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"International Mergers and Joint Ventures: A Federal Trade Commission Perspective"

An Article by

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INTERNATIONAL MERGERS AND JOINT VENTURES: A FEDERAL TRADE COMMISSION PERSPECTIVE

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Since the occasion of last year's Fordham Corporate Law Institute, unpredictable and almost unbelievable political developments have taken place. These changes have occurred at a dizzying pace,[2] and have raised the prospect of economic, structural upheaval. In Europe, the hope is that upheaval will result in renewal. However, even the most optimistic experts have had to realize that it was one thing to dismantle the Berlin Wall physically, but quite another to remove the barriers that have frustrated economic development and, thus, efficient production and distribution of needed goods and services to the people constrained by those barriers.

This year's Institute gathers at a most opportune time, and its subject -- international mergers and joint ventures -- focuses on a matter of grave import to consumers, the business community,

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[2] To illustrate the degree to which these events were unexpected, as late as November 12, 1989, the Washington Post, in its Outlook section, published an article by the noted former State Department official George F. Kennan entitled: "This is No Time to Talk about German Reunification."

and government agencies alike. This article attempts to place the responsibilities of our own agency, the Federal Trade Commission, along with those of our counterparts at home and around the globe, in the context of startling international events. We discuss the need for clarity and public dissemination of government enforcement policies as a foundation for urgent international cooperation in the enforcement of competition policy. The FTC's recent action in the Institut Merieux case is discussed as a prototype of the obstacles presented in international merger enforcement, and as the latest chapter in the continuing debate over comity between sovereigns, and the appropriate roles of the executive and judicial branches of government in this area. Other recent actions of the Commission are also highlighted in connection with various aspects of international merger enforcement. Finally, we focus on joint ventures, or "strategic alliances", in the context of the Commission's action in the NSG/Pilkington case, and the differing characterizations of such arrangements as either "cartel-like" or "efficient." We close with some observations on information-gathering in international merger cases, with a call for more cooperation from the business community.

I. Maintaining Principles of Competition in a Time of Economic Upheaval

The euphoria over the breath-taking political events in Europe during this last year has been tempered by our awareness of the magnitude of the economic problems to be overcome. The haste to foster new opportunities for investment there has presented officials at competition authorities around the world with new challenges to the principles of competition that they are sworn to uphold. For example, Wolfgang Kartte, President of the Bundeskartellamt, faces the concern that some former East German state monopolies may be replaced by private ones.[3] Meanwhile, various representatives of the Federal Trade Commission and the Department of Justice have consulted with their counterparts on the technical aspects of competition policy in Poland, Czechoslovakia, and Hungary.[4] Poignant questions have been posed to our antitrust "ambassadors" about how to foster competition in economies that have both discouraged it, and been isolated from it, for forty years or more. Meanwhile, here in the United States, some urge certain exceptions to the antitrust laws in the interest of making American firms more competitive in global trade. Essentially, the question posed in each case is this: Can the world "afford" competition at a time when other needs -- investment, jobs, or even basic goods and services -- appear to be so compelling?

Competition -- that is, competition protected by enforcement policies grounded in sound, practical, and fairly applied economic principles -- will meet those needs. It is the obligation of

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[3] See "Carrying the Flame of the Free Market," Financial Times, Aug. 13, 1990, at 28.

[4] See, e.g., "Division, FTC Officials Meet in Poland to Advise on Development of Open Market," Antitrust & Trade Reg. Rep. (BNA) No. 1484, at 468 (Sept. 27, 1990).

enforcement authorities to ensure that the principles applied are, in fact, sound and that they are indeed fairly applied. Nevertheless, reasonable, intelligent, and well-informed people can differ over exactly what those principles should be, and how they should be implemented. Certainly, some of the divided votes on the Federal Trade Commission, for instance, demonstrate how there can legitimately be such differences.[5] Furthermore, competition policy is but one part of a sovereign nation's overall economic and foreign policies; thus, due to internal constraints, enforcement authorities of different nations may view the same transaction differently. Accordingly, another obligation of competition authorities is to state publicly, and as clearly as possible, the principles and factors on which each decision is based.[6]

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[5] The divergences are further illustrated from time to time within the United States between the two Federal enforcement authorities, and between the Federal and State competition authorities. Compare, e.g., Brief for the United States as Amicus Curiae Supporting Respondent, with Brief for Petitioners, Kansas and Missouri v. Utilicorp United, Inc., 110 S.Ct. 2807; 58 U.S.L.W. 4898, 1990-1 Trade Cas. (CCH) ¶ 69,064 (1990).

[6] For further discussion of the need for greater explanation of, and clarity in, the decisions of competition authorities in an international context, see Remarks of Commissioner Deborah K. Owen before the Antitrust Law Section of the State Bar of Michigan (April 26, 1990) (hereinafter "Owen Michigan Bar Speech") at 3-6. The exhortation in this regard is certainly "nothing new under the sun." See, e.g., "Antitrust in the Sunshine", Remarks by Donald I. Baker, Assistant Attorney General, Antitrust Division, before the New York State Bar Association Antitrust Law Section (January 26, 1977) at 1-5, 15-22 (commenting on issuance of the 1977 Justice Department International Antitrust Guidelines).

II. The Need for International Cooperation in Enforcement of Competition Policy

A. New FTC Directions

A considerable number of transactions -- mergers, acquisitions, and joint ventures -- examined by the Federal Trade Commission during any given year involve foreign firms. During this past year, several transactions illustrated the changes transpiring in the world economy; two such cases deserve particular note.[7] One was unusual in that it was an acquisition involving two foreign firms, which posed a question of prosecutorial discretion based upon considerations of international comity. The other was more typical, a joint venture involving foreign firms, which raised issues of actual potential competition and ancillary restraints. The first case is important because it highlights a continuing conflict in U.S. jurisprudence. The more typical case is noteworthy because of widely-varying perceptions of the potential anticompetitive nature (or, on the other hand, efficiencies) of joint ventures, referred to in some circles as "strategic alliances".

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[7] Outside of the merger context, the Commission has undertaken other investigations with foreign implications. One such investigation involves the so-called "Keiretsu" system. See Prepared Statement of Chairman Janet Steiger before the Comm. on the Judiciary of the U.S. House of Representatives (May 3, 1990) and Prepared Statement of Kevin J. Arquit, Director, Bureau of Competition, before the Consumer Subcomm. of the Senate Comm. on Commerce, Science and Transportation (July 19, 1990) (hereinafter "Arquit Senate Testimony"). The results of this investigation will be reported to Congress pursuant to section 6(h) of the Federal Trade Commission Act, 15 U.S.C. 46(h).

Review of these cases is timely and important since, over the past year, the media has reported that, with Janet Steiger as Chairman of the FTC and James Rill as chief of the Justice Department's Antitrust Division, the "antitrust cops are back on the beat."[8] What that statement implies about the past may not be completely fair,[9] and may at least in part result from a lack of clarity emanating from the antitrust agencies about their enforcement decisions.[10] Nonetheless, Chairman Steiger's publicly stated desire to enhance the Commission's scrutiny of, and vigilance with respect to mergers "at the margin",[11] in particular those involving high concentration and high barriers to entry, has, in the authors' judgment, been fulfilled during the last year.

B. The Institut Merieux Case

This so-called "margin", in appropriate merger cases, may certainly include anticompetitive conduct that occurs outside the

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[8] See, e.g., Psst! The Trustbusters are Back in Town, Business Week, June 25, 1990, at 64; Moore, Stoking the FTC, Nat'l J., May 19, 1990, at 1271-21; Assistant Attorney General Rill Sends Message To Firms as He Strives to Intensify Antitrust Effort, Wall Street J., June 13, 1990, at A16.

[9] See, e.g., "Merger Enforcement in the 1990's: A Change in Fashion?", Remarks by Commissioner Mary L. Azcuenaga before the Practising Law Institute Advanced Antitrust Seminar, San Francisco, Calif. (January 12, 1990).

[10] See "What We May Have Here is a Failure to Communicate," Remarks by Commissioner Deborah K. Owen before the 26th Annual Symposium of the Trade Association and Antitrust Law Committee of the Bar Association of the District of Columbia (Feb. 27, 1990); and Owen Michigan Bar Speech, supra note 5, at 3-6.

[11] "Agenda for the Federal Trade Commission," Remarks of Chairman Janet Steiger before the 23rd New England Antitrust Conference, Cambridge, Mass. (Nov. 3, 1989) at 4-5.

boundaries of the United States, but affects a U.S. market. One problem that the Commission faces in the event of such a finding is fashioning an appropriate and effective remedy; that problem is compounded where achievement of the remedy requires cooperation between a foreign government and ourselves. The Commission faced that very dilemma in a case involving the acquisition of Connaught BioSciences ("Connaught"), a Canadian firm, by the France-based Institut Merieux, S.A. ("Institut Merieux"), a subsidiary of Rhone-Poulenc, S.A. ("Rhone-Poulenc").[12] These two firms were obliged to notice the transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[13] and both maintained some assets in the United States. While any significant assets involved were not directly relevant to the anticompetitive effects of the merger in the United States, the Commission nonetheless accepted a consent agreement and issued an order in this case.

Institut Merieux illustrates some general, and seemingly contrary, factors that affect Commission activities. One factor is a practical limit on the Commission's authority, posed by jurisdictional or comity considerations. Another factor is the willingness of parties to transactions arguably outside the Commission's reach to seek to accommodate the Commission's concerns, by way of a consent agreement, in order to ease their

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[12] Institut Merieux, S.A., No. 891-0098, 55 Fed. Reg. 1614 (Jan. 17, 1990).

[13] 15 U.S.C. 18a.

way into a U.S. market. Both factors can influence the exercise of prosecutorial discretion in appropriate cases, and a Commission decision whether to accept a consent agreement and order, or take any other enforcement action.

The facts of the case were as follows: Institut Merieux, the acquiring party, is based in Lyon, France. It is a subsidiary of Rhone-Poulenc, which is principally owned by the French Government. Institut Merieux is the only firm that sells rabies vaccine nationwide in the United States; it maintains a small sales staff and warehouse facility in Florida, but does not manufacture rabies vaccine in the United States. Connaught is a Canadian firm which is the only producer and seller of inactivated polio vaccine in this country. It is one of the few potential entrants into the rabies vaccine market in the United States, while Institut Merieux is one of the few potential entrants into the domestic market for inactivated polio vaccine.

From a law-enforcement perspective, the Institut Merieux-Connaught combination was plagued by myriad conflicting elements. In terms of sheer dollars, the two product markets in the United States were sizeable. There were, however, minimal relevant assets in this country to sculpt into a remedy. Furthermore, while these markets constituted an exceedingly small part of the overall size of the transaction, a substantial consumer, the Canadian Government, was emphatically and legitimately concerned about maintaining a secure supply of rabies vaccine there. Finally, an effective remedy for the anticompetitive effects of the transaction in the United States would have to be implemented in Canada. The case, thus, presented the question of whether the interests and authority of the Canadian Government with respect to this transaction, as well as the ability of the Commission to fashion an appropriate and effective remedy, argued for the Commission, in contemplating an enforcement action, to defer to our neighbors to the North.[14] In addition to these substantive issues, of course, was the question of whether the Commission had fulfilled its notification obligations under the Memorandum of Understanding that exists between the Canadian and American Governments.[15]

The parties concurred with the Commission in a consent agreement under which Connaught's rabies vaccine business in Toronto would be leased for at least 25 years to a Commission-approved acquirer, and "best efforts" would be made by the merged entity to secure U.S. Food and Drug Administration approval of the lessee. The parties also agreed that, for the next ten years, prior FTC approval would be necessary before Institut Merieux could acquire any interest in a company that produces a vaccine with

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[14] See Institut Merieux, S.A., supra note 12 (Statement of Commissioner Deborah K. Owen).

[15] Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation With Respect to the Application of National Antitrust Laws, March 9, 1984, reprinted in 4 Trade Reg. Rep. (CCH) ¶13,503.

respect to a disease for which it currently manufactures a vaccine. Institut Merieux would be allowed to enter into research joint ventures or fund independent research ventures, so long as it notified the FTC. The Commission, by a 3-2 vote,[16] accepted this proposed consent agreement for public comment on January 3, 1990.

C. The Comity "Struggle"

Before describing how the case was ultimately resolved, a brief digression to review the reach of U.S. antitrust enforcement is necessary. The Institut Merieux case typifies what has been characterized by Fordham Corporate Law Institute Director, Professor Barry Hawk, and others as a "struggle" among the courts, law enforcement authorities, and commentators to come up with criteria to apply in determining whether jurisdiction may be appropriately exercised over foreign transactions that have anticompetitive effects in a given U.S. market.[17] The struggle

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[16] Commissioners Azcuenaga and Owen dissenting. The following discussion reflects the concerns of Commissioner Owen.

[17] See, e.g., Hawk, International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment, 51 Fordham L. Rev. 201, 203, 241 n.183 (1982) (as to government actions where there are potential international conflicts, "comity and/or foreign policy issues could be considered in the exercise of prosecutorial discretion," noting that the Justice Department stated, in its then-extant (1977) International Guidelines, that it did just that); Atwood and Brewster, Antitrust and American Business Abroad (2nd ed.) §§ 6.05 - 6.22; Atwood and Lister, International Antitrust Enforcement in the George Bush Administration: The Enforcement Guidelines and Beyond, 23 J. World Trade 97, 105 (April 1989).

began with Judge Hand's opinion in the Alcoa case;[18] and is stalemated between the interest-balancing analysis adopted by the Ninth Circuit in the Timberlane cases,[19] and by the District of Columbia Circuit's rejection of that approach in the Laker case.[20]

The concerns raised by Circuit Judge Wilkey in Laker about the proper role of the courts and concurrent prescriptive jurisdiction

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[18] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), 1944-45 Trade Cas. (CCH) ¶ 57,342.

[19] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976) ("Timberlane I"), 1977-1 Trade Cas. (CCH) ¶ 61,233; Timberlane Lumber Co. v. Bank of America, 749 F.2d 1378 (9th Cir. 1984), 1985-1 Trade Cas. (CCH) ¶ 66,332, cert. denied, 472 U.S. 1032 (1985). In Timberlane I, Circuit Judge Choy suggested a three-step test to determine whether exercise of jurisdiction would be appropriate in a case involving allegedly anticompetitive conduct overseas: "[T]he antitrust laws require in the first instance that there be some effect - actual or intended - on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States - including the magnitude of the effect on American foreign commerce - are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority." 549 F.2d at 613 (emphasis in original). Albeit a Sherman Act case, the approach he suggests is applicable to Clayton Act matters. See Atwood & Brewster, supra note 17 at § 12.13.

[20] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984), 1984-1 Trade Cas. (CCH) ¶ 65,885. Over the dissent of Circuit Judge Kenneth Starr, Circuit Judge Wilkey's opinion for the majority rejected the "interest-balancing" approach adopted by the Ninth Circuit in Timberlane I, noting inherent, jurisdictional, and political factors therefor and concluding: "[b]ecause we see no neutral principles on which to distinguish judicially the reasonableness of the concurrent, mutually inconsistent exercises of jurisdiction in this case, we decline to adopt such a rule here." Laker, 731 F.2d at 953.

are certainly reasonable. Nevertheless, in the end, a court must decide, as Judge Wilkey did in the Laker case, whether to exercise its jurisdiction in the case, or defer in the interests of comity.[21] In fairness to Judge Wilkey, he was faced with a titanic struggle brought by private parties which created a direct conflict between orders of the courts of the United States and Great Britain. And, in fact, the earlier part of his opinion displays a weighing of interests, even though the test itself is repudiated later in the opinion. The facts of the Institut Merieux matter may pale by comparison; nonetheless, the Commission was similarly faced with a question of the practical reach of its jurisdiction. As a law enforcement agency of the United States Government, as opposed to a private litigant, the Commission may be in a more objective position to evaluate the public interest to be protected in the

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[21] In Laker, the court was faced with substantially similar, but conflicting interests and rights between the parties, as well as the policies of the governments of the United States and Great Britain, with resort by the parties to the courts in both countries. In his opinion, Judge Wilkey refers to the presence of concurrent prescriptive jurisdiction. 731 F.2d at 921-926. In his 1980 opinion in Federal Trade Commission v. Compagnie de Saint Gobain-Pont-à-Mousson, 636 F.2d 1300 (D.C. Cir. 1980), 1980-81 Trade Cas. (CCH) ¶ 63,632, ruling that the FTC could not serve a subpoena outside of the United States by registered mail, Judge Wilkey began his analysis with the distinction drawn in the Restatement (Second) of the Foreign Relations Law of the United States between prescriptive and enforcement jurisdiction. That distinction is essentially that the sovereign can prescribe certain conduct wherever it may be carried out; but, it is another thing for that sovereign to enforce that prescription outside his own territory. As Judge Wilkey stated, "The two types of jurisdiction are not geographically co-extensive." Saint-Gobain, 636 F.2d at 1316. That statement is exemplified by the situation facing the FTC in the Institut Merieux matter: a remedy to anticompetitive effects in the United States had to be effectuated in Canada.

matter; it frequently is also in a better-informed position, than may be private parties reporting to a court, to exercise discretion on the basis of comity. Finally, in deference to the concerns raised by Judge Wilkey, the Commission should be obliged, in the first instance, to take comity into consideration in the appropriate case before calling upon the courts to aid the Commission in its enforcement mission. Certainly U.S. District Judge Gerhard Gesell's opinion in the Baker Hughes case appears to bolster that approach:

> . . . whatever the relevance of comity concerns in antitrust disputes between private parties, [citing Laker], they are not a factor here. The State Department has considered Finland's position [objecting to blocking the merger], and the United States [Department of Justice] has decided to go ahead with the case. It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.[22]

The debate continues. At the 1988 Fordham Corporate Law Institute, the application of comity considerations was seriously questioned. In that discussion, the general view seemed to be that a finding of "direct, substantial, and reasonably foreseeable effect on commerce" was sufficient to trigger jurisdiction.[23] With due deference to the participants in that discussion, it appears that this test might assist the Commission in determining whether its prescriptive jurisdiction is properly invoked, but it would not

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[22] U.S. v. Baker Hughes Inc., 731 F.Supp. 3, 6 n.5 (D.D.C. 1990), 1990-1 Trade Cas. (CCH) ¶ 68,930; aff'd 908 F.2d 981 (D.C. Cir. 1990), 1990-1 Trade Cas. (CCH) ¶ 69,084.

[23] See 1988 Fordham Corp. L. Inst. 5-11 - 5-17 (B. Hawk ed. 1989).

help where the materials for fashioning efficacious enforcement remedies are clearly located outside the Commission's territorial jurisdiction.[24]

Applying the interest-balancing factors initially listed by Judge Choy in Timberlane I,[25] and refined by the Third Circuit in Mannington Mills,[26] to the facts in the Institut Merieux matter

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[24] Several cases can be cited in support of the proposition that the Commission may take enforcement action against foreign transactions and order divestiture of foreign assets. However, in contrast to the situation in Institut Merieux, these cases involved parties with substantial and relevant productive presence in the United States. See, e.g., United States v. National Lead Co., 332 U.S. 319 (1947) (with co-defendant du Pont, the dominant U.S. producers of titanium products); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (major U.S. bearing producer, charged with territorial allocation and price-fixing with its British and French namesakes); United States v. Imperial Chemicals Industries, Ltd., 105 F.Supp. 215 (S.D.N.Y. 1952) (with co-defendant du Pont, divided territories). See also the discussion of the National Lead, Timken, and ICI cases in 1 Atwood and Brewster, Antitrust and American Business Abroad §§ 2.14 - 2.16 (2nd ed.); United States v. Inco Ltd., 1978-1 Trade Cas. (CCH) ¶ 61,869 (E.D.Pa. Jan. 27, 1978) (industrial battery manufacturer with substantial U.S. assets); Jim Walter Corp., 90 F.T.C. 671 (1977), petition for reconsideration and other relief denied, 91 F.T.C. 514 (1978) (major U.S. building products supplier with Canadian subsidiary); Murata Manufacturing Co., Ltd., 96 F.T.C. 1116 (1980) (Japanese company with substantial U.S. production and distribution assets, acquired a Canadian company with substantial production and distribution assets in the U.S.); Pilkington Brothers plc, 103 F.T.C. 707 (1984) (acquisition of 30% of U.S. glassmaker Libbey-Owens-Ford). The Inco, Murata, and Pilkington cases, like Institut Merieux, were not litigated and were concluded with consent agreements in which the parties did not contest jurisdiction. And, in the ICI case, the British courts refused to uphold the required divestiture.

[25] 549 F.2d at 614.

[26] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-8 (3rd Cir. 1979), 1979-1 Trade Cas. (CCH) ¶ 62,547.

suggested that it would have been more appropriate for the Commission to exercise prosecutorial discretion and defer to the Canadian authorities. This raises another notable point about the resolution of this case. Enforcement remedies -- albeit of questionable efficacy --were brought within the reach of the Commission by the parties' willingness to enter into a consent agreement.[27] The initial agreement, which was placed on the public record for comment, ceded control of relevant assets outside the territory of the United States to the control of the Federal Trade Commission. When Canadian authorities objected to this agreement, it was modified to require the concurrence of Canadian authorities to the disposition and administration of the assets within their boundaries.

The Commission's action in this case, when viewed in the context of media reports of more aggressive antitrust enforcement in the United States, might cause some to question whether the Commission is being tougher on foreigners than on our domestic firms. Three years ago at the Fordham Corporate Law Institute, then-FTC Commissioner Terry Calvani put it very simply: ". . . merger analysis is merger analysis. There are no different rules or standards applied to deals involving foreign companies or

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[27] Regarding the irrelevance of parties accepting consent agreements to the merits of the case, see Statement of Commissioner Owen in CPC International, Inc., No. 892 3176, and discussion therein of FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 246 n.14 (June 11, 1990).

foreign commerce."[28] That statement is certainly correct as a principle of fairness and international goodwill, and it continues to be applied at the FTC as the authors have observed it. However, as Institut Merieux and other cases[29] illustrate, the Commission's interests, and the rules that apply to those interests may, in an increasing number of cases, overlap with the interests of other sovereign nations. When that occurs, what rules should apply to resolve the overlap? The several cooperative agreements entered into by the United States with Australia,[30] Canada,[31] and Germany,[32] as well as the 1986 OECD Recommendation[33] provide procedures for the notification and accommodation of those interests. But, there is little guidance as to how much deference the Commission should accord those interests, particularly when their satisfaction may minimize the relief available to remedy anticompetitive effects of

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[28] 1987 Fordham Corp. L. Inst. 59 (B. Hawk ed. 1988).

[29] See discussion accompanying notes 37-42 infra.

[30] Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,502.

[31] Supra note 15.

[32] Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501.

[33] The 1986 Recommendation of the OECD Council Concerning Co-operation between Members and Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(86) 44 (1986), reprinted in IA Hawk, United States, Common Market and International Antitrust: A Comparative Guide (2nd ed. Supp. 1990), Appendix 35.

the transaction in the United States. And, the difference between the approaches posed by the Ninth and D.C. Circuits is somewhat unsettling. Nevertheless, there is a lesson to be divined from the opinions of those two circuits, and that is where the enforcement agencies seek the aid of the court in a case involving foreign interests, the court should be able to expect the following: first, that the enforcement agencies have fulfilled their obligations under any relevant bilateral agreement; second, that the public interest has been considered; and, third, that comity considerations have been evaluated. It is then for the court to decide, first, how much deference to give the agency's comity evaluation, and whether the agency has acted within its jurisdictional limits.

D. Articulation of the Commission's Principles

The Justice Department Antitrust Enforcement Guidelines for International Operations[34] offer some relevant guidance, particularly Illustrative Case 4, which applied to the situation that the Commission faced in the Institut Merieux matter. In Case 4, the Department indicated that, on the basis of comity, in the exercise of its prosecutorial discretion, and in light of the difficulty of obtaining effective relief, it would ordinarily decline to prosecute a merger between "leading" companies in a global product market, which are "foreign and all of their assets

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[34] Reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,109 (Nov. 10, 1988).

involved in producing and distributing [the product] are located outside the United States," even though the shipments of those companies into the United States account for 60% of this market. The Department indicated that it might "reach a different conclusion . . . if either [party] had production facilities or substantial distribution assets used to produce or distribute [the product] located in the United States."

It is my understanding that neither party in Institut Merieux maintains relevant production facilities or relevant substantial distribution assets in the United States. Accordingly, an interested observer, without necessarily endorsing the Guidelines, might legitimately note that the Commission's action in the Institut Merieux matter does not reflect the approach to a wholly foreign merger which is described therein. But, as the Commission's then-Director for International Antitrust, Edward F. Glynn, Jr.[35], stated in this forum two years ago, the Commission has not formally acted on the Guidelines. On July 19, 1990, FTC Bureau of Competition Director Kevin Arquit, in testimony before a Senate subcommittee, was authorized to say only that: "These Guidelines include an explanation of factors that may affect the Department's decision to assert jurisdiction in a particular case."[36] Since the Commission has taken no other action to articulate its own

[35] See 1988 Fordham Corporate L. Inst. 5-2 - 5-3 (B. Hawk ed. 1989).

[36] Arquit Senate Testimony, supra note 7, at 5 (emphasis added).

standards, the public remains uninformed concerning the extent to which the Commission may differ from the approaches taken in the Justice Department International Guidelines.

During the past year, representatives of competition authorities around the world have called for more international cooperation in antitrust enforcement.[37] Not to be underestimated are the difficulties in developing methods and rules for respecting the competitive concerns of many different and sovereign nations, and for resolving conflicts between them. Witness the length of time it quite naturally took the European Community to conclude a merger control regime. While we wish them well, it will take additional time to evaluate how well the regime works in practice, just as we have watched our own develop over the years.

In this context, the Commission's initial, unilateral decision to take an enforcement action in the Institut Merieux matter may have sent an unnecessarily harsh response to calls for cooperation, perhaps along the lines of: "What's mine is mine and what's your's is negotiable." Furthermore, it raises an interesting conundrum. If the Commission is to be a party to any international negotiations, perhaps leading to bilateral or multilateral

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[37] See, e.g., "Jurisdictional Issues in E.E.C. Competition Law", Remarks of Sir Leon Brittan, Vice President of the Commission of the European Communities, Cambridge, England, (Feb. 8, 1990), and remarks of various participants in the 5th International Cartel Conference, Berlin (West) (June 17-19, 1990).

agreements regarding antitrust enforcement, from what position is it negotiating? In the absence of a clear, thorough, and thoughtful analysis by the Commission of its position on problematic areas in international merger enforcement, and articulation thereof, discussions with foreign counterparts with an eye toward substantive action may take place without adequate foundation. This raises some rather disturbing prospects for confusion. Lest these views be interpreted as a wet blanket by our foreign colleagues, rest assured that they are not meant to discourage cooperative dialogue. Quite to the contrary, they are meant to encourage the Commission to make adequate analytical preparations for such discussions. Furthermore, it is important for the U.S. side to conduct an inclusive dialogue among the Commission, the Antitrust Division, the business community and the bar to enhance the foundation necessary to fruitful negotiations.

E. Other Complications from "No Different Rules for Foreigners"

The comity question has been one of the most challenging during the last year for the Commission. There have been other issues involving foreign firms and international considerations as well. In the area of international antitrust, it is also accurate to say that Terry Calvani's statement is correct: There were no different rules for foreigners. However, several of the cases did raise noteworthy points which reflect the political and economic changes that have occurred during the past year.

For example, in one case, the wholly-owned U.S. subsidiary of a West European firm sought to acquire another U.S. company. Regardless of how the product market was defined, the Herfindahl-Hirschman Index, which is the first step in our antitrust analysis, was quite high, both in terms of the amount of the increase generated by the merger, and the final result. With respect to one substantial market, the acquiring party noted that it imported the product into the United States, but did not manufacture it; it was made and supplied in toto by its European parent. The prospective merging party alleged that the parent was about to stop shipments in their entirety in order to meet new orders from its largest European customer, generated by demands for the product in Central Europe. If true, this development, under a General Dynamics[38] analysis, might have removed that party as a player in the market for a long enough period, so that the merger effectively would not pose any anticompetitive effects. The argument proved not to be determinative, however, because concentration in other markets was too troublesome. Nonetheless, this type of eventuality might prove to make the difference in a future case.

If it appears that the Commission has been tougher on foreigners in the past year, it is interesting to note that the U.S. Department of Commerce recently criticized the Commission for imposing undue regulatory burdens on a domestic merging firm which,

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[38] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

Commerce asserted, competes in a global market. The Commission accepted for public comment a consent agreement with the Emerson Electric Company regarding its acquisition of McGill Manufacturing Company,[39] which required Emerson to divest McGill's mounted ball bearing business. The Commission's complaint alleged that the relevant line of commerce was the production and distribution of mounted ball bearings, and that the geographic market was the United States. The Commerce Department[40] felt that the Commission did not take a sufficiently "global" view of the bearing industry. It argued that the bearing industry world-wide has consolidated in recent years, while U.S. production remains relatively fragmented, and therefore is at a competitive disadvantage.

The Commission differed with the Commerce Department on defining the relevant product and geographic markets for purposes of antitrust analysis. First, in keeping with long-standing precedent, the Commission found, on the basis of demand- and supply-side substitution, that the product market was mounted ball bearings, as opposed to the larger market of all ball bearings advocated by Commerce. Second, while imports into the United

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[39] Emerson Electric Co., 55 Fed. Reg. 6446 (Feb. 23, 1990) (Proposed Consent Agreement With Analysis to Aid Public Comment).

[40] See Emerson Electric Co., 55 Fed. Reg. 28829 (July 13, 1990) (comment of the U.S. Dep't of Comm., Bur. of Export Admin., May 4, 1990).

States represent almost 22% of sales of all types of bearings,[41] the imports' share of mounted bearings is only about 6%,[42] and the Commission found little likelihood of additional import entry in the event of a supracompetitive price increase. Finally, the Commerce Department did not argue that any particular efficiencies would result from this acquisition. Accordingly, the Commission issued the order in final form on June 22, 1990.

As can be seen from these examples, applying the U.S. antitrust law impartially can create tension between competition and other international policy concerns.

III. Transnational Joint Ventures, or "Strategic Alliances," and their Compatibility with Single State Antitrust Enforcement

A final case deserving of special attention in this forum is the joint venture between Nippon Sheet Glass and Pilkington plc.[43] It, too, illustrates the potential practical impediments to the Commission's authority. But, it is more important as an example of the Commission's analysis of joint ventures.

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[41] See U.S. Dep't of Comm., U.S. Industrial Outlook (1989) at 23-5.

[42] See U.S. Dep't of Comm. Import Statistics, IM 146 at 9742-9744.

[43] Nippon Sheet Glass Company, Ltd., 55 Fed. Reg. 11256 (March 27, 1990).

In recent years, the joint venture has been a means by which companies could "test the water" in a new market -- perhaps in the child-like hope of not taking a bath. For example, it is worth remembering that, at the time of the GM/Toyota joint venture, Honda and Nissan had already taken the plunge into the U.S. market with U.S. assembly plants[44]; but, Toyota was not so sure about the idea.[45]

A joint venture is but one of a number of agreements that may be characterized by the participants with the current trendy term, the "strategic alliance". The perceptions of competition specialists as to such alliances vary widely, from suspicious to benign. For example, Bundeskartellamt President Kartte has commented that, strategic alliances are "what used to be referred to simply as cartels." His views on the subject have been characterized as likening strategic alliances to "alte Hüte mit neuem Etikett," which is roughly the German equivalent of "old wine in new bottles".[46] In contrast, Professors Jorde and Teece say that alliances are "different from cartels" in that they may be temporary in design; they envelope only a limited range of a firm's activities; and they are driven by efficiency concerns. Accordingly, these scholars feel it "unfortunate that U.S.

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[44] See General Motors Corp., 103 F.T.C. 374, 396 (Dissenting Statement of Commissioner Patricia P. Bailey).

[45] For a discussion of the effects of the GM/Toyota joint venture, see Langenfeld and Scheffman, Innovation and U.S. Competition, Antitrust Bull. (1989) 1.

[46] Neukirchen, Heide, "Strategische Allianzen - mehr als ein modischer Trend?", Welt am Sonntag (June 24, 1990) at 37.

antitrust laws treat some cooperative agreements less permissively than mergers. Moreover, they are sometimes equated with cartels."[47]

Without betraying the confidences attendant to the deliberative process at the Federal Trade Commission, the widely-disparate views expressed by both President Kartte, and by Professors Jorde and Teece could certainly have been argued in the matter of Nippon Sheet Glass' acquisition of a 20% stake in Pilkington's Libbey-Owens-Ford. Furthermore, like the Institut Merieux matter, this case tested the Commission's territorial jurisdictional limits as a practical matter, and was settled with a consent agreement.

First, the facts in the matter: Pilkington of Great Britain is the world's largest manufacturer of automotive and architectural glass produced by the so-called "float" process, which was developed by Pilkington just over 30 years ago. In 1984, Pilkington acquired 30% of Libbey-Owens-Ford, one of the largest North American producers of float glass, and which is based in Ohio. That acquisition was reviewed by the Commission and settled

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[47] Jorde and Teece, Acceptable Cooperation among Competitors in the Face of Growing International Competition, 58 Antitrust L.J. 529, 542 (1989). Jorde and Teece, therefore, support enactment of legislation to limit liability under the antitrust laws for production joint ventures, similar to that provided to research joint ventures under the National Cooperative Research Act of 1984, 15 U.S.C. 4301 note. Jorde and Teece feel that such further legislation is necessary because of their belief that successful innovation requires enormous risk and is not a "serial" process, that is, one that can be readily divided into research, development, and production stages.

with a consent agreement and order which permitted the acquisition, but required Pilkington to divest its production capacity in Canada.[48] Pilkington has since acquired 100% ownership of Libbey-Owens-Ford.

Nippon Sheet Glass, or NSG, is a significant float glass producer in Japan and elsewhere in Asia and the Pacific. NSG entered into a Common Stock Purchase Agreement with Pilkington and Libbey-Owens-Ford to acquire 20% of the common stock of Libbey-Owens-Ford from Pilkington. Ancillary to the stock purchase agreement was a so-called Capacity Agreement which, had it gone into effect, would have prohibited both Pilkington and NSG from independently building or acquiring capacity for the production of float glass in North America, except through Libbey-Owens-Ford, for a period of five years.

Once the Commission defined an appropriate geographic market and found that that market was concentrated, several questions arose: First, would the acquisition violate Section 7 of the Clayton Act by eliminating an actual potential competitor in the relevant market? Second, would the ancillary agreement violate Section 5 of the Federal Trade Commission Act as an unfair method of competition?

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[48] Pilkington Brothers plc, 103 F.T.C. 707 (1984).

Differences arose traceable to the opposing views exemplified by those of Bundeskartellamt President Kartte, and Professors Jorde and Teece. The matter was ultimately resolved by the offer of a consent agreement whereby the parties abrogated the Capacity Agreement and further agreed not to restrain either capacity in North America or imports to North America.[49] The Commission voted 5-0 to accept the consent agreement which eliminated the ancillary agreement restraining independent entry by the parties for the next five years. However, Commissioners Strenio and Azcuenaga, in a separate statement, felt that the acquisition itself was likely to substantially reduce competition in the float glass market and would have preferred that the Commission challenge the acquisition and not just the collateral agreement.

The debate over the ancillary agreement in the NSG/Pilkington case continues, despite the parties' willingness to abrogate it. A different view of the ancillary agreement was offered in a recent speech by Dr. James Langenfeld, the Commission's Director for Antitrust in the Bureau of Economics. Dr. Langenfeld said that the ancillary agreement "would have effectively forced each party to commit fully to the joint venture by preventing the opportunistic behavior of expanding capacity outside of the venture."[50] While Dr.

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[49] Nippon Sheet Glass Company, Ltd., supra note 43, (Order ¶ I, II).

[50] "Antitrust Enforcement: The Gray Area of Agreements Among Competitors", CATO Institute Conference, "A Century of Antitrust: The Lessons and the Challenges," Washington, D.C. (April 11, 1990) at 5.

Langenfeld recognizes that horizontal agreements among competitors have long been viewed negatively, he counters that many horizontal agreements have strong efficiency rationales and are unlikely to harm consumers.

NSG's joint venture with Pilkington was certainly not of the magnitude of GM/Toyota[51]. It does share a characteristic of that venture, however, in that it provides to NSG a means of learning first-hand about manufacturing in the U.S. market. If, at some point in the future, NSG wants to take the plunge and go it alone, it will be free to do so, and may provide another experienced competitor in the product market.

If the allegedly fashionable trend of entering into strategic alliances continues, it is to be expected that more transactions styled as joint ventures will be noticed for the Commission's consideration. But, as yet, the development of a complementary fashionable trend in how the Commission views ancillary agreements has not occurred. This lack of a clear view can impose significant uncertainty on firms seeking to do business in the United States, and accordingly, may discourage some productive new investment in the United States.

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[51] GM/Toyota did not, of course, feature the potentially restrictive ancillary agreement.

IV. Obtaining Information in a World of 21st Century Communications and 19th Century Jurisdictional Rules

The potential for difficulty in obtaining information relevant to a Commission investigation is an issue that has been raised before in this forum.[52] In the Pilkington matter, the Commission staff wished to question a certain member of the Pilkington Board of Directors about matters within his area of expertise. Pilkington moved to quash the subpoena based on lack of Commission authority to subpoena a foreign corporation or individual; lack of personal jurisdiction over the particular individual; and improper service of process. The British Embassy expressed concerns to the Commission regarding issuance of this subpoena. The Commission ultimately accepted testimony from another Pilkington official whose commanded attendance did not raise the same delicate issues, and the petition to quash was denied.

One of the authors of this article has recently succeeded former Commissioner Calvani as the Commissioner who has been delegated the responsibility for initially ruling on motions to quash subpoenas under our Commission Rules.[53] The authors anticipate that the Pilkington scenario will not be an isolated one. Attempting to balance increasing corporate cross-fertilization on a global plane, and the Commission's strong

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[52] See, e.g., Calvani & Tritell, Issues in International Antitrust Discovery: View from the FTC, 1984 Fordham Corp. L. Inst. 89 (B. Hawk ed. 1985)

[53] 16 C.F.R. § 2.7(d)(4).

determination to have access to evidence crucial to its informed judgment, will prove challenging. At a time of increasing cooperation on the part of sovereign entities in attempting to fashion fair and effective responses to world-wide activities, one might hope for similar cooperation on the part of far-flung corporate entities.

V. Concluding Observation

For all the talk of a "global market" and "effects" tests, barriers to effective competition remain, whether they be barriers to entry or limits on the ability of competition authorities to fulfill their responsibilities. Cooperation will be necessary from both the business community and governments in order to foster economic activity consistent with principles of competition.