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## U.S. Antitrust Laws and the Global Market: National and Extraterritorial Enforcement

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# I N T R O D U C T I O N

## U.S. Antitrust Laws and the Global Market: *National and Extraterritorial Enforcement*

*Introduction by Professor Christian Johnson*

My name is Christian Johnson. I am a new professor here at Loyola University Chicago. It is my pleasure to introduce the panel for the last discussion of this afternoon. For those of you who were here this morning, you know that this morning's discussion was about the proper goals of antitrust. The second panel discussed the detection and punishment of tacit collusion. Both panels touched on and in that way provide a nice introduction to this panel's topic, the enforcement of the United State's antitrust laws in the international context.

I think this panel's topic encompasses both previous panel's discussions and is the most timely considering the increasing move toward globalization in this economy. First, I doubt whether any of our previous panelists would dispute the proposition that international enforcement of U.S. antitrust laws is a proper goal of antitrust. It may not be an attainable goal, but it is certainly a proper goal. From the second panel's discussion, it is clear that a major issue concerning the domestic enforcement of the antitrust laws comes from the fact that collusive agreements often originate in a foreign jurisdiction. Ms. Moltenbrey told us how gathering evi-

dence concerning a collusive agreement, while difficult in the United States, is made much more difficult when the meetings take place and the agreement is made in a foreign jurisdiction.

The first panelist to speak will be Professor Harry First. He is professor of law at New York University School of Law where he teaches antitrust and regulated industries. Professor First has visited Japan twice as a Fulbright Research Fellow. Before beginning his teaching career he was an attorney with the United States Department of Justice, Antitrust Division. He is a graduate of the University of Pennsylvania Law School and has published extensively in the area of antitrust. Today, he will be presenting his ideas with respect to the prospects for international antitrust enforcement.

The Honorable Diane Wood, Circuit Judge for the Court of Appeals for the Seventh Circuit, will also be participating in the panel discussion. Judge Wood was appointed to the Seventh Circuit in 1995. Prior to being appointed to sit on the Seventh Circuit, Judge Wood was Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice. She is a graduate of the University of Texas Law School

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and clerked for Supreme Court Justice Blackmun. Judge Wood has taught at the University of Chicago School of Law and has a special expertise in antitrust law and federal civil procedure.

Finally, Stephen Rasher is Assistant General Counsel for United Airlines where he has the responsibility for all international legal matters, including those touching on antitrust. He has had extensive experience with various acquisitions

and commercial transactions which involved United Airlines. Before joining United Mr. Rasher worked for Mayer, Brown & Platt and Katten, Muchin & Zavis in Chicago. He is a graduate of the University of Michigan Law School.

I think that Mr. Gotfryd should be commended for putting together such a qualified and distinguished panel. It is with great pleasure that I present our first speaker, Professor First.

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# CONFERENCE PRESENTATION

## Presentation by Professor First:

Now as the “closer” for today’s proceedings, I think I should say what we learned from the prior panelists. Ralph Nader has left, but one thing that struck me is that he believes that criminal capitalism is not a redundant term because he talked about criminal capitalism in Eastern Europe; this gives me hope that some capitalism is not criminal. Richard Epstein told us (shockingly) that antitrust will not cure everything. It will not redistribute wealth, and it won’t give us necessarily the glorious society, but he did say that the core of antitrust, which he approves of, is the rule against horizontal price fixing. Finally, a commentator who is really the segue to our panel is Eleanor Fox, who reminds us of the importance of market access and who said some important things about international enforcement and enforcement in Europe.

In my remarks, I would like to talk about three things: First, I want to begin by taking stock of some of the past efforts at international antitrust enforcement and, specifically, U.S. international antitrust enforcement. Second, I will say a little bit about some of what I think are the core difficulties of international antitrust enforcement. Third, I will offer a few suggestions about the future prospects for international antitrust enforce-

ment.

With all of the emphasis and discussion about international trade and internationalism and how the world is changing, we might tend to think that this is a new problem for antitrust enforcement, but, in fact, of course, it is not. There has been a long concern about international trade and it goes back to the passage of the Sherman Act in 1890—concern about imports coming into the United States and their importance in our economy.

One of the earliest antitrust prosecutions by the Justice Department was an effort to break up the international cigarette cartel which had divided world cigarette markets (*United States v. American Tobacco*, 328 U.S. 781). We also have long had a concern about export trade and the effect of antitrust rules on exports. In 1918, Con-

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gress enacted the Webb-Pomerene Act in an effort to give U.S. exporting firms a safe harbor where they would not be subject to U.S. antitrust law liability for certain behavior abroad.

Still, as we look back over the history of antitrust enforcement, there are two periods in which international antitrust enforcement was quite prominent. The first period is 1939 to 1942, the period when Thurman Arnold was heading the antitrust division.

Thurman Arnold's interest in international antitrust enforcement stemmed from his interest in the anticompetitive uses of patents. As the Antitrust Division began to look at the patent cases, it found that: (1) patents governed a number of critical war industries; (2) patents were used by a number of international cartels; and (3) many of these cartels involved German firms. These investigations led to quite a bit of enforcement activity. I will give you a little list of the industries involved in international cartel behavior against which the Antitrust Division moved: potash makers, military optical instruments, synthetic rubber, electric lighting, electrical equipment, aluminum, magnesite, magnesite brick, tools and dies, photographic materials, nitrogen products, magnesium products, acrylic products, pharmaceutical and biological products, titanium die stuffs and molybdenite concentrates. If you add the cases up, approximately 30 cases involving international anti-competitive practices were brought in this 1939 to 1943 period.

Note that when Thurman Arnold was engaged in this effort, our nation had just come out of the Depression, and we were heading towards the Second World War and the central planning that it entailed. There was some question about the wisdom of antitrust in a war time context.

In effect, Arnold's prosecutions of these inter-

national cartels provided some persuasive justification for having antitrust laws. They showed that trade restraints could affect important war industries, and they showed how cartel arrangements could be used to benefit German firms while disadvantaging U.S. firms. In a statement indicative of the rhetoric of that time, the Attorney General, Francis Biddle, wrote in his annual report in 1942: "Vigorous action has been taken to break the control exercised by Nazi-dominated international cartels over vital American interests."

Note, also, that Arnold's enforcement efforts were probably consistent with the state of antitrust law at the time, although it is difficult to tell for certain because so many were settled by pleas or decrees. That is, as a matter of antitrust doctrine, Arnold did not push to test the limits of U.S. jurisdiction in these cases.

The second important period really starts in 1990, and continues through the present. In 1990, the Justice Department began a new effort at international antitrust enforcement by threatening to remove a footnote from a policy statement. Maybe this does not sound like a grand enforcement effort, but the footnote was "Footnote 159" in the Justice Department's 1988 guidelines for international operations, which were issued during the Reagan administration. In Footnote 159, the government pointed out that it would bring suit against restraints of trade affecting exports *only if* these restraints adversely affected U.S. consumers.

The enforcement position which the Reagan administration took reflected antitrust philosophy of that time, which stressed that the purpose of antitrust is to advance consumer welfare, as reflected by the achievement of allocative efficiency, and not to advance producer welfare.

Restraints on exports from the United States might adversely affect U.S. producers reducing their sales abroad, but the affect in and of itself was irrelevant to antitrust. Footnote 159 meant that U.S. antitrust enforcers should be concerned only if an export restraint ended up affecting U.S. consumers.

A change in Footnote 159 was first hinted at in 1990 by Jim Rill, who headed the Antitrust Division during the Bush administration. This hint came in the context of our Strategic Impediments Initiative talks with Japan's government in which the United States was complaining about barriers to entry into Japan's markets.

In 1992, when the Clinton administration took office, it pledged to further increase the pressure on Japan and to become more confrontational. Footnote 159 was already out, and the administration wasted little time marrying antitrust to the then current trade policy. This is similar to what happened in Thurman Arnold's day, when anti-trust enforcers appeared to be anxious to show that antitrust was relevant to broader policy and, again, to the broader foreign policy effort.

So what have been the results of this current push for antitrust enforcement? We basically have two categories of cases. There has been some civil litigation and some criminal prosecutions of price-fixing conspiracies involving U.S. and non-U.S. firms.

On the civil side, three cases have been filed, and all have been settled by consent decree. Perhaps the most well-known of these cases, is *Pilkington, (PPG Industries, Inc., v. Pilkington plc*, 825 F.Supp. 1465 (1993)) which was filed in 1993, four years after the threat to remove the footnote.

Pilkington is the company that developed the process for manufacturing flat glass and con-

trolled that process throughout the world through its licensing efforts. The Justice Department, in a consent decree, enjoined Pilkington from enforcing any agreement that would restrict the territories within which its licensees could build flat glass plants, thereby freeing U.S. builders and U.S. glass companies to build plants abroad in other countries, such as China. The Justice Department claimed that the potential non-U.S. sales freed up could range from \$500 million to \$2.5 billion, not a small amount.

The second and third civil cases are quite similar, not to *Pilkington*, but to each other. They involve telephone companies. One is MCI's joint venture with British Telecommunications, and the other is a joint venture between Sprint, Deutsche Telekom and France Telecom. In both cases, the U.S. telephone carrier entered into a joint venture with a non-U.S. carrier or carriers which would allow access by the joint venturers to each other's network for the purposes of completing international calls and offering callers "seamless service" for international calls. In both cases, decrees were entered to ensure nondiscriminatory access to the non-U.S. networks by competing U.S. long distance carriers, AT&T, MCI, or Sprint.

On the criminal side, prosecutions have been pursued against agreements in six industries—the most recent is the ADM lysine litigation which we have already referred to. These have been fairly successful prosecutions in the sense that most of the parties pled guilty and paid fines. There have been some problems with criminal prosecutions, however. One example of this is the GE prosecution, a criminal prosecution against GE, DeBeers, and two non-U.S. citizens.

The Justice Department was only able to bring General Electric before the criminal court.

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DeBeers and the two indicted individuals did not appear. The result was a failure of the government's proof at trial and a grant of General Electric's motion of acquittal by the district court.

The other problem that the government has run into arose in the thermal fax paper prosecutions. The most recent of these cases was brought against a company called Nippon Paper, a Japanese corporation. It was charged with entering into an agreement with other thermal fax competitors in Japan to raise the price of exported thermal fax paper.

Rather than pleading guilty, like everyone else had in this prosecution, Nippon challenged the assertion of United States jurisdiction over it. The district court judge found that Nippon, in fact, had sold fax paper for export to two trading companies within Japan, which is the normal process for exporting products in Japan, and that it engaged in no activity in the United States. The court held that a criminal prosecution for violation of Section 1 of the Sherman Act could not be brought because "none of the overt acts of the conspiracy took place within the United States."

If we compare the record of the current Justice Department with the record during Thurman Arnold's administration, the results of the current administration are more mixed. For example, the government withdrew Footnote 159 so that it could reach export restraints, but there has not been a case which only involved exports to test the question of U.S. jurisdiction. Even *Pilkington* involved imports as well as exports; as a result of the decree, firms will be freer to import as well as export. And, of course, there are a lot fewer cases brought during this period than in Thurman Arnold's day. The fact that Thurman

Arnold bought more successful cases, though, is, in some ways, not particularly surprising because the enforcement targets of those days were easier targets. The targets of prosecution then were cartels that prevented imports into the United States and prevented companies from competing in the United States. This idea of concern for import competition was well accepted as an antitrust concern, and it was backed by the fact that a lot of cartel participants were also German corporations heavily involved in the German war effort.

By contrast, the policies behind the current push for international enforcement are deeply controversial. There are substantial questions about whether antitrust, for example, is appropriately used to address the issue of market access. As the *Nippon Paper (United States v. Nippon Paper Industry Co., Ltd., 944 F. Supp. 55 (D. Mass. 1996); but see, United States v. Nippon Paper Industry Co., Ltd., No. 96-2001, 1997 WL 109100 (1st Cir. (Mass.))* case indicates, there remains strong reaction to the use of U.S. law to police conduct that takes place abroad.

There are two other problems with international antitrust enforcement. One involves antitrust theory—whether consumer welfare and allocative efficiency are the right goals or achievable goals for antitrust.

I would suggest that these goals become much more difficult to achieve on an international level. It is difficult enough to think about whether we can support a policy of antitrust in specific cases within the United States because we might make our economy more efficient allocatively, but how do we ask the question or even begin to ask the question, on an international level? Can the application of antitrust make the international world

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economy more allocatively efficient? It seems like a difficult question, not to ask, but to answer.

In terms of consumer welfare—two words that are easy to say but sometimes harder to pin down in meaning—the question when we think internationally is, whose consumer is it? After all, if consumer welfare is our goal, why is it that we should stop (as Footnote 159 of the 1988 guidelines did) with U.S. consumers? Why are we not concerned with exports? Things that are exports for us are, in fact, imports for other consumers, non-U.S. consumers. If antitrust is concerned about consumer welfare, can we ignore non-U.S. consumers?

The other problem with antitrust theory is that our emphasis on consumer welfare has led us toward an analytical approach in antitrust that has made it difficult to consider market access in itself as a separate worthwhile goal of antitrust. I will just use Japan as an example.

When we think about the exclusion of U.S. firms from markets in Japan, our first reaction might be, from the U.S. exporter's point of view, are there *other* markets available to U.S. exporters? Indeed, is Japan even a "market" in the antitrust sense as we have been using the term? And perhaps there are already enough sellers within "the market" in Japan such that it is competitive even without the U.S. firm.

In fact, as a result of today's standard antitrust analysis, we may not, under that kind of market-definition approach, necessarily increase market access. We may instead find that our current analytical approach brings us to the result that we have no antitrust violation because that market is already competitive.

In addition to antitrust theory, international antitrust enforcement raises a question about the

institutions of antitrust enforcement, and here I think the problem is pretty obvious and very difficult. There is no international antitrust enforcement authority. We have international issues, and I have talked about U.S. international antitrust enforcement, but our only working model of enforcement is the nation-state's enforcement authority.

If we return our inquiry to Thurman Arnold's day, you might argue, in fact, that the United States in those days actually served as an international antitrust enforcement agency. No other country at that time had a strong antitrust law. There was no European Union; no laws at that time fostered competition in Japan or Germany.

In the post-war period, though, the assertion of U.S. antitrust authority became very controversial. In the 1970s, it provoked enactment by our allies of retaliatory legislation—blocking and claw-back legislation—and the reaction continues today. Japan has vigorously condemned the erasure of Footnote 159 and condemned the U.S. government for bringing the *Pilkington* case.

The attack on U.S. unilateralism, which has occurred in recent years, has led to a halting U.S. response to do something that does not seem quite as unilateral and has given rise to some notion of what has been called "positive comity"—asking non-U.S. enforcement authorities to investigate antitrust issues, giving them the chance perhaps to do something about antitrust problems that occur within their territories before the United States asserts jurisdiction over those disputes.

Unfortunately, but no doubt predictably, not every enforcement agency stands ready to investigate cases that the Justice Department would like to see brought. One example of this is found in the thermal fax paper case itself. In the wake



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of the dismissal of the indictment in the *Nippon Paper* case, one might perhaps hope that Japan's Fair Trade Commission might take a look at the situation since virtually all of the companies that have pleaded guilty in this case are, in fact, Japanese companies, and, in fact, the Japanese do use thermal fax paper, but there seems to be no interest in Japan in such an investigation.

Another response that has occurred in complaints about U.S. unilateralism is a slow, but perhaps steady, movement to articulate some set of substantive international antitrust principles, along with some tentative suggestions for making the World Trade Organization, the WTO, into some sort of international antitrust body, perhaps just to mediate disputes. Whatever problems there are in articulating an agreed upon set of substantive standards, and in some ways maybe certain core principles are not that difficult to articulate, the problems of establishing an international authority are even more daunting. Perhaps the WTO may turn out to have some mediating role, but it's hard to imagine a role that will end up being much more than that, for example, an investigative or prosecutorial role. We return again to the *Nippon Paper* case. If the United States cannot prosecute the parties, and Japan will not, it is hard to believe that the WTO is now going to step in and do something.

This brings me to the third part of my remarks: What are the prospects for international antitrust enforcement? What is important for international antitrust enforcement is to re-examine our goals of antitrust. This reexamination is important, not only because of the difficulty of using allocative efficiency as a way of measuring whether antitrust policy is right, but also because the popularity of antitrust on an international level calls for some explanation that does not reside in the

Chicago School's theories. If we think about the popularity of antitrust on an international level, and we want to associate antitrust with one word, I suggest the word is not "efficiency." The word is "freedom."

If we look at what happened in the late 1980s, as antitrust's popularity spread, and not just in Eastern Europe, but in Asia as well, countries were moving away from centralized government control to free markets, with the emphasis on "free." Countries were removing barriers, legal and physical—barriers that impeded the entry of goods and people, and I do not think that that was just because they wanted markets to be allocatively efficient and not have the welfare loss triangle that economists like to talk about.

If we go back to U.S. antitrust law, the belief in the importance of free entry into markets actually has a long history in U.S. antitrust law, perhaps reaching its zenith with Justice Black's opinions in the late 1950s. Recently, courts have started to downplay or downgrade this idea, calling the concern for competitor exclusion the 'no-sparrow-shall-fall' view of antitrust as opposed to the more vigorous and hard-edge view that we protect competition, not competitors.

Even so, even with the retreat from a straight concern for market access, the issue of access is still very much alive in litigated cases, *Eastman Kodak v. Image Technical Services*, (*Eastman Kodak v. Image Technical Service, Inc.*, 504 U.S. 451 (1992)) for example, and in U.S. antitrust enforcement policy. I would add that as we look on the international level, this goal is quite consistent with the international economic policy that we have pursued in the post-war era under the GATT where the object has been to remove barriers to trade.

In a sense, market access is consistent not only

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with traditional antitrust views and with political values of freedom; it is also consistent with the economic theories that underlay a liberal world trading order. In terms of the institutions of antitrust, given the problems of nation-state enforcement, I think there is some sort of natural attraction to looking to the WTO and seeing whether we can craft some international system. At this point, though, the efforts are misplaced; I would prefer that we return our attention to the United States and enforcement in the courts in the United States.

I have cataloged some of the problems that we have had with enforcement in the United States courts, but we should balance that against some of the real strengths. First, antitrust in the United States is at heart a legal system based on rules that are ultimately articulated by the courts and have to be rationally presented and justified. As much as we know that there is politics in U.S. antitrust, political deals in the end are not supposed to be the way antitrust decisions are made. This legal quality gives antitrust rules strong legitimacy.

Second, as a general matter, antitrust courts in the United States are not nationalistic and they are not protectionist. They do not generally apply the law to favor U.S. citizens or to protect U.S. citizens or firms from competition. The Supreme Court's decision in *Zenith v. Matsushita*, (*Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)) where the Court treated skeptically Zenith's claim of predatory behavior by the Japanese television industry, well-illustrates the non-nationalistic approach taken by U.S. courts.

Third, judicial systems in the United States are highly developed and competent. We have invested, if you think about it, substantial resources

in our courts and have paid particular attention to the mechanisms of fact-finding, something that is quite critical for resolving antitrust disputes. Within this overall system, our antitrust infrastructure is actually very strong. Lawyers are well-trained in antitrust; economists are readily available. We have a good infrastructure for making antitrust decisions.

Fourth, we have not given government enforcement agencies a monopoly on antitrust enforcement. Perhaps one of the most critical institutional differences between U.S. antitrust and antitrust in other countries is the existence of a strong private cause of action and a strong private antitrust bar in the United States. The government may have lost the General Electric criminal case, but there is private litigation still pending against General Electric for price-fixing of industrial diamonds. The government may have fostered an international cartel in aluminum, but private litigants at least tried, although they failed, to attack it. And even when we think about the thermal fax paper case, private litigants could still bring this case in the U.S. courts for damages.

Looking at the strengths of antitrust enforcement in the U.S. courts, I would like to suggest that in this area the United States actually has a comparative advantage in producing antitrust enforcement. In fact, if one applies to antitrust enforcement the same approach that we applied to the manufacture of automobiles or semiconductors, it would be clear that we would be better off if the United States were allowed to specialize in producing this product, leaving other countries to make the products for which they have competitive or comparative advantage.

Of course, we have not yet taken this approach to the production of legal goods, and, actually,

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we do not always take this approach to the production of other goods when it comes to national interests. The core notion of comparative advantage, though, is that it is wise to specialize in the things that you do well. I would keep in mind that we do antitrust well, and I would be concerned about moving away from our somewhat unilateral approach to suggest a multilateral approach to antitrust enforcement.

So, the bottom line: We should keep our an-

titrust goals truly international. We should be concerned about market access and the right of entrepreneurs to enter markets. We should seek to advance consumer interests, not just in the United States, but consumer interests generally. Lastly, we should always keep in mind Thurman Arnold's example of vigorous antitrust enforcement involving international issues litigated in U.S. courts. Thanks.

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# CONFERENCE PRESENTATION

## Presentation by Judge Wood:

### Preface

Free international trade is not an option; it is a necessity. Antitrust has a role to play in assuring international free trade, but its effects are long-term. Litigants in antitrust actions often run into problems when parties, witnesses, or documents are located out of the United States. Though these persons and documents may be obtained through the sanctioning power of the U.S. court, the victorious litigant may regret arousing the ire of the other country if she needs to enforce her judg-

ment in that country. A better path may be for the United States to form cooperative relationships with these other countries. These relationships and the resultant communications would go a long way towards reconciling the goals of our antitrust laws with those of other countries and may help reassure other countries that the information would not be divulged to inappropriate parties.

### Presentation

Thank you all for being here. I appreciate this opportunity to participate in the conference on Antitrust Law for the New Millennium. We are not talking decades here. We are not talking centuries. We are going for the millennium, but after this morning, I now think that this was probably a correctly named conference.

I would like to comment on what Harry [Professor First] has said, but I would like to begin with a few more general remarks. I found the brochure for this program, which I have now studied very carefully, very interesting in its description of what this session was to be about. It notes, for example, that international trade barriers have fallen—true enough. It postulates that there

is growing political sentiment for their further reduction. That is a questionable proposition. I have heard others, better placed than I, who wondered whether there is the political will, either in the United States, or in Europe, or elsewhere in the world, to push forward with more liberalization than that which we achieved at the end of

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the Uruguay Round and with the creation of the WTO.

The brochure also asks whether, under the present state of transnational and international antitrust enforcement, we can reach conduct that is traditionally condemned in the United States when it is now occurring all over the world. That is this weird field that we have called international antitrust.

I cannot begin to tell you how many people have no idea that antitrust even has an international dimension. But this will change, if it has not started to change already. For this group, however, the point is clear. And according to Harry [Professor First], we have earned about a C plus, if I might assign a grade in our ability effectively to implement this policy right now.

And, finally, the brochure concludes with two additional questions. One, do the benefits of free international trade currently outweigh the risks and, two, how do we keep trade free?

Well, none of us has the time this afternoon to look at those two questions in their entirety, but I do want to comment a bit on them, particularly after Ralph Nader has told us what a bad idea the GATT was. That is a sentiment that I do not share, but it is worth a brief word.

With respect to the question about the benefits of free international trade, my real response is almost a flippant one: Who are we kidding? Do we really think we have a choice in today's world between participating in the international trading system, as it is, and not participating in that system? That cannot possibly pass the straight-face test. Unless the United States wants to become the 21st Century equivalent of pre-Admiral Perry Japan or post-World War II Albania, I think we are in this system for good whether we want to be or not. More than that, I think we want to be in it. We have certainly obtained many,

many benefits in terms of choice of products, quality of products, export markets, and the like, that people would be loathe to live without. In fact, when you see the occasional trade fight escalate to the point where trade sanctions begin to be traded back and forth, such as the pasta wars, wine wars, computer panel wars, mushroom wars, and the like, people begin to regret that foreign products are coming in at a higher price.

This underscores an important point: we may be the only super power militarily, but we are certainly not the only significant power economically. There are at least two other huge economic forces in the persons of the European Union and the Asian giants. Soon there may be a third, when China begins to reach its full potential. The fact of the matter is if we decide that we are going to insist on playing only by our own rules, this will come back to haunt us.

So I think in terms of that first question, we *are* in this, and, yes, trade *does* help us. If we decided to pull out, we would regret it.

The second question, "How do we keep trade free?" is plainly important. We are trying today to see the extent to which antitrust plays a role in keeping free trade free. There are political and legal dimensions to take into account as we try to achieve this goal and as we try to preserve an international trading system that is open, dynamic, and competitive.

I'm not asserting that we live in Utopia today. We obviously do not. We do, however, have a remarkable degree of openness, of market access, and of global integration when you consider the incredible political barriers that had to be overcome to get to where we are.

Thus, the international trading system, as a whole, parallels some of the points Harry [Professor First] has been making. There is a politi-

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cal dimension to our commitment to international free trade, and the legal institutions that we have to support that system need to be clear and strong. One of the achievements of the Uruguay Round was that these institutions have become somewhat stronger as part of the WTO, although I think no one would say that we are finished with the process of developing those institutions. Ralph Nader pointed out some areas of these institutions that need improvement; they are not open as many would like, and the people who staff the dispute resolution panels are not the kind of independent judges that we find in national courts. These are plainly areas in which further work is necessary. The system as a whole, however, holds great promise for future trade liberalization and the concomitant prosperity it will bring.

Now, let me turn to where antitrust fits into this picture more directly. Does it really make any difference whether there are antitrust laws in every country in the world, or in some but not others, whether the laws are enforced with equal vigor, or whether only a few countries make antitrust the centerpiece of their economic policy? Properly understood, I believe the answer is "yes."

Antitrust has a positive role to play in the trading system, but its benefits are likely to be longer term, as it helps to assure open, free, competitive international markets. Antitrust is not likely to be a kind of quick fix to a trade problem. It must, therefore, be contrasted with laws like the Anti-Dumping laws or the countervailing duties laws or Section 301, which can respond rapidly to certain unfair trade practices. With Section 301, once you convince the authorities that a problem exists, *boom*, tariffs are imposed, negotiations ensue, and (usually) the problem is resolved. On the whole, it is a pretty fast process.

Antitrust is something which attacks problems in the market at their source, and so, only over time, will you begin to see the benefits from well-taken antitrust enforcement measures.

How does the political dimension of antitrust enter this picture? There plainly is such a dimension, as Professor First has already suggested. Our other speakers today have reinforced this idea; certainly, one could not think otherwise after listening first to Ralph Nader and then to Richard Epstein. They obviously had different visions, and of course, neither antitrust nor economics is a science. It is not going out there, taking the temperature, and seeing whether it is 33 degrees or whether it is 65 degrees.

There are now approximately 60 antitrust laws around the world. They are all different. Some of them stress one goal; some of them stress other goals. If you look at the Canadian antitrust laws, they have a laundry list of goals in Section 2, which encompass virtually everything anyone ever thought of that an antitrust law might do. Allocative efficiency, equitable distribution of wealth, control of large concentrations of power, assistance to small- and medium-size businesses, and market access, are among the goals that appear in these laws. Each country has chosen the goals that are appropriate to it. We know, for example, in the European Union that one of the goals was to facilitate market integration. In the United States, by contrast, the Commerce Clause had been enforced for a hundred years by the time we came up with the Sherman Act. We did not really need to create a single national market using the vehicle of antitrust laws.

Now in what sense does this mean that antitrust laws are political? There are two different ways we could be using that term. One refers to the legislative goals a particular country chooses to have for its law. It will decide what goals it

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wishes to achieve, and, of course, some countries will have one set of goals and others will have another. However, once the law is in place, its content becomes fixed. Another possible way of using the term "political" is much more particularized, as when we speak of the political dimensions that are brought to bear in the decision-making. The best illustration of the way that can happen comes from the German merger law. In Germany, once the Federal Cartel Office has evaluated a merger and decided whether it is appropriate from a competitive policy standpoint from criteria in their own competition law, it might decide that the merger would be an anti-competitive one. You would think it then becomes forbidden. No. The Minister of the Economy has a political override. He may conclude that even if it would be an anti-competitive merger, it should be permitted for purely political reasons: job preservation, regional development, or anything else he deems important. We do not have this particularized level of political enforcement in the United States. Furthermore, if you are going to have that kind of system, as the Germans do, it is desirable to make sure that the political component of it is a very transparent one. The British have a similar system in that they ultimately have the Minister for State and Industry pass on their mergers and monopolies to see if they're "in the public interest," which is as vague a standard as it appears to be.

Where does the United States stand? In my view, the allocative efficiency goal that is paramount in antitrust has helped to keep the U.S. antitrust laws apolitical. Courts have had the benefit applying a weighted list of goals. We know which goals will trump in the end. We know which other goals of the law may be an additional or complementary benefit from enforce-

ment, but which are not something that would override an efficiency-based argument. Robert Bork made a case for this approach in *The Anti-trust Paradox* where he invoked the metaphor of the black box. If you have five different goals and you just throw them into a black box and stick your hand in and pull out the results, you cannot know in a predictable way what the result will be. This makes it difficult for businesses to plan, and it tempts the courts into behaving more politically, in the second sense I am using the term, than they should. Bork also stresses one of the points that Richard Epstein made this morning, which is that the efficiency goal does not imply hostility to other worthy social goals. It just means that other laws must take care of other concerns, such as assistance to small-and-medium-size businesses. One might help them by forbidding lots of mergers, or by breaking up exclusive distribution arrangements, or by taking other measures under the antitrust laws, but if you really want to help small-to-medium sized businesses, maybe you should adjust the tax code, give the Small Business Administration more money, or help out state and local government programs. There are, in short, other ways to foster that kind of market structure if society deems this to be important.

The scope of antitrust in the United States and its efficiency basis may help to explain Professor First's observation that the U.S. courts are the best place in the entire world to bring an antitrust case. Assuming this is true (and I would like to believe it is), what explains it? First of all, antitrust disputes are judged on "legal grounds." That is an apolitical, predictable standard. Second, litigants in U.S. courts have powerful discovery tools at their disposal. Professor First's argument that these methods for fact determinations are second to none is more contro-

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versial. Opponents of the civil jury trial in complex cases would probably disagree with him, and though I am not one of those opponents personally, they certainly exist. Similar circumstances exist even when the judge is the trier of fact. Skeptics of the generalist judiciary model that we have, including many from the Continental tradition, cannot understand how judges who might see one antitrust case every couple of years can cope, even if they are the triers of fact. How do they know what all of this evidence means? Well, I actually think our judges rise to the occasion very well, but the key point here is that our methods for determining facts may need improvement and are not universally admired. Last, it is quite clear that the U.S. offers a menu of remedies.

Could a U.S.-style system of antitrust improve market access to foreign countries? If the real concern is to ensure that competition laws in other countries are effectively enforced and that foreign firms in particular who are seeking access into those markets can be assured of competitive conditions, you can do nothing better than create a private right of action in those countries—break the government’s monopoly on antitrust enforcement. Under those circumstances, you would not have to worry about whether any particular enforcement agency is likely to bring an action. People would be able, as they can here, to take matters into their own hands. This suggests that at least the private action aspect of the U.S. system could be genuinely useful.

Could we use a model of unilateral U.S. enforcement as a way of handling problems of the international economy? Well, I certainly agree that proposals to push everything into the WTO (which is being pursued at a very serious level by the European Union) are premature at best. We will need to be very careful if we end up go-

ing down that line because there are so many visions of what competition means around the world. We would not want inadvertently to sign on to one that was incompatible with our own notion. On the procedural level, there are also many problems that will stand in the way of trying to use a unilateral U.S. approach.

In the international setting, there are serious practical limitations on the unilateral model. I have already mentioned that foreign countries look at fact discovery, document discovery, and use of witnesses quite differently from the way we do. The theory of personal jurisdiction is also crucial. If you are in a U.S. court, you are a party, and the court has personal jurisdiction over you, then one of the things that goes along with that fact is that the court can order you to do things. The court can say to you, “Bring your documents into court.” The court can say to you, “Show up for a deposition.” The court can say to you, “Show up for a hearing.” The court does not care where you keep your documents. If you like keeping them in London, you can just jolly well go get them from London, as far as the U.S. court is concerned. That is not the way the UK authorities would look at it. They do not care whether the U.S. court has personal jurisdiction over you or not because their view is that if those documents are physically located in London and the only reason you decide that you are going to go to retrieve them is because some foreign court (worst of all, a U.S. court) told you to do it, that is the same thing as the U.S. court setting up chambers in London and starting to issue judicial decrees, plainly an affront of UK sovereignty. So the result of a Rule 34 request for documents located in London, with perfect personal jurisdiction in the United States, could be a diplomatic incident. The UK says, no, you cannot get the documents unless you go through our proce-



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dures our way, and, by the way, we mistrust a lot of your enforcement anyway. I am happy to report that the U.S. authorities are slowly making progress in trying to show our foreign counterparts that there are times when these requests of ours are legitimate. Even then, however, it is important to go through the appropriate channels before cooperation will be forthcoming.

So right away, if the documents are not located in the United States or if the witness is not located in the United States or willing to come to the United States, you have a huge problem getting the documents or the person. Of course, we know the other thing the U.S. court can do, if the documents or witness is a party and it's a proper Rule 34 request, is you can try going down the sanction route: get an order, have the person fail to comply, get sanctions – and that works sometimes. It also means, however, that you better really hope that you do not need to do anything to enforce your judgment in the other country because is not likely to happen. There could even be a blocking decree. Thus, the information problem is a very significant one.

Another problem comes up at the level of basic jurisdiction. Many of the examples that we have talked about have been examples of international enforcement by the United States opposed by other countries on the ground that our efforts have exceeded the scope permitted under public international law. This is particularly true in the export-oriented cases. Most people in other countries these days accept the importance and the legitimacy of enforcement in cases dealing with imports into that country where products are sold at prices that reflect monopolies or price-fixing cartels, or the like, but the export cases are a different matter. There was a firestorm when Footnote 159 of the DOJ Antitrust Guidelines for International Operations was removed from

the guidelines, notwithstanding the fact that it had only been in there four years. By way of background, there had been from 1890 through 1988 a policy which allowed some cases to be brought against restrictions on export commerce; even the Supreme Court reviewed a few. From 1988 until 1992, however, the Department of Justice announced in Footnote 159 that it would no longer bring cases dealing solely with export restraints. When, in 1992, Footnote 159 was deleted and the former policy was reinstated, the change was heavily criticized.

The most controversial cases are still the market access export-oriented cases, and I am not at all optimistic that this will be an attitude that changes any time soon. We just have to be practical. These cases are not easy to bring, but it is a theory that Congress recognizes and supports. It is a road that the Department of Justice tries to follow when it can. Private parties, in theory, can do so also.

So what do we do instead? My suggestion is not to be so pessimistic about bilateral cooperation because bilateral cooperation really works. We know that it works because we have tried it in a number of instances where it was legally possible to do it. It is a realistic response to the fact that markets are international now. It is a response that the SEC has used with great success since about the mid-1980s. They went through exactly the same pattern as the antitrust enforcers have followed, trying to push everybody around the world into giving them information and running up against the same roadblocks. The difference with the SEC is that in 1988, they obtained legislation allowing them to enter into cooperative agreements with other countries. They did so, and now they have about 18 of them. The entire atmosphere has changed. The authorities all exchange documents. There

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is a significant flow of information—some 300 requests in each direction per year, and it has helped tremendously in the efforts to enforce the rules protecting securities markets.

Maybe one might say that there is more global support for the securities rules than there is for rules about global competition. If so, all the more reason to take things one step at a time and make sure that we are on the same general wavelength with other countries before we start trying to move forward at an international level. With the Canadians, whose law is sufficiently similar to ours, we have exactly that kind of working relationship because we have a treaty, the Mutual Legal Assistance Treaty, that covers criminal antitrust matters. We can exchange information lawfully with them under that treaty, and several of the cases Professor First mentioned were made possible because of that treaty. The same thing is true in the *Microsoft* case (*see generally, U.S. v. Microsoft Corp.*, 159 F.R.D. 318, (D.C.Cir., 1995)), in which Microsoft decided to waive its right to confidentiality in a limited fashion in order to permit the authorities of the European Commission and Department of Justice to work together and resolve the *Microsoft* case all in one proceeding. Obviously, the right was theirs to waive, and they chose to do so. I do not expect waivers to be very important in cartel cases, but this is another example of when someone's law is close enough to ours that we can work with them on that common ground. This is the way, ultimately, that international enforcement will move forward, and at the same time, it will almost surely lead to a convergence of substantive policies and rules as we begin to see from one another's experience what is really important in this field.

I do not think this will come easily because I think the United States has some reputational

problems to overcome based on our history of unilateral action. We also should assure people that we will not use our antitrust laws in overtly political ways, but the record on antitrust is excellent on that. Other countries need to be convinced that when we talk about market access, we are not converting the antitrust laws into a powerful adjunct to Section 301, which people really, really do not like in other countries. We also need to assure them somehow that with the right mechanisms in place, the right kinds of cooperative arrangements, the right commitment to positive comity, we will refrain from objectionable assertions of jurisdiction. We might begin with a promise to resort first to the established cooperation mechanism and see how well that goes. We would not be giving up anything irretrievably because if they refuse to take up the ball, then we would be reserving the right to act ourselves, but the first resort would address many present difficulties.

We also need to make sure that everyone is confident that sensitive business information does not fall into the wrong hands. You would be amazed how many people in other countries are fearful that if the Department of Justice obtains information from companies located in other countries that the Department of Justice is going to package it all up in FedEx boxes and send it over to the private bar. As this audience knows, that is not the way information gets handled by the Department of Justice or the FTC. The concerns of foreign companies and enforcement authorities can be addressed through dialogue and through education. These are surely problems that can be overcome. In my view, serious bilateral cooperation is the inevitable, important, and necessary next step in international cooperation. Thank you.

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# CONFERENCE PRESENTATION

## Presentation by Mr. Rasher:

I am going to begin with just a little mathematical puzzle. I went to China in 1986 to open up United's operations prior to our acquisition of the Pacific Division of Pan Am. My business colleague traveling with me had family in Beijing; in fact, his grandmother still lived there. I asked him for some pointers, and he told me this little story.

He said, "imagine for a moment a single elimination tennis tournament with 32 players. He then asked me, "how many matches do you have to play to get to the winner?"

"Well," Chris said, "a westerner will tell you that when you have 32 players, there will be 16 matches in the first round, 8 in the second, 4 in the third, 2 in the fourth, then the final one. Your answer is 31."

My business colleague told me how his Chinese grandmother would answer. He said, "my grandmother would say to me, well, if it's 32 players and a single elimination, you have got 31 losers and 31 matches."

Now, the point of this story is that people can view the same facts and have totally different perspectives of what those facts mean, how you get there, and what is the appropriate result. The reason I share this with you is not so much because I thought this morning's panel discussion was a very good example of the point, but to illustrate the fact that although I am a lawyer, I also view myself as a business person. I was actually asked to participate in today's panel

discussion more in my capacity as a business person, albeit I am a lawyer, but still to bring a business perspective, if you will, to the topic at hand.

I am not going to get into legal theories or refer to cases. I will be the first one to admit that I am not a regularly practicing antitrust lawyer. I do provide counsel within our company on both the domestic and the international front. Thus, I am somewhat conversant, but I will not profess expertise in this area. I will, therefore, represent the business person's perspective and what this means in the context of my business.

I hope that the little story I shared with you will have some relevance as we go through the comments I share today. Also, let me begin by stating that the views I express are my own, not those of United Airlines.

First, I wholeheartedly agree with the proposition that free access is, and should be, the pre-eminent objective of antitrust policy. I feel that

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way because all of the other theories propounded today, in my view, are the hoped-for-expected-result of free access. Whether you call it efficient, or allocation, or consumer benefits, if you truly have open access to free markets, you have open competition; then, hopefully, you are going to get the efficiencies. Competition, therefore, is going to force the efficiencies. You are also going to have the consumer benefits because of the improved service and hopefully, have it at a very economical cost. And I am, of course, in favor of that.

If I understand him correctly, Professor First expresses a concern about our court's ability to deal with the open access issue. I will just posit a question on this issue. I wonder whether our court's refusal to deal with the open access issue does not come from our economic philosophy. Our philosophy presumes open access even though we may not always adhere to this philosophy.

This is why we have enforcement. We seek judicial buzz-words or tests, if you will, to help us reach the second or third layer of the onion to ensure that we, in fact, have the open access. It may be that the domestic perspective of our court system, understandably with one hundred years experience of focusing on the domestic economy, makes it ill-equipped at present to deal with the international economy. Although I am not sure that the rest of the world will necessarily accept that premise—which I will address in a moment. Open access, however, is an interesting proposition because open access only becomes an issue if, in fact, you cannot get the product into the market.

This restriction on access is an interesting phenomena. There are still a number of products and services that the U.S. generates which have very

few access problems because they are unique products. I am not talking specifically about the technological items we have today. I am not talking about Kodak's access problem to Japan although the reason you had an access problem there was because you had a local producer who was trying to protect its market.

On the other hand, if you take Boeing with its larger aircraft, except for some slight resistance in the European Community ("the EC") because of Airbus, Boeing does not really have that many true access problems. They may have some marketing problems and some pricing problems, but, they do not really have that many true access problems because they have a unique product.

We need to understand that when we are talking about open access, we are also talking about a certain number of products where, over time, the home country has developed its own infrastructure in that particular field. There may be some resistance in letting in that product. If a country does not have the product and they need it, they will import it.

Finally, on the free access issue, I want to talk about something Professor Epstein said. We profess open access, yet, we speak out of both sides of our mouth. Open access is a two-way street. I thought Professor Epstein was quite eloquent in providing some examples of where the United States is not exactly on the right side of the smell test. As the United States goes forward internationally in trying to influence the rest of the world to adopt our perspective, the U.S. is going to have to look more critically at ourself. The United States is open to attack, and this fact will undermine our credibility, both in terms of trying to influence and enforce.

As I am in the airline industry, I would like to share some industry thoughts. Over the last few

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years, the United States' Federal Aviation Administration has placed a number of Latin American countries on a "safety black list" because of various safety violations of either their carriers or their own regulatory authority in policing the safety practices of their carriers. Given the number of accidents in the U.S. over the last couple of years, this list has been somewhat of a political hot potato. The black listed countries are now coming back and saying, "now look, we have had one accident and look at all the accidents you have up there." We have to be very careful about taking the high road, so to speak." We had better understand our situation at home and make sure that we can, in fact, go forward with clean slates.

I would like to address my second topic somewhat more briefly. I know I am being a lawyer and taking more time than I want, but it is the political element both Professor First addressed somewhat in his speech, and, I think, Judge Wood got into a bit more in her presentation. In the airline industry, we are very much in the political realm because the airline industry, from an international perspective, is still a regulated industry; although, we are trying to push it to less of a regulatory environment and more of an "open skies" environment.

It is no secret that open skies is one of United Airline's agendas. We push this and will continue to push. We were at the forefront in the push for deregulation in 1978. We have been at the forefront of pushing for open skies agreements with as many countries as we can. Nevertheless, this is a political process, and I do not mean to suggest with my following comments that antitrust as a discipline is a political process.

We need to recognize that antitrust, given that it so directly impacts upon our economic envi-

ronment, has to be construed as part of a political process. Let me try to briefly put a little meat on that one. We need to understand that not all countries, for many reasons, will accept the principle of open access to markets. This is a very important point which needs to be addressed, and a significant impediment if you think about it. It goes back to my earlier premise that domestically we are over that hump and now are trying to implement it.

We must recognize this political reality, and Japan is a good example. Japan is not yet over the hump. The political aspects of antitrust have many implications. The most significant issue for many countries is jobs, jobs, jobs. Jobs are at the heart of the economy and at the heart of the citizenship. I believe that fear of the loss of jobs underlies the resistance to access in many cases. One example: United has been very active before the EC in certain proceedings brought before DG4 to open up some of the ground handling monopolies at Frankfurt Airport and at the airport in Milan. The EC initiated a separate process to obtain a directive which would force the liberation of the ground handling for all the passenger service. They also moved to liberate the monopolies which service airplanes in the hangars and the cargo handler.

Four of the carriers involved were very receptive to the case. The case was initially brought by British Airways, Air France, and others, and we joined them and we got to a certain point where the initial draft of the directive was quite acceptable in opening up access. We were all in agreement that we wanted access. We assumed it would create efficiencies, lower prices, and improve the quality of service. Well, a directive was proposed. The directive impacted labor. The EC Labor Section became involved at the insis-

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tence of both the Italians and the Germans in particular, as well as some of the others that had monopolies, like the French and the Greeks. It came down to jobs. They told us the directive we obtained will cost us jobs. The revised directive that was ultimately issued was subject to conditions but had a lot of holes in it. We are probably not going to have much liberalization beyond this for another 10 or 15 years.

The lesson is that we have to be pragmatic when we go to open up markets internationally. This is especially true because what we want will affect jobs. These are the facts of life that we have to deal with internationally when it comes to access. Access is about politics. It is a fact of life that many countries' economic politics are very much politicized processes. It is part of their political agenda, and it is well articulated and well coordinated. Foreign countries have different standards of operation, both in terms of government operation and the coordination of government with business.

Well, what does this suggest? As I said earlier, it is quite apparent that not all cultures and economies accept the U.S.'s approach to economics and business. We believe in the survival of the fittest, open access, and then "let's see what happens" approach. While that is our basic tenet, that is not their basic tenet. In many countries, I submit that the U.S. is going to have difficulty in selling the open access principle and getting true open access. The economic reality within many countries is a need to preserve jobs. The U.S. needs to recognize that political factor in going forward with our antitrust policy; it is so inextricably tied with economic policy.

Our judicial system is well-equipped, and I think it is one of the best in the world to address these types of issues, at least domestically. I have

concerns as to ability of the judiciary to do so internationally for the reasons that Professor First and Judge Wood articulated. The problem I have with Professor First's proposition is a reliance upon the judiciary as a prime force or a vehicle to seek change in international markets, antitrust change in international markets, and use of the judiciary as a primary vehicle for international antitrust enforcement. I believe we are talking about a deep philosophical and infrastructure-type of issue. I suggest we borrow a page from the commercial world.

I was a litigator for ten years before I joined United. I do not do any litigation now. I once did a moderate amount of antitrust litigation. As a trial lawyer my main objective was to win for my client. This is not necessarily the businessman's main objective. From the businessman's perspective, usually winning the lawsuit is not the objective. Rather, while this may be a disappointment for many litigators, the litigation process is also not the driving force. From a commercial perspective, you have a business issue, you have a commercial objective, and, for better or for worse, sometimes you have to employ litigation as a tactic to achieve that commercial purpose.

Hopefully, if you have good, strong business people and an in-house lawyer involved, one that understands what the business objective is, in many cases the litigation approach is a good tactic because it brings pressure to bear. People get to flex their muscles. They spend some money. But, finally, they start truly looking at the facts and start analyzing the risks and benefits and start measuring them. The parties will ultimately come to resolution. That is why so many cases are settled rather than going to full trial. Therefore, what happens, hopefully, is that the lawsuit then

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should be resolved, but that does not mean that lawsuit has not served its purpose. In fact, it has because it was very instrumental in getting to where you want to go.

I am suggesting that, in addition to some of the other suggestions that were made as to the various vehicles, we ought to use antitrust enforcement devices to achieve our policies. One for which some disdain was expressed earlier in the day, but Professor Fox alluded to, is a positive thing, and the one thing we cannot overlook, but see it as an important arrow in the quiver is to use our antitrust policies. There may be an antitrust policy articulated by the government; I sense there is, but I am not sure about its coordination, and I am sure the Japanese have an articulated competition policy.

Assuming our government has a policy, we should then use the judiciary as a vehicle to bring pressure to bear. I am suggesting that the judiciary, whether private parties or the government, should be seeking cases that will give you the bigger bang for the buck—the case that will bring pressure to get the parties to the table. I am not convinced that individual case resolution will change the infrastructure. I think it can bring

the parties to the table because a lot of barriers we face are not so much the company itself—it is really the government under which it is protected. Japan is a good example. This is my basic proposition.

Do I know how we get there? I am not exactly sure, but that is the basic proposition. I can give you one example, and I will leave it at that. In the airline industry, as part of the Airline Deregulation Act, there was a section passed called IACTFA. Don't ask me what the acronym is. I can never remember. Basically, it allows carriers to bring an action in the Department of Transportation to enforce against not only a carrier of the particular country but the country itself for violation of the aviation bilaterals. Very few of those cases actually go to trial. What it does is bring pressure to bear and bring out some of the facts so that the cases can then be resolved through negotiation on a government-to-government basis. I am suggesting that given the political realities we have to face, if we are going to change perspectives on market access, vehicles of that nature should be continued, and if need be, improved.

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## QUESTION & ANSWER

**Q:** I heard both Judge Wood and Professor First refer to the court's apolitical approach to antitrust. That might be a controversial statement, especially overseas, because with the exception of constitutional law, there is a no more heavily politicized body of law than antitrust, or so an argument could be made. But I think if you look at the deeper political context, you quickly see (especially with regard to Professor First's recommendation that Frances Jugamia and the other nationalits) democracy is not competitive. It's losing the competitive debate to social democracy. And if you ask people why Eastern Europe, they will say, I think, if we kick out the political royalists, then we have no need to create economic royalists such as they had in the United States. I have heard this several times, but in terms of a kind of ideological competition system, to me—especially in Eastern Europe—the Germans are making great headway, I suspect. I suggest they're hoping to create "middle Europe" before the Americans notice, but because of their comparative advantage they apparently have not. It is an entirely different mind set in which legal economic oligopolies and Americans know little and care less about.

**Professor First:** I just want to respond to the beginning, when I said that non-political elements—in the sense of non-protectionism—are in the sense of not favoring firms, because of their nationality. There are other aspects of political choices that judges make, probably even in antitrust cases, but I think that antitrust generally in the U.S. is non-protectionism. I think that is the sense in which I meant.



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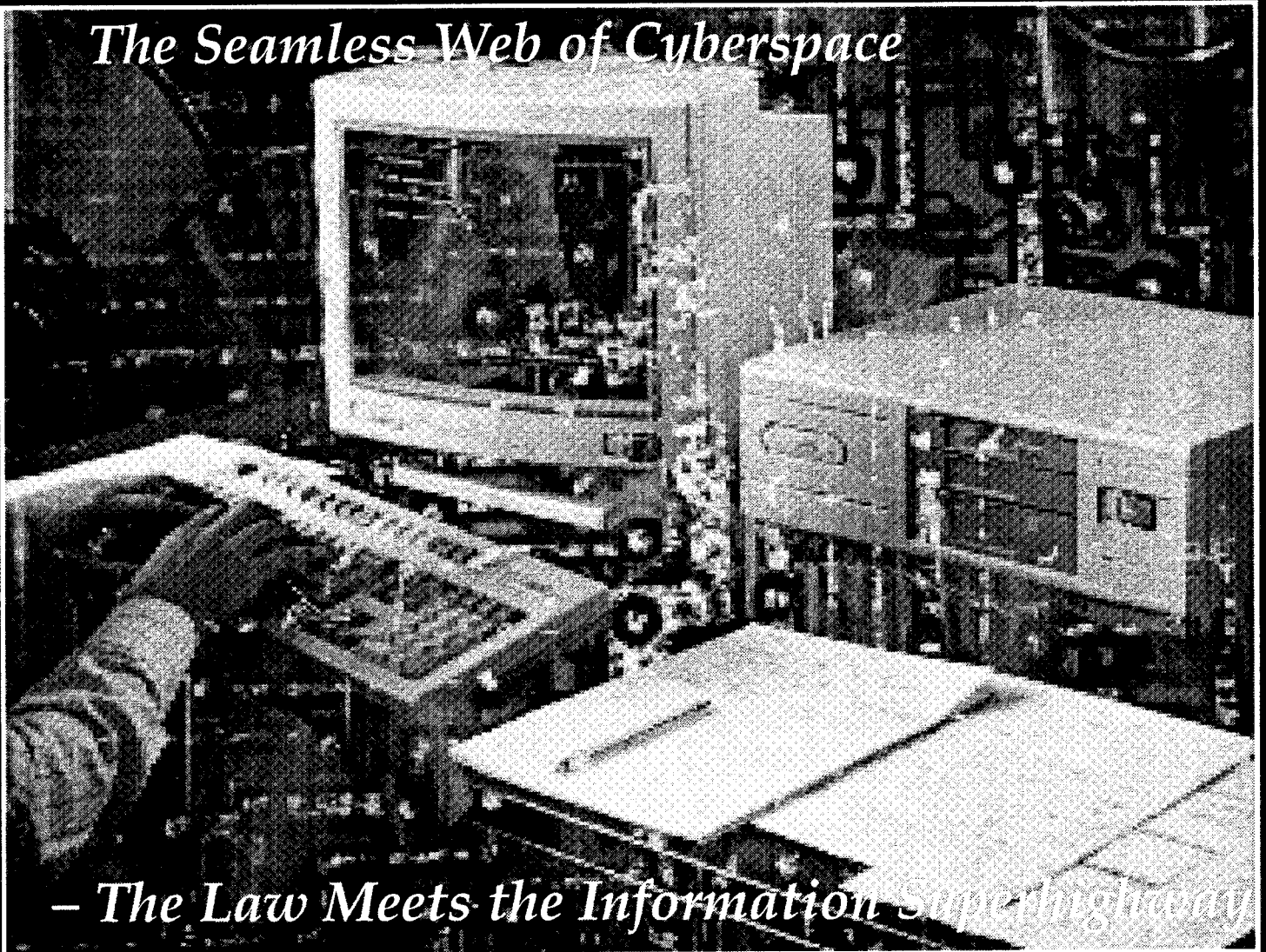




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