THE RELATIONSHIP BETWEEN COMPETITION AGENCIES AND OTHER UNITS OF GOVERNMENT

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It is a privilege to return to China to participate in this International Seminar on the Review of the Draft Anti-Monopoly Law. We in the United States recognize the tremendous resources that the Chinese government has been devoting for many years to ensure that the legislation will be based on sound principles and practices aimed at contributing to the growth of China's economy and the welfare of its people. The rules of competition are crucial to the successful operation of an economy based upon market activity, and we believe that a well-crafted Anti-Monopoly Law will hold the promise of benefits for both China and the rest of the world. As you know, we have attended numerous seminars and meetings over the past year to discuss the topics to be covered in the legislation. We are grateful to the Ministry of Commerce, the Asian Development Bank, and the Organisation for Economic Cooperation and Development for taking the lead in organizing this week's seminar and for bringing us to the beautiful West Lake and city of Hangzhou.

In May of last year, I had the honor to participate in the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China, held in Beijing under the sponsorship of the Legislative Affairs Office of the State Council, together with the Ministry of Commerce and the State Administration for Industry and Commerce. My remarks there addressed three topics – abuse of dominant position, merger control, and agency structure.[1] My presentation today will elaborate on the earlier discussion of

agency structure. In particular, I would like to focus today principally on the relationship between competition agencies and other units

Examples are not limited to the United States, of course. It is now commonplace for competition authorities to express caution over the anticompetitive consequences that often flow from regulatory capture and rent-seeking.[7] Many jurisdictions have also adopted policies that limit governmental favoritism in the form of state aid; the most widely recognized example is in the European Union, where the Treaty of Rome prohibits Member States from interfering with commerce among themselves.[8]

A second observation from the Chairman's speech relates to the reasons that governmental intervention can be so attractive to businesses seeking a haven from the rigors of competition:

> Engaging in private anticompetitive conduct is risky for firms: predatory pricing requires the predator to lose profits in the short term; collusive behavior has the risk of cheating on the cartel; and there is the risk of detection and legal punishment. By contrast, persuading the government to adopt an anticompetitive restriction is much less risky: the costs of lobbying are low; the government enforces the restriction, which reduces the likelihood of cheating; and the ability of the competition agencies to intervene is limited.[9]

Government-imposed restraints on competition often prove to be especially effective and durable. In our experience, restraints authorized for government-controlled enterprises or

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Muris, Chairman, Fed. Trade Comm'n, *Creating a Culture of Competition: The Essential Role of Competition Advocacy*, Remarks before International Competition Network Panel on Competition Advocacy and Antitrust Authorities (Sept. 28, 2002), available at http://www.ftc.gov/speeches/muris/020928naples.htm.

[7] *See, e.g.*, Dr. Ulf Böge, President, Bundeskartellamt, *State-Imposed Restrictions of Competition and Competition Advocacy*, Remarks before Opening Session of 2004 Seoul Competition Forum (Apr. 20, 2004).

[8] Article 86 of the Treaty limits the powers of the Member States to enact measures adversely affecting competition, and Article 87 authorizes the European Commission to challenge and order repayment of competition-distorting state aid.

[9] *Culture of Competition*, *supra* note 2, at pt. I. *See also* Timothy J. Muris, Chairman, Fed. Trade Comm'n, *State Intervention/State Action – A U.S. Perspective*, Remarks before Fordham Annual Conference on International Antitrust Law & Policy, at 2 (Oct. 24, 2003), available at http://www.ftc.gov/speeches/muris/fordham031024.pdf. Muris writes:

> public restraints are far more effective and efficient at restraining competition. Unlike private restraints, there is no need to maintain backroom secrecy or to incur the costs of conducting a covert cartel. Public restraints can be open and notorious. Public restraints are also a more efficient means of solving the entry problem. Rather than ceaselessly monitoring the marketplace for new rivals, a firm can simply rely on a public regime that, for example, provides for only a limited number of licenses. Perhaps the clearest advantage of public restraints is that they frequently include a built-in cartel enforcement mechanism. While cheating often besets private cartels, public cartels suffer from no such defect. Cheaters, once identified, can be sanctioned through government processes.

imposed on the private sector pursuant to government regulation often have a greater

to the relationship can vary. In one juri

jurisdiction, its role will become one of advocacy – even if the competition authority cannot control the outcome of a given decision, it will be important to take steps to assure that the sectoral regulator with decision-making responsibility adequately recognizes and gives weight to competition considerations.[19]

More generally, if a country has selected *markets* as the primary basis for organizing its economic system and if it wants those markets to function well, it needs to protect the competitive process. That objective will often encounter resistance, because the government will face recurring pressure to consider interests and values other than competition. Those interests and values will sometimes be legitimate in their own right, but they will have other champions. The responsibility to serve as a leading champion for competition interests will frequently fall on the competition authority – by urging competition as an organizing principle for the economy, by explaining the benefits of competition to the public and to others in government, by engaging in appropriate investigations and interventions when it has jurisdiction, and by engaging in advocacy before other regulators when it does not.

THREE FORESEEABLE CHALLENGES FACING COMPETITION AUTHORITIES

As it goes about its mission of protecting the competitive process, virtually every competition authority is likely to face three predictable challenges, which I am about to describe. We in the United States face these challenges, as do our counterparts in other countries, but we are a long-established agency in an economic system that has widely embraced competition as an organizing principle. For new competition agencies and for agencies in transi prcompIwill agenkA47ies in trans(cust[(som) and he com)9(p)1(etitiv)6itimrk,ace te es es

everywhere below it.[21] In the limited circumstances in which this condition is present, advocates of exemption are correct in asserting that a competitive outcome is infeasible, such that the "monopoly problem cannot be left to the unregulated marketplace or to the antitrust laws for correction."[22] The usual solution is comprehensive oversight by a sectoral regulator. Most industries, however, are structurally competitive and are not characterized by the cost structure required for "natural monopoly" treatment to apply.

- An industry that once had the attributes of a natural monopoly does not necessarily have those attributes forever. As technology evolves, the cost characteristics of an industry change, so that an industry that formerly had constantly-declining LRAC may become structurally competitive. As an example, shifts in telecommunications technology have brought competition to certain businesses that were once viewed as natural monopolies.

- An industry that qualifies as a natural monopoly in some locations is not necessarily a natural monopoly in all locations. In particular, while an industry may have constantly-declining LRAC over a typical range of outputs, high levels of output or density may place operations in a range where costs flatten or begin to increase. In those locations, at least, the business can be structurally competitive. An example is traditional local wireline telephone service – while this service was historically treated as a natural monopoly (wholly aside from recent technology shifts and from potential for competition from wireless service), certain localities had sufficient density to realize virtually all scale economies and to support multiple competing systems.

- An industry that qualifies as a natural monopoly for some stages of operation is not necessarily a natural monopoly for all stages of operation. If the industries products or services can be provided on an unintegrated basis, natural monopoly regulation can be limited to those stages of operation that are not structurally competitive. An example is electric service – transmission might be a natural monopoly that should be regulated accordingly, but generation might be separately marketable competitively. Based on our experience in the United States,[23] we note that dis-integration of formerly integrated businesses and deregulation of formerly regulated activities need to be carefully analyzed and properly structured.

A second challenge facing competition authorities involves the tendency by regional and local government units to engage in preferences favoring their businesses within their territories, typically to the disadvantage of more distant competitors and

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[21] *See* VISCUSI ET AL., *supra* note 11, at 401.

[22] BREYER, *supra* note 13, at 191.

[23] *See* VISCUSI ET AL., *supra* note 11, at 456-61 (describing restructuring of electric power regulation in California and other states).