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International Antitrust Enforcement in the Computer Industry

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I. Introduction

It has become a truism that economic relationships and competition—especially in the high-technology arena—are increasingly global. In the context of the computer industry, this truism poses particular challenges for government antitrust enforcers. On the one hand, because of increasing returns and network externalities that often allow a de facto standard setter or monopolist to emerge within many segments of the computer industry, effective antitrust enforcement is especially important in this area. Yet on the other hand, the anticompetitive effects of activities constituting private restraints of trade in global industries such as the computer industry may occur in multiple jurisdictions, and thus antitrust enforcers of a single country often are ill-equipped acting alone in seeking to curb or remedy the effects of such practices.

To seek effective antitrust enforcement in global industries, we in the Department of Justice have developed three approaches. First, we rely on coordinated enforcement actions, in which we pursue parallel investigations of particular practices along with other national competition authorities through shared information and cooperation. Second, we invoke positive comity, a doctrine by which one enforcement agency requests enforcement action by another country where the latter may be better able to challenge or curb the anticompetitive activities in question. Finally, we directly apply our laws to conduct occurring in whole or part in other jurisdictions where the effects of such conduct may be felt in the United States.

These approaches offer promise for effective antitrust enforcement in global industries such as the computer software industry, as...
evident from the discussion below concerning the recent successfully coordinated enforcement activities, between the United States and European Community against Microsoft Corporation. Nevertheless, further groundwork—to which we in the Department of Justice are committed—needs to be established before we can more fully ensure that private restraints of trade do not impede competition within the global computer industry. In the context of the coordinated U.S.-E.U. investigation of Microsoft and other recent investigations concluded by the Department of Justice, this paper will explore the promise of effective antitrust enforcement in the global age of business and industry, and outline the necessary additional efforts we are undertaking to achieve this promise.

II. THE NEED FOR STRONG ANTITRUST ENFORCEMENT IN THE COMPUTER INDUSTRY: INCREASING RETURNS, NETWORK EXTERNALITIES AND THE DE FACTO STANDARD SETTER

The recently concluded investigation, complaint and consent decree against Microsoft Corporation illustrate the effects that often characterize the computer industry and that make antitrust oversight of that industry particularly necessary and complex. After interviews of over one hundred people at roughly eighty companies, depositions of twenty-two persons, issuance of twenty-one civil investigative demands, and thousands of attorney hours, the Department of Justice in June 1994 concluded that Microsoft had engaged in certain anticompetitive practices. At a minimum, these practices threatened seriously to impede future innovation and competition in the operating systems market.

The central challenged practice was the per-processor license, under which Microsoft licensed its operating system software to personal computer (PC) manufacturers on the basis of a fee that had to be paid for all PCs containing a particular processor chip, whether or not the machine actually used a Microsoft operating system. The practical effect of this license was to impose a "tax" on manufacturers' use of competing operating systems—the computer manufacturer had to pay two licensing fees for using any operating system other than Microsoft's—and thus to diminish the viability of actual or potential competitors to Microsoft. The anticompetitive impact of the per-processor license was increased by Microsoft's

2. Id. ¶¶ 21-22.
practice of using it in long-term licenses with large minimum purchase commitments, thereby locking in PC manufacturers to Microsoft and impeding development and marketing of competing operating systems. The Department of Justice concluded that the use of these licensing agreements, along with minimum purchase obligations and long-term licenses, had the anticompetitive effect of creating strong economic incentives for PC manufacturers to deal exclusively with Microsoft and thus to foreclose for competing operating systems developers the important distribution channel of preloading operating systems onto PCs. Additionally, the Department concluded that Microsoft had attempted to impose unreasonably restrictive non-disclosure agreements on applications software manufacturers who were testing Microsoft's prototype Windows 95 operating system, so that they could not develop applications for operating systems of Microsoft competitors. The Department entered into a consent decree pursuant to which Microsoft agreed to terminate each of the challenged practices.

3. Id. ¶ 28.
4. Id. ¶ 29-34.
5. See United States v. Microsoft Corp., No. 94-1564, proposed final judgment (D.D.C. filed Feb. 1995), reprinted in 59 Fed. Reg. 42,845 (1994); also available at gopher://justice2.usdoj.gov:70/00/attr/cases/microsoft/judge.txt. The consent decree enjoined Microsoft from engaging in any of the challenged practices. Id. ¶ IV. Specifically, it enjoined Microsoft from entering into per-processor licenses; obligating personal computer manufacturers to purchase any minimum number of Microsoft's operating systems; entering into any licenses with terms longer than one year (although PC manufacturers were allowed under the decree to renew licenses for another year on the same terms); requiring PC manufacturers to pay Microsoft on a "lump sum" rather than per-unit basis; requiring PC manufacturers to purchase any other Microsoft product as a condition of licensing a particular Microsoft operating system; and requiring developers of applications software to sign unlawfully restrictive non-disclosure agreements. Id. The term of the decree was for six-and-one-half years from the date of its entry. Id. ¶ VI (A).

The consent decree was filed along with the civil complaint on July 15, 1994, in the United States District Court for the District of Columbia. Pursuant to section 16(b) of the Tunney Act, 15 U.S.C. § 16(b) (1994), the Justice Department published the proposed decree and a competitive impact statement in the Federal Register and invited public comment. See 59 Fed. Reg. at 42,845. Five comments were received during the statutory period, to which the government responded on October 31, 1994. At subsequent hearings before the district court concerning entry of the decree, Judge Sporkin of the United States District Court for the District of Columbia invited interested persons to seek leave to participate in the court's hearing on the consent decree. At various stages prior to the hearing, the district court granted leave to I.D.E. Corporation, the Computer & Communications Industry Association and three anonymous computer industry companies to submit briefs and to participate as amici in the district court's hearing. See Order re Motions to Participate and Motion to Strike (Feb. 14, 1995); available at gopher://justice2.usdoj.gov:70/00/attr/cases/microsoft/opinion.txt. All amici opposed entry of the decree on grounds that the proposed relief (and, accordingly, the claims in the government's complaint) did not go far enough in curtailing or challenging Microsoft's monopoly power. See Brief of Plaintiff ¶ III, United States
In a declaration filed with the United States District Court for the District of Columbia in support of the consent decree, Professor Kenneth J. Arrow, a world-renowned, Nobel prize-winning economist, both described the natural barriers to entry that characterize many computer software markets and distinguished them from the artificial barriers erected by Microsoft. He noted that the software market is peculiarly characterized by increasing returns to scale, due to the fact that virtually all of the costs of production are in the design of the software. Because the incremental costs of reproducing software, once developed—i.e., the cost of copying a disk—is minimal, software production costs are largely independent of the quantity sold and, consequently, the marginal cost of production is virtually zero. Therefore, in markets such as computer software that are characterized by increasing returns, there may—unlike in other markets—be no natural point of diminishing returns at which marginal costs begin to exceed marginal revenues and at which it becomes uneconomical to increase production or market share. The natural barriers to scale in increasing returns industries


On January 18, 1995, the government moved for entry of the decree and attached an affidavit prepared by Professor Kenneth J. Arrow. In an opinion dated February 14, 1995, the district court denied the government's motion to approve the consent decree on four grounds:

First, the Government has declined to provide the Court with the information it needs to make a proper public interest determination. Second, the scope of the decree is too narrow. Third, the parties have been unable and unwilling adequately to address certain anticompetitive practices, which Microsoft states it will continue to employ in the future and with respect to which the decree is silent. Thus, the decree does not constitute an effective antitrust remedy. Fourth, the Court is not satisfied that the enforcement and compliance mechanisms in the decree are satisfactory.

United States v. Microsoft Corp., 159 F.R.D. 318, 332 (D.D.C. 1995). On appeal, the United States Court of Appeals for the District of Columbia reversed, and remanded with instructions that the district court enter an order approving the decree. See United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995). The court of appeals concluded that the proposed consent decree was in the public interest and that the district court exceeded its authority in concluding to the contrary. In a rather extraordinary move, the court, "deeply troubled by several aspects of the proceedings in district court," also ordered that the case be assigned to another judge on the district court. Id. at 1463, 1465. Judge Jackson subsequently ordered entry of the consent decree. See United States v. Microsoft Corp., No. 94-1564, final judgment, reprinted in 1995-2 Trade Cas. (CCH) ¶ 71,096; also available at 1995 WL 505998 (D.D.C. Aug. 21, 1995).


7. Id. § III(A).

8. Id.
may therefore be absent, and the tendency toward monopolization correspondingly great.

More significantly, perhaps, the tendency toward monopolization in the software industry is further reinforced by the so-called "network externalities" that characterize the industry—the self-reinforcing qualities of an established product that has a large installed base and that is compatible with complementary applications. A large installed base for a particular product makes the product more attractive to consumers because they know the product is likely to be supported by the vendor with upgrades and service. Similarly, because the value of the operating system is in its capability to run application software, independent software vendors are more likely to write applications programs to be run on an operating system with a large installed base. Additionally, a product with a large installed base also attracts consumers because it means that others will use the same product or compatible products, and thus consumers of the product are more likely to be able to exchange work products with their peers successfully.

All of these advantages flowing from a large installed base interact together in a circular, reinforcing fashion. Accordingly, the fact that a critical mass of consumers use a particular operating system ensures that others will use it in order to be able to exchange work product with their peers, software vendors will write supporting applications and product upgrades will be introduced, thus making an operating system with a large installed base even more attractive for consumers.9

The combination of these two phenomena of the software industry—increasing returns to scale and network externalities—is to create an enormous natural advantage for a "first mover" within the industry. The first company to achieve a reasonable installed base is likely to enjoy the circular effects resulting from virtually zero marginal costs of increased production, and the even greater increases in its installed base that it is likely to enjoy by virtue of this increased production. It is thus not uncommon for the first mover to become the de facto standard setter or monopolist with respect

to a particular industry or market. Although there is considerable debate as to the role of government antitrust enforcers with respect to these natural advantages resulting from increasing returns and network externality features of the computer industry, there is little dispute that, given these market phenomena, the government must be especially vigilant to ensure that a de facto standard setter or monopolist does not—as Microsoft did through use of the per-processor licenses and other challenged practices—erect artificial barriers to entry that serve to maintain or to extend a naturally derived monopoly.

III. The Complexities of Effective Antitrust Enforcement in the Computer Industry: The Paradigm of a Global Industry

Antitrust enforcement in the computer industry, complicated as it is by such phenomena as increasing returns and network externalities that may result in substantial natural barriers to entry and the emergence of a de facto monopolist, is made even more difficult because of the global nature of the industry. Indeed, the software industry is paradigmatic of a global industry, in which both the conduct at issue and its effects may occur in multiple jurisdictions.

The consent decree against Microsoft illustrates the challenges of antitrust enforcement in global industries. As it turns out, just as the Department of Justice was investigating Microsoft’s use of per-processor licenses, minimum commitments and long-term agreements with PC manufacturers, and its restrictive nondisclosure agreements with applications developers, the Directorate-General IV of the European Commission for Competition of the European Community (DG-IV) also decided to look into

10. The effect of network externalities resulting from the demand for compatibility may enable the first mover to leverage its advantage into future, related markets for distinct goods. As new technologies converge in multimedia products, it is quite possible—indeed likely—that consumer demand for interoperable products may broaden for computer discs that are compatible with CD-audio discs, for example, or video discs. Today, we can play our CD-audio discs on our home computers, and in the not-too-distant future, it is quite possible that we will be able to watch compact video discs on our computer monitors as well. A standard setter with respect to certain formats in computer technology may thus be able to extend its power to markets that currently are considered separate from the PC market, thus further underscoring the need for coherent antitrust and public policy in this area of network industries.

Microsoft's use of the identical practices in Europe. The result of these parallel investigations was close cooperation between two enforcement agencies, leading to simultaneous settlements with Microsoft, as to which it can fairly be said that the whole was greater than the sum of the parts. But that gets ahead of the story: first, one must understand the enforcement problem.

The Department of Justice soon realized that, because of the "spillover" or transjurisdictional effects of the conduct at issue in the Microsoft investigation—the same practices in different parts of the world—it was apparent that our ability to curb effectively the anticompetitive effects of Microsoft's licensing practices would be enhanced significantly if DG-IV undertook similar remedial measures. Microsoft could still have been able to erect artificial barriers to entry for competing operating systems in the United States had it been able to continue using the restrictive licensing practices in Europe. By artificially creating a large installed base of consumers in Europe through restrictive licensing practices, Microsoft might well have been able to strengthen the positive reinforcement cycle that characterizes network industries. Because software vendors would have been ensured of a large Microsoft base in Europe, they might have written more programs for Microsoft's operating systems, and consumers in the United States wishing to exchange work product with their European colleagues might have been more attracted to Microsoft's product, than they might otherwise have been absent Microsoft's artificially large installed base in Europe.

Moreover, without access to the PC distribution market in Europe or elsewhere outside the United States, it is quite possible that Microsoft's competitors would have been impeded in their incentive to develop and in their ability to market operating systems—both in the United States as well as in Europe—since the marginal cost of developing for a second market (especially in increasing return industries) is de minimis. By virtue of its artificially maintained monopoly in Europe and elsewhere, Microsoft could thus have been able to reduce competition for operating systems even in the United States.

In short, given that the European market for computer technology and computer operating systems is substantial and growing, any remedy that would have extended only to Microsoft's conduct

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12. European Union (E.U.) competition law is enforced administratively by the European Commission, which oversees the work of the 23 Directorates-General that carry out the day-to-day implementation of E.U. policies. The Directorate-General for Competition Policy, also known as Directorate-General IV, originates enforcement actions in the competition area.
in the United States—but that would have allowed Microsoft to continue engaging in anticompetitive practices designed to block access by competitors to markets abroad—might well have been inadequate. Coordinated action by U.S. and European enforcement authorities was important to ensure an effective remedy in a global network industry such as PC operating system software.

The increasing need for transjurisdictional enforcement activities and remedies is readily apparent apart from the case of Microsoft. The increased globalization of high-tech industries is manifest in the rising trade—both export and import—of such industries in the United States. Between 1980 and 1988, for example, high-technology exports as a percentage of total manufacturing exports for the United States rose from 34% to 41%, and high-technology imports as a percentage of total manufacturing imports for the U.S. rose from 19% to 26%.13 In the computer industry in particular, U.S. exports of computers and office equipment constituted 72.3% of the total value of the U.S. industry in those goods in 1988 (compared to 47.6% in 1980), and U.S. imports of computers and office equipment constituted 61% of the total value of the U.S. industry in the same year (compared to 25.5% in 1980).14 The rising U.S. imports and exports of high-technology goods, and of computers in particular, demonstrates the rapidly growing globalization of production, business activities and demand for such goods, increasing the spillover effects of private restraints of trade across jurisdictions.15

Significantly, this increased globalization has tipped toward areas of the world such as Asia, in which the United States has had very little experience to date in undertaking or establishing cooperative government enforcement mechanisms or relationships. Over the last two decades, dramatic changes have occurred in the competitive positions of the United States and Europe vis-a-vis Japan and the developing countries of Asia with respect to high-technology trade. Between 1970 and 1989, the United States’ share of world high-technology exports declined from about thirty percent to about twenty-one percent and the European Community’s share

14. Id. at 29.
declined from forty-six percent to thirty-seven percent, whereas Japan's share increased from seven percent to sixteen percent and the share of the newly industrializing countries in Asia—Hong Kong, Korea, Singapore and Taiwan—increased from one percent to roughly nine percent. As these new actors have entered high-technology markets, it becomes increasingly important for U.S. antitrust enforcers to forge cooperative structures and relationships not only with our enforcement counterparts in Europe, but in Asia as well. These are difficult waters to navigate; they raise complex issues of sovereignty, different substantive law, different enforcement approaches, and different policy (or, worse, political) agendas. Although imperfect, cooperation is becoming increasingly important and, to maximize our effectiveness as well as to preserve our flexibility, the Department of Justice is relying, for the time being, on three approaches in international enforcement cases (1) coordination, (2) positive comity and (3) application of U.S. laws to conduct occurring abroad.

IV. THE APPROACHES FOR EFFECTIVE ANTITRUST ENFORCEMENT OF GLOBAL INDUSTRIES

To some degree, the success of any of three approaches, despite their differences, depends on our ability to cooperate meaningfully through useful exchanges of information and evidence among competition authorities in order to overcome the difficult hurdles—especially in obtaining foreign-located evidence—that national boundaries present to the detection and prosecution of anticompetitive conduct in global cartels or global industries.

The Antitrust Division of the Department of Justice today is cooperating with foreign antitrust authorities on an unprecedented scale and negotiating agreements with other countries to overcome these difficult hurdles through information exchanges. Our recent joint criminal investigations with the Canadians in the fax paper and plastic dinnerware cases are examples of just how cross-border cooperation can work. In the fax paper case, we and the Canadian Bureau of Competition Policy worked closely together to uncover and to dismantle an international price-fixing conspiracy, much of which was hatched in Japan by several multinational companies, in the $120-million thermal fax paper industry. Our coordination

16. See TYSON, supra note 13, at 23.
and cooperation in this matter, using the tools provided under the U.S.-Canada Mutual Legal Assistance Treaty, allowed each country to bring criminal antitrust charges.

U.S.-Canadian coordination was also instrumental to our success in prosecuting a price-fixing conspiracy in the $100-million plastic dinnerware industry. Indeed, U.S.-Canadian exchanges of confidential information enabled the execution of search warrants that were essential in obtaining evidence of, and successfully prosecuting, this particular cartel. Fifty Canadian Mounties and U.S. Federal Bureau of Investigation (FBI) agents simultaneously executed search warrants at target offices in Montreal, Boston, Los Angeles and Minneapolis. As a result of the important evidence we seized, three corporations and seven executives, including both Americans and Canadians, have pled guilty. The three corporations have been fined in excess of $9 million and the seven executives are serving time in prison. Had we not simultaneously executed search warrants in both countries, the likely loss of evidence in one when it learned that its co-conspirators in the other had been searched would have been great.

These two cases vividly demonstrate the benefits and the need, especially in criminal cases, of obtaining a broad range of assistance from foreign law enforcement agencies, including taking of statements from witnesses, obtaining documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures. Our invaluable cooperation with the Canadians was possible in these cases because of the mutual assistance

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20. Plastic Dinnerware Probe, supra note 19, at 661.


22. See Top Corporate Official, supra note 21, at 399.
treaty between our two countries, which authorized exchanges of investigatory information that would otherwise be confidential. While the United States has mutual legal assistance treaties, or MLATs, with several other countries, our MLAT with Canada is the only MLAT to date that has been used by the United States to obtain assistance in antitrust investigations. The Antitrust Division is currently exploring ways to increase our use of MLATs with other countries for antitrust cases.

To facilitate exchanges of information in civil as well as criminal cases, we have entered into a number of "soft" bilateral agreements—in contrast to the "hard" MLATs, which are treaties—with Canada, the European Community, Australia and Germany. These "soft" agreements do not supersede existing national laws with respect to confidential information and thus do not allow exchanges of confidential investigatory information among competition authorities. The soft agreements do, however, establish mechanisms by which enforcement agencies in the nations can notify one another of activities having multijurisdictional effects, consult freely with one another, and even share certain investigation information within the consent of the party under investigation.


24. U.S. DEP'T OF JUSTICE & FED. TRADE COMM., ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS ¶ 2.91 (Apr. 1995); available at gopher://justice2.usdoj.gov:70/00/atr/Guidelines/internat.txt [hereinafter ANTITRUST ENFORCEMENT GUIDELINES]. Generally, these MLATs are used in international drug or terrorism cases.


29. In addition, through our active participation in the Competition Law and Policy Committee of the OECD, the United States has spearheaded the adoption of the OECD's recommendation on international antitrust cooperation. See Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade,
Notwithstanding the progress afforded by existing MLATs and “soft” agreements, the inability of enforcement agencies in various countries to share confidential information gathered as part of their investigations in all cases threatens to undermine our capacity to realize the full potential of enforcing competition laws in global markets. To overcome this hurdle, we have been giving the highest priority to improving and to expanding our existing cooperation mechanisms so that we can have meaningful exchanges of confidential information in all cases—in civil and criminal cases, as well as in criminal cases involving countries with which we do not have a MLAT.

In 1994, in response to a Justice Department initiative and with bipartisan support, Congress passed the International Antitrust Enforcement Assistance Act (IAEAA). The IAEAA gives the Justice Department and the Federal Trade Commission authority to enter into agreements with foreign antitrust authorities to exchange on a reciprocal basis evidence possessed by each authority. In addition, the Act enables us to ask foreign antitrust authorities to use their powers to get foreign-located evidence for use in a U.S. antitrust investigation and gives us the authority to get that kind of cooperation by providing reciprocal assistance in foreign antitrust proceedings. While implementation of this kind of legislation always takes time, we have already received some very positive responses abroad to our efforts to generate interest in agreements under the IAEAA—although most other countries will need new legislation to implement this approach, just as we did.

OECD Doc. No. C (86) 44 (Final) (May 21, 1986). The new recommendation—developed in a working party under the chairmanship of the United States—urges member countries to undertake more extensive enforcement cooperation and coordination. See also Antitrust Enforcement Guidelines, supra note 24, ¶ 2.92 (citing OECD recommendation). Earlier versions of the recommendation have been instrumental in reducing jurisdictional conflict in antitrust enforcement and we are confident the new version will be equally instrumental in spurring advances in effective international enforcement cooperation.

31. Id. § 6202(b). The statute provides:
In accordance with an antitrust mutual assistance agreement . . . the Attorney General and the Commissioner may . . . conduct investigations to obtain antitrust evidence relating to a possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which such agreement is in effect under this chapter, and may provide such antitrust evidence to the foreign antitrust authority, to assist the foreign antitrust authority 1) in determining whether a person has violated or is about to violate any of such foreign antitrust laws, or 2) in enforcing any of such foreign antitrust laws.

Id.
32. Id.
Until we are able to conclude IAEAA agreements with other countries which will authorize transfers of confidential information, we are somewhat impeded in our ability to achieve fully the potentials and benefits of antitrust enforcement conducted globally on the basis of cooperation and shared information among national enforcement authorities. Nevertheless, through our existing cooperative mechanisms, we have made significant progress to date in implementing the three approaches to antitrust enforcement of global industries: coordination, positive comity and application of our laws to conduct occurring abroad.

A. Coordinated Enforcement Activities

Frequently, the most promising approach for dealing with anticompetitive practices occurring and having effects in multiple jurisdictions is for enforcement agencies in each jurisdiction to pursue parallel investigations and enforcement activities in close coordination and cooperation with one another. This allows each country to pursue its own investigation to the extent its market is affected by the conduct in question, while reaping the benefits of fact-gathering activities and remedial measures outside of its borders.

Coordinated enforcement activity, in fact, is the approach we pursued with respect to the Microsoft investigation. As discussed above, we worked very closely with the European Community's DG-IV in investigating and ultimately seeking a remedy for Microsoft's anticompetitive licensing practices. That kind of close coordination, however, was made possible by Microsoft's request for a single settlement procedure and its waiver of its right to preserve the confidentiality of the documents that it had produced to us and DG-IV, a right that was otherwise guaranteed under the laws of both the United States and the European Union. Absent a waiver of confidentiality on the part of Microsoft, our ability to share the kind of information that was essential for meaningful coordination of remedies might well have been sharply curtailed if not voided altogether.

33. It is important to remember that our "soft" bilateral agreement with the European Community—in which the procedures for cooperation and coordination are established—like other our other "soft" bilateral or multilateral initiatives to date, does not supersede existing national law, and thus does not allow for exchanges of confidential investigatory or other information among national competition authorities. See Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 23, 1991), 30 I.L.M. 1491, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,504.
The Antitrust Division has also coordinated with its counterparts abroad in reviewing transnational mergers and acquisitions. Last year, for example, we filed a civil complaint alleging that the proposed combination of Sprint (with its international long distance services) and France Telecom (FT) and Deutsche Telekom (DT) (with their monopolies over telecommunications services in their respective countries), might lead to a substantial reduction in competition in international telecommunications to or from the United States. Accompanying the complaint was a proposed consent decree, which has not yet been entered as of the preparation of the article. Under the consent decree, Sprint and the joint venture will be subject to transparency and reporting requirements; will be prohibited from disclosing competitively sensitive information; and will be prohibited from favoring themselves with exclusive licenses. The consent decree also restricts the types of businesses that FT and DT may place in the joint venture. Additionally, there are various other provisions to ensure nondiscriminatory, competitive access to the telecommunications and public data networks in France and Germany. The restrictions will operate in two phases, relaxing over time as competition in the telecommunications industry develops in France and Germany. The European Union also reviewed this transaction and we actively coordinated with them to ensure that our respective restrictions on the merger did not conflict.

B. Positive Comity

A second approach for dealing with anticompetitive practices occurring or having effects in multiple jurisdictions is for one nation to request another’s enforcement agency to initiate enforcement action and to report regularly on its progress to the requesting country. This approach holds the most promise when the bulk of the conduct at issue—although having effects abroad—is largely confined to a single jurisdiction. It is also effective when the competition authority of that jurisdiction is in the best position

36. Id. § III.
37. Id. § III(D).
38. Id. § III(F)-(I).
to remedy the practices at issue, because it has the best access to information about the conduct, and will be able to assert its remedial authority most easily over the firms engaged in the market-closing behavior.

In order for this approach to be successful, however, the foreign country concerned must have in existence a strong antitrust law that prohibits a range of collusive or monopolistic practices similar to that prohibited by the Sherman Act39 and one that provides sufficient authority to its enforcement authorities to eliminate the unlawful practices. To deter these activities, the foreign laws must also provide for penalties that are sufficiently high to offset the potential profits that companies believe they can derive from the unlawful conduct. It also goes without saying that this authority must be adequately staffed and truly independent of political pressures so that it can carry out its enforcement efforts even if a remedy would favor foreign over domestic competitors.

We have thus embarked on significant efforts to encourage the adoption of sound and effective competition laws and enforcement policies around the globe. In fact, we have provided advice and assistance to roughly two dozen countries in the last five years on the drafting of their competition laws or on the enforcement of those laws. Our efforts appear to be paying off here as well, as we are seeing a newfound interest in antitrust policy throughout the world. At our last count, approximately sixty countries, representing about one-third of the countries of the world but more than eighty percent of the world's GDP, had enacted antitrust or competition laws.40

Obviously, however, the effectiveness of even the best-crafted antitrust law will depend on the willingness and ability of the relevant authorities to enforce the law vigorously against unlawful practices that restrain competition from foreign competitors. Because as many as one half of all competition laws in the world are less than five years old, many of the countries are still developing the expertise and political support necessary for sound and effective enforcement. Even among countries with reasonably sound and long-standing antitrust laws, we too often see them, even today, failing to

39. 15 U.S.C. §§ 1-7 (1994). The Sherman Act declares that "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal." Id. § 1. Also, the Act prohibits monopolization and attempts at monopolization. Id. § 2.

provide the resources or political support to their competition authorities to enable them to enforce their law in an effective manner.

For example, we have expended considerable effort over the last several years in trying to convince the Japanese government to reinvigorate its antimonopoly enforcement. Our commitment to enhancing the laws and enforcement efforts of Asian countries is especially important for the computer industry, because Asia has been a major impetus and beneficiary of globalized business activities within that industry. Thus, starting in 1989 with the Structural Impediments Initiative (SII) talks, and continuing with the U.S.-Japan Framework talks in this Administration, we have been encouraging Japan to strengthen the Japan Fair Trade Commission's (JFTC's) ability and willingness to enforce its Antimonopoly Act in a way calculated to eliminate the cartels and entry-restricting anticompetitive practices and market structures that many believe have been pervasive in the Japanese market.


42. See U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (SII), JOINT REPORT (1990). The Structural Impediments Initiative (SII) was launched in July 1989 by President Bush and Japanese Prime Minister Uno in order "to identify and solve structural problems in both countries that stand as impediments to trade and to balance of payments adjustment . . . ." Id. at intro. The U.S. negotiating team gave a high priority to addressing in the SII discussions the inadequacy of Japanese antitrust enforcement in punishing and deterring anticompetitive exclusionary business practices that impede efforts by American firms to compete in the Japanese marketplace. The Joint Report contained significant commitments by the Japanese Government to strengthen antitrust enforcement in Japan. Id. The First and Second SII Annual Reports were issued on May 22, 1991 and July 30, 1992, respectively. U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE, FIRST ANNUAL REPORT (1991); U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE, SECOND ANNUAL REPORT (1992). The 1992 Annual Report contained expanded commitments in the antitrust area. Id. § IV, ¶ 1. In addition, the Report included new Japanese commitments to improve access to its civil litigation system. Id. § IV, ¶ 5. See also, Abbott B. Libsky, Jr., Current Developments in Japanese Competition Law: Antimopoly Act Enforcement Guidelines Resulting from the Structural Impediments Initiatives, 60 ANTITRUST L.J. 279 (1991) (discussing fundamentals of Japanese competition law and new competition law enforcement guidelines).

There has been some progress in this effort; although much remains to be done before we can be confident that the JFTC is willing and able to stamp out anticompetitive practices in the Japanese market that have a market-access denying effect. One of the most notable recent developments was the JFTC's establishment of an Import Restraint Task Force in April of 1995 to investigate and prosecute restrictions on import competition. We are hopeful that creation of this Task Force spells the beginning of a long-overdue Japanese government commitment to eliminate the collusive and trade restrictive practices that have resulted in a number of Japan's markets being effectively closed to American and other foreign competition.

We are continuing our efforts to foster an effective antitrust enforcement environment in Japan. Last year, we urged the Ruling Party's Administrative Reform Project Team, a team of about twelve Diet members charged with recommending new legislation to strengthen the JFTC and to promote administrative reform within the Japanese government, to make dramatic increases in the staff and resources of the JFTC, so that its enforcement resources are commensurate with Japan's position as the second-largest economy in the world.43 We also urged the Japanese Government to raise the administrative status of the JFTC so that it is better able to interact with the "industrial ministries," such as the Ministry of Finance and the Ministry of Transportation (MITI), on competition policy matters.

Clearly, the effectiveness of the positive comity approach—in Framework had five sub-areas: Procurement, Automobiles, Regulatory Reform and Competitiveness, Economic Harmonization, and Implementation of Existing Agreement. Id. In January and again in November of 1994, the U.S. Government submitted a list of proposals for action with respect to deregulation and competition policy. The competition policy proposals were designed to strengthen the Japan Fair Trade Commission (JFTC) and antimonopoly enforcement in general, and to follow up on the progress made in the SII talks in this area. In 1995, the U.S. government, under the Framework talks, provided comments on the Government of Japan's five-year Deregulation Action Plan; included in these were recommendations on the competition policy aspects of the Action Plan. These recommendations addressed needed enhancements of the JFTC's investigatory and enforcement powers, prevention of anticompetitive practices by trade associations, measures to eliminate bid rigging on publicly-funded procurement, and crucial improvements to Japan's private civil remedy system for antimonopoly violations, among others.

43. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 855-56 (115th ed. 1995). In 1993, Japan's GDP was $2.559 billion, as compared with $6.260 billion for the U.S., and $1.503 billion for Germany. Id. Per capita GDP for Japan was $20,523, as compared with $24,302 for the U.S., and $18,510 for Germany; if GNP per capita is used instead of GDP, Japan rises to $34,160, while the U.S. figure was $24,580, and the figure for Germany was $21,020. Id.
which competition authorities request action by their counterparts in other countries—essentially rests on the willingness of nations to enact substantive competition laws, and to enforce those laws vigorously against private restraints of trade occurring in their territories. Where we in the Justice Department have been confident that other nations are willing and able to prosecute anticompetitive restraints occurring primarily in their territories but having effects in the United States—as has been the case in several instances of anticompetitive conduct in the European Union—we have been willing to request that they (DG-IV, in most cases) act to investigate and to remedy the alleged conduct, while we stay our hand. In such cases, of course, we always reserve the authority to come in on our own later if the circumstances warrant.

Despite the desirable aspects of positive comity when done right, there are still too many situations in which other antitrust authorities are not effective in preventing anticompetitive practices in their markets that have effects in other jurisdictions. In those circumstances, we need to have other options for removing the impediment to market access that the world community has a right to expect, and that we in the Department of Justice are mandated by statute to achieve.

C. Application of U.S. Antitrust Laws to Foreign Private Restraints of Trade

A third approach for curbing anticompetitive practices having global effects is for individual enforcement authorities to seek application of their laws within their full jurisdictional reach. The competition laws of many nations authorize enforcement agencies to take action against conduct occurring outside of their own territories, but having effects within the territories. For example, the Sherman Act, as reaffirmed by the Congress in the Foreign Trade Antitrust Improvements Act of 1982,44 protects American consumers and exporters from anticompetitive restraints imposed by foreign firms in foreign markets that have a direct, substantial and reasonably foreseeable effect on U.S. domestic or export commerce.45 The European Community, too, following the Wood Pulp46 decision in 1988, generally accepts the validity of exercises of juris-

45. Id. § 6(a)(1).
diction over foreign-based conduct that has substantial market effects within the European Community.\textsuperscript{47} The antitrust laws of many other countries—particularly the newer laws—also have adopted effects-based jurisdiction.

Of course, antitrust enforcement action of this kind is not a practicable or appropriate way to deal with every instance of foreign anticompetitive conduct. In the United States, we must be able to obtain personal jurisdiction over the defendants, get access to sufficient evidence to prove our case in court, and, in civil enforcement actions, have remedies available that a court will be capable of enforcing.\textsuperscript{48} And, as we said in our new Antitrust Enforcement Guidelines for International Operations issued in 1995,\textsuperscript{49} we take serious account of considerations of international comity in making our enforcement decisions—factors that include the effectiveness of foreign antitrust enforcement as an alternative to remedying the problem.\textsuperscript{50} Because some countries are sensitive to the application of our competition laws to conduct occurring within their territories, we may be impeded in our ability to gather foreign-located evidence or obtain information cooperatively. Thus, our ability to pursue this approach of antitrust enforcement in a global industry is hampered greatly by the limits imposed by the real-world constraints in evidence-gathering beyond our borders, limitations of our jurisdictional reach and foreign policy or comity considerations.

Still, in the past two years, we have successfully taken action directed at practices that, if unchecked, would have had a significant adverse impact on U.S. trade. For example, on December 22, 1994, the Division obtained from a British company, Pilkington Glass, a consent decree that will allow U.S. firms to compete for over fifty float-glass plants expected to be built around the world.\textsuperscript{51} Pilkington had engaged in a variety of anticompetitive practices—involving market allocations and misuse of intellectual property

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\item \textsuperscript{47} Id. at 5242-43 (European Court of Justice holding that members of foreign-based export cartel whose products were sold within European Community were subject to E.C. law; sales into Community provided necessary link to E.C. territory).
\item \textsuperscript{49} Antitrust Enforcement Guidelines, supra note 24.
\item \textsuperscript{50} Id. § 3.2.
\item \textsuperscript{51} United States v. Pilkington, Plc., No. 94-345, final judgment (D. Ariz. 1994), reprinted in 1994-2 Trade Cas. (CCH) ¶ 70,842; also available at gopher://justice2.usdoj.gov:70/00/atr/cases/pilk/pilkfj.txt.
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claims—to prevent U.S. glass competitors from gaining entry into the float-glass manufacturing industry in Asia.\textsuperscript{52} As a result of the consent decree against Pilkington, we estimate that there could be an increase in U.S. export revenue of up to $1.25 billion over the next five years.

V. CONCLUSION

This article has addressed the special challenges presented by antitrust enforcement in the global computer industry. The Department of Justice utilizes all three approaches discussed above—coordinated enforcement, positive comity and applying our antitrust laws abroad—when anticompetitive conduct occurs on a global scale. However, not all are used to the same degree. The last approach remains one of last resort, given the international sensitivities and the difficulties of obtaining foreign-located evidence or foreign cooperation in evidence-gathering.

In an ideal world, all nations would enact effective competition laws to which they would be committed to enforcing—enhanced by effective cooperation and information sharing—and have in place mechanisms for cooperation and sharing of confidential information with their sister agencies abroad. Coordinated enforcement actions or positive comity would thus be adequate to address anticompetitive practices occurring or having effects in multiple jurisdictions. Until, however, the full potential of the approaches of coordination and positive comity are realized through commitment by each country to adopt and enforce effective competition laws and establish cooperative information exchange mechanisms, we have no choice to keep open the option of applying our own laws to conduct occurring abroad but having effects within our territory. In short, at least for now, only through the application of all three approaches can effective antitrust enforcement be achieved in global industries.

\textsuperscript{52} United States v. Pilkington, Plc., No. 94-345, complaint (D. Ariz. filed May 25, 1994); see also Competitive Impact Statement § I(A), 59 Fed. Reg. 30,604 (June 14, 1994).