REPORT ON THE INTERNATIONALIZATION OF COMPETITION LAW RULES: COORDINATION AND CONVERGENCE

EXECUTIVE SUMMARY

This report is being submitted by the Sections of Antitrust Law and International Law and Practice ("Sections") upon recommendation from the Joint Task Force on the Relationship of International Trade Law and Competition Law. The views expressed herein are presented on behalf of the Sections and have not been approved by the ABA House of Delegates or the ABA Board of Governors and thus, should not be construed as representing the position of the ABA.

The convergence report considers various approaches to harmonization of competition laws. The report is intended to describe the costs and benefits of different approaches, rather than to recommend specific actions, although it concludes that convergence in certain areas would be more useful than in other areas.

The report begins by reviewing early efforts to develop international competition law rules or guidelines in which the United States has participated. These include the Havana Charter in the late 1940's, the NCTAD Sets of Principles on Restrictive Business Practices and on Transfer of Technology in the 1970's, OECD Multinational Guidelines in the 1970's and 1980's, and the OECD Recommendation on Hard Core Cartels in the 1990's.

Next the report considers the current state of convergence of competition laws, noting similarities and differences in approaches among jurisdictions. Competition laws generally address basic abuses of economic power, including (i) cartels, (ii) vertical arrangements among distributors and suppliers such as minimum price fixing and forced tying arrangements by firms with market power, and (iii) the abuse of a dominant, or monopoly, position. The manner in which these concerns are addressed varies significantly from one country to another, strongly influenced by national cultural and economic traditions. Specifically, competition law regimes generally break out into seven different models, including:

(a) The Capitalist Model (the U.S.), which seeks to prevent only those private practices that interfere with the competitive process and reduce economic welfare,

(b) The Social Market Model (Germany), which seeks to limit political as well as economic power and is more protective of smaller market players,

(c) The European Union Model, which is designed to enhance the creation of a common market, is more regulatory than the capitalist model, and also reflects a greater concern for the welfare of market actors,

(d) Industrial Policy with Competition (Japan), which has been characterized by strong government involvement in organizing a tight-knit domestic economy and minimal enforcement of competition law,

(e) The Statist Model (China), which involves pervasive government involvement in the economy with little, if any, competition laws,

(f) Restrictive Practices Law (Less Developed Countries), which principally prohibit abusive or exclusionary conduct by large, multi-national corporations, and

(g) The Free-Market, No-Competition Law Model (Hong Kong and Singapore), which relies solely on market forces.

Current initiatives for harmonized or world competition law rules are driven by reduction of trade barriers, globalization of business, and recognition that anticompetitive conduct often transcends national boundaries. These efforts include (i) bilateral memoranda of understanding, mutual legal assistance treaties, cooperation agreements, and information exchanges among the more advanced competition law regimes, (ii) adoption of new competition laws in many nations in the past decade, based on, and strongly influenced by, EU and/or US competition law, (iii) the development of multilateral and regional associations (such as NAFTA and APEC) that provide fora for consultations and other interactions, and (iv) scholarly, professional and bar association fora, and the Attorney General's International Competition Law Advisory Committee (ICPAC).

The report evaluates two proposals that go beyond such soft harmonization but not as far as a world competition code. The analysis is informed by the absence of consensus that trade among nations is significantly restrained as a result of differences among the competition laws of jurisdictions that actively enforce their laws, such as the relatively stricter treatment of vertical restraints and abuses of dominance under EU as opposed to US laws.

First, the report evaluates the idea of a uniform competition law agreed to by many nations but adopted and interpreted by each jurisdiction unilaterally. This approach might reduce transaction costs for multinational firms and diminish (but not eliminate) the prospect of inconsistent results, but it would have an uncertain effect on the balance of payments of any particular nation. This approach would be very difficult to achieve, since even nations with a commitment to vigorous competition law enforcement disagree on what is an optimal law. An international negotiation could lead to pressure on nations that effectively enforce competition law in a manner designed to maximize consumer welfare to degrade their national laws.

Second, the report considers the possibility of selective harmonization around core principles, as recently suggested by the EU Commission. Under this approach, nations would agree, perhaps as a condition of entry into the WTO, to enact and effectively enforce national competition laws embodying a few basic principles, such as prohibitions of horizontal cartels, anticompetitive mergers and abusive practices by firms with unilateral market power. Nations would be free to enact additional prohibitions, so long as they were enforced in a non-discriminatory manner with regard to domestic and foreign entities. Many jurisdictions already satisfy this standard - including the US, the EU, Canada and Mexico - and Japan has a law that facially meets this test. A major advantage of this approach would be to avoid trying to harmonize the minutia of competition laws, and allow attention to focus on real problems such as hybrid and private restraints that deny market access.

Either of these approaches to harmonization could encompass an entirely voluntary system, in which case most of the benefits would lie in sharing ideas and identifying areas of agreement. Harmonization could not be assured without an enforceable system with a binding dispute settlement mechanism. The WTO provides such a dispute settlement mechanism, which has worked reasonably well in other contexts, but there are serious questions as to the feasibility and desirability of using this system for competition law. An intermediate approach would employ a consultative mechanism for the time being and revisit the issue of mandatory dispute settlement after some experience with the consultative mode.

Selective convergence of trade and competition laws requires identifying points of tension and also points at which trade and competition policy would work together more effectively to eliminate obstructions. Candidates for study in this regard include elimination of (i) hybrid restraints, over-regulation and discriminatory regulation that deny market access, and (ii) discriminatory procurement practices not necessary to national defense imposed by government agencies or private firms that control essential facilities.

In conclusion, the ABA has previously urged and continues to believe that one priority is for nations that do not have competition laws to adopt an appropriate law, and for all nations to effectively enforce their competition laws in a non-discriminatory and transparent manner. There are or may be a few essential principles - such as a rule against cartels and a rule against private market access blocking restraints - that may be a useful subject for an agreement among nations. It would also be useful for the nations of the world to seek common ground on issues such as how to define markets and what constitutes an anticompetitive restraint or merger.