Department of Justice

COMPETITION ADVOCACY AND INTERNATIONAL TRADE: A NEW ROLE FOR ANTITRUST POLICY

Remarks by

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I am delighted to have this opportunity to participate with such a distinguished faculty -- including three of my predecessors.

As our recent activities indicate, antitrust enforcement in United States foreign commerce is a matter of great importance to me and the Division. Our enforcement program, as described in the Antitrust Guide for International Operations and exhibited in the cases we prosecute, is relatively well known to you.

Today, I would like to talk about another and related activity of the Antitrust Division -- one that receives less attention but is no less important. That activity is what I call competitive advocacy: the promotion of effective competition in United States markets through analysis, persuasion, consultation, and argument -- over and above our program to enforce the antitrust laws. We are setting out significantly to increase our competitive advocacy in the international trade area. Today, I would like to tell you why, and then talk about some of the things we expect to do.

The antitrust laws embody a basic American policy commitment to promoting the market mechanism as the primary means for allocating goods and services, and to promoting open access to markets. In the recent past, the Antitrust Division has achieved considerable success working with other government agencies to promote this basic policy. These successes have been especially notable in sectors of the United States domestic economy under relatively pervasive schemes of governmental regulation, such as transportation, communications, financial services, and energy.

We have filed briefs and argued before regulatory agencies seeking to promote competition policy as a regulatory tool, and to limit the heavy hand of government regulation to the minimum necessary to accomplish valid regulatory goals. We have participated in interagency committees of the executive branch advocating competition solutions to various policy problems. We have worked both within the executive branch and with independent agencies precisely to identify the competitive consequences of proposed actions and limit the anticompetitive effects of otherwise justified regulatory intervention. Where Congress has created

exemptions or immunities from the operation of the antitrust laws, we have carefully monitored, and opposed, where appropriate, efforts to expand these exemptions by unnecessary regulatory intervention or approval.

Finally, we have worked with the Congress to review the competitive effects of existing and proposed legislation, and to insure that the competitive costs of particular proposals were both understood and adequately weighed in the balance when determining what action was in the public interest.

We have, however, done relatively less competition advocacy in the foreign trade area. It is clear that we must do more.

We are now completing a thirty-year period of relatively free international trade. During this period, the volume of that trade has expanded dramatically. For the first time in U.S. history, the United States is becoming dependent, to a significant degree, on a multiplicity of strategic imports. In addition, U.S. industries and U.S. agriculture increasingly require expanding sales opportunities in foreign markets for economic health. The relatively limited nature of

international protectionism during this period was a critical factor in this surge of international trade.

Swept along on this thirty-year crest of trade enthusiasm, America was stocked with European and Japanese automobiles, Italian leathers and French wines, Asian textiles, and, ultimately, foreign capital as well as consumer goods. In turn, we filled the world with American airliners, computers, chemicals, food and technology. To a significant extent classical economic theory worked: trade followed advantage, capital followed opportunity, and considerable prosperity followed both.

But there are disturbing signs of a change in direction. Worldwide economic sluggishness, an increasingly adverse U.S. trade balance, decreasing U.S. export shares of foreign markets, persistent problems of unemployment, weakness in the dollar, and a widespread perception that other governments are unfairly promoting exports of their producers while inhibiting foreign imports by a variety of visible and invisible non-tariff barriers -- all these factors and others are combining to generate new and growing demands for limitations on competition in international trade.

Some members of Congress have expressed strong reservations about both the wisdom and promise of the Administration's commitment to negotiate meaningful trade reform in the Tokyo Round of the Multilateral Trade Negotiations (MTN). There have been increasing demands for protection for the steel, color television, footwear and textile industries, with a host of others knocking at the door looking for governmental relief from competitive pressures. Third World leaders have called for a new international economic order that would significantly limit the operation of the market mechanism as to nineteen of the world's basic commodities. And there continue to be a few voices within this Administration (as there are in every Administration) suggesting that the United States cannot restore its former prominence in international markets without significantly relaxing antitrust enforcement against the international activities of U.S. enterprises.

These signs are disturbing. I do not believe it to be excessively rhetorical to note certain parallels between the present voices of protectionism and those that were speaking out for passage of what ultimately became the Smoot-Hawley Tariff of 1930. That Act may

have had as much to do with the subsequent catastrophic world economic depression as any other single factor. In any event, the Antitrust Division's commitment to competitive advocacy does not and cannot stop with domestic economic policies and activities. There are many voices for protectionism; we will speak out for open markets.

Happily, there is no conflict between my international competition advocacy and those in this Administration more directly responsible for formulating international economic policy. Since the presidency of Franklin Roosevelt, it has been the foreign economic policy of the United States to seek open and competitive international markets. Where there are conflicting national security objectives, it has been and continues to be the broad U.S. foreign economic policy that departures from competition should be explicitly limited in time and scope and adopted only where necessary to serve these overriding interests.

I have an institutional obligation to speak out for competition. But there is a more practical justification as well. As protectionism grows, efforts to increase the regulation of markets in international trade will irresistibly follow. Economic regulation

has been a failure in U.S. domestic markets; it is one of the few things we should not try to export.

This short discussion explains why we see a need to expand our efforts in this way. Let me now tell you a bit about how we plan to do it. Obviously, these ideas are to some extent only preliminary. As we gain experience, we will be able to modify and refine our efforts.

At the outset, our intervention will be highly selective. The Antitrust Division has very limited professional resources. Because of our relative inexperience, we will be especially deliberative. We are in much the same position today with respect to international trade competition advocacy as we were ten years ago with respect to the regulated domestic sectors. In the domestic regulated industries, we now have considerable expertise. Where we already have relevant experience in the international area, as for example with particular industries that have furnished a host of past antitrust defendants, we will be especially active.

This effort will be organized and implemented primarily through our Foreign Commerce Section, which is

being strengthened for the task. Obviously, one of our first priorities will be activities under the Trade Act of 1974.

This is the principal statute embodying U.S trade law. There are two provisions of the Trade Act as to which we have long-standing and particular interest. Section 337 deals with "unfair methods of competition"; section 201 provides an escape clause for U.S. industries faced with temporary conditions of injury resulting from international competition. Quasi-regulatory determinations of injury under both of these provisions are made by the International Trade Commission (ITC). We will continue to argue before the ITC against anticompetitive determinations of injury or recommended remedies under both of these provisions.

Obviously, foreign producers can and do engage in unfair patent and trademark infringement violations against U.S. producers in U.S. markets, and in those situations, cease and desist orders under Section 337 may be an appropriate remedy. In fact they may be consistent with promoting competition. Certainly, under Article XIX of the General Agreement on Tariffs and Trade (GATT), domestic producers may properly be entitled to short-term protection against serious trade

disruption to enable them to resume a healthy status in a competitive market. Section 201 is the means provided by U.S. law for achieving this objective.

Nevertheless, the potential for protectionist abuse through inappropriate application of these statutes is enormous. For example, our opposition to the claims of welded stainless steel pipe and tube manufacturers in their recent Section 337 action pointed out that vigorous price competition is not an unfair trade practice. Unfortunately, the ITC apparently did not get the message.

Similarly, as we argued in opposing the recent petition for escape clause relief by several U.S. zinc manufacturers, which were seeking relief from negotiated tariff levels, such relief should only be granted when whatever injury has occurred has resulted from import competition -- not from such extraneous economic factors as obsolescent plants, declining demand or, in the case especially of concentrated, price-sluggish industries, lack of competitive vigor.

In these proceedings and others, we have not had much success in persuading the ITC of these relatively basic points. It has become clear to us that we can

and must do a much better job of assisting ITC decision-making in the future.

Under both Sections 337 and 201, the President has the authority to reject or modify anticompetitive orders when inconsistent with U.S. foreign policy and the national interest. Presidential review of ITC actions is conducted within the framework of the Trade Policy Committee headed by the Special Trade Representative, Ambassador Strauss. We are going to follow through with our ITC participation in the Trade Policy Committee structure, not only at the top cabinet committee level, but in the staff sub-committees where the detailed work is done. It may well be that this inter-agency competitive advocacy will be more effective.

For example, we played a part in and strongly support President Carter's disapproval of the ITC's section 337 order in the welded stainless steel pipe and tube matter. In his order, the President referred specifically to the Administration's concern as to overlapping investigations and determinations taking place under the panoply of United States trade laws. He was apparently referring to the overlapping jurisdiction that now may exist under both the Antidumping Act

and section 337. We share that concern. In addition, we are becoming increasingly worried about the overlapping jurisdiction between ITC enforcement of section 337 and the traditional antitrust laws enforced by the Department of Justice, the Federal Trade Commission, and private antitrust plaintiffs.

As the President stated:

> ". . . Unnecessary duplications and conflicts in the administration of those laws result in confusion and the inefficient use of both private and governmental resources. Unfair trade practice laws should be administered so as to provide reasonable certainty to private parties as to which forum they should devote their resources in bringing their petition. To do otherwise is to impose an unreasonable burden upon the parties, both complainants and respondents."

If section 337 were to be truly enforced as an antitrust law -- i.e., to promote competition rather than the economic interests of particular competitors -- and if it were applied consistently with the large body of antitrust jurisprudence developed over the past 90 years, this problem might be less serious. This has, unfortunately, not been the case to date.

In the past, we have not always been active participants, or even commentators, in trade issues

affecting competition not raised by complaints filed with the ITC under sections 337, 201 or the Anti-dumping Act. But the antitrust issues raised by the voluntary steel arrangements in the 1960's, by the negotiation and implementation of international "safe-guard" or comprehensive market allocation agreements as in the textile industry, the recent fashioning of an innovative arrangement for trigger price determinations of allegedly dumped steel imports, and the current active status of international discussions looking toward treaties or understandings to stabilize particular international commodity markets -- none of which involve the ITC -- suggest to me that we should broaden our horizons.

Once again, one can recognize that some limitation of competition in selected international markets in particular cases may be necessary to ensure long-term supplies of critical resources, to assist developing countries to deal with market destabilizing factors that prevent economic growth, or as compromises to avoid international adoption of more anticompetitive alternatives. Still, this Administration strongly believes that such departures should only be made to

the extent necessary and after careful review. This makes it a good time for the Antitrust Division to participate in the councils of the Administration implementing this policy, and I am glad to say we are doing so with the assistance and encouragement of our sister agencies more directly responsible for U.S. policy in this area.

Let me give you three examples of our inter-agency activities that relate to the international trade area. The first is a Task Force on Commodities Policy. Here, the group is reviewing the manner in which private industry advisers are selected, and the role they play when they attend international commodity meetings between governments. We are also reviewing the anti-trust and competition implications of various types of international arrangements relating to particular commodities.

For example, in the tin industry, there is a formal treaty establishing an international consultative body to address international market problems. In the lead and zinc industry, on the other hand, there are periodic meetings of a "study group," which, while it meets at a governmental level, has a less formal mandate

and relies heavily on the participation of private industry representatives. We are reviewing the ways these various contacts are made and conducted, and considering ways in which they might be organized in the future to limit antitrust and competition concerns.

We are also working closely with the Departments of State and Treasury, and others on issues of international competition policy. Opportunities may now exist in international diplomacy for fostering greater cooperation among governments based in part on a mutual recognition of the legitimacy of certain antitrust and competition principles.

Finally, we have participated in the Export Policy Task Force, currently seeking ways in which to promote United States export trade. The Department of Justice strongly supports efforts by this Administration to free United States export markets from anti-competitive restraints both private and governmental. A principal concern, of course, of antitrust enforcement is removing such private constraints. Similarly, a principle concern of antitrust competition advocacy is removal of unnecessary governmental restraints.

Of course, there are continued claims that the antitrust laws are themselves non-tariff barriers to

United States export trade. My predecessors have labored to bury that myth, with mixed results. The year-old Antitrust Guide for International Operations, which was part of that effort, should have dealt with the problem of perception, since it stated our view of the law both forthrightly and reassuringly. With a strong sense of deja vu, I find myself plowing much of this old ground again. I have tried to make it clear that any limitation on the antitrust laws in United States export trade is both unnecessary and counter-productive to increased exports, and I think I am being heard. Nevertheless, myths die hard, and I suspect we will see this one again.

Looking to a longer term perspective, we see a need for strengthening and rationalizing existing trade law. We are beginning to formulate concrete proposals in this direction. One area of particular interest for us relates to existing antidumping laws. For example that there should be some streamlining of the multiplicity of remedies -- both private and governmental -- which now exist in the dumping area. Further thought needs to be given to what constitutes predatory dumping.

In addition, we have some serious procedural concerns with the way the antidumping law is applied by the ITC. The Administrative Procedure Act does not apply to antidumping investigations. The absence of a right of confrontation, including the right to cross-examine, significantly limits the ability to find the facts -- the real facts unstead of those merely asserted. More serious, defendants and other interested parties have no access to the ITC confidential staff investigation and thus cannot impeach or verify claims and findings upon which the ITC may have based its position.

There are additional problems, such as serious practical limitations of the right to appeal adverse dumping findings and the unwillingness of the ITC to entertain a "meeting competition" defense under the dumping law, even though its validity is established under domestic price discrimination laws.

My point in raising these issues is to indicate that there is a great deal that the Antitrust Division can constructively do by extending its role as competition advocate from the domestic economy to the international trade area.

We stand ready to increase our assistance in rendering antitrust advice on international trade matters to our sister agencies. We are making continuing efforts to improve our business review procedure to assist private enterprises to compete in international trade with a minimum of antitrust risk.

There are some risks involved in our undertaking this new policy. To some, we risk the independence we have built up as a law enforcement agency. But in my experience, our independence comes more from a respect for professionalism than it does from isolation. I am not at all sure that the Antitrust Division can gain any freedom of action by having nothing to do with the hard choices of practical policy-making.

The present political and economic climate internationally is, at worst, dangerous, at best, ambiguous. But it is far from hopeless. We are now finally recognizing that inflation is perhaps the greatest current enemy to national and international prosperity we have. Protectionist policies are becoming increasingly recognizable as major inflationary stimulants. The American people are beginning to realize that one must pay heavily in the long run for

the short-term economic gains of restraints upon competition.

I have just returned from Japan. I leave shortly for Europe. During these travels, I observe that, just as protectionism lacks universal or unqualified support at home, with each of our trading partners as well there exists potent support for maintenance of free trade. So long as escalating trade wars do not provoke senseless, pyramiding protectionist retaliation, we have hopes that more thoughtful responses to trade problems will prevail. There is considerable natural support for open markets to be tapped and mobilized, based on educated awareness that no nation can long enforce an inequitable international trade policy -- and that long-term prosperity is much more likely to occur in a dynamic trade framework than in a world of compartmentalized, water-tight nations searching hopelessly for trade self-sufficiency. The support that exists for open markets is the logical ally of an antitrust enforcement that seeks to prevent those markets from being cartelized. We must mobilize this support if our current policy is to be preserved, if the international economy is to prosper, and if the

Division is to have a meaningful antitrust enforcement program in United States foreign commerce.

I welcome this opportunity to help build that support, and hope you will all join me in this worthwhile endeavor.