Statement of Robert Pitofsky

polypropylene and license its production technology. The proposed joint venture betv
Shell and Montedison raised competitive concerns in the worldwide markets for
polypropylene technology and its licensing, given that the joint venture's technologies wo
have accounted for over 70% of worldwide polypropylene manufacturing capacity. Based
on evidence obtained in the investigation, the FTC was concerned that, among other things,
the creation of the joint venture between Shell and Montedison would have caused Shell to
further reduce its support of its U.S.-based joint venture with Union Carbide and to impair
that venture's ability to export. The FTC's complaint charged that the joint venture between
Shell and Montedison would have a direct, substantial, and reasonably foreseeable
anticompetitive effect on export commerce, as defined in the Foreign Trade Antitrust
Improvements Act of 1982 (the FTAIA).[2] The case was ultimately settled with Shell's
divestiture to Union Carbide of its half interest in their joint venture.[3]

The second case, brought in 1996, concerned an acquisition of Metal Leve, a Brazilian firm,
by Mahle, a German firm, both of which operated subsidiaries in the United States. The

engine component and would retard

their foreign counterparts -- there may be differences in applicable laws, or differences in the conclusions drawn from the available evidence, which itself may differ across jurisdictions. This is to be expected. However, even in those instances, the antitrust agencies have not altered the course of action that they believed was appropriate under U.S. law, as illustrated by the FTC's decision not to challenge Boeing's acquisition of McDonnell Douglas despite the European Commission's concern about the merger in conjunction with Boeing's exclusive supply agreement with several airlines.(15) Sometimes, as in the Ciba-Geigy/Sandoz transaction, the roles are reversed -- in that case, the FTC took remedial action in the gene therapy market, while the EC did not see a need to pursue similar relief in that market.(16)

3. Policy Development

In addition to the FTC's cooperative work in specific cross-border cases, the Commission has been able to study, develop, and apply new international antitrust policies based on its work in other related antitrust areas. For example, the FTC's enforcement action in the Ciba-Geigy/Sandoz case involving the gene therapy market reflected the Commission's approach to innovation markets that developed during the hearings that led to the issuance of the May 1996 FTC Staff Report on Competition Policy in the New High-Tech, Global Marketplace ("FTC Staff Report"). Those hearings were the beginning of a continuing effort by the FTC to review its enforcement policies to determine what adjustments might be necessary to account for the vast changes that have occurred in commercial markets in the second half of the 20th century. In addition, the FTC Staff Report generated a review of the consideration of efficiencies in merger analysis which, in turn, led to amendment of the Horizontal Merger Guidelines in 1997. As a further step in this process, the FTC last year commenced its Joint Venture Project to consider the competition issues raised by joint ventures -- a form of business organization that is frequently used in transnational business dealings. Coincidentally, the European Commission is conducting a review of its analysis of joint ventures and other non-merger horizontal agreements and EC staff has discussed issues and exchanged views with FTC staff. It is too early to predict what will develop from these reviews, but the EC and FTC staff discussions have been useful in clarifying the issues that we confront in the antitrust analysis of joint ventures. Moreover, our discussions have enabled the FTC to share with its sister agencies observations and insights about competition trends in the increasingly global marketplace.

of the requesting country. The positive comity principle was embodied in a 1973 OEC recommendation,[17] and was incorporated in our 1991 antitrust enforcement cooperation agreement with the European Communities and our 1995 agreement with Canada.

Earlier this year, the antitrust agencies entered into a new agreement with the EC elaborating on the 1991 agreement by clarifying the circumstances under which the antitrust authorities would refer cases of anticompetitive activities to each other.[18] The antitrust agencies believe this agreement will have several significant benefits, including facilitating the efficient deployment of limited enforcement resources, avoiding difficulties encountered in obtaining evidence and in implementing remedies abroad, and reducing friction that can arise in transborder enforcement. Thus, use of the agreement may result in termination of anticompetitive practices abroad that are injuring U.S. exporters and/or U.S. consumers without using U.S. resources. In addition, the desired results may also be accomplished without engendering complaints that have been raised in the past about the United States' assertion and exercise of extraterritorial jurisdiction and without the practical impediments that the antitrust agencies often face in conducting investigations and seeking to impose remedies beyond U.S. borders.

A key feature

able or willing to receive and pursue a positive comity request. Nor should the agencies -- or companies bringing the complaints -- expect that the foreign authorities will always succeed in investigating and prosecuting a complaint.

5. Comments on the Proposed Trade Law Enforcement Improvement Act of 1998

In 1982, Congress passed the Foreign Trade Antitrust Improvements Act ("FTAIA"), clarifying that the U.S. antitrust laws cover, among other things, anticompetitive practices that have a "direct, substantial, and reasonably foreseeable effect" on U.S. export trade or commerce. In 1988, the Department of Justice issued Antitrust Enforcement Guidelines for International Operations.[20] Footnote 159 to the Guidelines set forth the Department's enforcement policy under which, notwithstanding the clear mandate of the FTAIA, it would exercise its prosecutorial discretion not to bring cases involving conduct that harmed only U.S. consumers, as opposed to U.S. exports or exporters.

In 1992, the Department's Antitrust Division, under Assistant Attorney General Rill, rescinded that policy and restored the Department's mandate under the FTAIA to prosecute foreign anticompetitive practices that injure U.S. exports. This change in enforcemen was reflected in the 1995 Antitrust Enforcement Guidelines for International Operations, which the Department and the FTC issued jointly.[21] Consistent with this change, the Commission fully intends to investigate appropriate cases involving such conduct.

Section 2 of S. 2252, the Trade Law Enforcement Improvement Act of 1998, would codify the repeal of footnote 159 of the 1988 Enforcement Guidelines by amending the Sherman Act and the Federal Trade Commission Act to state that they will apply to anticompetitive conduct "without regard to the effect of 3b /TT3(t)- ee c(e)4(cu388.8b<</MCS1 cs 0t)- f2-2(w)2(i)-(s)

reprinted in 4 Trade Reg. Rpt. (CCH) ¶ 13,503.

10. Organization for Economic Cooperation and Development, Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL, 27-28 July 1995, available on the OECD's World Wide Web site at http://www.oecd.fr/daf/ccp/rec8com.htm. This Recommendation was first adopted in 1967 and was revised in 1973, 1979, 1986, and 1995.

11. 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.

12. 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.

13. *See* FTC Press Release, "First International Antitrust Assistance Agreement under new law announced by FTC and DOJ," April 17, 1997, published with the text of the proposed agreement on the FTC's World Wide Web Site at http://www.ftc.gov/opa/1997/04/iaeaa.htm

14. Pub. L. No. 103-438, 108 Stat. 4597, *codified at* 15 U.S.C. §§ 6201-6212.

15. The Boeing Co., et al., Joint Statement closing investigation of the proposed merger and separate statement of Commission Mary L. Azcuenaga, FTC File No. 971-0051, announced July 1, 1997, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,295; Boeing/McDonnell Douglas, Case No IV/M.877, European Commission Decision of 30 July 1997, OJ L 336/16 (8 Dec. 1997).

16. *Supra*, note 5.

17. *Supra*, note 9.

18. Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, June 4, 1998, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504A; and OJ L 173/26 (18 June 1998).

19. Consorzio del Prosciutto di San Daniele v. Consorzio del Prosciutto di Parma (Rif. I138) Delibera del 19.06.96 - Boll. N. 25/1996.

20. U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, (Nov. 1988), *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,109.

21. U.S. Department of Justice and the Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (April 1995), *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,107, at fn. 62.

22. U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,104.

23. *Supra*, note 21, § 1.0. Supply substitution factors -- i.e., possible production responses -- are also considered in identifying the firms that participate in the relevant market and in analyzing entry.

24. *Federal Trade Commission v. Staples, Inc. and Office Depot, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997), *citing Brown Shoe v. United States*, 370 U.S. 294 (1962) and *United States v. E.I. DuPont de Nemours and Co.*, 351 U.S. 377 (1956).