Department of Justice

STATEMENT

OF

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BEFORE

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SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ANTITRUST ENFORCEMENT AND
INTERNATIONAL COMPETITION

ON

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Mr. Chairman and Members of the Committee, I am pleased to be here today at the invitation of the Subcommittee to discuss recent international antitrust activities and initiatives of the Department of Justice. As the economic environment in which American consumers and businesses operate becomes an increasingly global one, international matters have become a key element of the Antitrust Division's policy and enforcement programs.

On the enforcement side, our concern has been to make sure we have the tools we need to deal with anticompetitive conduct in our transnational economy. The antitrust cooperation agreement we signed in September with the Commission of the European Communities is one of those tools, and we expect it will be a valuable one. Our recent enforcement policy change under which we will, in appropriate instances, challenge anticompetitive conduct that restrains U.S. export trade, is another.

We recognize that the United States alone cannot police the world's markets with its antitrust laws, however. Fortunately, the United States is not alone in its commitment to antitrust principles as a key element in keeping domestic and international markets open to competition. Most of the world's industrial nations have antitrust laws, and the vigor with which they are applied is growing. Encouraging that development is an important aspect of our international program. Current initiatives in

which that objective is reflected include our work with Japan in the Structural Impediments Initiative and our role in the OECD's program to promote antitrust convergence and cooperation.

I will focus on these aspects of our international antitrust program in my testimony this morning.

Bilateral Antitrust Cooperation. The antitrust cooperation agreement we entered into in September with the Commission of the European Communities is a significant milestone in our bilateral and multilateral efforts to promote improved international cooperation in antitrust enforcement in the global marketplace. The agreement is an important one. The twelve member states of the EC taken together are the United States' largest trading and investment partner. As in this country, antitrust enforcement in the EC plays a central -- in the EC, literally a constitutional -- role in shaping the economic landscape. Like that of the United States, EC antitrust law can reach anticompetitive foreign conduct with domestic effects. Accordingly, when EC Competition Commissioner Sir Leon Brittan broached the idea of an antitrust agreement between us in the spring of 1990, both sides quickly recognized the idea as one whose time had come.

The EC agreement, like our prior agreements with Germany, Australia and Canada, provides for notification and consultation of antitrust matters that may affect the other's important

interests. These notification and consultation procedures avoid surprise and are the foundation for the agreement's more detailed provisions for conflict avoidance and enforcement cooperation.

But the agreement goes beyond our earlier antitrust understandings in two particularly significant ways. First, it contemplates the possibility of coordinated investigations where we and the EC are looking at related conduct, if both sides conclude it would be the most efficient way to proceed and advantageous to their respective enforcement objectives.

Second, it allows us to ask the EC to take action under its antitrust laws against conduct in Europe that harms both its consumers and our exporters, and they can ask us to do the same if the situation is reversed. We have come to refer to this provision as the "positive comity" provision. Ordinarily we think of comity in the international antitrust context as a principle that may lead one side to moderate action it would otherwise take in deference to the other's important and legitimate interests. The "positive comity" concept contemplates not that one side will defer, but that it might affirmatively act against anticompetitive conduct that injures the other party as well.

The agreement is new, and these novel provisions in particular have not yet been tested. But I expect them to prove valuable, and both we and the EC are very much aware of the

opportunity they present for new levels of cooperation and convergence in our approach to competition law enforcement in international markets.

I will mention one other bilateral agreement to which the United States is a party, which while not limited to antitrust nonetheless represents a major advance in antitrust cooperation. Just over two years ago, a treaty between the United States and Canada on mutual assistance in criminal enforcement matters went into effect.

While we have similar treaties with a number of governments, the Canadian treaty is the first to encompass antitrust offenses, which can be criminal in both the U.S. and Canada. The assistance we can ask for and provide under this agreement includes the exchange of otherwise confidential material, and the use of compulsory powers to assist a criminal antitrust proceeding in the other country.

The cooperation contemplated in this agreement reflects the close working relationship and substantially common approach we share with Canada in antitrust matters. It brings us closer to the day when those who engage in cartel behavior cannot escape detection and punishment by hiding behind national boundaries.

Enforcement Policy on Export Restraints. As you are aware, earlier this month the Department announced a change in its antitrust enforcement policy to permit challenges to overseas conduct that is anticompetitive and restrains the export commerce of the United States. This modification of our enforcement policy had been under review since April 1990, when I said publicly that the policy was being re-examined within the Antitrust Division.

In 1988, the Justice Department published a set of guidelines called the "Antitrust Enforcement Guidelines for International Operations." These Guidelines provide a very useful framework for analyzing the antitrust aspects of a wide range of international business conduct.

One footnote to these Guidelines, footnote 159, however, had generally been interpreted as precluding Justice Department antitrust enforcement actions against restraints on U.S. export trade unless the conduct would have adverse effects on competition that directly harms American consumers. This 1988 footnote represented a departure from the Department's earlier enforcement policy in this area, and in April 1990, I determined that the self-imposed limitation warranted reexamination. The Department's 1977 Antitrust Guide for International Operations clearly allowed for actions against export-restraining conduct, even in the absence of direct harm to U.S. consumers. In 1982, for example, the Antitrust Division challenged a foreign buying

cartel for fixing the prices its members paid Alaskan seafood processors for crab exported to Japan. U.S. v. C. Itoh & Co., et al., 1982-83 (CCH) Trade Cases ¶65,010 (W.D. Wash. 1982). In fact, going back as far as 1912 the Department had brought over forty antitrust cases based in whole or part on allegations that the challenged conduct harmed U.S. export trade.

In the Foreign Trade Antitrust Improvements Act of 1982, Congress included specific jurisdictional provisions regarding the application of the antitrust laws to export-restraining conduct. That Act confirmed that the jurisdictional reach of the U.S. antitrust laws extends to conduct that has a direct, substantial and reasonably foreseeable effect "on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The Act was intended as a clarification of existing law and was not an extension of antitrust jurisdiction.

The Supreme Court also has confirmed that the antitrust laws can apply to anticompetitive conduct that impedes U.S. export opportunities, even if there is no direct harm to U.S. consumers. For example, in Zenith Radio Corporation v. Hazeltine Research Inc., 395 U.S. 100 (1969), the Court had no difficulty basing Sherman Act liability on the activities of a Canadian patent pool that made it impossible to export U.S.-made radios and televisions in Canada.

The modification to our antitrust enforcement policy that we made this month restores the Department's long-standing pre-1988 position in this area. Specifically, the Department will be prepared, in appropriate cases, to challenge conduct occurring overseas that restricts American exports of goods or services. Any such case would be brought within the clear framework of existing law:

First, the conduct would have to fall within the jurisdictional reach of the Sherman Act, as set forth in the 1982 Foreign Trade Antitrust Improvements Act. In other words, the conduct must have a "direct, substantial and reasonably foreseeable effect" on exports of goods or services from the United States.

Second, the conduct would have to be anticompetitive and violative of the U.S. antitrust laws. For the most part, the Department would focus its attention on group boycotts, price-fixing arrangements directed against our exports, and other exclusionary activities.

Third, the participants in the export-restraining activities would have to be subject to the personal jurisdiction of U.S. courts. The revised policy, I should note, would in no way alter the existing jurisdictional principles that determine when foreign firms and individuals are within the reach of U.S. courts.

This policy is one of general application. It is not directed at any particular country or group of countries. We intend to apply the laws neutrally to protect U.S. domestic and foreign commerce against anticompetitive restraints.

Of course, we will continue to apply our longstanding policy of considering international comity principles when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. Under this approach, we will continue our practice of notifying and being prepared to consult with foreign governments, as we do currently under bilateral agreements with Australia, Canada, Germany and the EC, and under a 1986 Recommendation of the Organization for Economic Cooperation and Development ("OECD")

In some circumstances, the export-restraining conduct might also violate the antitrust laws of the country where the conduct took place. The Department has been making substantial efforts to encourage foreign governments to adopt and effectively enforce sound competition laws. These efforts include the Structural Impediments Initiative talks with Japan, as well as formal and informal consultations with competition officials in North America, Europe and Asia.

Our hope is that foreign antitrust authorities will be able to prevent just the sort of anticompetitive exclusionary activities that would be subject to the Department's revised

enforcement policy. Where foreign antitrust authorities are in a better position than we to remedy unlawful conduct, and if they are prepared to act, we will be prepared to work with those authorities in order to ensure that the anticompetitive practices are eliminated.

And, as with other enforcement matters implicating the foreign relations of the United States, the Department will notify and consult with other interested Executive agencies so that all relevant factors can be considered.

In summary, the contemplated modification to our enforcement policy has two primary bases. First, it would bring Department of Justice enforcement policy into conformity with existing law as confirmed by Congress in 1982 and with the long-standing pre-1988 enforcement policy of the Department. Second, it would more appropriately reflect the increasingly global nature of markets and the importance that export, as well as import, commerce plays in our economy.

SII and Antitrust Enforcement in Japan. Let me turn now to the antitrust-related issues in the Structural Impediments Initiative (SII) discussions. Our underlying premise in addressing antitrust issues in the SII is that a credible antitrust enforcement policy that stresses vigorous enforcement and effective penalties is essential to ensure that markets are

open and competitive. I am convinced that one of the most important functions of antitrust enforcement here and elsewhere is to deter firms from engaging in anticompetitive conduct in the first place.

The widely-held perception of Japanese antitrust enforcement policy is that it has not adequately deterred anticompetitive activities in Japan and that, as a result, foreign products and firms have been unjustifiably excluded from the Japanese market. For these reasons, we have placed great importance in the SII discussions on actions that the Government of Japan will take to ensure that antimonopoly enforcement is vigorous, sanctions for violations are adequate, private damage remedies for antimonopoly violations are effective and that, overall, the antimonopoly enforcement system in Japan effectively deters business practices that are anticompetitive and exclusionary.

I believe that our efforts in the SII discussions have resulted in some tangible progress in this area. The Japanese Government's actions so far represent good initial steps toward a comprehensive approach for deterring private anticompetitive behavior in Japan.

First, the Government of Japan has acted to strengthen the enforcement arm of the Japan Fair Trade Commission by increasing the investigative staff of the JFTC by about 38% since JFY 1989. More importantly, the JFTC appears to be making good use of these

additional resources. In JFY 1991, the JFTC took 30 formal actions against antimonopoly violators, more than four times the average number of actions taken in the six years prior to SII. The JFTC also imposed a record level $97 million in administrative fines in FY 1990.

Second, the Government of Japan committed to bring more criminal enforcement actions against hard core antimonopoly violations including price fixing, bid rigging, market allocations and group boycotts. To this end, the Ministry of Justice, Public Prosecutor's Office and the JFTC jointly established a permanent liaison mechanism to facilitate the development of cases for criminal prosecution. This new mechanism has borne fruit -- in November 1991, the Ministry of Justice brought its first criminal antimonopoly action in 17 years against 8 firms and 15 individuals that had engaged in a price-fixing cartel in the plastic food wrap industry. We are hopeful that this action was not a one-time gesture but rather the beginning of a new era of vigorous criminal antimonopoly prosecution in Japan.

Third, the Japanese Government amended the Antimonopoly Act to increase the JFTC's administrative fines (called "surcharges") automatically imposed on companies committing the most egregious antimonopoly violations. Large manufacturers and service providers are now assessed a surcharge of 6% of the value of their commerce affected by the anticompetitive activities,

quadruple the level in effect prior to SII. While this represents a significant increase, it still falls short of the 10% level that we believe is the minimum necessary to force disgorgement of the illegal profits from antimonopoly violations.

In addition, at the JFTC's urging and in the face of reportedly stiff opposition in the Japanese business community, the Japanese Government is seeking legislation that would increase the maximum penalty for criminal violations of the Antimonopoly Act more than twentyfold, from approximately $35,000 to about $750,000.

Fourth, the JFTC last July issued new antimonopoly guidelines that clarified and strengthened the JFTC's enforcement policy with respect to unlawful distribution practices and activities by "keiretsu" or corporate groups in Japan. The JFTC is now following up this action by investigating and conducting detailed analyses of keiretsu practices in four sectors of key interest to the United States: automobiles, auto parts, paper and glass.

Fifth, the Japanese Government also agreed to increase its efforts to eliminate bid rigging on government-funded projects in Japan. To this end the JFTC has taken eight enforcement actions against bid rigging activities in the last two years.

Finally, the JFTC has adopted a number of administrative measures intended to promote effective recourse to private damage remedies for antimonopoly violations. As a surrogate for private discovery, the JFTC will preserve evidence its obtains in its investigations and, upon request of the court, will submit those materials to the court for use in private damage litigation. The JFTC also will provide the court with its detailed analysis of the amount of damages suffered by the plaintiff and the causal link between the violation and those damages.

The steps taken so far by the Japanese Government in the antitrust area have been encouraging. But much more must be done before Japan's antimonopoly regime can be viewed as providing a credible deterrent to exclusionary conduct. For example, although the proposed increase in the maximum criminal penalties is a substantial move in the right direction, it remains below the level necessary to provide effective deterrence and below world standards.

Furthermore, although the JFTC has taken some administrative measures to facilitate private damage actions, I do not believe that these measures, by themselves, will be sufficient to enable parties injured by antimonopoly violations to recover their damages through private litigation. Too many serious barriers remain. We have called on the Japanese Government to reduce the filing fees for private damage suits -- which are now prohibitively high -- and to adopt other necessary measures --

such as an effective discovery system, rebuttable presumptions in favor of plaintiffs, class action lawsuits; and adequate incentives for injured parties to undertake the time, expense and risks necessary to pursue private damage claims. I firmly believe that an effective private remedy is a necessary adjunct to JFTC enforcement of the Antimonopoly Act and would contribute significantly to deterring antimonopoly violations in Japan.

If the Japanese Government makes a serious and long-term effort to implement a multi-pronged attack on anticompetitive activities -- consisting of more criminal prosecution, increased enforcement efforts, greater penalties, heightened vigilance by procuring agencies and more effective private damage actions -- the SII process should have a dramatic impact on the deterrence of unlawful collusive activities in Japan. This, in turn, should directly benefit American companies trying to do business in Japan, who should see a reduction in exclusionary activities by their Japanese competitors aimed at keeping them out of the market. American companies will also have more options available to them in the event they are injured by anticompetitive conduct in Japan. They will be able to bring their complaints to the JFTC with new confidence that the JFTC will have both the willingness and ability to take effective enforcement action where violations of the Antimonopoly Act are found. And, for the first time, they should have a reasonable chance to secure relief through private litigation in Japanese courts.

While these efforts to work with the Japanese government to encourage effective antitrust remedies are ongoing, they are bearing fruit. I took part in Tokyo earlier this month, with Commerce Department Under Secretary Michael Farren and General Counsel Wendell Willkie, FTC Commissioner Deborah Owen and the general counsels of seven major U.S. companies in a competition policy seminar co-sponsored and hosted by our Japanese government and private sector counterparts. JFTC Chairman Umezawa, with whom I also met privately, stated in his address that:

> If anti-competitive conduct [that impedes exports into Japan] should take place in the Japanese market, they must be addressed rigorously under Japan's Antimonopoly Act. We at the JFTC intend to rigorously eliminate such unlawful conduct.

I believe that Chairman Umezawa intended that commitment seriously, as I certainly intend to take it.

Work in OECD. Last spring, the Ministerial Meeting of the OECD noted that "[the OECD's recent work] on competition law and policy provides the foundation for greater policy convergence and progress toward updating and strengthening existing rules and arrangements (including both policy principles and procedures) for international antitrust cooperation in this area." An OECD

Competition Committee working party on international cooperation, which I chair, has begun work toward increased cooperation and convergence in the procedures used to investigate multinational mergers subject to review in more than one jurisdiction. Last year's valuable report by the American Bar Association Antitrust Section's Special Committee on International Antitrust strongly recommended increased intergovernmental cooperation in this area, to facilitate antitrust enforcement and to minimize unnecessary burdens on the firms involved. The working party expects to complete the project by next spring, and I have every reason to think that the result will be a significant contribution.

Mr. Chairman, the pace at which the world's markets are becoming integrated and interdependent is accelerating, and the importance of sound antitrust enforcement in keeping those markets open is increasingly recognized. I appreciate the opportunity to appear this morning to describe some of the steps we have taken toward that end.