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Change and Continuity in International Antitrust Under an Obama Administration

D. Daniel Sokol*

I. OVERVIEW

A change in the antitrust leadership in the United States as a result of the election of Barack Obama[1] has potentially significant challenging effects for antitrust enforcement and priorities around the world. Nevertheless, some of the differences between Democratic and Republic administrations, at least on international issues, may be exaggerated. To better understand the potential differences in the next administration, this essay will first provide a background of the precarious state of international antitrust that existed in 2000 for the incoming Bush antitrust team at the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") as well as review the current state of international antitrust issues that the Obama team will inherit. Then, the essay will explore potential challenges for the Obama antitrust team. Finally, the essay will conclude with an analysis of the areas where continuity and change in antitrust seem most likely under an Obama administration.

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[1]Whom I fondly remember in class at the University of Chicago Law School as Professor Obama.

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II. A COMPARISON PRE-BUSH AND POST-BUSH

To understand how a presidency can impact international antitrust, we need to look no further than the outgoing Bush presidency. In 2000, the international antitrust scene showed signs of significant fragmentation. One major issue at the time was the heated discussion regarding the intersection of antitrust and international trade. Starting in 1992, the Europeans had pushed for a more active role for the World Trade Organization ("WTO") in international antitrust. The United States antitrust agencies, and the Department of Justice in particular, showed a deep reluctance to create binding international rules that might limit prosecutorial discretion. Antitrust discussions at the WTO level exposed significant divergences across the Atlantic and beyond over the nature of international problems and potential solutions. The Organization for Economic Co-operation and Development ("OECD") at this time was, for the most part, moribund. Other than issuing a report on recommended practices on international cartels in 1998, it seemed satisfied with hosting occasional meetings of agency heads in Paris that did not lead to lasting results.

Outside of international organizations, a significant disconnect remained between the European Commission and the United States. The *Boeing/McDonnell Douglas* merger suggested that there was a significant trans-Atlantic rift in terms of economic analysis and the potential use of antitrust for political purposes.[2] Early in the Bush administration, the rift became more exposed due to the failed *GE/Honeywell* merger, which at times felt like a full blown war between the Department of Justice and the

[2]Though day to day, most trans-Atlantic mergers were not problematic and cooperation overall was good between European and U.S. agencies. John J. Parisi, *International Regulation of Mergers: More Convergence, Less Conflict*, 61 N.Y.U. ANN. SURV. AM. L. 509, (2005)

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European Commission. The issue of how to control mergers lacked the level of close *global* cooperation and coordination that exists today. The lack of: (a) transparency and (b) procedural rules that made business sense and were coordinated across jurisdictions created significant transaction costs for multinational businesses.

Merger control was not the only global challenge. The anti-cartel norm was in its nascent stages and serious coordination of anti-cartel efforts was far less than it is today. The discovery and prosecution of global cartels has never been greater than the present. Moreover, the portion of charged persons imprisoned and the length of imposed prison terms increased during the Bush years. Unlike 2000, cartelists sitting in U.S. prisons today now represent individuals from many countries, not merely U.S. nationals.

Serious differences remain across jurisdictions in terms of unilateral conduct—the Bush antitrust team did not resolve issues of single-firm conduct globally. Though the Bush DOJ team quickly settled with Microsoft over what my colleague Bill Page in his excellent book on the litigation termed "the antitrust case of a generation,"[3] Microsoft cases (and other cases involving potentially dominant firms such as Intel and Qualcomm) continue to be litigated outside of the United States.

Most of the issues that were at the forefront of antitrust in 2000 are not those that are at the forefront in 2008. Indeed, the international landscape has changed drastically. There is more antitrust activity around the world, conducted by over 100 agencies. This includes agencies in jurisdictions large and small, ranging from Greenland, Barbados, Jersey, and Mauritius on the one hand to China on the other hand.

[3] William H. Page and John E. Lopatka, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE (2007).

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For the most part, the global discussion of trade and competition was dead even before the more general demise of the Doha Round of WTO. However, the WTO discussions also have died a quiet death in part because of the success of non-binding institutional alternatives. The International Competition Network ("ICN") and OECD are better suited to promote the antitrust cooperation and coordination issues that top the antitrust agenda on a day-today level and affect most practitioners (i.e. mergers and cartels).

Indeed, the creation and success of the ICN have improved relations and increased regular cooperation among the European Commission ("EC"), the U.S. agencies, National Competition Authorities ("NCAs") in Europe, and other agencies from around the world. The ICN has resolved many of the procedural and coordination issues of international merger control by creating a series of recommended practices that agencies have implemented. Indeed, early ICN successes in merger control have created a momentum for success that has reached to other issues in which: (a) the primary problem is coordination and cooperation; and (b) there is general agreement about the antitrust problem to be confronted and the types of solutions to pursue. These ICN successes include areas such as capacity building, cartels, and the relationship of antitrust to regulated industries. The success of the ICN also has reinvigorated the OECD.

Difficult problems in which government and mixed government-private restraints to competition remain, but in the current political climate it is unlikely that the Obama antitrust team will focus on the antitrust-trade interface. At the regional or bilateral level,

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should there be any future trade agreements, antitrust may have a place at the negotiating table but this can hardly be assured. Moreover, how effective such chapters will be remains an open question. Thus far, all U.S. antitrust chapters in trade agreements lack any binding dispute resolution feature on antitrust specific issues such as mergers, cartels, or single firm conduct and so these chapters have for the most part only symbolic effects.[4]

The other significant difference between 2000 and 2008 has been the emergence of China onto the antitrust scene and a significant improvement in the quality of decision-making on the part of the EC and NCAs. China (with India soon to follow) will play an increasing role for international antitrust practitioners, primarily in the area of merger control but potentially also on issues such as single-firm conduct. The future role of China in antitrust cannot be understated.

A number of challenges remain ahead with regard to young agencies. One is the transparency of decision-making. Current decision-making in many jurisdictions lacks sufficient transparency to allow for better understanding of the risk-reward benefits involved in undertaking certain types of business activities. Moreover, many believe that the sophistication of the economic analysis in merger and conduct cases (and indeed the larger political motivation for bringing cases) may be suspect. Specific to China, the

[4] D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231 (2008) (noting however that some free trade agreements do contain dispute resolution for state enterprises and designated monopolies. The one such litigated case is *UPS vs. Canada Post* brought under NAFTA shows a lack of economic sophistication in the published decision and so I hold little hope that these provisions will actually be useful.)

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reach of the Antimonopoly Law ("AML") to “strategic” sectors and many state-owned enterprises remains unclear.

With regards to Europe, significant divergence remains in the area of single-firm conduct. How much divergence will continue is a function of what the new U.S. approach will be to single-firm conduct. However, part of the divergence is due to a different set of assumptions about firms and legal institutions in the EU and its Member States. The true test of the ICN and the reinvigorated OECD is in how effective they will be in reducing serious divisions across the Atlantic to some mutually agreed upon best practices in the area of single firm conduct.

III. THE TONE OF INTERNATIONAL ANTITRUST DISCOURSE WILL CHANGE

There is a perception abroad of an imperialistic and paternalistic Department of Justice. The basis for this view is the perception that DOJ believes there should be a convergence of antitrust agencies to approach the DOJ model in terms of agency priorities and analytical approach. DOJ officials in speeches discuss tolerance for a diversity of approaches so long as they fall within a benchmark of recognized “best practices.” However, some competition authorities find a disconnect between DOJ in speeches versus DOJ in practice. This idea of an imperialist DOJ has a negative effect on the impact of DOJ's good work abroad. As I discuss below, lamentably the discussion of DOJ imperialism leads some antitrust experts and agency officials to under-emphasize the important and positive role that the DOJ has played in pushing an anti-cartel message

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worldwide.

IV. MIXED MESSAGES ABROAD START AT HOME

DOJ "imperialism" is not limited merely internationally but for some also extends to the DOJ's relationship with the FTC on international and domestic matters. In a telling interview last year, then Commissioner and now probable outgoing Chairman Bill Kovacic described the relationship between the two agencies in an interview. He said, "We have an archipelago of policy makers with very inadequate ferry service between the islands… In too many instances when you go to visit those islands the inhabitants come out with sticks and torches and try to chase you away." On the dynamics of this relationship and its impact internationally, Kovacic described it as, "We develop more effort internationally with our counterparts to cooperate in the competition area than we do domestically with our counterparts… You can have debates and disagreements, but there is a culture inside this building that the sharpest of disagreements [between the DOJ and FTC] get vetted internally and your counterparts are never surprised."[5]

There are domestic elements to the inter-agency squabbling, such as the DOJ Report on Unilateral Conduct, but these tensions play out in the international realm as well, coming out in terms of the type of message that agency officials present when giving speeches abroad and the types of advice that agency officials give to agencies around the world. A reduction in the tension between the two U.S. agencies will make it easier to sell a U.S. antitrust agenda abroad, whatever that agenda might be.

[5] Corey Boles, INTERVIEW: FTC Commissioner Criticizes Relations With DOJ Dow Jones News Service January 29, 2007.

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I suspect that under the Obama administration the DOJ Report on Unilateral Conduct will be consigned to some large room, like the one that houses the Ark of the Covenant in the end credits of the movie, *Raiders of the Lost Ark*. Until we have a better sense of what the general domestic approach will be on monopolization issues at the Department of Justice, it is premature to speculate too much as to what the potential international effect of change at the U.S. agencies will be. Nevertheless, change is likely and that change will allow for more tolerance of alternative approaches around the world (and perhaps in the United States). An Obama administration is likely to generally reduce the tensions between DOJ and FTC.[6] This reduction of tension should spill over into the international realm. This does not mean that the U.S. agencies will stop efforts to push the adoption of those U.S. successes that can be transplanted abroad. Indeed, two of the most successful exports of U.S. antitrust have been the merger guidelines and the successful cartel program that includes leniency, criminal sanctions, and settlements. However, much of the rest of the world remains agnostic at best as to the U.S. approach on unilateral conduct.

An Obama administration may increase the number of government actions against unilateral conduct domestically and may be less hostile to other countries doing the same in their countries. However, a change in U.S. leadership will not change a reality of U.S. court-based outcomes in antitrust. There has been a steady trend of U.S. courts accepting Chicago/Harvard approaches to antitrust. These approaches make it more difficult for a more activist administration to win in courts, even if there is a political desire to do so.

[6]Some concern may exist going forward that the common standard may be overly interventionist.

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The impact of U.S. case selection plays a role in shaping the kinds of positions that the United States takes abroad.

V. INTERNATIONAL TEAM LEADERSHIP

In many ways, the Obama administration operates from an inherited position of relatively better and deeper international antitrust relations than any previous administration. As the very capable career staff at DOJ and FTC is likely to remain in place under the new administration, the institutional ties between the U.S agencies and its counterparts around the world also are likely to remain deep and strong. Nevertheless, the DOJ and FTC staffs have only as much power as their respective leaderships allow them to utilize. Indeed, a critical question to ask of the Obama administration's international antitrust agenda is, "who is in charge?"

Let us begin with the FTC. Given a long personal history of international antitrust involvement, Kovacic came to the Chairmanship with the deepest rolodex of international contacts of any prior FTC Chairman.[7] The FTC relies strongly on the Chairman to set the agenda. Will the entering Chairman encourage and support the international role that Kovacic undoubtedly will continue to play? Whether Kovacic's role abroad will be as an individual Commissioner or more of a de facto emissary of the incoming Chairman and/or the Commission will depend on the incoming Chairman's interest in international antitrust issues, and his or her personal relationship with Kovacic.

A second potential issue affects the FTC. It may well be that the next Chairman may have a consumer protection background rather than one in antitrust. This would

[7] Kovacic's term expires in September 2010.

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create a substantive void between the DOJ and FTC in terms of charting a more unified course for international antitrust. The potential void on the U.S. side comes at a time in which there is a significant change in DG Competition, with Philip Lowe soon to be replaced by Alexander Italianer. Moreover, Commissioner Kroes may step down soon. There would be a different conversation about moving the international antitrust agenda forward if the Kovacic and Kroes replacements are knowledgeable about antitrust.

The impact of the leadership change at the Department of Justice is of equal importance. At the time of writing, the head of DOJ antitrust has not yet been announced. The top two contenders have significant international experience—Bill Kolasky of Wilmer Hale and Eiener Elhauge of Harvard Law School. Kolasky was the Deputy Assistant Attorney General (DAAG) for International under Charles James and co-heads the antitrust practice at Wilmer Hale. He is an insightful practitioner who has been at the forefront of many international developments. Likewise, Elhague has taught international antitrust at Harvard and is author of a comparative U.S.-EU antitrust law casebook. Both Kolasky and Elhauge would ensure that international antitrust remain a priority for DOJ. Moreover, if either of them heads DOJ, the person picked for the DAAG for International would be less important because of the knowledge and support of the Assistant Attorney General on international issues.

Other than Kolasky himself, the various DAAGs for International under Bush did not arrive at the position with previous international experience. This is not to suggest that many were not fast learners. Rather, a DAAG for International with little

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international experience would need time to learn the critical international issues and how to affect change in a way that reduces international friction, advances better cooperation and coordination, and moves the antitrust agenda forward based upon evolving best practices.

A second issue at DOJ is the future of international cartel enforcement leadership. The rate of detection of international cartels continues to rise even though penalties are surging on international cartels, with penalties rising all over the world.[8] Moreover, global cartels still include sophisticated international firms, which suggests that the risk-reward tradeoffs for firms with compliance programs is not yet sufficiently high to effectively deter such behavior. Cartel enforcement has been the area of greatest success of the DOJ internationally and is the area in which tangible "wins"—based on financial and criminal penalties—makes the agency look impressive both domestically and abroad. In recent years, there has been an erosion of U.S. leadership in the area of cartel enforcement. Between public and private fines, the EU, its Member States, and private parties in Europe have imposed more financial penalties than the United States (including both public and private fines). The implication of this change is that the DOJ is not the only show in town when it comes to anti-cartel innovation. Indeed, the newest innovations have come from Korea and the U.K. rather than the United States. Both of the former countries have introduced a payment bounty for cartel informants. In the U.K. the amount is far too low (at £100,000) but the United States has not responded in turn.

[8] For Connor's most recent work (with updated 2007 data), see John M. Connor et al., *Antitrust Division Cartel Enforcement: Appraisal and Proposals* (March 18, 2008), *available at* http://ssrn.com/abstract=1130204; John M. Connor, *Cartel Enforcement at the Antitrust Division, U.S. Department of Justice, 1990-2007*, 9(2)GCP MAGAZINE(Sep-08), available at http://www.globalcompetitionpolicy.org/index.php?id=1393&action=907.

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One question going forward will be the extradition of U.S. cartelists to foreign jurisdictions. For example, will the DOJ be as enthusiastic to support the extradition of a U.S. national to a Russian jail as it would to support the extradition of Ian Norris to the United States?

VI. FISCAL RESTRAINTS

In a period of increasing budget austerity for the U.S. government (outside of the growth area of increased funding for the Federal Reserve system), I suspect that the international antitrust efforts of U.S. enforcers may be hamstrung by budget constraints. This means fewer technical assistance missions than would be optimal. Fiscal restraints for technical assistance come at a particularly bad time given the continued growth of antitrust around the world. Thankfully, some of the technical assistance work can be done via emails and conference calls. The ICN Competition Policy Implementation group has done a spectacular job in assisting young agencies to work through operational issues on how to make competition policy more effective. Nevertheless, phone and email conversations are imperfect substitutes for face-to-face conversations.

VII. STATE INTERVENTION IN THE ECONOMY

One important contribution of the Bush antitrust team was to focus on government-created restraints through competition advocacy. This was a message that took on global effect in terms of understanding how government regulation might have as significant an anti-competitive effect as private restraints. Government-created restraints remain an important concern in much of the world—China, India, Europe, Latin America

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and increasingly, as a result of the financial crisis, even the United States. The global nature of the financial crisis might dilute the antitrust competition advocacy message as countries react to the crisis by increasing state control of the economy. This state control might create increased anticompetitive restraints with strong popular backing that has origins in interest group politics. Masking their intentions via a larger "public will," certain industries and companies could abuse the legislative and regulatory process for their benefit, hurting consumers.

With Chinese antitrust growing particularly important, limiting the role of anti-competitive government restraints will be an important message for U.S. enforcers to send. However, as the United States soon might impose some of the same kinds of restraints because of the economic downturn, the ability of the United States to advocate pro-competitive reforms might be compromised. Moreover, the economic crisis may be viewed by foreign agencies and governments as a function of placing too much focus on regulatory liberalization, which will make younger competition agencies more reluctant to pursue competition advocacy lest they face retribution through reduced budgets and influence.

VIII. CONCLUSION

The Obama administration inherits an international antitrust situation that is relatively better than the one that the Bush team inherited. Antitrust coordination and cooperation with agencies around the world have never been better. There has been an emergence of best practices across a number of different areas, both substantive and

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technical. On these issues, I expect that there will be no significant shifts in priority, except perhaps a less forceful approach on monopolization issues. Cooperation and harmonization will continue, as will the support of technical assistance.

On the margins, the U.S. agencies may need to refine the message of competition so that market reform does not mean a lack of regulation, just better regulation that protects consumers from anticompetitive harm. Leadership changes may play an important role on a personal level and poor leadership may impact the ability to progress on many issues. International issues should remain a priority merely because of the ever increasing global role of China and other countries and an ever expanding European Union. Yet, the emergence of China and other countries onto the antitrust scene will create new challenges, which the current financial crisis will compound in terms of analytical harmonization regarding single-firm conduct and the proper role of the state in the economy.

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