Note from the Editor

Mr Davidow's article "Recent Developments in the Extraterritorial Application of U.S. Antitrust Law" which appeared in our March 1997 issue (Volume 20, No. 3, p. 5 ff.) has provoked a strong reaction from one of our readers.

This letter, together with Mr Davidow's reply, are a useful addition to the above article, and we are pleased consequently to publish them.

July 9, 1997

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Re: March 1997 Issue: Joel Davidow "Recent Developments" Article

Dear Sirs,

Joel Davidow's article in your March 1997 issue, "Recent Developments in the Extraterritorial Application of U.S. Antitrust Law," contains a section which discusses Eastman Kodak's complaint with respect to Japan's market barriers in consumer photographic film and paper. I am one of several attorney's at Dewey Ballantine who have served as counsel to Kodak since the inception of this matter, and I have several comments on this section of the article.

I am aware that legal journals constantly address matters of public controversy, and it is normal for differing, often clashing points of view to be reflected in their pages. However, it is rare that a succession of out-and-out false statements are published in a journal article which purports to review recent developments for readers in an objective manner. Unfortunately, that has happened here. I will be specific:

1. Mr Davidow says (p. 14) that "Kodak never complained to the JFTC and indicated that it had no interest in JFTC action but rather preferred an import penetration target negotiated with the Japanese Ministry of International Trade and Industry."

– The statement that Kodak "preferred an import penetration target" negotiated with MITI is false. Kodak has *never* said that it sought an import target, negotiated with MITI or otherwise. Mr Davidow offers no citation for this extraordinary charge and indeed, cannot do so. Kodak's original Section 301 petition (Attachment 1) stated that "Kodak does not seek retaliation against any Japanese producer, nor does it seek a fixed or guaranteed level of sales in Japan. Its

objective is an open and competitive market." Kodak has repeatedly reiterated this position from the outset of this matter.

– The statement that "Kodak never complained to the JFTC" is false. In August 1996 Kodak filed a petition with the JFTC pursuant to Article 45 of the Antimonopoly Law, backed by a large evidentiary submission, and formally requested that the JFTC investigate specific current anticompetitive practices in Japan's consumer photographic film and paper market. Because Mr Davidow's article cites articles as recent as February 1997 (see note 50), his failure to acknowledge Kodak's Article 45 action (which was publicized at the time, see Attachment 2) cannot be attributed to his having completed the article prior to Kodak's filing with the JFTC.

2. Mr Davidow states (p.15) that in the U.S. WTO complaint "the United States argued that inadequate antitrust enforcement could 'nullify and impair' tariff reductions with regard to affected goods."

– This statement is totally false. The United States has made no such argument in the WTO proceedings and has in fact gone to great lengths to *avoid* making any argument that suggests it is complaining about inadequate enforcement of the Antimonopoly Law. The U.S. complaint is based *solely* on laws and measures of the government of Japan which have excluded foreign suppliers from distribution channels and limited the sale of imported products at the retail level. The U.S. submissions to the WTO are publicly available, and the U.S. government has repeatedly gone on record to make clear that it is not complaining about "inadequate antitrust enforcement." (Attachment 3 reproduces the introduction to the U.S. WTO submission, and as can be seen there is no "inadequate antitrust enforcement" claim set forth.) Again, Mr Davidow cites no authority for his sweeping statement, and cannot do so.

3. Mr Davidow states (p.14) that "[A] former head of the Antitrust Division wrote in a paper for Fuji concluding that their alleged practices would not violate U.S. antitrust law."

– This statement is false. Mr Davidow is referring to a memorandum submitted to USTR on 24 April 1996, on behalf of Fuji by Baker & Miller, PLLC. That memorandum did *not* reach the conclusion which Mr Davidow claims, e.g. "Fuji's practices...would not violate U.S. antitrust law." Here again, Mr Davidow cites no authority (and cannot) to support his statement. The Baker & Miller report concluded that "Kodak has not presented a prima facie case that would justify a full Department investigation [of Fuji's practices in Japan]." (Baker & Miller Report, p. i, Attachment 4). That conclusion was based, however, on various jurisdictional and procedural considerations (such as Section 6a of the Sherman Act) that limit extraterritorial application of U.S. antitrust laws—*not* as Mr Davidow claims, on a finding that Fuji's practices "would not violate U.S. antitrust law." In fact, the Baker & Miller report concluded (p. 73) that "Kodak has made a general claim relating to horizontal price fixing by [Fuji-

affiliated] retailers and wholesalers. If the activities complained of occurred in the U.S. this would likely lead to further investigation by the Department [of Justice]...if the wholesalers/retailers' activities had taken place in the U.S. and the Department had enough evidence to suggest that they might well be conspiratorial, then there would be little doubt that the Department would investigate further." (Attachment 4)

Best regards,
Thomas R. Howell

July 29, 1997

Mr. Jacques Werner
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Re: Kodak/Fuji Discussion

Dear Sirs,

My article on recent developments in the international application of United States antitrust law, published in your March issue, devoted three paragraphs to Kodak's USTR/WTO complaint that it is unable to compete in Japan. There were also comments on the various positions the United States has taken in supporting Kodak and bringing the issue to the WTO. My comments elicited a rejoinder from Thomas Howell, an attorney who has represented Kodak in these matters. He states that three of the things I asserted about the dispute are "out-and-out false." While I do not agree with Mr Howell's characterization, I do recognize that the points he raises suggest the need for clarifications concerning a complex and constantly changing situation.

The main point of my comments was that cases mixing trade and antitrust issues often produces antitrust anomalies, and that the United States has been pushed by its automotive and photographic industries into bringing antitrust to the WTO at the very same time when the U.S. position on a WTO competition code has been more conservative than that of the EU or Japan. I stand by both generalizations, but Mr Howell certainly deserves a response to his particular points:

1. Mr Howell's first criticism is of my comments that Kodak never complained to the JFTC, indicated that it had no interest in JFTC action, but rather preferred an import penetration target negotiated with MITI. I should have said that Kodak never went to the JFTC *before* complaining to USTR about lack of prosecution of Fuji Film. Pursuant to

the SII talks the Japanese Government had set up a special office to receive foreign complaints regarding restrictive arrangements likely to impede imports. It remains true, as I stated, that Kodak filed a complaint in the United States based primarily on an antitrust theory, namely quasi-exclusive dealing between Fuji and certain powerful wholesalers, without having ever brought its evidence to the JFTC.

Neither had Kodak complained to the Antitrust Division in the United States. Almost nine months later, under pressure from USTR, Kodak relented and presented its evidence to the JFTC under Article 45. In addition, the JFTC on its own initiative conducted a broad based investigation of this industry, very recently released, concluding that no violations by Fuji of the Anti-monopoly Act had been found.

The trade press in the United States reported that when Japan first suggested consultations between Kodak and the JFTC, or between U.S. and Japanese competition officials, Kodak was adamant that it wished to deal not with the JFTC but with MITI, about increasing its access to Japanese retailers. I inferred from this that Kodak was not interested in an antitrust solution since it refused to meet with the Japanese antitrust agency but instead wished to negotiate with MITI, an agency that has no power to remedy antitrust violations. It has been well known and common in United States–Japanese market access disputes over the last decade that all companies wishing to negotiate with MITI take the position that what they want is a higher market share in Japan, and that they do not so much care how MITI gets it or whether it is called a prediction, a weather forecast or a target. Mr Howell says that Kodak did not seek a "fixed or guaranteed" level of sales in Japan. I think that admits what I was asserting, namely that their priority was not seeking antitrust relief for the alleged antitrust problem and then competing for sales, but rather was to bypass the JFTC and press MITI to use its influence to get them more market share one way or another.

2. Mr Howell states that I am incorrect in asserting that the United States argued to the WTO that inadequate antitrust enforcement could "nullify and impair" tariff reductions in regard to photographic goods. He then states that examination of the United States briefs in the matter proves his point. I should note first of all that my entire statement on this point what was the United States was the first nation to bring antitrust issues to the WTO, and I referred to both the automotive distribution and photographic supplies cases. Mr Howell does not deny that I am correct that this theory was asserted by the United States in the documents it filed at the WTO before settling the automotive distribution case with Japan.

Turning to the photographic supplies case, the 20 February 1997, "First Submission of the United States of America" states that legal argument number one is "nullification or impairment". In listing the Japanese measures that nullify or impair, the United States first cites JFTC limitations on inducements to Japanese distributors. In its factual presentation, the United States cites JFTC Notification 17 and the JFTC's system of contract notification as further evidence of Japan's activities contrary to its WTO obligations. It is true that at the last moment, USTR decided not to allege that the JFTC's failure to prosecute Fuji was itself a nullification or impairment. Instead, the United

States brought that issue to the WTO under a 1960 antitrust consultation provision, and thus became the first nation to invoke that provision. Nevertheless, complaints in the U.S. WTO submissions about an exclusive distribution system, and about wholesalers who refuse to handle Kodak products, implicate areas of antitrust concern, regardless of the legal label that USTR places on them.

3. Mr Howell says that I was wrong in stating that a former head of the antitrust division wrote a paper for Fuji opining that their trade practices would not violate United States antitrust law. Having reviewed the paper by Donald Baker again, I stand by the correctness of my statement. Kodak's original complaint to USTR devoted scores of pages to the central contention that photographic distributors in Japan were "essential facilities" and that Fuji has illegally monopolized such distributors by giving them loyalty rebates. Former Assistant Attorney General Baker concluded that no United States court or agency has or would declare that a distributor of consumer goods is an essential facility, and that Kodak's theory of exclusive dealing was too loose, too small, and too equivocal in its effects to be likely to be declared illegal under United States standards or even investigated.

Mr Howell's objection probably stems from the fact that Kodak, having realized that its central antitrust theory was untenable, retreated to an alternative argument, namely that there was either retail price fixing or resale price maintenance in the industry, and that these practices do violate United States antitrust law (which Mr Baker had admitted in passing). Nevertheless, even this alternative position by Kodak is replete with problems: (a) if the price fixing is horizontal, i.e. among retailers, then it is not an offense by Fuji, which is the accused party; (b) if Fuji is engaging in resale price maintenance, it is not limiting market access, since it is making it easier for Kodak to beat it on price; (c) the JFTC didn't find the alleged conspiracy to exist.

Let me emphasize in conclusion that it was the purpose of my article to comment provocatively on selected aspects of interesting international antitrust problems. I had no special mission to suggest that either Kodak or USTR was totally wrong or would not prevail on any theory.

Best regards,
Joel Davidow