



DEPARTMENT OF JUSTICE

AN IMPORTANT FIRST STEP: A U.S./JAPAN BILATERAL ANTITRUST COOPERATION AGREEMENT

Address by

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I. Introduction

I am delighted to have the opportunity today to address the Japan Fair Trade Institute, an organization that is approaching its 50th anniversary and is widely known for its expertise in competition policy matters in Japan.

As many of you know, Chairman Pitofsky and I are in Tokyo to attend the annual consultations between the U.S. antitrust agencies and the Japan Fair Trade Commission. The JFTC is one of the world's oldest and largest competition agencies, and the relationship between the JFTC and the Antitrust Division runs deep. We had a very fruitful discussion with the JFTC yesterday about a broad range of topics, including international enforcement issues.

We have conducted annual consultations with the JFTC since 1976 — the longest series of consecutive consultations that the Antitrust Division has had with any foreign antitrust agency. Over the years, the Antitrust Division has hosted a number of JFTC officials in the U.S., while they studied our antitrust laws. And this year, the JFTC will host one of the Antitrust Division's top international lawyers, Stuart Chemtob, who is now in Japan on a Mansfield Fellowship.

I would like today to make a few comments about the prospect of a U.S./Japan antitrust cooperation agreement. As an introduction to those comments, I will note some important lessons from the U.S. antitrust experience that might shed light on what we understand to be the context and potential benefits of such an agreement.

A. Antitrust Benefits Business

As a general matter, U.S. antitrust laws are concerned with preventing private conduct that injures competition or reduces efficiency. Our experience has shown that sound antitrust

enforcement opens markets to competition, provides new opportunities for businesses, and contributes to economic well-being.

Observers sometimes think that antitrust law is anti-business. They think that, I believe, because antitrust law often focuses on what economists call “consumer welfare” and because, when antitrust law comes to the attention of business leaders, it is often when they have to hire antitrust lawyers to figure out how to achieve their business objectives without violating the law or to defend the company in antitrust disputes — when, in other words, antitrust law appears as an obstacle or burden to be overcome.

In fact, however, I think it is clear that sound antitrust law, overall, provides an enormous benefit to the business community. In the first place, experience has shown that antitrust enforcement and competition result in firms that are more effective and more efficient, and thus better able to compete in the global economy. Second, and perhaps more important, businesses are consumers, too; and most of the time they are the most immediate beneficiaries of antitrust enforcement and the deterrence of anticompetitive conduct that results from such enforcement.

For example, as you probably know, we have been prosecuting over the last four years a huge international cartel in feed additives. The purchasers of those food additives were businesses, which paid millions of dollars in inflated, non-market prices as a result of the cartel. Businesses were also the victims of the international graphite electrodes cartel and, indeed, of most of the cartels we have prosecuted in recent years.

The story is similar in the area of civil antitrust enforcement. The principal beneficiaries of our merger cases in the aluminum and airline industries, and our non-merger matters in the health care and electric power industries, for example, were businesses that purchased the goods or services involved.

B. International Cooperation

With that background in mind, let me turn to the main topic of my talk — international cooperation among competition agencies. As I am sure many of you know, on September 22 the JFTC and the Ministry of Foreign Affairs announced in a joint press release that the U.S. antitrust agencies and JFTC had begun negotiations on a bilateral antitrust cooperation agreement. We welcome this announcement and look forward to the prompt conclusion of negotiations leading to a modern, U.S./Japan bilateral antitrust cooperation agreement, in line with similar agreements that the U.S. has with, among others, Canada and the EC. We believe that the conclusion of such an agreement is an important first step towards a more mature relationship between our two countries.

The U.S. and Japanese economies are the two largest economies in the world, and the conclusion of a bilateral antitrust cooperation agreement makes sense given the amount of trade flowing over our respective borders. If, as former Ambassador Mike Mansfield is fond of saying, “The U.S. and Japanese relationship is the most important bilateral relationship in the world, bar none,” then a bilateral antitrust cooperation agreement should be a natural development.

I expect that announcement of negotiations towards an antitrust cooperation agreement has generated some discussion in Japan, so I would like to outline what we in the U.S. (and others in the international community) see as the reasons that bilateral cooperation is important and the key components of a modern bilateral cooperation agreement.

II. Internationalization of Antitrust

Let’s start with the basic question: Why should there be a bilateral cooperation agreement between the U.S. and Japan? The reasons are that antitrust is rapidly

internationalizing and that a bilateral agreement is necessary to deepen our relationship, to reduce tensions and to enhance our sound antitrust enforcement. It is an unavoidable fact in today's global economy that antitrust enforcement cannot stop at national borders if it is to be effective.

There are, I think, two basic reasons why antitrust is rapidly internationalizing. First, the increased liberalization of international trade through the successive GATT rounds, especially the Uruguay Round, has led to increased international business activity. Companies that used to be shielded from the rigors of international competition by at-the-border barriers such as tariffs or quotas have seen many of these protectionist tools dismantled. In response, some companies have sought to replace abandoned government barriers with their own private anticompetitive agreements. Moreover, the fact that more companies are now engaged in cross border business transactions naturally increases the likelihood that, when companies choose to enter into anticompetitive agreements, they will have international ramifications; that conduct that takes place in one country will cause harm in other countries; and that the investigative techniques and remedies applied to anticompetitive conduct by antitrust authorities will have an international dimension.

Second, the technological, and in particular telecommunications, revolution has shrunk the economic globe. It is now easier than ever for business executives to communicate at the touch of a button with their counterparts in other countries, via phone, fax, e-mail or video conferencing. The shrinking globe both increases international commerce and makes anticompetitive international agreements more tempting and more feasible.

The internationalization of antitrust is one of the most important challenges we are confronting at the Antitrust Division. In the last few years, we have witnessed first-hand an

explosion of cases with an international component. At present, the Antitrust Division has more than 30 grand juries — approximately one-third of its criminal investigations — looking into suspected international cartel activity that has injured the U.S. economy. The subjects of these investigations are located on five continents and in more than 20 different countries. In more than half of the investigations, the volume of commerce affected over the course of the suspected conspiracy is well above \$100 million; in some of them, the volume of commerce affected is more than \$1 billion per year. Over the past few years, we have prosecuted international cartels in a variety of industries; and the firms and individuals involved have been American, Belgian, Dutch, French, German, Italian, Japanese, Korean and Swiss.

Much of our merger review has an international dimension as well. In recent months, we have worked closely with the British authorities during our investigation of the British Telecom/MCI joint venture, with the German Federal Cartel Office on Allison/ZF merger investigation, with Canadian and Mexican antitrust authorities on a number of mergers with a North American dimension, and with the EC on several transatlantic mergers.

As I understand it, Japan, too, recognizes that antitrust is internationalizing and has recently amended the Antimonopoly Law to reach mergers that, although they may occur outside Japan's borders, will affect Japan's economy. We were not surprised to see this important change in Japan's antitrust policy (which brings Japan in line with the US and EC), given the fact that so many mergers now transcend national borders and affect consumers in a number of countries.

Moreover, in June the JFTC issued a cease recommendation to a Canadian supplier to Japan of a raw material used to produce drugs used in the clinical diagnosis of cancer and other diseases. One trade journal characterized this enforcement action by the JFTC as the "first

extraterritorial effort under the [Antimonopoly Law].” That case would appear to portend future cases involving international enforcement issues.

The increased internationalization of commerce and antitrust poses difficult new challenges for all of us. Often, we are unable to obtain crucial evidence located abroad or personal jurisdiction over defendants (although the latter is usually not a big problem with multinational firms); and we recognize that antitrust enforcement sometimes raises issues of foreign sovereignty. Bilateral cooperation agreements are an immensely valuable means of ameliorating these problems.

III. Overview of a Modern Cooperation Agreement

I imagine that some of you are asking — what do I have in mind when I talk about a bilateral cooperation agreement. As I see it, there are three basic components.

A. Notification and Consultation

First, a cooperation agreement should include notification and consultation provisions. This notion was embodied in a 1967 OECD Recommendation, which was most recently amended in 1995. The Recommendation provides that, when one country undertakes under its competition laws an investigation or proceeding that might affect important interests of another country, it should notify the other country, if possible in advance. The reasons for the notification are to give the other country an opportunity to express its concerns; to ensure that the enforcing country does not needlessly disregard the concerns of the other; and, if the matter raises questions under both countries’ laws, to create appropriate means of cooperation or coordination. The United States made nearly 100 such notifications during fiscal year 1997.

All of our bilateral agreements include notification provisions which contemplate that each party will provide the other with advance information about planned actions that might

affect the others' important interests. While the specifics vary, each also provides for consultation to resolve concerns arising from enforcement activities.

B. Cooperation and Coordination

Second, a bilateral agreement should address issues of enforcement cooperation and coordination. All of our bilateral agreements address these matters.

Cooperation and coordination are really two sides of the same coin. By "cooperation," we mean assisting one another with matters, including investigations, by sharing information. But I should be clear — the bilateral cooperation agreement we are discussing with Japan does *not* contemplate sharing statutorily protected confidential information. The type of information that we normally share under our agreements with Canada and the EC, while often nonpublic, is not statutorily protected and usually does not involve commercially sensitive information about individual companies. Thus, for example, we discuss possible enforcement theories or market definition, or possible public sources of relevant information.

By "coordination," we mean structuring our investigatory activities to achieve a common goal or to avoid stepping on one another's toes. If possible, we try not to make decisions that may disrupt our counterpart's investigation.

Cooperation and coordination can take many different forms. In some instances, cooperation and coordination enables us to *defer* to foreign enforcement agencies. For example, in 1996, we began an investigation of AC Nielsen, a U.S. firm that provides services tracking retail sales, to determine whether Nielsen was using its market power in certain areas to injure competition. The EC also investigated the matter, and there was close cooperation between our staff and the EC's. When it became apparent that the EC was in a better position to remedy the matter — in part, because most of the conduct occurred in Europe and had a direct impact on

consumers there — we decided to let the EC take the lead; and we closed our investigation when Nielsen signed an undertaking with the EC. The US/EC bilateral antitrust agreement provided a framework for our cooperation that made such a result possible.

In other instances, cooperation has led to a *coordinated remedy*. For example, in 1994, we and the EC conducted a joint investigation of anticompetitive practices by Microsoft that resulted in a single coordinated remedy, implemented by a court decree in the U.S. and an undertaking in Europe that were virtually identical. This cooperation was possible because Microsoft agreed to waive confidentiality restrictions, and the staffs on both sides of the Atlantic were thus able to coordinate their investigations to a degree that could not otherwise have been achieved.

In the merger context, too, cooperation has led to coordinated remedies. One recent example is the WorldCom/MCI telecommunications merger, which involved two U.S. firms and resulted this summer in the divestiture of MCI's \$1.75 billion in Internet assets to Cable & Wireless plc — the largest divestiture in U.S. merger history. In that case, our staff and EC staff worked closely to share their independent analyses of the transaction as they evolved, and we and the EC ultimately reached essentially the same conclusions. With the parties' consent, obtained through written waivers of confidentiality, the agencies shared confidential information with one another and held joint meetings with the two U.S. companies to discuss the issues and possible solutions. In addition, before announcing its approval of the transaction in July, the European Commission formally requested, pursuant to the 1991 U.S.-EU antitrust cooperation

agreement, the Division's cooperation and assistance in evaluating and implementing the proposed divestiture, which had been proposed both to us and to the Commission.¹

In our experience, antitrust coordination provides two benefits. First, it helps to deal with particular problems — improving enforcement and reducing international frictions — in individual cases. Second, by facilitating dialogue and communication among enforcement agencies, it reduces misunderstanding, and over time creates or reveals areas of agreement, among enforcement agencies. That, in turn, has led to increased cooperation and improved relations among the agencies.

C. Positive Comity

Both the 1991 EC and the 1995 Canadian agreements also include “*positive comity*” provisions. The positive comity concept is not a new one, but rather has its roots in a 1967 OECD Recommendation. The term “positive comity” was actually coined by our European colleagues.

Under these positive comity agreements, the antitrust agency of a country that believes its firms are being excluded from another country's markets as a result of private anticompetitive behavior must first reach a preliminary conclusion that there are reasonable grounds to investigate, perhaps under its own competition law but, in any event, under the competition law of the country in which the conduct is occurring. If it reaches such a conclusion, it can refer the matter, along with its preliminary analysis, to the competition authority whose home market is

¹The Commission's press release of July 8, 1998 stated, in part: “The Commission's investigations, and negotiations of remedies, were undertaken in parallel with the examination of the case which is still being conducted by the [Department]. The process so far has been marked by [a] considerable level of cooperation between the two authorities, including exchanges of views on the analytical method to be used, coordination of information gathering and joint meetings and negotiations with the parties.”

directly affected; that authority then conducts an investigation and reports to, and consults with, the referring authority as to the nature of its investigation, its findings, and any remedy it is considering. The referring authority can then accept these results, seek to persuade the other authority to modify them, or take appropriate action under its own laws.

In April 1997, we announced our first formal positive comity request to the EC under the 1991 agreement. We asked the EC to investigate possible anticompetitive conduct by certain European airlines that might be preventing U.S.-based computer reservation systems from competing effectively in certain European countries. Because the alleged conduct took place in Europe and European consumers would suffer if competition is diminished, it seemed clear that the EC was in the best position to investigate. The EC has announced that it is actively pursuing the matter.

We believe that positive comity offers a practical way to deal with market access problems that result from foreign anticompetitive conduct. As you know, a number of market access disputes have arisen over the years between the U.S. and Japan. Positive comity could provide a new approach to resolving such disputes. Of course, positive comity requires effective and independent antitrust enforcement in the country where the problem arises, and we look forward to working with our colleagues at the JFTC to make this process work for the U.S. and Japan.

The positive comity approach has several things to recommend it. First, competition authorities should have a stake in taking complaints about anticompetitive conduct seriously, even if they involve foreign access, because they also involve alleged harm to consumers in the country where the conduct is occurring. Second, a positive comity referral makes it much more likely that the evidence required to decide such cases properly can be obtained — thus reducing

the likelihood of groundless allegations and increasing the prospect for effective antitrust remedies where violations are found. Finally, the positive comity approach should increase the credibility of competition laws and competition authorities by addressing market access issues through a systematic, competition law approach.

Positive comity is not a device to pry open foreign markets. It is, instead, a law enforcement process that is initiated by competition agencies, which will be expected to screen allegations of access problems and to make positive comity referrals only after determining that they genuinely involve antitrust law issues that warrant investigation. Positive comity should not be used, and it is not our intention to make positive comity requests, without first making such a determination.

Our commitment to positive comity is reflected in the fact that we, the FTC, and the EC agreed on a new positive comity agreement earlier this year. That agreement adds to and expands upon the positive comity provisions in our 1991 agreement.

IV. Other Tools With Other Countries

Although our current negotiations with the Japanese government are focused on the first step (that is, a bilateral cooperation agreement), I should note that with other countries we have taken steps farther down the path to strengthened international enforcement. As I am sure many of you know, the United States now has nearly 20 mutual legal assistance treaties (MLATs) with other countries, many of which cover assistance in antitrust matters, and approximately 15 other MLATs, or MLAT-like agreements, have been signed but not ratified. The Division has sought and received assistance in cartel investigations pursuant to these MLATs. While we do not now have an MLAT with Japan, we have received, pursuant to Japan's legal assistance law and more

traditional letters rogatory, very helpful assistance from the Ministry of Justice in antitrust enforcement matters.

V. Conclusion

In sum, a bilateral cooperation agreement between Japan and the United States can improve antimonopoly law enforcement in both countries. Better enforcement will benefit both consumers and businesses in Japan and in the U.S., and can more generally help lead to improved relations between our governments. We look forward to the successful negotiation of such an agreement.