart of the venture.

The reason why this issue -- the enhancement of a dominant U.S. market position -- is so important will be obvious to this audience. Our antitrust laws are intended principally to protect the competitive health of those markets

serving U.S. consumers.[7/] We have an extraordinarily diverse and competitive economy, but inevitably situations of market dominance and unhealthy competitive conditions will arise from time to time. Given the dynamic nature of our economy, these situations are likely to be transitory, because noncompetitive sectors of the economy where supracompetitive profits can be earned will naturally attract new entrants. But some transitions will be longer than others, and our antitrust rules should try to shorten the transition period by limiting the ability of entrenched firms to bar new entry.

Not infrequently, a likely source of a competitive challenge to an entrenched U.S. market position will come from offshore firms, either in the form of imports or direct entry. And, a dominant U.S. firm will appreciate this risk, and may try to use a transactional joint venture or other form of collaborative arrangement to forestall the foreign competition. There are many examples in the antitrust casebooks of

---

[7/] In the specific context of merger analysis, the FTC Staff Report agreed with many witnesses that "the critical focus should be the impact of the transaction on U.S. consumers." Report, supra note 3, ch. 4 p. 19. This principle holds in the other areas of antitrust analysis as well. See, e.g., U.S. Dep't of Justice, Antitrust Division, Antitrust Guide for International Operations 5 (1977) (hereinafter "1977 International Guide"); Atwood & Brewster, supra note 1, at § 18.05.

such efforts. ICI/DuPont in the immediate post-war era was one, where by joint agreements and otherwise a dominant American and British firm sought to divide world markets and protect their home territories.[8/] A less dramatic but still telling example is Everest & Jennings in the early 1970s, where the government charged that the dominant U.S.-supplier of wheelchairs engaged in a strategic pattern of foreign joint ventures, signing collaboration agreements with off-shore manufacturers as they began to look like serious potential entrants into the United States.[9/]

Another example, well known to the Commission, is Brunswick/Yamaha,[10/] where the focus of the Commission's (and the court of appeals') concern that a U.S./Japanese joint venture for the manufacturing and marketing of outboard motors would help perpetuate unhealthy competitive conditions in the

---

[8/] United States v. Imperial Chem. Indus, Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), modified, 105 F. Supp. 215 (S.D.N.Y. 1952).

[9/] See United States v. Everest & Jennings Int'l, 1979-1 Trade Cas. ¶ 62,508 (C.D. Cal. 1979) (consent decree).

[10/] Brunswick Corp., 94 F.T.C. 1174 (1979), aff'd as modified sub nom. Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982).

U.S. market. The American market was highly concentrated,[11] and Brunswick, with a 20% to 25% share, was the second largest seller.[12] Entry barriers were high, and the number of firms in the United States was declining, even though sales and profits were increasing.[13] Yamaha was one of a very few number of likely potential entrants, and the joint venture would have insulated the United States from that competition for a period of ten years or longer. Moreover, the venture seemed to involve principally the reallocation and rationalization of existing production facilities,[14] without construction of any new facilities that would increase supply and thus have -- at least presumptively -- a pro-competitive effect in the United States.[15] So, the venture was challenged, and the Commission's ruling of illegality was sustained by the courts.

A final example, while not precisely within the category on which I am focusing here because it involved a joint venture investment in the United States and not abroad,

---

[11] The top four firms had 98.6% of sales revenue, and the top two had 85.0%. 94 F.T.C. at 1256.

[12] Id. at 1262.

[13] Id. at 1256.

[14] See Brunswick, 94 F.T.C. at 1266.

[15] See Pitofsky, supra note 1, 74 Geo. L.J. at 1619.

is GM/Toyota.[16] Because General Motors was seen as a dominant domestic firm when the venture was formed in the early 1980s, the Commission imposed significant constraints on its operations. But with deconcentration of the U.S. automobile industry over the following decade, all constraints on the venture were lifted in 1993.

If I have correctly identified the principal issue for antitrust analysis of transnational ventures -- the question of possible entrenchment of a dominant U.S. market position by the U.S. partner[17] -- it follows that the number of such ventures likely to be worrisome under this criterion will be small. The analysis that would apply is roughly the same as in a domestic potential competition merger case, and the conditions for a credible § 7 challenge under that theory arise in only limited circumstances: The current market conditions must be highly concentrated, the number of possible potential entrants must be very small, the potential entrant to be affected by the transaction must be a likely independent entrant in the near term, and that independent entry must be

---

[16] General Motors Corp., 103 F.T.C. 374 (1984) (consent order), reopened and set aside, 116 F.T.C. 1276 (1993).

[17] Or, partners, in the case of a venture with more than one use parents.

expected to have a significantly greater procompetitive impact as compared to the merger/venture alternative.[18/] Experience has shown that only infrequently are these conditions all present at the same time.

One might argue that the risk of loss of even a moderate level of potential foreign competition should require the venture's proponents to show some efficiencies or procompetitive benefits as part of a balancing test. But this is not required in the merger area unless the relatively high requirements for a potential-competition challenge are first made out. Nor should it be required for the type of transnational joint venture that I describe. After all, joint ventures typically receive rule-of-reason rather than per se analysis because they are seen as likely to generate some efficiencies as a result of partial integration of the business activities of the venture's parents.[19/] It is true that

---

[18/] See, e.g., 5 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 1116b (1980). See also, e.g., United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); Tenneco, Inc. v. FTC, 689 F.2d 346 (2d Cir. 1982); B.A.T. Indus., 104 F.T.C. 852 (1984); Brunswick, 94 F.T.C. at 1271 ("the potential competition doctrine has meaning only as applied to concentrated markets").

[19/] See, e.g., Mary L. Azcuenaga, "Integrated Joint Ventures" p. 2 (Remarks before the ABA Antitrust Section and Section of Business Law, Chicago, Ill., Aug. 7, 1996) ("It is the effi-

(continued...)

the likelihood and magnitude of such efficiencies may be harder to prove in the joint venture vs. merger context. This is because, generally speaking, "higher levels of integration are likely to be associated with more substantial efficiencies,"[20/] and a joint venture between two entities may well involve less integration than an out-right merger. Nevertheless, even modest levels of integration can create substantial efficiencies, depending on particular market circumstances.[21/] So, a requirement of an a priori assessment of efficiencies would involve a fair degree of guesswork and put at risk what may be inherently speculative but nonetheless legitimate business objectives of the venture's proponents. Absent a serious risk that the venture will cause entrenchment of a dominant U.S. market position, such an exercise does not appear to be worth the effort or the risk of an erroneous decision.

2. Essentially "naked" import restraints.

[19/](...continued)
ciency enhancing potential of joint ventures that justifies their treatment under the rule of reason, and looking at the nature of the efficiency may clarify whether the joint venture is sufficiently integrated.").

[20/] Pitofsky, supra note 1, 74 Geo. L.J. at 1623.

[21/] See Azcuenaga, supra note 18.

A possible area of secondary antitrust concern is that the venture might impose unreasonable ancillary restraints on the ability of the foreign partner(s) to compete in the United States with respect to non-venture activities. This describes the situation where the ancillary restraints on the foreign party do not bear a reasonable relationship to the needs of the collaborative effort. If such arrangements cannot be related to legitimate joint-venture objectives, they are effectively "naked" and ought to be prohibited. But if there is some credible business justification associated with the success of the venture, there should be a high level of deference by antitrust agencies and courts. This is because (since I assume the venture has crossed hurdle (1) above) any affected U.S. market is either not concentrated or is readily suspectable to competitive entry by others. The U.S. antitrust concern should thus be relatively low, and we should avoid over-enforcement of antitrust norms that could impair legitimate business objectives.

Note that I have not included as a concern ancillary restraints on the U.S. partner(s) that limit their export potential. If the U.S. party voluntarily agrees to such restraints as being in its best business interests, that

agreement is comparable in terms of its antitrust relevance (or irrelevance) to a voluntary agreement among U.S. exporters to divide foreign markets among themselves. Such agreements are lawful under U.S. law under the Webb-Pomerene Act,[22/] the Export Trading Company Act,[23/] the Foreign Trade Antitrust Improvements Act of 1982,[24/] and -- I would argue -- even under the original, unamended Sherman and FTC Acts, absent anticompetitive spillover effects within U.S. markets.[25/] So, the concern of U.S. law should be to identify restraints that are supposedly ancillary but that are in fact essentially naked restraints on the foreign party's import commerce. Such restraints should be easy for the venture proponents to avoid and for the enforcement agencies to excise if found to exist.

I also exclude from this secondary principle of possible antitrust concern restraints on the venture's deal-

---

[22/] 15 U.S.C. §§ 61-65.

[23/] 15 U.S.C. §§ 4001-21.

[24/] 15 U.S.C. § 6a.

[25/] See 1977 Antitrust Guide at 7; Atwood & Brewster, supra note 1, at §§ 9.14 & 18.05. The 1982 Foreign Trade Antitrust Improvements Act, which puts voluntary export agreements generally outside the scope of the Sherman and FTC Acts, is usually read as simply clarifying prior law. E.g., U.S. Dep't of Justice & FTC, Antitrust Enforcement Guidelines for International Operations § 2.7 (Apr. 1995) (hereinafter "1995 International Guidelines"); H.R. Rep. 97-686, at 14 (1982).

ings in the U.S. market in competition the U.S. parent(s). That is, if the basic structure of the venture passes the first hurdle above because it is not like to entrench a dominant U.S. market position, U.S. antitrust law should be wary of prohibiting restraints on the venture's conduct in the U.S. market. A contrary rule would serve to discourage the foreign investment by the U.S. party, with little or no countervailing competitive interest being served. Indeed, where the U.S. parent is in a position as a matter of corporate-law principles to control the operations of the foreign affiliate, such restraints should be regarded as internal corporate matters and not as "agreements" subject to Sherman Act § 1 challenge. I urge that the enforcement agencies restore the guidance that the Department of Justice had previously given on this subject in both the 1977 International Guide (pp. 12-13) and 1988 International Guidelines (Case 9).[26/]

[26/] Thus, I endorse the same suggestion made during the 1995 policy hearings. See Staff Report ch. 10 p. 8 n.39 (citing testimony of Benjamin W. Heineman, Jr., senior vice president and general counsel of General Electric Co.). See also 7 Phillip E. Areeda, Antitrust Law ¶ 1467g (1986) (urging a presumption against applying § 1 theories to relations between a parent and its controlled affiliate); Stephen Calkins, "Copperweld in the Courts," 63 Antitrust L.J. 345, 353 (1995)

(continued...)

3. Foreclosure of competitive exports.

Another potential U.S. antitrust concern could arise if the joint venture were able to impair unreasonably the export opportunities of competitive U.S. businesses. This is, without doubt, a relevant issue for purposes of U.S. antitrust enforcement.[27/] There would be legitimate concern, for example, if the joint venture or its parents were in a position to deny U.S. competitors access to important foreign markets. The MCI/British Telcom and Sprint/Deutsche Telekom/France Télécom ventures raised this problem, at least in the eyes of the Justice Department, and consent decrees were the result.[28/]

However, I believe that this concern properly falls in my "secondary" category because it is unlikely to create a serious competitive problem in a significant number of cases. This is for two reasons. First, except where foreign markets are subject to regulatory or natural-monopoly constraints

---

[26/](...continued)
(same).

[27/] See, e.g., 15 U.S.C. § 6a(1)(B) (U.S. antitrust jurisdiction extends to conduct having an adverse effect on "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States"); 1995 International Guidelines § 3.122.

[28/] United States v. MCI Communications Corp., 1994-2 Trade Cas. ¶ 70,730 (D.D.C. 1994); United States v. Sprint Corp., 1996-1 Trade Cas. ¶ 71,300 (D.D.C. 1996).

(such as in telcom markets), private parties will rarely be in a position as a practical matter to lock-up a significant foreign market. Second, in the area of export restraints, I submit that the U.S. courts and agencies should adopt broad rather than narrow geographic market definitions. With export markets defined in a broad manner, it follows that conduct that allegedly forecloses a particular foreign market may be of minor concern.

Let me elaborate on the market-definition point. In domestic commerce, restraints of trade and monopolizing conduct are questioned in part because they result in injury to particular buyers or seller. But in U.S. export commerce, the most pertinent United States antitrust concern should be with the competitive health of firms exporting from the United States and not with the foreign consumers or other entities with whom they are dealing. This suggests that the foreclosure impact of an arrangement should usually be measured not by a particular foreign national market but in terms of the full range of markets open to the American firms engaged in the trade. Co-option of a single national market by a particular exporter may or may not result in higher prices for consumers in that country, but any such impact abroad is a

matter for foreign antitrust authorities and not for the U.S. agencies.[29/]

The dangers of too narrow a market definition are clear. Many business arrangements that will enhance an individual firm's exports -- including transnational joint ventures -- may involve exclusive features such as assigned marketing territories or exclusive licensing rights. If each of the many national markets of the world were treated as a separate geographic market for purposes of Sherman or FTC Act analysis, the exporter might be deterred from such arrangements, even if it were evident that the result of the arrangement would have been to increase its exports while leaving ample business opportunities for its export competitors.[30/] So, U.S. law should take a broad geographic view when assessing restraints on our export trade, leaving it to foreign antitrust authorities to focus on any concern that conditions for consumers in their own local markets are being adversely affected.

[29/] E.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies.").

[30/] See generally Atwood & Brewster, supra note 1, at § 7.24.

B. Some Specific Suggestions for Guidelines

I will close with a few more specific points that might be useful for the agencies in their consideration of developing enforcement guidelines.

1. The utility of joint venture guidelines.

One threshold question is whether joint venture guidelines would be of sufficient utility to justify the effort that would be involved. I believe the answer is yes. As a practitioner in this area for some years, I can personally attest to the frequent use that I and my colleagues made (and still make) of the joint venture discussions contained in the Justice Departments 1977 International Guide and 1988 International Guidelines. While understandable, it is unfortunate that the superseding 1995 International Guidelines contain no comparable substantial analysis of common joint venture scenarios. The Health Care Guidelines are, of course, of some utility, and certainly so in the Health Care field, but for obvious reasons their usefulness for analyzing a wider range of joint ventures -- and in particular international ventures -- is limited.

2. The NCPRA

The single-damage protections of the NCPRA are limited to production joint ventures whose principal facilities for production are located in the United States. 15 U.S.C. § 4306(1). This limitation is unfortunate, for it leaves certain types of legitimate transnational joint ventures subject to harsher antitrust sanctions than those that apply to comparable domestic ventures. Indeed, it is ironic that foreign-based ventures may face harsher sanctions under U.S. law than domestic ventures, even though -- everything else being equal -- the latter are more likely to raise substantive concerns under U.S. law. Also, this limitation on the availability of protection from treble damages raises non-frivolous questions about nationalistic discrimination and compliance with U.S. treaty obligations.

Assuming, however, that a legislative change is not possible at this time, the agencies could usefully address interpretive questions under this clause. For example, is the requirement that "the principal facilities" of a venture be in United States to mean that all principal facilities be so located, or only (for example) that a majority of the facilities be in the United States? I encourage the agencies to

give this provision a construction that will allow an expansive, rather than a limited, scope to the NCPRA as a whole.

A second set of interpretation questions is raised by the NCPRA's requirement that "each person who controls any party to such venture (including such party itself) is a United States person, or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint venture production." 15 U.S.C. § 4306(2). The 1995 International Guidelines simply quote this rather awkward language, without comment (§ 2.5).

As the Commission is no doubt aware, this provision was very controversial in the legislative process, and -- in an effort to respond to claims of unlawful discrimination under international law -- the House and Senate committee reports state that, because "law" for this purpose should be interpreted to include treaties, "a country that is a party to an international agreement with the United States that provides for national treatment satisfies the requirements of section [4306(2)]."[31/] The enforcement agencies presumably

---

[31/] H. Rep. No. 103-94, at 20 (1993); S. Rep. No. 103-51, at 12 (1993).

agree that this legislative history is authoritative, and if so the discussion should be incorporated in any new guidelines.

3. Single enterprise conspiracies.

Finally, as already noted in my more general remarks, I encourage the agencies to re-adopt the position of the 1977 and 1988 Guidelines that effective working control of a corporate affiliate -- as is often the case in joint venture situations -- will be regarded by the Government as satisfying the single-enterprise analysis under the Copperweld line of cases, and thus avoid any argument that the omission of this point in the 1995 International Guidelines reflected a change in the agencies' long-standing position on this issue.

* * * *

I would be pleased to respond to any questions that the Commissioners or staff might have.