DEPARTMENT OF JUSTICE

EFFECTIVE ENFORCEMENT OF ANTITRUST LAW FOR INTERNATIONAL TRANSACTIONS

Address by

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Today's program promises you an "update on the foreign antitrust climate," with special attention directed toward three subjects: the new international guidelines of the Department of Justice and the Federal Trade Commission, the new mutual assistance legislation signed just last fall by the President, and developments within the European Union. In deference to others on the panel better suited than I am to address the last topic, I would like to confine my remarks to the first two of these subjects. Furthermore, rather than discuss them individually, I would like to take a more synthetic approach, and explain why we see the approach taken in the international guidelines and the new possibilities for international cooperation as comple-mentary responses to the need for strong antitrust enforcement in the global economy.

In brief, I will explain why the commitment reflected in the International Guidelines to enforce the antitrust laws in all appropriate cases falling within U.S. jurisdiction in no way excludes or is inconsistent with our equally strong commitment to improve and expand our ability to cooperate with our sister agencies in other countries. In fact, just as the Securities Exchange Commission found that cooperative relationships with its counterparts greatly improved its ability to detect and pursue violations of the U.S. securities laws, we expect to find the same thing for antitrust law. The fact that cooperation will in all probability not occur in every single case in no way diminishes its importance; on the contrary, it underscores the flexibility of the device and its usefulness in furthering the development of common views about antitrust policy around the world.

I. International Guidelines

As this audience undoubtedly knows, the Department of Justice and the Federal Trade Commission released for public comment their draft Antitrust Enforcement Guidelines for International Operations last October 13, 1995, and published the draft in the Federal Register on October 19, 1995. We provided a 60-day period for public comment, during which we received about fifteen submissions. Our joint task force has nearly completed its revisions of the October 13 draft based on those comments and its own further work, and we expect to release the final version very soon. Although my remarks today of necessity will still be based on the draft released for public comment, the general points that I am making will apply equally to the final version.

The draft International Guidelines begin, like their predecessors, with a brief review of the pertinent antitrust laws and other legislation that may arise in international cases. Most of this is self-explanatory. However, I would like to highlight a new section in this descriptive portion, section 2.9, which describes the relevant international agreements that

already exist in this area. The Guidelines note that the Agencies have developed close relationships with antitrust and competition policy officials of many different countries, in order to further the twin goals of promoting enforcement cooperation and of reducing potential tensions or difficulties that may arise in particular proceedings. These relationships are reflected in a number of agreements, including the 1976 Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices between the United States and Germany, the 1982 Agreement between the Government of the United States and the Government of Australia Relating to Cooperation in Antitrust Matters, the 1984 Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to Application of National Antitrust Laws between the United States and Canada, and (subject to its formal reinstatement on the European side), the 1991 Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws. In addition to these bilateral agreements, general provisions relating to competition law and antitrust appear in many of the bilateral Treaties of Friendship, Commerce, and Navigation to which the United States is a party. Finally, of course, formal cooperation in the area of criminal antitrust enforcement is possible under many of our Mutual Legal Assistance Treaties, and in fact has occurred under the MLAT with Canada.

At the multilateral level, the Guidelines also recognize a variety of important instruments and fora for cooperative efforts. These include the Organization for Economic Cooperation and Development (OECD) and the working groups established pursuant to the North American Free Trade Agreement. We might also have noted the work that is just beginning on competition policy issues in the Asia-Pacific Economic Conference (APEC).

The cooperation that has occurred through these different mechanisms has unquestionably been helpful. It has brought the antitrust authorities involved closer together in their understanding of the competitive consequences of various business practices; it has defused problems through the system of notifications and consultations that has developed; and it has permitted a limited amount of case-specific cooperation. However, on that last point, I must stress the word "limited." None of the arrangements to which I have just referred -- with the important exception of the MLATs -- overrides national laws that prohibit the antitrust enforcement agency from releasing most of its investigatory information. Since most countries do not have laws that permit them to offer investigatory assistance to foreign agencies, in-depth case-specific cooperation is normally impossible.

It is this state of affairs that led us to conclude that the time had come to take the next step, and to seek legislative authorization for investigatory assistance and information sharing between the U.S. agencies and foreign agencies. We did so because we believed that this was one of the best ways to promote effective enforcement of the antitrust laws in the interest of U.S. markets and consumers. That, after all, is our job: through enforcement of the antitrust laws, to protect the competitive process in the United States from arrangements that threaten it, such as cartels, monopolies, and practices that harm competition by raising prices, diminishing innovation, or excluding competitors through anticompetitive means.

Readers of the draft Guidelines will appreciate that the U.S. antitrust enforcement agencies are firmly committed to exercising the jurisdiction that Congress has conferred upon them, and that the U.S. courts have recognized, in the foreign commerce area. Thus, the Guidelines follow the majority of the Supreme Court in the *Hartford Fire* case, and recognize that the Agencies have jurisdiction over cases involving import commerce whenever foreign conduct was meant to produce, and did in fact produce, some substantial effect in the United States. In cases presenting conduct involving other foreign commerce, the jurisdiction of the Agencies under the Sherman Act and the FTC Act is set forth in the Foreign Trade Antitrust Improvements Act of 1982. Phrased positively, and I hope somewhat more felicitously than the statute itself, jurisdiction exists when conduct has a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce, U.S. import commerce, or the export commerce of U.S. exporters. Finally, following long-standing case-law on the point, the Guidelines recognize U.S. jurisdiction when the U.S. government is a purchaser, or substantially finances the purchase, of goods or services for consumption or use abroad.

Mergers are treated in a separate section of the Guidelines, in recognition of the fact that the FTAIA amended only the Sherman Act, and mergers and acquisitions are judged under section 7 of the Clayton Act. The Agencies note that the express language of section 7 reaches the stock and asset acquisitions of persons engaged in trade or commerce "with foreign nations." In general, however, the same principles that are useful for assessing Sherman Act jurisdiction are helpful in cases brought under section 7 of the Clayton Act.

Recognizing that the exercise of jurisdiction in international cases can often involve the interests of other governments (and that their enforcement can implicate ours), the Agencies make a strong statement in the Guidelines about their commitment to take considerations of international comity into account in all enforcement decisions. The new

Guidelines give more prominence to the various factors that enter into the comity analysis, and they add two additional factors ("the extent to which the enforcement activities of another country with respect to the same persons, including remedies from those activities, may be affected," and "the effectiveness of foreign enforcement as compared to U.S. enforcement action"). This commitment to international comity is genuine, and it is our hope that it will continue to foster effective working relationships with our sister agencies. There is nothing inconsistent in the commitment to comity, on the one hand, and the fact that the U.S. agencies retain the responsibility and the right to bring appropriate actions in U.S. courts when the necessary effects are occurring in the U.S. market and U.S. enforcement action appears to be necessary, on the other.

It is important to remember that the antitrust picture has changed significantly in many important countries over the last thirty or forty years. The commitment to competition as the best process for the market exists now in many other countries and regions, from the European Union, across North America, to the trans-Tasman area. The countries in transition from socialist to market systems are adopting antitrust laws and putting them into practice. Privatization has spread around the globe, as well as deregulation, and in their wake, antitrust laws have inevitably begun to play a prominent role. To the extent that this new environment leads countries that once would have tolerated cartels that harmed the United States as well as their own markets to take action against them, the need for U.S. enforcement is plainly less. Although I cannot mention particular cases, I have observed a number of instances since I have been with the Antitrust Division when practices that appeared troublesome to us were addressed effectively (and entirely satisfactorily from our standpoint) by foreign antitrust agencies. This, I firmly believe, is the wave of the future. It does not require any country to forswear its responsibility to protect its own market. Instead, it offers new tools for the achievement of that goal, in the form of a network of cooperating national antitrust agencies around the world.

II. IAEAA

The best way to describe the International Antitrust Enforcement Assistance Act of 1994 is as a statute that authorizes the Department of Justice and the Federal Trade Commission to enter into mutual assistance agreements with foreign agencies or governments, under carefully controlled circumstances described in the statute. When (and only when) such an agreement enters into force with a particular country, the normal prohibition that prevents the U.S. agencies from sharing most information with anyone else

will not apply with respect to the particular antitrust enforcement authorities identified in the agreement. All the protections for confidential information that presently exist will continue to exist in full force vis a vis everyone else, and -- as I will stress throughout -- the protections that the foreign agency gives to any information received from the United States must be at least as good as those we would apply ourselves. These agreements will therefore give us and our counterparts the tools we need to undertake genuine cooperative antitrust enforcement when a transaction, or the parties involved in a transaction, affect both countries party to the agreement.

In order to reach the goal of effective case-by-case cooperation, three steps will normally be necessary:

> *First*, both parties must have the basic legislative or parliamentary authorization to hold up their respective ends of the bargain, both with respect to the ability to share investigatory information with a foreign antitrust authority and the ability adequately to protect the confidentiality of information received.
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> *Second*, antitrust mutual assistance agreements must be negotiated, and for the United States, must be put on the public record for comment before they may enter into force. Although the International Assistance Act does not preclude cooperation under any other existing provisions of law, such as the MLATs that are already in force or court assistance pursuant to 28 U.S.C. § 1782, the benefits of the Act will not be available in the absence of qualifying agreements.
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> *Third*, whenever a request is made to one of the parties to an agreement, that party must decide on a case-by-case basis whether cooperation can and should take place, and what particular steps will be appropriate.

Let me comment on each of these requirements in turn.

Legislative authorization. As most of you know, thanks to the strong bi-partisan support that the concept of mutual assistance in antitrust enjoyed in the last Congress, the bills that became the IAEAA were passed in record time. They were introduced in both

Houses of Congress on July 19, 1994, and were passed ten weeks later. In the Senate, the bill was co-sponsored by the Chair of the Subcommittee on Antitrust, Monopolies, and Business Rights of the Judiciary Committee, Senator Howard Metzenbaum, and (then) Ranking Minority Member Senator Strom Thurmond, along with Senators Kennedy, Biden, Leahy, Simon, Simpson, Grassley, Hatch, and Specter. In the House, the bill was co-sponsored by then-Chairman Jack Brooks of the Committee on the Judiciary and the Subcommittee on Economic and Commercial Law, and then-Ranking Minority Member Representative Hamilton Fish. Final passage was nearly unanimous, thanks to the extensive work that everyone concerned had done to consult widely with the business and legal communities and the efforts that were made to address the concerns that had been raised.

In most other countries, something like this process has yet to occur. For them, it will be necessary to decide whether the kind of across-the-board authorizing legislation that we have offers the best approach, or if they would prefer to proceed on a country-by-country basis, using something more like the treaty route or specific parliamentary authorization. We are making every effort to share our experience with others and to inform them fully about our own legislation. For example, in late October 1994 Assistant Attorney General Anne Bingaman made a presentation about the new law to the OECD's Committee on Competition Law and Policy, and former Assistant Attorney General James Rill led a discussion within the same OECD committee on behalf of the Business and Industry Advisory Committee (BIAC). We have met with a number of countries on a purely informational basis, both to let them know about the new possibilities under our law, and to learn more about the possibilities and constraints under their laws. I will not attempt to predict which countries may be interested in negotiating agreements, or which agreements are likely to be concluded first. I can say, however, that we are working hard to get the process going.

Mutual assistance agreements. The U.S. legislation is quite specific about the content of the antitrust mutual assistance agreements. Most of the required provisions can be found in section 12(2), which defines the term "antitrust mutual assistance agreement." In form, the agreements may be concluded either as government-to-government agreements or as agency-to-agency agreements, depending on what is necessary in order to include all relevant agencies in a particular country or to comply with other countries' legal requirements.

In substance, there are a number of important requirements in section 12(2). The agreement must include an assurance of reci-procity, bearing in mind that the reason for the entire system is to create a two-way street that will benefit U.S. enforcement as well as the ability of antitrust authorities in general to address global competition problems. Next, as I have already noted, the agreement must include an assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that it may receive from the United States, and furthermore that the protection they afford will be no less than the protection provided under the laws of the United States to such evidence. To back this up, the statute requires the agreement to list both countries' relevant laws respecting confidentiality, as well as both countries' antitrust laws.

The agreement must also provide that information that is exchanged may be used only for the administration or enforcement of the foreign antitrust law in question. The only exception is that the foreign agency may seek the prior written consent of the Attorney General or the Commission for an additional significant law enforcement use of the evidence, if strict requirements of necessity and preservation of confidentiality are satisfied. The same use limitations would of course be imposed on the U.S. agencies by the foreign party to the agreement.

Finally, the agreements must contain several additional provisions designed to give further protection for confidential information and to address any problems that could arise. (I wish to note, however, that the SEC has not experienced any such problems in the administration of its analogous mutual assistance arrangements with foreign securities agencies, under similar legislation.) At the conclusion of a proceeding, the foreign recipient of U.S. evidence must return all such evidence and all copies of such evidence, if it is still within the agency's control. If a breach of confidentiality occurs and the foreign agency does not take adequate steps to minimize the harm that results and to ensure that the problem will not arise again, the agreement must be terminated. In addition, if a breach occurs, the foreign agency must notify the Attorney General or the Commission promptly, and the U.S. agency must then notify the party who provided the evidence.

Case-by-case cooperation. The International Assistance Act also contains significant restrictions on the process of case-by-case cooperation, which are set out for the most part in section 8. Cooperation must be for purposes of "antitrust enforcement," according to sections 12(5), (7), and 12(2)(E). The evidence in question must qualify as "antitrust

evidence," as that is defined in section 12(1). Antitrust evidence includes evidence collected for U.S. enforcement purposes by either the Department of Justice or the Federal Trade Commission, as well as evidence collected on behalf of a foreign authority using the powers provided by sections 3 or 4 of the statute. Finally, all particular exchanges of information must satisfy the criteria of section 8(a): (1) another check on reciprocity, (2) another check on adequacy in the specific case of confidentiality protections, (3) the use restrictions, (4) compliance with the limitations on exchanges required by section 5 of the statute, and (5) the public interest determination.

I have already touched on the reciprocity, confidentiality, and use restriction issues. The limitations in section 5 to which I refer include certain categories of information that may be exchanged only in authorized ways, and other categories of information for which exchanges are absolutely prohibited. The most important limitation applies to information collected under the Hart-Scott-Rodino Act. In spite of the fact that this would otherwise be collected for our own investigation, and thus exchangeable under section 2 of the statute, section 5(1) withdraws Hart-Scott information from the scope of section 2. This means that we can only assist a foreign party to an agreement in a merger case if we send out a *specific* Civil Investigative Demand (CID) or institute a section 4 judicial assistance proceeding.

The second type of restricted information exchange relates to matter occurring before a grand jury. This was important to us because our most serious cartel cases normally are handled as criminal proceedings by the Department of Justice, and it is precisely these cases that we believe will give rise to the need and the desire for cooperative enforcement efforts most frequently. Section 5 requires us to obtain an order under Federal Rule of Criminal Procedure 6(e) to allow disclosure to a foreign authority, upon a showing of particularized need. This places foreign authorities on roughly the same footing as state authorities for general purposes of grand jury disclosures. The legislative history also notes that we should take into account whether the grand jury testimony was gathered under any kind of immunity arrangement, in deciding what the 6(e) order should cover and what assurances we should require from the foreign government before releasing the information.

Finally, the statute absolutely prohibits the sharing of classified information and information classified under the Atomic Energy Act -- two limitations which I regard as totally self-explanatory.

Last, I would like to discuss the public interest standard. It is deliberately wide-ranging, even though the statute itself mentions only the need to take into account whether the foreign state holds any proprietary interest that may benefit or be affected by the investigation. However, the legislative history also mentions factors such as how much evidence should be turned over, how sensitive the evidence is, whether the party who provided it should be given notice, whether the provider was given immunity, and whether the provider is a target or a third-party witness. The idea of such a broad public interest standard is to ensure to the greatest extent possible that cooperation takes place only when the United States agencies regard it as both appropriate and in the general U.S. interest, and of course when the foreign agency comes to the same conclusion with respect to its interests. Paradoxically, the broad scope of the provision is precisely what will make the cooperation scheme workable in practice. Cooperation will be permitted under the mutual assistance agreements, and it will be most likely to occur when both sides see the matter in a compatible light -- or, if you prefer, where the natural "convergence" of antitrust laws and policies has advanced the furthest.

III. Conclusion

As international cooperation among antitrust authorities improves, both through the new mechanisms made possible by the International Assistance Act and through existing mechanisms, we can look forward to a number of benefits. First, it will help the U.S. agencies in their response to the increasing international component of the U.S. market itself. Even today our GDP is about one-quarter "international," and that percentage will only grow larger. Second, coordination will naturally eliminate many of the inconsistencies and tensions that can arise when different countries impose conflicting or varying rules or remedies on businesses. Nothing will speed substantive convergence better than the ability of enforcement agencies to work together in specific cases. Where we already can cooperate effectively, such as under the U.S.-Canada MLAT, the results are immediate and tangible, and we find that our differences are far less important than our commonalities. Finally, the core mission of antitrust and competition laws all over the world will be achieved more effectively -- that is, ensuring healthy competition for the benefit of consumers and businesses everywhere.