

Section of International Law (Annual Meeting 1981)

BE IT RESOLVED, That the American Bar Association recommends to the President and the Congress:

A. The implementation of a United States government policy, by executive action or by legislation if necessary, providing:

1. That any independent federal regulatory agency or executive agency ("Agency") shall take a law enforcement or regulatory action of a type determined by the President to involve important potential conflicts of law and policy between the United States and foreign nations,

(a) as to non-national individuals or enterprises (including foreign subsidiaries of U.S. parent enterprises) located outside the United States, or

(b) involving the issuance of subpoenas or investigative requests for service outside, or seeking information located outside of the United States, only after prior notification to, and the opportunity for consultation during a period of two calendar weeks from the date of notification, with, the United States Department or such other executive agency as the President shall designate;

2. If an Agency determines that in unusual circumstances its law enforcement or regulatory responsibilities would be seriously compromised by failure to take immediate law enforcement or regulatory action of a kind that would have required two weeks prior notice, it may do so, notwithstanding the above, after giving at least one calendar day's prior notice to the United States Department of State or such other executive agency as the President shall designate;

3. That when, on the basis of such consultations, the President determines it to be appropriate, affected foreign governments will be provided an opportunity to consult with United States government officials during the period of two calendar weeks from the date of notification to the United States State Department or such other executive agency as the President shall designate, to provide that the views of such governments may be taken into account before the law enforcement or regulatory action is taken while, at the time, leaving the Agency free to proceed with its enforcement responsibility without undue delay;

4. Each Agency shall designate an official within its organization to: (a) consult in the preparation of the Presidential guidelines as to actions requiring notification and consultation (which guidelines shall be published), and (b) establish and operate internal procedures so that proposed actions requiring notification are identified and timely notice is given; and

5. The implementation of this policy shall not create a private right of action to delay or nullify an Agency law enforcement or regulatory action as to which such notification should have been but was not provided.

B. The establishment of a bipartisan Commission on the International Application of the United States Antitrust Laws, composed of twenty members to be appointed by the President, eight from the private sector, four from the Senate, four from the House of Representatives, and four from the Executive Branch (including the Assistant Attorney General in charge of the Antitrust Division and the Legal Adviser of the Department of State), charged with studying and reporting within eighteen months on:

1. The application of the United States antitrust laws in foreign commerce, and their effect on--(a) the ability of United States enterprises to compete effectively abroad; and (b) the ability of United States enterprises to compete or deal effectively with foreign controlled enterprises in market and nonmarket economies;
2. The effect of the application of the United States antitrust laws on United States relations with other countries;
3. The jurisdiction and scope of the application of United States antitrust laws to foreign conduct and foreign parties;
4. The issue of reciprocity between nations with respect to mutual access to markets, equal opportunities for foreign investments, and enforcement of antitrust laws;
5. The effect of application of the laws of foreign nations to United States enterprises and to their conduct occurring outside the territory of such foreign nations;
6. The applications of United States rules of court relating to the enforcement of antitrust laws in the context of international transactions (for example, the "per se" and "rule of reason" doctrines);
7. The application of the United States antitrust Laws to joint ventures, mergers, acquisitions, and distributions and licensing arrangements between and among the United States and foreign based enterprises;
8. The proper scope and effect of the following on the application of the United States antitrust laws: (a) the rules governing sovereign immunity; (b) the defense of "foreign sovereign compulsion"; and (c) the doctrine of comity;
9. The appropriate mechanisms by which the courts and antitrust enforcement agencies may be informed of, and may take into account, the foreign relations implications of antitrust enforcement actions.