DEPARTMENT OF JUSTICE

INTERNATIONAL ANTITRUST:
A JUSTICE DEPARTMENT PERSPECTIVE

Address by

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Good morning. I am pleased to be here speaking to this distinguished crowd, at this preeminent forum for international antitrust issues. Each of you has worked to promote, in international forums and in legal journals, a vision of competition-based economies, nurtured and safeguarded by antitrust principles. Most of you in this room have been laboring in these vineyards far longer than I have. As I look around, I see many of the people who have provided the intellectual firepower, and the sustained will-power, that have propelled this vision forward.

The fruits of that vision are now being harvested. We now have the makings of a worldwide community of antitrust agencies working, to a remarkable degree, toward common objectives. But now that much of the world has been convinced to structure individual national economies around competition and antitrust, I believe we must do everything we can to make sure that antitrust works in practice to fulfill its promise -- and not just in separate national economies around the world, because national economies are becoming less and less separate. Nearly a fourth of the GDP of the United States is export and import trade; that's double what it was at the end of World War II. And for many other nations, the figure is much higher. So we must also make sure antitrust works effectively in the increasingly global economy, where many corporations have multinational operations and even powerful nations find it harder and harder to go it alone. This is critically important, because our ultimate ability to overcome the few remaining pockets of resistance with the argument that open and vigorous competition is the most efficient way to run a world economy depends on our commitment to fulfilling the promise of the structures and models we have set in motion.

The United States and some of our trading partners have developed and begun significant implementation of three models for ensuring effective antitrust enforcement in an age of global markets: First, the model of cooperation and coordination, in which national competition authorities have worked in close coordination and cooperation with one another through, where appropriate, parallel investigations and enforcement activities; second, the model of positive comity, in which national enforcement agencies have established mechanisms and bases through which one enforcement agency might request enforcement activities by agencies in other countries where the latter may be better able to

challenge or curb the anticompetitive activities in question; and third, the model of applying an individual country's laws to conduct occurring in whole or part in other jurisdictions where the effects of such conduct may nevertheless be felt in the territory of the enforcing nation.

Each of these models holds promise -- the promise of which we have tasted but not yet entirely fulfilled. I would like this morning to review significant developments and achievements within the past year with respect to each model, and to highlight what we in the Department of Justice are already doing as our part to build on them.

I. Cooperation and Coordination

In some respects, the most promising model for dealing with anticompetitive practices occurring and having effects in multiple jurisdictions is for enforcement agencies in each jurisdiction to work in close coordination and cooperation with one another through, where appropriate, parallel investigations and enforcement activities. This allows each country to pursue its own investigation to the extent its market is affected by the conduct in question, while reaping -- through cooperation and coordination with other nations -- the benefits of fact-gathering activities and remedial measures outside of its borders.

Recognizing the potential benefits of cooperation and coordination, the United States is, as you all know, party to a number of bilateral and multilateral initiatives designed to put in place common understandings and practices. Just this past August, the United States and Canada signed a new bilateral antitrust cooperation agreement to replace our 1984 antitrust agreement and put greater emphasis on cooperative and coordinated law enforcement efforts over avoidance of conflicts. The old agreement was a relic of a time when the U.S. and Canada spent more time debating jurisdiction than developing cooperation -- something I have heard about, but have a hard time imagining from our own very constructive experience working with George Addy and his colleagues. Our new agreement with Canada still does not permit us to share confidential information to the full extent that would be permitted under our new legislation -- the IAEAA, but we are very encouraged that Canada is considering amending its law to permit this.

Across the Atlantic, an April vote of the European Council has removed the legal uncertainties about whether our 1991 cooperation agreement had been authorized in accordance with the right legislative procedures, so we are back in business. That agreement does not permit the Antitrust Division or our European Union counterpart DG-IV to share confidential information otherwise prohibited by law to be disclosed. But we have been able to conduct joint investigations where the parties agreed to waive confidentiality restrictions, as was the case with Microsoft. And we have been able to pool our general expertise as to particular product markets. We've seen a real increase in the frequency with which both we and the EU have been interested in the same or related matters. And now that the uncertainty about our 1991 agreement is resolved, I expect to see a real growth in day-to-day, tangible cooperation between us. Indeed, in January, two Antitrust Division officials participated in a public hearing before the European Commission on the EU's proposed block exemption for technology licensing. We were delighted to be able to share some of our experience in producing our Intellectual Property Guidelines, and the result may be a greater similarity of approaches to everyone's benefit.

On the multilateral front, I was particularly pleased when, this past July, the 25 nations of the Organization for Economic Cooperation and Development (OECD) adopted the revised Council Recommendation on cooperation, giving added emphasis to the need for international cooperation in antitrust investigations. The OECD is a leading international forum for discussion of the role of competition in the international marketplace, and its endorsement of expanded international cooperation in antitrust is obviously an important step forward for our cause. The new recommendation urges member countries to undertake more extensive enforcement cooperation and coordination, including the sharing of investigative information. Earlier versions of the recommendation have been instrumental in reducing jurisdictional conflict in antitrust enforcement, and we are confident the new version will be equally instrumental in spurring advances in effective international enforcement cooperation.

We also are hopeful that strong voices for international cooperation in antitrust enforcement will also emerge in several other fora. In our own neighborhood, the working group on trade and competition issues established under NAFTA is already in the midst of

analyzing the competition laws of the three NAFTA partners, to identify ways in which differences among them might be inconsistent with the liberalization of trade in the region -- and that is not to imply that we will find any such differences. Likewise, the 34 countries in the Free Trade Area of the Americas (FTAA) have agreed that at the Cartagena summit next March, they will establish a working party to look at the competition policies of FTAA countries and their effects on commerce in the hemisphere. And the 18 countries in the Asia-Pacific Economic Cooperation group (APEC) are focusing on the importance of competition policy as a part of APEC's trade liberalization objective. In July, a conference was held in New Zealand under APEC auspices to bring together competition and trade officials. APEC is now developing a work program to promote effective competition policies in all member countries.

Now, all of this work on cooperation and coordination is important, ultimately, only when it's translated into action in individual investigations and cases. As you know, we have from the beginning placed a top priority on letting the business community, here and abroad know we're serious about enforcement. We currently have some forty open investigations with an international dimension, depending on how you count them, roughly equally divided between civil and criminal matters. In many of them, we are receiving very meaningful assistance from foreign antitrust enforcement authorities, or providing it **to** them.

Our recent joint criminal investigations with the Canadians in the fax paper and plastic dinnerware cases are important examples of how cross-border cooperation can work. In the fax paper case, we and the Canadian Bureau of Competition Policy worked closely together to uncover and break up an international cartel in the $120-million thermal fax paper industry. Our coordination and cooperation in this matter, using the tools provided in our Mutual Legal Assistance Treaty, allowed each country to bring criminal antitrust charges. So far, the U.S. has charged three Japanese corporations, two U.S. subsidiaries of Japanese corporations, the U.S. subsidiary of a Swedish corporation, and an executive of one of the Japanese firms with conspiring to raise the price of thermal fax paper. These defendants pled guilty and have agreed to pay a total of some $10 million in fines to the U.S., and additional fines to Canada. This investigation is continuing. In fact, just yesterday New Oji Paper Co., Ltd, a Japanese company, was arraigned in Boston and entered a plea

of guilty. In the plea agreement, New Oji agreed to pay a fine of $1.75 million based on the commerce involved in both a 1991 conspiracy effected largely through meetings in the United States and a 1990 conspiracy that was organized and directed largely through meetings in Japan.

U.S.-Canadian coordination was also instrumental to our success in cracking a price-fixing conspiracy in the $100-million plastic dinnerware industry. Fifty Canadian Mounties and U.S. FBI agents simultaneously executed search warrants at target offices in Montreal, Boston, Los Angeles, and Minneapolis. As a result of the important evidence we seized, three corporations and seven executives, including both Americans and Canadians, have pled guilty. The three corporations have been fined in excess of $9 million, and the seven executives are serving time in prison. And the investigation is still ongoing.

The Antitrust Division has also coordinated with its counterparts abroad in reviewing transnational mergers and acquisitions. Last year at this time, for example, Anne Bingaman told you about the British Telecom/ MCI acquisition and joint venture. Since then, we have been examining the proposed $4.3 billion purchase by France Telecom and Deutsche Telekom of a 20 percent interest in Sprint, which also involved a proposed joint venture to provide international telecommunications services, which would be owned 50 percent by Sprint and 50 percent by the two European telephone companies.

In July, we filed a civil complaint alleging that the proposed combination of Sprint, with its international long distance services, and France Telecom and Deutsche Telekom, with their monopolies over telecommunications services in their respective countries, might lead to a substantial reduction in competition in international telecommunications to or from the United States. Accompanying the complaint was a consent decree, which has not yet been entered. Under the consent decree, Sprint and the joint venture would be subject to transparency and reporting requirements; would be prohibited from disclosing competitively sensitive information; and would be prohibited from favoring themselves with exclusive licenses. There would be restrictions on the types of businesses that FT and DT could place in the joint venture. And there would be various other provisions to ensure nondiscriminatory, competitive access to the telecommunications and public data networks

in France and Germany. The restrictions would operate in two phases, relaxing over time as competition in the telecommunications industry develops in France and Germany. The EU has also been reviewing this proposed transaction, but I'll let Commissioner Van Miert tell you what they've been up to.

As you all know, one of the fundamental building blocks for our efforts at the Antitrust Division in this area is the International Antitrust Enforcement Assistance Act, an Antitrust Division initiative that was signed into law, with strong bipartisan support, almost exactly one year ago. This law gives us authority, along with the Federal Trade Commission, to enter into agreements with foreign antitrust agencies to exchange evidence on a reciprocal basis and assist each other in obtaining evidence located in the other's country, while also ensuring that confidential information will be properly protected.

Most other countries will need new legislation before they can enter into one of these agreements, just as we did. Australia is one exception, and in fact, it was the law already on their books that in part inspired us. We will be on hand to share with other interested nations the lessons we learned in getting our own legislation enacted. But we are already getting a very positive response from some of our major trading partners.

For example, Canada is now considering amending its antitrust law in a parallel fashion to our new law. And we were very pleased to see last July that a group of experts appointed by Commissioner Van Miert -- a group that included Frederic Jenny, who is also here today -- recommended in a July report that our cooperation agreement be broadened to allow the exchange of confidential information, along the lines authorized by our IAEAA. The report cited not only "the importance of transatlantic relations," but also "the role fulfilled by the EC/US Agreement as a model for the development of cooperation between each of the two partners and other countries in the world." The report urged that "deepening of the EC/US agreement should be a priority for the Commission's action in the months ahead ... ."

We cannot agree more fully. Nations in the antitrust community must find ways to work together and pool our efforts so that the scope of our enforcement capabilities is

coextensive with the scope of anticompetitive conduct. We need to be able to obtain information located in other countries, and coordinate our enforcement activities with our sister agencies overseas, so that there are no safe havens from which international cartels can organize and direct their anticompetitive schemes in the world marketplace with impunity, brazenly picking the pockets of the world's consumers. There must be no place to hide.

But the inability of enforcement agencies in various countries to share confidential information gathered as part of their fact-finding investigations threatens to undermine our ability to realize the full potential of the model of enforcing competition laws in global markets through cooperation and coordination. To overcome all existing hurdles to effective pursuit of the cooperation and coordination model, we at the Department of Justice have been giving the highest priority to improving and expanding our existing cooperation mechanisms through IAEAA-type agreements, and I urge your efforts in this regard as well.

II. Positive Comity

A second approach for dealing with anticompetitive practices occurring or having effects in multiple jurisdictions is for one nation is to request the enforcement authorities of another nation to initiate enforcement action. This model holds most promise when most of the conduct at issue -- although having effects abroad -- is largely confined to a single jurisdiction, and when the competition authority of that jurisdiction is in the best position to remedy the practices at issue, because it has the best access to information about the conduct, and will be able to assert their authority most easily over the firms engaged in the market-closing behavior.

In order for this approach to be successful, however, the foreign country concerned must have in existence a strong antitrust law that prohibits a range of collusive or monopolistic practices similar to that prohibited by the Sherman Act and that provides sufficient authority to its enforcement authorities to eliminate the unlawful practices. To deter these activities, the foreign laws must also provide for penalties on violators that are sufficiently high to offset the potential profits that companies believe they can derive from the unlawful conduct.

We have thus embarked on significant efforts to encourage the adoption of sound and effective competition laws and enforcement policies around the globe. In fact, we have provided advice and assistance to around two dozen countries in the last 5 years on the drafting of their competition laws or on the enforcement of those laws. Our efforts appear to be paying off here as well. We are seeing a newfound interest in antitrust policy around the globe. And, at our last count, approximately 60 countries, representing about one-third of the countries of the world but more than 80% of the world's GNP, had enacted antitrust or competition laws.

Obviously, however, the effectiveness of even the best crafted antitrust law will depend on the willingness and ability of the relevant authorities to enforce the law vigorously against unlawful practices that restrain competition from foreign competitors. Since as many as one half of all competition laws in the world are less than five years old, many of the countries are still developing the expertise and political support necessary for sound and effective enforcement. And even among countries with reasonably sound and longstanding antitrust laws, we too often see them, even today, failing to provide the resources or political support to its competition authorities to enable them to enforce their law in an effective manner.

For example, we have expended considerable effort over the last several years in trying to convince the Japanese Government to improve its antimonopoly enforcement. Starting in 1989 with the Structural Impediments Initiative talks, and continuing with the U.S.-Japan Framework talks in this Administration, we have been encouraging Japan to strengthen the Japan Fair Trade Commission's (JFTC's) ability and willingness to enforce its Antimonopoly Act in a way calculated to eliminate the cartels and entry-restricting anticompetitive practices and market structures which many believe have been pervasive in the Japanese market.

There has been some progress in this effort, although much remains to be done before we can be confident that the JFTC is willing and able to stamp out the myriad of anticompetitive practices in the Japanese market. One of the most notable recent developments was the JFTC's establishment of an Import Restraint Task Force in April of

this year to investigate and prosecute restrictions on import competition. We are hopeful that creation of this Task Force spells the beginning of a long-overdue Japanese Government commitment to eliminate the collusive and trade restrictive practices that have resulted in a number of Japan's markets being effectively closed to American and other foreign competition.

We are not resting in our efforts to foster an effective antitrust enforcement environment in Japan. Just last month, I went to Tokyo to meet with the Ruling Party's Administrative Reform Project Team, a team of about twelve Diet members charged with recommending new legislation to strengthen the JFTC and to promote administrative reform within the Japanese Government. We urged the Project Team to make dramatic increases in the staff and resources of the JFTC, so that its enforcement resources are commensurate with Japan's position as the second largest economy in the world. We also urged the Japanese Government to raise the administrative status of the JFTC so that it can deal effectively with other powerful Japanese ministries on competition policy matters.

In addition, in the next several weeks, we will be submitting to the Japanese Government a comprehensive set of recommendations to strengthen antitrust enforcement in Japan. These recommendations will address needed enhancements of the JFTC's investigatory and enforcement powers, prevention of anticompetitive practices by trade associations, measures to eliminate bid rigging on publicly-funded procurement, and crucial improvements to Japan's private civil remedy system for antimonopoly violations, among others.

On the end, of course, the effectiveness of any positive comity model -- in which competition authorities request action by their counterparts in other countries -- must rest on the willingness of nations to enact substantive competition laws, and to enforce those laws fully against private restraints of trade occurring in their territories. Until that occurs, there will inevitably be situations where particular antitrust authorities will not be effective in preventing anticompetitive practices in their markets that have effects in other jurisdictions. In those circumstances, we need to have other options for removing the impediment to market access that the world community has a right to expect.

III. Application of Antitrust Laws to Foreign Private Restraints of Trade

A third model for curbing anticompetitive practices having global effects is for individual enforcement authorities to seek application of their laws within their full jurisdictional reach. In many cases, these laws authorize enforcement agencies to take action against conduct occurring outside of their own territories, but having effects within their territories. For example, the Sherman Act, as reaffirmed by the Congress in the Foreign Trade Antitrust Improvements Act of 1982, protects American consumers and exporters from anticompetitive restraints imposed by foreign firms in foreign markets that have a direct, substantial and reasonably foreseeable effect on U.S. domestic or export commerce. The European Community, too, following the Wood Pulp decision in 1988, generally accepts the validity of exercises of jurisdiction over foreign-based conduct that has effects within the European Community. The antitrust laws of many other countries -- particularly the newer laws -- also have adopted effects-based jurisdiction.

Of course, antitrust enforcement action of this kind is not a practicable or appropriate way to deal with many instances of foreign anticompetitive conduct. In the United States, we must be able to obtain personal jurisdiction over the defendants, get access to sufficient evidence to prove our case in court, and, in civil enforcement actions, have remedies available that a court will be capable of enforcing. And, as we said in our new Antitrust Enforcement Guidelines for International Operations issued this spring, we take serious account of considerations of international comity in making our enforcement decisions -- factors that include, I would note, the effectiveness of foreign antitrust enforcement as an alternative to remedying the problem. In the past year and a half we have successfully taken a number of actions directed at practices that, if unchecked, would have had a significant

adverse impact on U.S. markets. For example, our Cleveland, Ohio office recently conducted a criminal investigation into price-fixing of bronze and copper flake, used in making inks and paints. It resulted in several prosecutions and plea agreements. M.D. Both, a joint venture of a British firm and a German firm, pled guilty and paid a substantial fine. And just last month, Obron Atlantic Corp., a U. S. firm, and two German nationals who oversaw Obron's U.S. operations, also agreed to plead guilty and pay substantial fines.

Again, though, our ability to pursue this model of antitrust enforcement in a global industry is hampered greatly by constraints in evidence-gathering beyond our borders, jurisdictional issues, and foreign policy or comity considerations. Nevertheless, until the full potential of coordination and cooperation is realized through adoption of laws and agreements that would allow for exchanges of confidential information, and until the full potential of positive comity is realized through commitment by each country to adopt and enforce vigorously effective competition laws, each of us must keep open this option of applying our own laws to conduct occurring abroad but having effects within our territories.

IV. Conclusion

As recent initiatives and cases involving coordination and cooperation among competition authorities illustrate, the strides we have made in recent years in seeking effective antitrust enforcement of global industries have been substantial. It would have been unthinkable years ago for us to have had the kinds of successes we had with the EU in the Microsoft matter, or with the Canadians in the thermal fax paper matter. And it would have been seemed quixotic to suggest that forums as diverse as OECD and APEC would be

embracing the substance of competition law principles, and seeking procedural routes for making international competition law enforcement a viable alternative to trade policy. To ensure, however, that we continue to move forward in this vein, we must continue to bolster competition laws and enforcement efforts in nations around the world, and to facilitate the kind of exchanges of confidential information that are essential to coordinated enforcement activities. I am sure that we will not fall short of this substantial challenge, and I look forward to working with you in moving further toward our common goals.