THE ROLE OF ANTITRUST IN INTERNATIONAL TRADE

Address by

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I am very pleased to be here tonight. I have enjoyed and learned from my two trips to Japan with the Japan Society, and I consider myself to be among old friends. The fact that I was invited to speak before your society -- and I believe I may be the first head of the Antitrust Division to speak here -- reflects the growing understanding of the role that antitrust law and policy can and must play in ensuring that the gains of open trade achieved through the GATT are not undercut through private restraints of trade.

It was not so long ago, when the United States could afford to be more parochial, that the whole concept of international antitrust enforcement was regarded as a somewhat esoteric specialty -- intellectually interesting, but seemingly not of great consequence to many Americans. Today, however, the importance of international trade to the United States is indisputable. In fact, approximately 22 percent of the GDP of the United States is accounted for by export and import trade, roughly double the figure after World War II. In today's global economy, U.S. firms compete abroad and foreign firms devote considerable efforts to United States markets. To prosper, U.S. firms need access to foreign markets, and U.S. consumers now look to foreign producers as important sources of price and quality options. International competition disciplines domestic and foreign

competitors both inside and outside the United States, and must be nurtured.

The simple fact, however, is that increased liberalization of classic trade restrictions has not always meant increased competition. Outside the United States, various markets continue to be sheltered by both governmental nontariff trade barriers and private restraints of trade. Some service markets may reflect no effective competition at all. International cartels continue to exist with respect to some commodities. In this environment, antitrust enforcement in the international context is being recognized more and more as necessary to ensure that the governmental trade restraints painstakingly eliminated through generations of multilateral trade negotiations are not simply replaced by private conduct with the same trade-restricting results.

In the United States, antitrust law has long been recognized as a primary tool for ensuring openness of markets to new competitors, so that prices for consumers will remain as low as possible, with easy entry of new competitors to markets. The European Union has increasingly adopted an activist stance in enforcing its own antitrust and competition laws, as have many other countries which have worked together effectively for many years in the Organization for Economic Cooperation and Development. Japan has been an important and long-standing member of this group. The efforts of many countries to work together on matters of competition policy

reflects an increasingly international world, with trade barriers falling and international legal tools more important than ever before.

It is for this reason that over the last several years the United States Government has raised antimonopoly enforcement issues in bilateral discussions with the Japanese Government. In particular, we have emphasized the importance of ensuring that Japanese antitrust law and policy, as well as the Japanese antitrust enforcement agency -- the Japan Fair Trade Commission -- is ready and able to act swiftly and decisively against private restraints of trade that act to close the Japanese market to effective import competition. The government of Japan has voiced support for this effort and, in the words of former JFTC Chairman Umezawa, vowed to "eradicate" restrictive trade practices in Japan that block entry to foreign goods and services. We are concerned, however, that meaningful action has not always followed the verbal commitments, as we note in more detail below.

Beginning in the late 1980s, the United States attempted to address Japan's historically weak antimonopoly enforcement record in the Structural Impediments Initiative discussions. That process focussed on persuading Japan to give the JFTC the tools it needed to be a credible antimonopoly enforcement body and, to some extent, that effort was successful. The JFTC received a significant increase in its budget and personnel, which 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 increased 20-fold. The JFTC, in coordination with the Ministry of Justice, reinstituted criminal enforcement of "egregious" antimonopoly violations, and two prosecutions have been successfully pursued.

But, after all is said and done, the question still remains whether there has really been any meaningful change in Japan. After years of complaints about exclusionary business practices in Japan, and despite its apparently strengthened position within the Japanese Government, the JFTC has not brought a single enforcement action against activities that restrain foreign competition in Japan in more than 10 years. Furthermore, the JFTC has not indicated any intention to change this pattern. And, unfortunately, as much as I would like to believe it true, I do not think that this lack of action can be attributed to the absence of any exclusionary conduct in Japan.

On the contrary, there are a number of areas of continuing competitive concern in the Japanese economy -- many of which the JFTC has itself acknowledged -- that cry out for correction. Let me give you some examples.

One area that is of particular concern to us is the role that trade associations play in the organization of Japanese industry and in government-industry relations. Because trade associations in Japan have often been the organizing forum for industry cartels, they

can have important exclusionary effects on foreign competitors.

It is also important to note the way in which the Japanese government has tended to use trade associations as instruments for furthering government policy and in which trade associations use the Japanese government to further their own members' business interests. Japanese ministries have frequently used trade associations to communicate administrative guidance to industry members as well as for collecting and analyzing industry data on behalf of the government. Ministries frequently give associations a formal or informal role in the application process for obtaining licenses or other permission for proposed conduct, or for obtaining government-controlled information, such as internal regulations or competitively- important statistical information. As a result, participation in certain key activities of trade associations has often been essential for any firm that hopes to be successful in the Japanese market. Yet many Japanese trade associations exclude altogether, or give lesser privileges to, foreign-based companies.

The findings of a recent JFTC study of trade association practices support the conclusion that membership in Japanese trade associations is important to business success in Japan. The JFTC study group found that almost 3/4 of all associations reported that membership conferred easier access to government regulatory information. And almost 1/3 reported that membership provided easier approvals of applications with government authorities. Significantly,

more than 1/3 of associations also reported that their standards and certification systems were not open to non-members.

The conclusion to be drawn is inescapable -- exclusionary practices facilitated by trade associations in Japan can have a real and devastating impact on the ability of foreign companies to compete successfully in the Japanese market.

Let me be clear about one thing. We are not saying that trade associations in Japan are inherently anticompetitive. Indeed, we have long recognized in the United States that trade associations are a legitimate form of business activity, and perform many pro-competitive functions. However, U.S. trade associations are carefully advised by their U.S. antitrust counsel to be sure that they do not slip into anticompetitive or exclusionary conduct. The U.S. Department of Justice and the Federal Trade Commission have filed literally scores of cases challenging U.S. trade associations' practices they believed to be anticompetitive or exclusionary. This same vigilance, we believe, is essential in Japan.

Nor am I saying that all trade associations in Japan are closed to foreign companies. In fact, a large number of foreign companies have joined Japanese trade associations. However, in a substantial number of industries, foreign companies are still not permitted to join the association, or else are admitted only as "special members," with less than full membership rights, and with limited or no access to

association activities necessary to a company's ability to be a full and effective competitor in Japanese markets.

But the question we in the U.S. government have is why the JFTC has not taken effective steps to correct this situation. As far as I am aware, the JFTC has not brought a single enforcement action against trade association practices that have excluded foreign companies from membership and from effective participation in the market. There is some talk now that the JFTC is considering revising its guidelines on trade associations. While such strengthened guidelines could be a helpful first step, they are no substitute at all for strong enforcement action.

The second broad area in need of forceful JFTC intervention is the problem of anticompetitive and exclusionary market structures in Japan. Structural characteristics of a market, especially when examined in conjunction with how the market is actually operating, can often be a "red flag" that signals the presence of unlawful, anticompetitive behavior. There are a number of markets in Japan that are highly concentrated and are organized in such a way as to facilitate conduct or arrangements that effectively impede new entry by foreign (or other Japanese) companies.

Frequently in Japan, these problematic markets are characterized by close and often exclusive relationships between manufacturers, distributors and end users. These relationships may

have developed over many years -- and often include cross-shareholding, personnel exchange and lending ties. In some cases, exclusive relationships had their roots in explicit contractual agreements, which later may or may not have been stricken from the formal contract but without any change in the basic understanding of the parties or in actual practice. In other cases, the imperatives of the keiretsu system in Japan forced distributors and end users to "voluntarily" affiliate themselves with particular manufacturers, and thereby cut off any ties with other producers. Often, manufacturers use policing devices -- such as progressive rebates or threats of cut-off -- to ensure that distributors and users stay in line. The key point here is not the label "keiretsu," but the actual use of exclusionary market structures and arrangements that prevent efficient market operation and market access by all competitors.

The result in a number of sectors is the reinforcement of an oligopolistic market structure that protects the market position of the incumbents by precluding new entry. The cost is borne by Japanese consumers, by American and other foreign producers and exporters and by American citizens whose job opportunities are diminished by the lack of access to Japan's highly developed markets.

In most countries, it would be the responsibility, and within the power, of the antitrust authorities to take the enforcement actions necessary to remedy these anticompetitive situations; for example, by requiring the anticompetitive practices and policing devices to

cease, or by imposing appropriate structural remedies. The JFTC has ample power to deal with these anticompetitive market conditions under Japan's Anti-Monopoly Law, and to impose remedies necessary to restore competition to the market. However, despite numerous complaints and its own surveys that verify the non-competitive nature of some of its important markets, the JFTC has so far failed to take significant action. Recently, it has even made the surprising suggestion that it is unable to address anticompetitive market structures, implying that it has renounced all structural remedies, no matter how egregious the situation.

The actions of JFTC in the face of these acknowledged anticompetitive restraints seem notably soft, particularly in comparison to the antitrust enforcement regimes of other advanced industrial states. The agency has issued "advice" to some industries concerning their admittedly problematic practices and, in December of last year, noted that some unspecified progress is being made. There was no formal remedial action, and, so far as we can tell, not even a formal investigation of industries which the JFTC itself implicitly acknowledges as having structural defects.

These highly limited responses to anticompetitive situations do not seem consistent with strong enforcement against market-blocking business practices. It is certainly inconsistent with Chairman Umezawa's commitment to strong action I cited earlier.

What, then, is the solution? Is it to use U.S. antitrust law as a trade weapon, as the Japan Society's title for this speech would suggest? The answer to that question is simple. Antitrust enforcement decisions by the Department of Justice are made, and will continue to be made, on the basis of antitrust policy, not trade policy. I have taken an oath to uphold the laws of the United States, and the antitrust laws were not adopted by Congress to be a trade weapon.

The antitrust laws of both the United States and Japan are, however, designed to assure the open and efficient operation of markets, by protecting the competitive process itself. In that spirit, I am now, and I will continue to, enforce the U.S. antitrust laws to the full extent intended by Congress, which includes action against individuals or firms, foreign or domestic, that violate the U.S. antitrust laws, regardless of whether the conduct occurs in the United States or elsewhere. Specifically, harm to U.S. domestic commerce, to U.S. import commerce and to U.S. export commerce are all within the scope of our laws.

It was clear in 1890, when the Sherman Act was passed, and is even more plain now, that the antitrust laws reach the "foreign commerce of the United States." In the Foreign Trade Antitrust Improvements Act of 1982, Congress clarified the rules concerning the jurisdictional reach of the antitrust laws. Using the same formulation that applies to conduct restricting domestic or import

commerce, Congress stated that restrictions on U.S. exports imposed by private parties abroad are within the subject matter jurisdiction of the antitrust laws if those restrictions have a "direct, substantial and reasonably foreseeable effect" on U.S. exports. And, in last year's Hartford Fire Insurance decision, the Supreme Court reaffirmed the long-established principle that the Sherman Act applies to foreign conduct that is meant to produce, and does produce, some substantial effect in the United States.

Thus, I am in complete agreement with former Assistant Attorney General James Rill's decision in 1992 to rescind footnote 159 of our 1988 International Guidelines, which had renounced this part of our statutory responsibility. I therefore have reaffirmed the Department of Justice's policy to take enforcement action against foreign conduct that falls within the jurisdictional reach of the Sherman Act, as clarified by the 1982 Act, even where the restraints do not have a direct impact on U.S. consumers.

There is nothing particularly novel about this enforcement policy, nor should it be viewed as overly aggressive or extraterritorial in any pejorative sense. The Department will act in a manner consistent with the jurisdictional principles that determine when foreign firms and individuals are within the reach of U.S. courts. Thus, there may be situations where considerations of personal jurisdiction, international comity or effective relief cause us to decide not to challenge particular conduct. And, as we stated in our

export restraints policy statement in 1992, the Department will try to work with foreign antitrust authorities if they are better situated to remedy the conduct and are prepared to act effectively and promptly against it under their own antitrust laws.

To summarize, we continue to urge the JFTC to take the necessary actions to remedy anticompetitive practices in Japan that restrain competition from foreign competitors. At the same time, however, we recognize and take most seriously our own responsibility to enforce U.S. antitrust law against conduct that unreasonably restrains U.S. exports. We must and will do what is necessary to ensure that the competitive process is not undermined by anticompetitive business practices aimed at our domestic market or our export commerce.

That brings me to one of the major challenges facing the Antitrust Division -- ensuring that our enforcement tools are up to the job of dealing with the realities of international enforcement.

Antitrust enforcement is fact intensive. It takes facts -- recorded in documents, or described in the testimony of individuals -- to reach a conclusion about whether unlawful conduct took place, or whether the effects of a transaction are, on balance, anticompetitive.

In our global economy, the relevant facts are often spread

around the world, just as the conduct, the transactions and the economic impact may be. But the fact-gathering tools at our disposal, and those of our counterpart agencies abroad, simply were not designed for today's global economy. We are moving into the 21st century with what are, in many ways, tools designed in the 19th century.

If antitrust is going to fulfill its critical role of protecting competition in the domestic economy and helping to keep international markets open, those tools have to be brought up to date. I am committed to developing the tools needed -- both domestically and internationally -- to do the job.

Thus, one of my highest priorities is to increase cooperation among antitrust enforcement agencies throughout the world, especially in the collection of information in cases with multi-national implications. For the United States, Mutual Legal Assistance Treaties (MLATs) provide an effective means of cooperative assistance for most types of criminal investigations. Under the typical MLAT, each party agrees to use its own criminal 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 both

governments since it came into force in 1990. It has been of enormous help in allowing both sides to locate and obtain foreign-located evidence. The U.S. has entered into more than 12 MLATs so far and the number may soon increase to near 20. However, there are limits to the use of MLATs. For example, they are generally intended only for use in criminal matters, although there are some exceptions.

For this reason, we are currently considering legislation that would supplement MLAT cooperation in criminal antitrust matters and would enhance our ability to cooperate with foreign antitrust authorities in civil matters. This legislation would give us the authority to enter into reciprocal bilateral agreements with our foreign antitrust enforcement counterparts for purposes of information sharing and investigatory assistance.

At the same time, we are beginning to think about the extent to which competition policy issues should be included in the next round of GATT negotiations. While it is true that competition policy is now a matter of international interest, there are many difficult issues that we must think through thoroughly as we begin to consider multilateral negotiations in this area. We have recently formed an interagency working group -- chaired by the Justice Department -- to consider this matter carefully.

My last general subject concerns several initiatives that I have taken that apply both to our international and domestic

antitrust enforcement.

First, I intend to give high priority to increasing our civil enforcement efforts against practices that are anticompetitive and unlawful, but do not warrant criminal prosecution. To this end I have created a new Civil Task Force, whose mandate will be exclusively to uncover and litigate significant civil cases. That task force, as well as other components of the Antitrust Division, will focus on cases that involve large volumes of commerce, enhance the competitiveness of markets, establish broad legal precedents and have a significant impact on a large number of consumers. I expect that, through this new initiative, the Division will file a number of significant civil cases -- including cases involving transnational anticompetitive practices -- in the coming year.

One class of cases that will be considered in this civil enforcement program is the area of unreasonable non-price vertical restraints. Last year I rescinded the Department's 1985 Vertical Guidelines. Those Guidelines were criticized from the outset by Congress and the National Association of Attorneys General and were at variance with existing case law in a number of ways. The Antitrust Division will treat non-price vertical restraints as subject to a meaningful rule of reason analysis, based on an evaluation of the actual competitive effects of particular vertical practices in the specific factual context of each situation. And, we will treat vertical price-fixing as per se illegal. These laws will be applied

equally to domestic and foreign firms, where the facts warrant.

We also will give attention to practices that involve the anticompetitive abuse of intellectual property rights. I noted in another forum recently that the Division has underway several major investigations focusing on foreign firms which, in various ways, may have abused intellectual property rights to monopolize or attempt to monopolize industries important to U.S. exports. In addition, the Division is working closely with Patent Commissioner Bruce Lehman to ensure that patents are used appropriately and competitively. I have established an Intellectual Property Rights Task Force within the Antitrust Division, headed by my Deputy for Economics, Richard Gilbert. This Task Force will, among other things, examine our enforcement priorities in this area. We do not expect a sea change, nor will we "throw the baby out with the bath," but it seems appropriate to focus at an early stage on these issues, because they are so important to U.S. exports, which depend on the competitiveness of U.S. producers in international markets, as well as to the U.S. domestic economy.

Finally, we are in the process of revising the Division's 1988 International Guidelines. This project is being headed by my International Deputy -- Diane Wood -- and I expect the revised Guidelines to be completed sometime this Spring. Although it is premature to discuss the substantive content of the revised International Guidelines, you can be sure of one thing -- footnote

159 will not be included.

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In conclusion, I would like to stress some important basic points about the role that antitrust law plays more generally. By ensuring the efficient and competitive operation of markets, antitrust law protects consumer and producer welfare wherever it is enforced vigorously. Over a hundred years of experience in the United States has demonstrated the truth of this proposition. As other countries have adopted and enforced strong antitrust laws, their consumers too have begun to enjoy the benefits of competitive markets. While we have urged Japan to follow this path because we are interested in market access for U.S. and other foreign firms that necessarily accompanies open markets, the truth is that the Japanese consumer and the Japanese economy would be the greatest beneficiary of these changes. In short, good antitrust enforcement is a win-win strategy for all concerned. We will continue to enforce our antitrust laws vigorously, and we look forward to the day when the same will be true in Japan.