



# DEPARTMENT OF JUSTICE

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## **Antitrust: A Remedy for Trade Barriers?**

Address by

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Over the past half-century, the world has enjoyed unparalleled economic growth and prosperity. It is generally recognized that this has come about because the world has been more or less at peace during this period, because in more and more countries democracy has taken root, and because the system for governing world trade that was put into place after the Second World War succeeded beyond anyone's wildest dreams. Today, after the successful conclusion of the eighth round of negotiations under the General Agreement on Tariffs and Trade, which has served (somewhat awkwardly) as the world's trading charter, and the launching of the new World Trade Organization, we are looking for ways to assure the same kind of growth and prosperity for the next century. In one form or another, competition policy will surely play an important role in this process. By the same token, antitrust or competition policy is not the only tool that will be needed as we work to keep markets open, free, and competitive in the 21st century.

## **I. The Relationship Between Antitrust and Trade Policy**

In the time available this morning, I would like to take a closer look at the claim that antitrust policy may contribute to the reduction of international trade barriers. Those barriers can take many forms, ranging from traditional tariffs and quantitative restrictions to the subtler non-tariff barriers that the GATT negotiators addressed in the Tokyo and Uruguay Rounds of multilateral trade negotiations. Whatever their provenance, trade barriers prevent the world economy from enjoying the full potential gains from international trade. Trade barriers also distort production and consumption decisions, and thus have important consequences for the national welfare of all countries -- both those that impose barriers and those that are shut out of particular markets.

The often-expressed concern with access to foreign markets reflects the simple economic fact that international trade will not follow the efficiency-based law of comparative advantage if trade flows among countries are somehow impeded. Trade negotiators have been tireless in their efforts to eliminate, reduce, or limit governmental barriers of all kinds, so that sellers will have the chance to compete in all potential markets. Obviously, whether any given company finally succeeds or fails in serving a foreign market should and will depend upon the quality of its product or service and the price it charges -- in short, upon the market. Eliminating barriers to market access can only ensure that the company will have the chance to be judged on the merits, and that it will not face a deck already stacked against it.

In part inspired by the European example, many commentators have begun to ask whether the elimination of governmentally imposed barriers to market access is, as a matter of first principles, sufficient to assure an open international trading system. They have noted that private barriers to markets, such as collective boycotts or cartels that control essential inputs or bottlenecks, can be just as effective in blocking the entry of new competition as governmental barriers have been. Within domestic markets, the public/private distinction is usually discussed in connection with a deregulation agenda, since it is well recognized that regulatory barriers to entry can impose some of the most serious impediments to vigorous competition within a national market. Once deregulation occurs, it is vitally important to have a strong competition policy in place, so that the newly freed markets will not succumb to monopolization, cartelization, or other anticompetitive strategies.

Internationally, the concern with public barriers to market access and private barriers is quite similar. With the lowering of public trade restrictions, it is still necessary to make sure that entry into the domestic market for foreign firms is not blocked through anticompetitive strategies. (This is not to suggest that domestic competition is unimportant; it reflects only the fact that international trade barriers are unlikely to have been acting as barriers to entry for domestic companies. Whether strong antitrust enforcement was occurring in the domestic market while international trade restrictions were in place is an independent question, with welfare implications that I am not addressing at this point.)

All of this leads me to join the chorus of those who argue that, in some way or another, the existence of strong and sound competition laws, and the effective enforcement of those laws, is an important component of an open and free international trading system. However, it is one thing to say that antitrust law and competition policy are important, and quite another to postulate that antitrust rules might somehow be an immediate "remedy" for trade barriers, at least in the sense that trade lawyers have traditionally discussed trade remedies. It is similarly problematic, in my view, to assume that antitrust is capable somehow of resolving the problem of market access around the world. Antitrust, or competition law, has a role to play -- indeed, an important role to play -- but it will only be part of the picture. Some market access problems are specific to particular competitors, and others reflect more general distortions of competition. Competition law can address the latter group, but, remembering that it it "protects competition, not competitors," it may not always be an appropriate vehicle for the former.

The source of the antitrust rules that are needed for a successful global trading system is also the subject of intense debate, much of which you will be hearing today, from the leading thinkers in the area. In the United States, our national jurisdiction extends (*inter alia*) to foreign restraints that have a "direct, substantial, and reasonably foreseeable effect" on the export trade of U.S. exporters, when we are able to exercise personal jurisdiction over the foreign actors. In those cases, to the extent that the U.S. enforcement action successfully prevents private anticompetitive behavior in other countries targeted at our exports, there is a beneficial effect on market access as well. Another possibility, which we note in our draft International Guidelines published in October 1994, is that the country where the private restrictive behavior is occurring might apply its own antitrust laws to correct the problem. This will almost always help the local consumers, who are by definition deprived of significant potential competition when foreign firms are shut out of the market.

Both of these strategies rely fundamentally on the use of national law to address restrictions that impose barriers to entry on foreign firms (among others). Some have argued that national law is inherently incapable of assuring fully competitive and open international markets. Among these skeptics, there are two different subgroups -- those who believe we should first explore what is possible under existing institutions, and those who believe we must be bolder and create new rules and (perhaps) new institutions. The former would apply existing GATT principles and remedies to the problems caused by anti-competitive conduct condoned by the government of a trading partner, perhaps expanding some of the precedents. More controversially, the latter group argues that an international set of binding rules, with resort to the World Trade Organization in the event of conflict, is the inevitable end-point for a successful world economy. Personally, I am far from persuaded that international rules are so "inevitable." A friend of mine the other day reminded me of the Esperanto movement for the problem of linguistic diversity, and the enchantment with the idea of World Federalism in the years following World War II, each of which was presented as inevitable in its own time. Suffice it to say that we should not jump to conclusions this time.

It should be plain, however, that there is a link between anticompetitive conduct (as an antitrust lawyer would use the term) and at least some market access problems (as a trade negotiator might describe them). This is reflected right now in U.S. trade laws. Section 301 of the Trade Act, for example, allows the President to take certain trade actions in the face of "unreasonable" acts, which are defined to include (among a number of other things) an "act, policy, or practice denying fair and equitable market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by private firms

or among private firms in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of U.S. goods to the purchasing by such firms." Section 337 of the Tariff Act refers specifically to unfair methods of competition, and the anti-dumping laws address the problem of international price discrimination and below-cost sales.

At a more formal level, the relationship between competition and trade was recognized as early as the 1948 Havana Charter, the ambitious post-World War II world trading system proposal, which eventually led to the more limited GATT. The original Havana Charter included a chapter setting forth broad rules on "restrictive business practices," or antitrust principles (as we would be more likely to term them). Important work on trade and competition policy continues today in various bilateral and multilateral fora, most notably the Organization for Economic Cooperation and Development, through its Competition Law and Policy Committee.

## **II. Antitrust Enforcement Affecting Trade**

Although this fact may not be as well known or appreciated as it should be, present U.S. antitrust enforcement policy takes full account of international competition, "warts and all." For example, as described in the 1992 Horizontal Merger Guidelines jointly issued by the Department of Justice and the Federal Trade Commission, we define global, regional, or hemispheric markets when the evidence shows that they exist. In doing so, we also take into account the elasticity of foreign supply, which may be diminished if trade barriers are likely to prevent foreign firms from responding to possible price increases in the U.S. market. From the earliest days of Sherman Act enforcement, the importance of protecting the U.S. market from anticompetitive practices imposed in whole or in part from other countries has been clear. In 1911, for example, the U.S. Supreme Court held that it was error to dismiss a foreign defendant in the *American Tobacco* case, where the allegation was that American firms and the foreign defendant had divided world markets. There are many examples of similar cases. Today, our jurisdiction extends to restraints overseas that have an actual and intended substantial effects on U.S. import commerce (*Hartford Fire*), as well as to restraints overseas that have a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, import commerce, or on the export commerce of U.S. exporters (1982 FTAIA).

The more conventional "international" antitrust case is one in which the Department of Justice pursues an international cartel or monopolist that is harming consumers or competitors in the United States. These cases may seem less relevant to the problem of market access, although it is important to note that a similarly vigilant attitude toward such anticompetitive behavior in all countries would contribute substantially to keeping world markets open. The more visible cases have been those that focus on barriers to U.S. exports -- a type of case that was both theoretically possible to bring, and actually brought, throughout our history, with the exception of the years 1988 to 1992. Congress made it clear in 1982 legislation that U.S. antitrust jurisdiction reaches these cases, and we have responded accordingly.

In 1994 the Department of Justice obtained a consent decree that demonstrated how enforcement of U.S. antitrust laws could have the dual effect of responding to anticompetitive restraints on U.S. trade, and of opening foreign markets for U.S. exporters. The Department accused Pilkington, a large British producer of float glass (the type of glass used in automobiles and buildings) with using exclusive territories and other restrictions in licensing its technology in an attempt to monopolize this \$15 billion a year global industry. The licensing restrictions discouraged U.S. firms from designing, building, or opening float glass plants abroad. Because the relevant patents had long since expired, and most of the remaining technology being licensed is now in the public domain and thus did not qualify for trade secret protection, we concluded that the licensing provisions were not legitimate business practices but were instead being used as monopolistic devices that harmed U.S. exports of glass plants and associated technologies. The settlement eliminated the British company's territorial restrictions, allowing U.S. firms the opportunity to compete in the formerly blocked markets.

While the effect of this type of enforcement action may be to open a foreign market, this is in a sense incidental. The substantive offense is complete when we can prove that a cartel or a monopoly has violated our antitrust laws, when its effects in the U.S. market meet the relevant jurisdictional tests. The soon-to-be-issued Department of Justice/Federal Trade Commission Antitrust Enforcement Guidelines for International Operations will make it even more clear than the draft version that the U.S. antitrust agencies do not and will not employ their statutory authority to further non-antitrust goals.

The American Bar Association, in a resolution adopted last month, also recognized the important limitations in the role that antitrust enforcement can play. The ABA noted that

the U.S. government should continue to focus its efforts on market entry barriers caused by, or traceable to, governmental action, which are not reachable by application of competition law. These barriers include foreign investment restrictions, inadequate IPR protection, market distorting subsidies, and discriminatory public procurement practices, product standards, and certification procedures. Simply to recite the list is to make clear the continuing importance of public restrictions in this area.

Thus, while antitrust enforcement may contribute over the long run to more open world markets, and from time to time a particular antitrust case may have the same effect, it is important to be realistic about antitrust policy. As a set of rules whose ultimate focus is variously described as consumer welfare, or allocative efficiency, or protection of the competitive *process* (rather than particular competitors), it will not hold the answer for every trade problem.

### **III. Has the Time Come for World Antitrust Rules?**

No one doubts that the negotiation and implementation of a new set of world-wide antitrust rules would be a massive undertaking. Thus, it is worth asking how much mileage we can get out of the existing GATT regime, both as it has existed and as it will develop in light of the Uruguay Round results.

Some commentators have advocated resort to traditional dispute resolution under existing GATT rules for trade disputes with a competition policy component. Although the GATT applies primarily to government measures, certain trade barriers resulting from anticompetitive conduct can be said to be supported by government measures. Article III of the GATT, for example, which imposes the national treatment obligation, has been applied in a number of situations, most involving beer distribution, where it has been successfully argued that national policies have blocked foreign access to distribution channels. Similarly, it could be argued that Article XVII, which limits the conduct of state trading monopolies, could be used to police abuses of control over domestic distribution systems. It might also be possible to argue under the GATT's nullification and impairment provisions that a country's failure to apply its antitrust law has altered the agreed balance of concessions.

Notwithstanding these precedents, the fact is that there is very little experience with using existing GATT remedies for disputes related to what antitrust lawyers would consider

to be *antitrust* violations. The GATT does not apply to purely private actions unsupported by government actions, and competition policy as such is not addressed by the GATT. In all but the most unusual case, this will probably not be a promising avenue for resolving trade disputes related to private anticompetitive conduct.

What does the Uruguay Round add to the picture? At this point, it is hard to tell. Many of the governmental barriers to market access that I noted a moment ago have been addressed in the Uruguay Round. However, as of now these new disciplines are untested, and some areas have not yet been the subject of multilateral agreement. The TRIMs agreement ("Trade-Related Investment Measures"), of course, calls for a review of competition policy within five years, although it is unclear how broadly the subject should be treated -- simply within the context of the effective operation of the TRIMs agreement itself, or more broadly? The TRIPs agreement ("Trade-Related Intellectual Property") addresses certain restrictive business practices when intellectual property rights are involved, but this too is different from an explicit competition agreement.

Some of our speakers today, along with others around the world, take the position that the next logical step is a world competition code -- that nothing short of multilateral rules covering trade and competition will suffice. They note that the European Union presents a model of successful integration of national economies combined with a single set of competition rules centrally enforced by the European Commission. This analogy does not take one very far, however, given the fact that no one would argue that the rest of the world is ready today for the degree of market integration and submission to central authority which the EU member states have chosen.

Other practical problems also counsel caution in moving too quickly in this direction. We should remember that although there has been great progress in recent years at a world-wide level toward acceptance of the principles of market economies, there is still a long way to go. It is not clear, for example, whether the strong affirmation of intellectual property rights recently adopted in the TRIPs chapter of the Uruguay Round has been fully accepted in all countries. Recalling the experience of two decades ago in the U.N. Conference on Trade and Development, with its Restrictive Business Practices Code and its incomplete Code of Conduct for the Transfer of Technology, it is fair to say that the potential may still exist for more harm than good in this critically important area.

It is also worth recalling that only about a third of the nations in the world have enacted antitrust or competition laws -- perhaps 53 or so. Many of that group have had only brief experience with their law -- between 1/3 and 1/2 of all competition laws in the world are five years old or younger. Understandably, these countries are still developing both the expertise necessary for sound and effective enforcement, and the political support for the sometimes harsh competitive market.

Finally, there is no escaping the fact that any kind of enforceable and enforced worldwide competition regime would present unpre-cedented issues relating to the appropriate kinds of follow-up and dispute resolution mechanisms that will be required. The various proposals for such regimes, going back to the Havana Charter I mentioned earlier, have included provisions giving a supranational enforcement body access to confidential business information of enterprises in countries against which a complaint is filed. Access to information is, however, something which must be provided with great care. We saw this last fall, when the U.S. Congress passed the International Antitrust Enforcement Assistance Act. That Act authorizes U.S. antitrust agencies to enter into agreements with foreign antitrust authorities that would permit the exchange of confidential information. Congress was careful to include in the legislation well-established safeguards that will ensure the proper treatment of all such information that is exchanged among responsible, existing antitrust agencies -- provisions that the Congress included because of concerns expressed by the business community while the legislation was under consideration. Before the necessary national support for a vastly expanded international system can be developed, it is reasonable to assume that enforcers and companies alike will need to build significant experience under the bilateral information sharing agreements that will be developed under the new law.

#### **IV. If Not World Rules, Then What?**

As I indicated at the outset, I have no quarrel with the proposition that antitrust law must take its place in international markets. The issue is how best to go about making antitrust an effective tool to protect competition in international markets. In brief, my response is to take matters one step at a time. None of us has the time or energy to waste

either working on a project that is truly not "inevitable," or creating a solution to a problem that may not exist.

I would like to distinguish for this purpose between two broad models of international integration. In one, multilateral rules are created to which all States subscribe, and all are bound to apply the "superior" law in their national systems. The GATT itself has been a prime example of this model. In a myriad of other areas, however, the best way of approaching the shrinking globe has been to improve methods of coordination and cooperation among national authorities. Our Criminal Division, for example, cooperates with law enforcement officials of many other countries through its Mutual Legal Assistance Treaties and otherwise, with respect to many of the most serious law enforcement problems of our time. With an effective network of bilateral memoranda of understanding and agreements in place, our Securities and Exchange Commission works with its counterparts in the other major countries of the world. No one, to my knowledge, thinks that the globalization of securities markets requires one massive oversight agency. Taxation is a third area in which a worldwide network of bilaterals operates to coordinate each country's policy with its important trading partners.

The cooperation model deserves to be tried seriously for antitrust enforcers, before we conclude that nothing but a multilateral code will do. We have taken the first step in this direction in the passage of the IAEEA, and we are hopeful that we will be able to conclude cooperation agreements with other countries within a reasonable period of time. This system preserves the benefits of local accountability and adjustment to local conditions, while at the same time it offers an effective mechanism for antitrust authorities to respond to the globalization of markets. Even if you think that global rules may some day be necessary or appropriate, it is hard to argue that we should not build some common experience in cooperative enforcement efforts in the meantime. We may find that world antitrust sounds a lot like World Federalism in fifteen years or so -- and if we do not, there will be time enough then to address the issue with a far better information base than we have today.

I would like to end with three key points:

First, the relationship between effective antitrust rules and the enforcement of those rules, on the one hand, and an open and fair international trading system, on the other, is critical.

Second, we will be able to pursue these interests in a variety of ways: bilaterally, regionally, through the important work of the OECD, and perhaps eventually through use of the World Trade Organization as a forum for discussions of this and other important issues. It is neither useful nor desirable to jump in feet first to a world antitrust code along the lines of the Havana Charter. We will take this step only if and when we and our trading partners believe that it is a necessary supplement to effective antitrust law enforcement and the cooperative arrangements we hope to develop. We are likely to have more success in achieving freer trade, and resolving difficult trade disputes that may have an antitrust component, by building on the trade expanding achievements of the Uruguay Round than by prematurely attempting to fashion multilateral rules specifically directed at private anticompetitive conduct.

Finally, our priorities over the short and medium term are to continue to work for strong and effectively enforced antitrust laws in all countries around the world, and to improve the tools for cooperation that link antitrust authorities. And, building on more than a century of bi-partisan commitment to antitrust enforcement in this country, we will continue to enforce U.S. antitrust law against conduct that harms U.S. markets to the fullest extent of our ability.