DEPARTMENT OF JUSTICE

U.S. ANTITRUST POLICIES IN WORLD TRADE

Address by

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Before the
World Trade Center Chicago Seminar on
GATT After Uruguay

Chicago, Illinois

May 16, 1994

I am delighted to be here in Chicago this morning to talk to you about antitrust enforcement at the Department of Justice and its role in global markets. This program, with its extraordinarily distinguished panelists, is one forum where I obviously need not spend time building a case for the importance of free and open competition in global markets. Moreover, the theme of your program, "Competition or Closed Markets in the Twenty-First Century," suggests an incisive understanding of the essential role of sound competition policy and effective enforcement in the world trading system. I suspect that this audience, more than most others, has through experience learned about the critical importance of reducing barriers to trade. I think you will agree that, despite the remarkable strides we have made in trade liberalization, the risk of market foreclosure arising from private forms of restrictive trade barriers remains a serious one.

I would like to talk to you this morning about the role of antitrust enforcement in ensuring competitive conditions in international markets. At the Antitrust Division, we have seen in recent years a large increase in the number of matters involving foreign defendants, foreign-located evidence, foreign markets, and cooperation with foreign antitrust authorities. Jim Rill, my predecessor under President Bush, began this renewed emphasis on international enforcement, and I have continued and strengthened it with the creation, with the approval of Congress, and the appointment of Diane Wood as the first International Deputy of the Division. Many other actions I have taken as Assistant Attorney General have also been related directly or indirectly to expanding and improving our international enforcement program. More fundamentally, as we all know, the high level of international enforcement is attributable to intrinsic changes in the way the world does business.

From where I stand, the days are long gone when the phrase "international antitrust" could serve as adequate shorthand for a handful of rather esoteric enforcement and policy issues. In today's Antitrust Division, investigations and cases with an international component are no longer regarded as curiosities. Instead, they are becoming, if not routine, certainly not unusual. We see this as a very strong indicator that "international antitrust" enforcement will be as vital to U.S. economic interests in the next century as domestic antitrust enforcement has been during the past 100-plus years. Consequently, one of the critical questions for antitrust is whether current policy and traditional enforcement models are up to the task of disciplining international markets.

It is a very positive sign that private groups such as this one have begun to examine the role of antitrust enforcement in an international context, for the choices we make now in defining the future role of antitrust will establish the framework for competition policy, both domestic and international, well into the next century. The regime eventually adopted will have huge consequences for U.S. business and U.S. law enforcement, and it is vital that business and government work together in defining the best course for the U.S. We are eager to hear your views on problems and possible solutions in this area, and I very much look forward to hearing today's panel discussion.

For fifty years, this country's political leaders of both parties have premised U.S. policy on the bedrock belief that this country's economic well-being is tied directly to our ability to compete in open and competitive foreign markets. Our trade negotiators have made tremendous strides in opening foreign markets to new competition. Under current law, however, there are limits to the extent to which trade agreements can discipline anticompetitive abuses within world

markets. For example, neither the GATT nor the World Trade Organization (WTO) that will come into being when the Uruguay Round results are implemented, is structured to protect international markets from the many types of private abuses that are addressed by U.S. antitrust law.

To put it simply, sound international antitrust enforcement, by U.S. and other enforcement authorities, is the logical step beyond pure trade policy in today's world of global business. We should be careful, however, to be clear about what this means. Some have suggested that if we look to competition policy as the tool for ensuring that entry into global markets is not foreclosed by anticompetitive private conduct, then we should at least consider whether it is feasible to introduce competition policy concepts to a multilateral regime.

Previous failed efforts to capitalize on the complementary aspects of trade and competition policy suggest that the two policy areas have an important but complex relationship. In the past, it seemed that trade and competition disciplines were inexorably linked as a function of a shared commitment to economic efficiency, but that underlying policy and analytical tensions severely limited the extent to which the two policy areas could adopt a unified approach to competition issues.

Recent focus on a possible future role for multilateral competition rules in the WTO, and other suggestions for the creation of a multilateral competition regime, have brought the matter again to public attention. Some argue strongly that the WTO is the proper home for <u>all</u> policies promoting competition or economic welfare, including antitrust. Others urge, equally strongly, that the WTO should focus <u>exclusively</u> on enforcing trade liberalization rules, leaving antitrust to national enforcement authorities.

What are the United States' interests in this debate, and what position should we take? In a public statement this past January, President Clinton referred to "antitrust and other competition policies" as an important emerging issue for international trade. Following up on the President's statement, Administration officials have indicated that we expect a careful dialogue in the WTO and other fora on the effects of competition policy in a trade context. In addition, the United States is an active participant in several OECD programs to clarify and define the relationship of trade and competition polices. We also have engaged in significant bilateral exchanges on this issue. Most important, the Administration has created an active interagency working group, led by my International Deputy, Diane Wood, to identify the appropriate strategy for pursuing the global dimensions of antitrust policy.

Diane is on your panel today, and I will leave further discussion of the multilateral option to her. I would like to address another option -- vigorous enforcement of existing national antitrust laws -- that is available today, and has a fifty-year history in U.S. enforcement policy and judicial precedents, but sometimes is overlooked in the current enthusiasm for broad multilateral approaches. I will use my remaining time this morning to consider whether this traditional and tested enforcement model is up to the job of preserving competition in global markets. I believe it is, and we in the Antitrust Division are working hard to add the tools to make it even more effective.

In the past five years, there has been an unprecedented level of interest among governments of both developed and developing market economies in reinvigorating or implementing an effective competition policy and enforcement program. Roughly 50 countries now have antitrust laws and antitrust agencies to enforce those laws. These new programs generally

have been developed and implemented according to a "western" model of policy and practice -- relying chiefly on the U.S. or European Union antitrust regimes for guidance. As a result, there is in place today a worldwide network of antitrust agencies working, to a remarkable degree, toward common objectives. In antitrust circles, we call this phenomenon "convergence."

One very positive benefit of antitrust convergence is the climate it has created for cooperation among antitrust agencies worldwide. Today, we are able to raise with a foreign government antitrust matters of concern to the U.S. with the reasonable expectation that our concern will be understood and shared to some degree. No longer do we expect an expression of antitrust concern to be met with indifference or even hostility. Moreover, we are looking to the time in the not-so-distant future when we can rely on our foreign counterparts to provide meaningful assistance in addressing our antitrust concerns.

This new and welcome environment of shared goals and reciprocal cooperation puts unilateral enforcement in an entirely new light. Of course, given the newness of antitrust concepts in many countries, and their small enforcement budgets, we well understand that we are not yet at the point where cooperation among foreign antitrust agencies necessarily is up to the full job of disciplining all anticompetitive behavior in international markets. While the Antitrust Division stands fully behind the concept of "positive comity" embodied in our bilateral agreement with the EU Commission as a means of addressing transnational violations, we have never lost sight of our own capacity and responsibility to move against violations of U.S. antitrust laws that involve foreign defendants or foreign-based conduct.

Let me give you a point of reference for my remarks. As you may know, Japan has had an antitrust statute in place for almost fifty years. Their law is quite good, but serious enforcement had not been in the Japanese tradition until quite recently. During the U.S.-Japan Structural Impediments Initiative (SII) in the early 1990's, a major point U.S. negotiators raised with the Japanese government related to the impediments posed to competition in Japan by inaction on the part of the Japanese antitrust agency, the Japan Fair Trade Commission (JFTC). The U.S. believed that JFTC enforcement of its own law was a win-win proposition, and we hoped that the Japanese government would agree. Japan, after all, was on record in its own policy declarations in the OECD and in other important fora as supporting the fundamental competition policy objectives espoused by the world's leading industrialized nations.

Japan, in fact, did agree in the SII to important improvements in its enforcement program, including changes ensuring that Japanese antitrust enforcement officials could and would act swiftly and decisively against private restraints of trade taking place within Japan. The JFTC received a significant increase in its budget and personnel: the agency now has over 500 employees. These increases led to a significant increase in the number of JFTC enforcement actions. The JFTC's administrative fines -- called surcharges -- were quadrupled, and criminal fines for corporations were substantially increased. The JFTC, in coordination with the Ministry of Justice, reinstituted criminal enforcement of "egregious" antimonopoly violations, and two prosecutions have been successfully pursued.

However, as I explained in some detail in a speech in March to the Japan Society in New York, our hopes that vigorous JFTC enforcement will fully resolve the allegations of anticompetitive conduct and structural abuses taking place

within Japan's borders are beginning to diminish. I will not repeat all the details of that speech -- it is available through our public information office.

While antitrust enforcement problems are often associated with Japan, they certainly are not unique to that country. What, then, should the United States do in the face of evidence that a foreign government lacks the authority, ability, or incentive to enforce its antitrust law? The answer need not be as complicated as negotiation and implementation of an international antitrust code of conduct, as some have suggested. Under long-standing and authoritative U.S. judicial precedents, and the 1982 statute on this subject enacted by the Congress, if the conduct in question has a direct, substantial, and reasonably foreseeable effect on U.S. commerce, to the detriment of U.S. consumers and business, then U.S. government enforcement of U.S. law is not only the next logical option, it is the duty of the U.S. antitrust enforcement authorities.

This means that the Antitrust Division is required under U.S. law to investigate, and, where warranted, take action against individuals or firms -- foreign or domestic -- that violate U.S. antitrust laws, regardless of whether the conduct occurs in the U.S. or elsewhere. Moreover, as we previously have announced, I am in full agreement with the Bush Administration's decision to withdraw "footnote 159" -- a policy statement in the Department's 1988 Antitrust Enforcement Guidelines for International Operations under which, for a brief period, the Department had indicated that it would not prosecute anticompetitive conduct affecting "only" U.S. exporters. Indeed, we are in the process of revising the 1988 Guidelines to reflect this and other changes in our international enforcement policy.

As a policy matter, there is nothing particularly novel about the determination to take action against violations of U.S. antitrust law that take place outside our national borders. Legal authority to proceed against foreign-based violations is embodied in our Sherman Act, which is 104 years old. It was clear by 1945, when Judge Learned Hand decided the famous Alcoa case, that the Sherman Act does in fact reach agreements entered into and consummated outside the physical boundaries of the United States by foreign persons if "they were intended to affect [U.S.] imports and did affect them."

But we need not look that far back. In 1969, the Supreme Court upheld liability in a case involving conduct beyond U.S. borders which affected U.S. exports in the Canadian patent pooling case, in Zenith v. Hazeltine. And in 1982, Congress clarified the subject matter jurisdiction of the federal antitrust laws by enacting the Foreign Trade Antitrust Improvements Act (FTAIA). The FTAIA applies a "direct, substantial and reasonably foreseeable" effects standard to foreign-based conduct that results in harm to U.S. non-import commerce and the export commerce of U.S. exporters. The U.S. Supreme Court reaffirmed a similar jurisdictional principle last year, in its Hartford Fire Insurance decision, when it upheld the application of the Sherman Act to anticompetitive foreign conduct that is meant to produce, and does produce, substantial effects in the United States.

Nor can the Division's enforcement policy properly be viewed as "extraterritorial" in any pejorative sense. There are few, if any, instances in which the United States would not much prefer that foreign-based anticompetitive conduct be addressed by enforcement actions initiated by the antitrust authority of the country in which the illegal conduct occurs. The important point is that the United States will continue first to seek to work with foreign antitrust authorities if they are better situated to remedy anticompetitive conduct

that impacts U.S. markets and are prepared to act effectively and promptly against that conduct under their own laws. If it is apparent, however, that we cannot look to these agencies to take action, we are required by law to take appropriate action to enforce the U.S. antitrust laws fairly and even-handedly, against all companies and individuals, whatever their particular nationality, where we have both jurisdiction and evidence which indicates that a substantial violation of U.S. law is occurring.

That brings me to a final point on U.S. international antitrust enforcement. The most formidable restrictions on the United States' ability to prosecute offenses that occur outside U.S. borders arise not under our jurisdiction or substantive law, but in connection with legal limitations on our ability to obtain foreign-located evidence or to share confidential information with foreign antitrust agencies. Obviously, sound antitrust enforcement requires extensive factual analysis. The Department, like any enforcement authority, must determine the antitrust legality of commercial practices, not on the basis of theory alone, but on facts. Price-fixers do not go to jail based on theory, but on facts; anticompetitive mergers are not prohibited based on theory, but on facts. And the relevant facts the Department needs to make prosecutorial decisions often are recorded in the documents of the companies under investigation or in the testimony of knowledgeable individuals. When such materials are located in the United States, they usually are readily obtainable. When they are located abroad, however, significant obstacles to obtaining critical evidence can arise.

Unfortunately, the traditional mechanisms available to U.S. enforcement officials for obtaining foreign-located antitrust evidence are not sufficient to meet the needs of modern antitrust enforcement. For example, an attempt to

obtain information through a letter rogatory procedure could conceivably involve disclosure of sensitive facts to several layers of bureaucracy within the requested country, months of deliberation, and no results. The situation more closely reflects the attitudes and economies of 50 or 100 years ago, than the needs of the era of global competition we experience in the late 20th century.

Finding a solution to the problem of accessing foreign-based evidence is one of my priority objectives for the Antitrust Division. For the Department of Justice generally, Mutual Legal Assistance Treaties (MLATs) do provide an effective means of cooperative assistance for most types of criminal investigations. Under the typical MLAT, each party agrees to use its own investigative powers to obtain information for an investigation being conducted by the other party, if requested to do so. MLATs also typically permit the sharing of investigative information whose disclosure would otherwise be constrained by domestic law.

The U.S.-Canada MLAT has been invoked several times by antitrust agencies in both countries since it came into force in 1990. As both we and our Canadian counterparts have stressed, the MLAT has been of enormous help in allowing the two antitrust agencies to locate and obtain evidence situated in the other's country. Moreover, the U.S. has entered into nearly 20 MLATs with countries around the world, and that number is steadily increasing. There are important limits, however, to the Division's use of MLATs: they are intended only for use in criminal matters, and some MLATs (for example, the one with Switzerland) exclude antitrust crimes from coverage. So MLATs alone are not the answer for truly effective international antitrust enforcement.

I strongly believe that enhancing the future effectiveness of U.S. antitrust enforcement will depend in

major part on improved cooperative assistance among antitrust enforcement agencies throughout the world, especially in the collection and sharing of antitrust evidence. If we cannot expand our ability to collect and share evidence, our effectiveness in transnational investigations will continue to be determined by the luck of the jurisdictional dice as to whether important information happens to be located in the U.S., or whether, perhaps, we can snare a hapless witness or defendant with a border watch and subpoena if he/she happens to land at, say, O'Hare. U.S. law enforcement should not be left to such sheer chance.

Accordingly, the Department has been developing a legislative proposal for removing some of the legal constraints that currently impair our effectiveness in international antitrust investigations. We now have such a proposal, which is modeled on existing legislation enacted to assist the Securities and Exchange Commission in its own international enforcement efforts. I am happy to announce that the Administration has approved our proposal and that we are working closely with the Congress to obtain the prompt introduction and passage in this Session of the necessary legislation. If enacted, this legislation would give us the statutory powers necessary to negotiate and implement agreements for foreign assistance in locating and obtaining evidence beyond the reach of U.S. personal jurisdiction, and for exchanges of confidential information.

We are sensitive to the many concerns that will inevitably accompany any proposal for changes to laws governing disclosure of confidential business information. At the same time, we are convinced that enforcement cooperation of this kind is no longer a luxury in today's world, but a real necessity. The realities of global cartels and other transnational arrangements compel us to find a means of reaching otherwise unreachable evidence, and of working with

foreign antitrust agencies in the development of cases to deal with anticompetitive behavior with an international dimension.

In the course of my speech today, I hope I have conveyed to you my strong personal commitment to vigorous antitrust enforcement and the crucial role such enforcement must play in maintaining the United States' competitive position in today's global economic environment by attacking private anticompetitive restraints on U.S. trade. The U.S. antitrust laws already provide us with the substantive and jurisdictional bases we need to do our job. What remains for us to work on is improved cooperation among antitrust enforcement agencies around the world, and obtaining modern and effective tools for obtaining foreign-located evidence. We in the Antitrust Division are working hard on both those goals, and I am confident we will achieve them. We look forward to working with our sister enforcement agencies around the world who are vital to our effort.

Thank you for having me, and for your foresight in convening a conference on this critical and timely issue for international business. I would be delighted to answer any questions you may have.