ANTITRUST IN AN INTERDEPENDENT WORLD

Remarks by

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Not so many years ago, the United States stood virtually alone among the major countries of the world in the field of antitrust. Today, I am happy to report that that field is significantly more crowded. For example, more than 20 nations now participate in the Restrictive Business Practices Committee of the Organization for Economic cooperation and Development. As we all know, this advance in antitrust has not come without friction, but the presence this evening of Chairman Hashiguchi of the Japanese Fair Trade Commission is symbolic of the particularly important cooperative relationship that has developed between the Antitrust Divison and the Japanese Fair Trade Commission.

Today I would like to offer some initial thoughts about the application of the United States antitrust laws to foreign conduct that produces substantial anticompetitive domestic effects. This is a genuinely difficult problem, and I have no easy answers to propose. I do suggest, however, that an existing body of legal scholarship familiar to both common law and civil law nations can clarify the nature and extent of the problem. Modern conflict of law analysis may enable us to separate the real from the illusory conflicts between United States antitrust enforcement and the concerns of other interested nations. With the scope of the problem thus reduced, solutions may emerge.

Substantive U.S. antitrust rules form a "charter of economic liberty" for the United States economy. At its core, this charter seeks to avoid the monopolization or cartelization of markets serving the American public. As the Attorney General said recently, American courts have sometimes adopted antitrust theories that depart from this legitimate core. This Administration is urging the courts to reject as unsound those theories involving solely vertical arrangements and to evaluate more carefully cooperative behavior among horizontally related companies that may not give rise to risks of cartelization. If successful, these efforts will assist both foreign and domestic enterprises caught in the web of unsound antitrust theories and the extensive discovery and treble damages they threaten.

Once economically isolated, the United States is now thoroughly integrated in a world economy that it cannot escape or ignore. United States exports and imports account for roughly one-tenth of the entire free world's international trade. Between 1970 and 1980 our exports and imports more than quadrupled. Between 1970 and 1979 foreign direct investment in the United States expanded by a factor of four and U.S. direct investment abroad increased over 2-1/2 times. Events in Japan, the Middle East, Europe -- all around the globe -- influence the daily economic life of America. In the context of international trade of this magnitude and importance, it is simply inevitable that the Antitrust Division will increasingly engage in investigations and proceedings that involve foreign firms.

The question is: how broad is the Divison's mandate to impose United States standards on firms of other nations?

Let me attempt to establish the parameters of the debate. Few, if any, would dispute our right to apply our laws to the activities of foreign firms in this country. At the other extreme, we lay no claim to control the foreign activities of foreign firms that have no effect in this country. The point of contention concerns foreign activities of foreign firms that do have effect in this country. There are two widely disparate positions on this issue. One would allow enforcement only when the objectionable acts actually occurred in the United States. Obviously, this would deny any enforcement activity in the disputed area. The other extreme is a claimed right of enforcement whenever the foreign acts produce an effect in the United States. This view is tempered to varying degrees by the well-known but ill-defined doctrine of comity.

Critics of broad enforcement of the United States antitrust laws describe the application of those laws to foreign acts of foreign firms as "extraterritorial." In my view, however, this term does more to confuse then to clarify the problem. Moreover, the "territorial" position is untenable on several grounds. Purely as a matter of political reality, if we were to ignore foreign cartel activity aimed at increasing the prices that consumers in this country must pay for products and raw materials, Congress shortly would either force a

change in that policy or create some new institution to attend to the national interest in competitive import prices. In addition, as a matter of theory, there is little to recommend the principle that factors such as the location of conspirators' meetings or other physical acts should automatically govern the scope of our antitrust laws. Although arguably relevant in some cases, such factors should rarely be dispositive. In short, we reject as both unrealistic and as unduly formalistic a rule based on a strict notion of territoriality.

Let me now consider the opposing position. Under the "effects doctrine," the United States asserts jurisdiction over conduct occurring partially or wholly abroad which has substantial and foreseeable effects in this country. This is neither a radical nor unique approach. Most of the nations with strong antitrust laws have adopted the effects doctrine either by statute, as in Germany and Canada, or by judicial interpretation, as in Sweden and the Common Market. In fact, about half of the free world's international trade is accounted for by the nations whose antitrust enforcement agencies incorporate, in some measure, the effects doctrine.

It is undeniable that the effects doctrine creates significant potential for conflict with the law of other nations. Recognizing this fact, the United States has been an important force in the OECD for setting up a system for notification,

exchange of information and consultation between OECD member countries whenever important interests of one member country are affected by an antitrust investigation or proceeding of another member country. For a number of years it has been our practice to follow this OECD procedure, and we will continue on this course in the future.

Courts in this country have also sought to temper the effects doctrine by applying principles of comity. Broadly, those principles recognize that nations should accord due deference and respect to the legislative, executive or judicial acts and policies of other nations. Under those principles, a court might decline to enforce national laws and policies in cases where the national economy is not subject to appreciable harm and other nations have a greater legitimate interest in the dispute. This approach requires a practical, realistic assessment of the consequences of the conduct under challenge, not a metaphysical attachment to the metes and bounds of particular territory. Comity has received increasing attention since the Timberlane decision. The most well-known list of factors to be considered in applying the principle of comity is found in the Mannington Mills decision. The factors listed include:

1. Degree of conflict with foreign law or policy,
2. Nationality of the parties,

3. Relative importance of the alleged violation of conduct here compared to that abroad,
4. Availability of a remedy abroad and the pendency of litigation there,
5. Existence of intent to harm or affect American commerce and its foreseeability,
6. Possible effect upon foreign relations, if the court exercises jurisdiction and grants relief,
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries,
8. Whether the court can make its order effective,
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances, and
10. Whether a treaty with the affected nations has addressed the issue.

Although some tempering of the effects doctrine is clearly appropriate, the judicial application of comity is a less than ideal solution. One obvious problem is that comity is in the eye of the beholder. Any long list of factors is simply an open invitation to the court to decide for itself. More specifically, the inclusion of foreign policy considerations within the rubric of comity is subject to a number of objections.

It is doubtful that courts should take on executive branch responsibility by making that type of judgment. Indeed, I expect that most courts would properly consider themselves unequipped to do so. Nor would executive branch intervention to advise the court on the foreign relations implications of the litigation solve the problem. There may be many instances in which the executive branch simply is unable to provide that advice. But more fundamentally, the vagaries and shifting concerns in our relationships with particular governments would inject an inappropriate degree of unpredictability into an area of law in which the possible imposition of criminal penalties and recovery of substantial damages calls for a more certain approach.

A possible alternative to the traditional principles of comity as a limit on the effects doctrine is a variation of the "interest analysis" now used regularly in conflict of law problems. Under this analysis, one asks what laws and policies of the arguably interested jurisdictions are implicated by the challenged acts. When both jurisdictions have legitimate interest in the application of their laws, the courts must attempt to balance the strength of the respective interests. But, in many cases, it will be apparent that the apparent conflict is merely illusory. In my view, a similar approach might be helpful in determining when to apply U.S. law to foreign acts of foreign businesses having an effect in our domestic

economy. I have already described the strong national interest in antitrust enforcement in this country. In disputed cases, it would be necessary to determine the laws and associated policies of other arguably interested countries that might apply to the acts in question.

As I have already indicated, the hardest case is where the acts are actually encouraged by laws of the other nation. To borrow from the conflict of law literature, this is a "true conflict." The strongest example of a true conflict involves the Act of State Doctrine or foreign sovereign compulsion defense. These doctrines provide for the fair treatment of American or foreign business entities which have had no choice as to how they would behave. They also reflect a recognition that a government may freely order economic activities within its borders even where effects are felt in another country.

Many "true conflicts" will not rise to the level of the act of state doctrine or the foreign sovereign compulsion defense. Over the long term, such problems can only be addressed effectively by international negotiation and agreement. In the shorter term, the courts can only attempt to predict the likely result of such negotiations by estimating the strength of the competing interests and the extent to which those interests would be impaired by a decision one way or the other.

For example, foreign government officials may, with varying degrees of formality, encourage or promote anticompetitive activities overseas which may have repercussions in the American marketplace. In this area a conflicts analysis may be extremely useful. Consider the case in which a European government is concerned about the future health of its widget industry. Widget technology has spread to many developing countries, and lower-priced imports are steadily increasing their market share. The European government carries out a clearly articulated structural adjustment program which calls for, though it does not compel under penalty of law, domestic widget markers to "rationalize" the industry. The result of the program is a specialization agreement under which all of that country's widget makers reduce capacity and specialize in the production of different sizes of widgets. Assume further that a small percentage of the European country's widget production is exported to the United States, and that the European country's widgets accounted for a small percentage of the widgets sold in the U.S.

I would not be eager to apply our antitrust rules in this situation. It involves a foreign government's national policy to assist in the restructuring of an industry whose effects are felt overwhelmingly in that foreign nation. The restraints are only among producers within a single nation

who are in open competition with producers of many nations. The likelihood that significant anticompetitive effects in the U.S. would flow from the foreign restructuring policy is rather low. American interests are rather peripheral; American consumers are unlikely to be damaged; substantial interests of a foreign government are involved; and the overwhelming focus of the actors and effects of the activity are outside the United States.

In some substantial percentage of cases, there may be no conflict between the relevant laws of the interested countries. The easiest case, of course, is where the objectionable acts are prohibited under the national laws of the other countries. In such a case there is no objection to the application of United States law where the acts also have an effect on our domestic economy. As the number of nations embracing antitrust policies expands, an increasing number of cases should fall in this category. I am not suggesting that only one nation's law should apply to a particular set of acts. For example, the international quinine cartel was appropriately challenged under both Common Market and United States antitrust law.

Also involving no conflict are cases where the challenged acts are neither encouraged nor prohibited under the national law of the other interested countries. An example drawn from our own law is the Webb-Pomerene Act of 1918. This statute expressly exempts from the prohibition of the Sherman Act

associations entered into for the sole purpose of engaging in export trade. United States law with respect to these arrangements is essentially permissive. The exemption is intended to avoid any discouragement under our law of export arrangements which may be beneficial to our own firms, and which may raise prices, if at all, only abroad. Our Government does not require the formation of export cartels, or actively supervise them as instruments of our national policy. Assuming that other nations had similar laws, we would consider it appropriate to prosecute similarly formed private cartels aimed at our marketplace. Both the United States and the Common Market have attacked export cartel activity abroad which has restrained competition in their marketplace.

While no panacea, the approach that I suggest is a more focused and practical approach to the difficult question of the application of our antitrust laws to foreign conduct of foreign firms. I believe that a consistent application of such an approach would at least narrow the range of potentially divisive problems facing us. Ultimately, however, we must rely on the type of cooperation and mutual restraint that has characterized our relationship with our friends in Japan.

Thank you very much.