DEPARTMENT OF JUSTICE

INTERNATIONAL CONVERGENCE EFFORTS: A U.S. PERSPECTIVE

Address by

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Good afternoon. I am delighted to be here in Toronto, in the only country with an older antitrust law than ours, to provide the U.S. Department of Justice's perspective on international convergence efforts and, in particular, on the work of the International Competition Network (ICN). I also am pleased to be sharing a podium with six distinguished individuals who are making significant contributions to the development of international competition policy. But most of all, I want to thank Konrad von Finckenstein for his outstanding leadership in the creation and progress of the ICN, which so obviously infused his remarks at lunch today.

Introduction

Let me begin by placing our interest in the ICN in a broader context. Antitrust enforcement is not a static process. Economic learning advances, markets emerge and change on a national and global basis, and legal processes and organizational structures that once worked well cease to respond efficiently in changed circumstances. Accordingly, we antitrust agencies, like other institutions, need constantly to consider whether our policies and processes continue to be adequate to fulfill our mission of protecting competition in a changing world. As our President Theodore Roosevelt said 94 years ago -- and Teddy was a man who often thought and acted on antitrust issues, sometimes in that order: "We are prosperous now. We should not forget that it will be just as important to our descendants to be prosperous in their time as it is to us to prosperous in our time."[1] At the U.S. antitrust agencies, this is a time for thinking about the future, and for review and renewal across the wide range of our work.

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[1] *Quoted in* Edmund Morris, Theodore Rex 500 (2001).

Among other things, Assistant Attorney General Charles James has, in the past few months: reorganized the Division in order to make its enforcement work more responsive to the modern global economy; streamlined our merger review process; and, most famously, signed an agreement with the Federal Trade Commission that overhauls the interagency clearance process and, for the first time, formally allocates primary areas of responsibility, on an industry-wide basis, between the Department and the FTC. As Charles has explained, these changes "will enable the Department to investigate more efficiently possible anticompetitive conduct affecting consumers and will provide greater certainty to the business community, all of which is good for consumers."[2] Finally, we and the FTC are conducting a broad series of public hearings on the relationship between antitrust and intellectual property rights, so that we can make an informed judgment about whether our enforcement policies in this important area are sound. I have reviewed these internal housekeeping actions for you in order to stress that, from our perspective, the matters I will now discuss are not isolated essays in antitrust diplomacy, but rather part of a comprehensive endeavor to enhance the efficiency and value of antitrust enforcement, both in the United States and in the world at large.

Nowhere is this effort more timely than in the area of merger enforcement. Twenty years ago, only a handful of countries had antitrust laws that were seriously enforced, and we few were thought by most everyone else to be eccentric enthusiasts. Today, over 90 countries --

[2] Department of Justice Press Release No. 02-119, March 5, 2002, at 1, available on the Antitrust Division's website: www.usdoj.gov/atr.

accounting for nearly 80 percent of world production[3] -- have enacted antitrust laws, and over 60 have adopted antitrust merger notification regimes. Having convinced much of the world to structure national economies around competition and free markets, we have a responsibility to ensure that antitrust works effectively and efficiently to deliver what it promises. Previous speakers today have identified numerous concerns with multi-jurisdictional merger enforcement. We in the antitrust agencies recognize that some of these concerns are serious ones in need of serious discussion and, in some cases, serious remedies. We also recognize that we need to enhance global convergence in our antitrust policies, and that in order to achieve that goal, multilateral efforts must supplement bilateral ties. Of course, consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S. or Canada -- not that *you* would presume to do such a thing. Sound antitrust enforcement requires a deep and shared "culture of competition." The first step is to build an understanding of one another's laws and institutions and of the economic principles that give antitrust laws their reason for being.

The International Competition Network

It was in this spirit that antitrust officials from 14 jurisdictions launched the International Competition Network last October to provide a new framework for interaction and cooperation among government officials, private firms and non-governmental organizations. This framework will be built around the vision that "[n]etworks rather than countries or economic areas, are the

[3] David S. Evans, "The New Trustbusters: Brussels and Washington May Part Ways," Foreign Affairs, Jan./Feb. 2002, 14, 15.

true architectures of the new global economy."[4] Just 6 months later, 52 jurisdictions on six continents have already joined the network. These countries represent 70 percent of the world's GDP [map with list of member countries by GDP].

The attraction and strength of the ICN is that it is a "virtual network," flexibly organized around working groups, the members of which work together largely by Internet, telephone, fax machine and videoconference. Working in this manner facilitates a low-cost ongoing dialogue about antitrust among scores of countries. We believe that regular and focused interaction among the still-growing number of antitrust authorities and the private sector will promote the spread of sound antitrust enforcement policies and procedures around the globe. It also will build stronger working relationships by facilitating communications among antitrust agencies. In this regard, our theme song is from *The King and I* -- "Getting to know you, getting to know all about you...."

I will emphasize -- as Konrad did -- that the private sector has an important role to play in the ICN, not as members but as partners. Businesspeople, members of the private bar, economists, academics and representatives of international organizations work with us side-by-side on each of the projects we undertake. Diversity in private sector participation, like diversity in our membership, is crucial in allowing a wide range of views and experiences to be shared and taken into account when developing ICN recommendations. The working groups have reached out to members from many geographic regions and differing stages of development. These members are encouraged to form local networks of advisors to participate and to assist them in their deliberations. It is important to us that the ICN should be inclusive. We are reaching deep

[4] Will Hutton & Anthony Giddens, Global Capitalism 61 (2000).

into the private sector, including the academy and consumer groups, so as not inadvertently to permit "gatekeepers" to establish barriers to entry to diverse expressions of views.

ICN's long-term goal is to develop guiding principles and best practice recommendations to be endorsed, and then implemented voluntarily, by member agencies. Our first two projects are large and important ones: the multi-jurisdictional merger review process and competition advocacy in emerging economies. Commissioner Adalberto Garcia of the Mexican Federal Competition Commission will speak to you in a moment about the Competition Advocacy Working Group, which his agency chairs; I will discuss the Merger Review Working Group, which I chair.

The mission of the ICN's Merger Review Working Group is to promote the adoption of best practices in the design and operation of merger review regimes in order to (i) enhance the effectiveness of each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multi-jurisdictional merger reviews. Initially, the Working Group is concentrating on three areas: merger notification and review procedures; the analytical framework for merger review; and investigative techniques for merger review. Each area has been assigned to its own subgroup.

Some of you will be disappointed, and others relieved, to learn that we do not expect to achieve convergence on all merger issues in the first year, or even the second or third years. Rather, we expect to maintain a continuous dialogue and to achieve practical improvements in the practice of international antitrust enforcement, one step at a time. Before I turn to the specific

results we expect to accomplish in the near term, I should emphasize that antitrust policy is part of a broader mosaic. In order for antitrust policy to be effective, a country needs strong and predictable legal institutions, well-established property rights, flexible capital markets, and many other government and private institutions necessary to sustaining a robust market economy. When we work with developing and transitioning economies, we need to be cognizant of the contexts in which their antitrust agencies operate. As the ICN develops principles and best practices to facilitate convergence, we must take care that we are not promoting merely paper principles and theoretical convergence. In our view, the ICN is a piece of a bigger picture, in which these principles and practices must make sense for a broad range of antitrust agencies.

In that context, in this first year, we hope to achieve the following concrete results in the Merger Working Group:

- **Adoption of guiding principles and best practices on pre-merger notification and merger review by antitrust agencies.**

The Notification and Procedures subgroup, chaired by Randy Tritell of the Federal Trade Commission, is developing a set of guiding principles and best practices pertaining to the notification of proposed mergers and their review by antitrust agencies. The guiding principles could include, for example, recommendations concerning the transparency of the merger process, making decisions on the merits without regard to the nationality of the merging parties, and minimizing the burden on the parties to the greatest extent possible consistent with providing the agencies the information they need to conduct a careful review of the competitive merit of a transaction. During our February meeting in Paris, this subgroup held a lively session with agency

representatives and members of the private sector, discussing and debating the merits and demerits of various proposals. The subgroup will continue to circulate drafts via E-mail. The group also is developing initial best practices recommendations. In this first year, the areas under consideration for best practices relate to notification thresholds that are clear and objective and have a sufficient nexus with the reviewing jurisdiction, and to flexibility in the timing of premerger notification filing. This subgroup expects to circulate a draft this summer with a view towards developing a consensus on these principles and practices at the first ICN conference in September in Naples.

Although our objective is to achieve a consensus, there may well be some principles and practices that are not feasible to implement in many jurisdictions at this time. However, if principles are to be adopted, it is important that we keep our standards high. In my view, for this effort to be meaningful, *i.e.*, for it to contribute significantly to effective global antitrust enforcement, it must include honest discussion of areas of agreement and disagreement. I would consider our efforts a success if ICN guiding principles and best practices become well-accepted in the international arena, even if there are dissenters, and if relevant jurisdictions accommodate their systems to the proposed ICN best practices.

- **Informing the debate on the advantages and disadvantages of various substantive merger review standards.**

We are very honored to have Dr. John Vickers, Director General of the UK Office of Fair Trading, as chair of the Analytical Framework subgroup, which is examining the substantive standards for prohibiting mergers and the criteria for applying those standards. This subgroup is organizing a discussion paper and panel for the first annual ICN conference that will compare the advantages and disadvantages of the "substantial lessening of competition," "creation or strengthening of a dominant position," and "public interest" standards. Much of the drafting will be spearheaded by a "work horse" group including Australia, the EC, South Africa and the UK. We expect that this subgroup's work will assist countries that are enacting new antitrust laws in the development of a legal framework, and those considering amending their existing regimes in making informed choices. In the longer term, this group may seek to develop model merger guidelines.

- **Learning from one another's practical experience in performing merger reviews.**

The Investigative Techniques subgroup, chaired by Dr. Menachem Perlman, Deputy Director General and Chief Economist of the Israel Antitrust Authority, is planning an ICN international merger conference to be held in the United States in November of this year. The conference -- inspired by the excellent series of cartel conferences held over the past three years in the U.S., the U.K., and Canada -- will provide a venue for staff-level lawyers and economists from many antitrust agencies to meet and learn from one another's practical experiences in performing merger reviews, using an interactive hypothetical case exercise. Discussions will include the effective planning of a merger investigation, methods for gathering reliable evidence and its interpretation, the use of economists and the evaluation of economic evidence. This subgroup

will use lessons learned at the November conference to develop best practices for making merger investigations more efficient and effective. Materials developed at this program could be used in subsequent regional programs or by individual countries as new members join the network.

ICN's relationship to other International Organizations

As today's program shows, a great deal of important work on international antitrust issues is done by governments through a number of international organizations, such as the Organization for Economic Cooperation and Development (OECD), including the OECD's series of Global Competition Fora; the World Trade Organization (WTO); and the United Nations Conference on Trade and Development (UNCTAD). These organizations provide fine venues, each with a different focus, for debating competition policy issues among many nations. In our view, the ICN, as the new kid on the block, should seek to build on what these organizations have done and are doing, and not to duplicate it. We anticipate that the dialogue in these organizations will provide valuable input to ICN projects and we hope that some of the ICN's work will enrich related discussions in other fora as well. Already, the OECD's work through BIAC in the area of best practices for the merger review process has provided a useful starting point for the ICN's Notification and Procedures subgroup. We expect that the OECD's pending work on its members' merger review processes will provide important insights into the incidence and relative seriousness of various merger process issues. Not surprisingly, both the ICN merger process subgroup and OECD's Working Party 3 -- chaired by the versatile Konrad von Finckenstein -- have identified some of the same areas for possible initial "best practices." Because the ICN is engaged in a continuous dialogue with agencies and the private sector, we hope that the ICN will

provide some momentum in reaching our common goals. Of course, throughout the process the ICN will continue to work with the OECD -- the OECD Secretariat is participating in the ICN's Notification and Procedures subgroup -- to make our final products consistent and complementary.

The ICN's Longer-Term Agenda

If the ICN works as we hope it will, we will need to agree on a longer-term agenda. The various ICN working groups also are developing work plans for 2003 that will be addressed by members at the Naples conference. Depending on decisions made at that conference, future ICN projects may include issues related to anticartel enforcement and enforcement cooperation. As most of you know, there is a fair amount of bilateral cooperation taking place in anti-cartel enforcement and merger review, particularly involving the U.S., Canada, and the European Commission. We anticipate that the ICN will reinforce this cooperation by helping to facilitate communications among antitrust agencies. As agencies cooperate with one another in antitrust enforcement it becomes necessary to take appropriate account of statutory restraints on the ability to share information and on the ability of each jurisdiction to protect shared information. Antitrust agencies have both a legal duty and a tremendous practical incentive to preserve the integrity of the document handling process. Adequate protection of information is an important prerequisite to sharing confidential information. In my view, however, we ought not to be content with a guiding principle that the use of shared information should be kept to the minimum necessary to the enforcement of antitrust laws. Rather, it is also important that restrictions on the use of information for antitrust enforcement purposes be kept to the minimum necessary to

protect that information.

It seems to me, therefore, that one of the areas the ICN might usefully explore is reconciling the need to preserve the confidentiality of information with the desirability of effective cooperation between and among agencies. Despite the valuable role of MLATs in cartel cases and waivers in merger cases, we have not yet achieved an appropriate equilibrium in this area. We need to continue to improve our balancing of effective enforcement and integrity of process. More precisely, firms and counsel need to recognize (better than I believe they do today) that it is often in their interest to permit agencies to share information in order to facilitate the making of sound and consistent agency judgments on the competitive nature of conduct under review. In my limited time at Justice, I have observed that companies frequently seem to fear -- unjustifiably, in my view -- to participate in cooperative antitrust enforcement. But the fact is that large publically traded companies that are good corporate citizens are often the *victims* of cartels. It should be in the interest of these companies and their counsel to work with us to enhance anticartel enforcement, and not to place unnecessary roadblocks in our path because of unjustified confidentiality concerns.

Another important, and sometimes undervalued, tool for international cooperation is technical assistance. The United States has worked with many new antitrust agencies to advise them in introducing into their systems competition values based on sound economics and consumer welfare goals, and on practical techniques to enhance their ability to achieve these goals. During the past decade, we and the FTC have sent nearly 300 missions to assist scores of countries, on both short-term trips and long term advisory missions of six months or more. We

have hosted hundreds of foreign officials on visits and internships to the Division and the FTC in order to share what we do and why we do it. I believe that the ICN is uniquely situated to offer a new type of assistance via its ongoing conversation among antitrust agencies from a wide range of developed and developing countries. Improved coordination of technical assistance programs through the ICN could be explored in future working groups.

In sum, the ICN's broad mandate is to promote sound antitrust enforcement in substance and procedure on a global scale. For now, we hope to achieve practical improvements in the practice of international antitrust enforcement, one step at a time. We encourage the business community, the private bar, and the academy to help us, and society at large, in this exciting endeavor.

US-EU Merger Working Group

In looking at today's comprehensive program, I noticed that there was no planned discussion of what I believe to be a very important vehicle for increasing international antitrust understanding and convergence: the US-EC Merger Working Group. So I'd like to spend a few minutes on the progress the US antitrust agencies are making on a bilateral basis with our colleagues in the European Commission.

In merger review and cartel enforcement, Washington and Brussels have, over the years, developed an excellent working relationship. This relationship has helped foster a considerable degree of substantive convergence, especially in how we define markets and how we evaluate the likely competitive effects of horizontal mergers. As a result, we have tended to reach similar

conclusions on matters when we become fully engaged with one another on the analysis and we are working from a common set of facts. *WorldCom/Sprint, Alcoa/Reynolds*, and *Dresser/Halliburton* are all well-known recent examples of mergers where close DOJ/EC cooperation led to harmonious resolutions that benefit consumers worldwide, and the FTC has had similar good experiences in its cases. Indeed, until last year in the *GE/Honeywell* case, neither of us had prohibited a merger over the other's objection.

The Justice Department has been open, both in discussions with our counterparts at the European Commission and in appropriate public fora, about our disagreement with the Commission's decision in *GE/Honeywell* and the reasons for it. Happily, several positives have already come out of this discussion. The first, and most important, is a strong reaffirmation by the European Commission that it shares our view that the ultimate goal of any sound competition policy must be consumer welfare, which competition advances through lower prices, higher output and enhanced innovation.[5] A second is a clarification by the Commission of its attitude toward efficiencies. The Commission has now made it clear, just as we have, that it views merger-generated efficiencies positively and that it will not challenge a merger just because it creates a more efficient firm and thereby benefits consumers, even if competitors might suffer

[5] *See* Mario Monti, *The Future for Competition Policy in the European Union*, Address at Merchant Taylor's Hall, London (July 9, 2001)(transcript available on European Commission web site, http://europe.eu.int, under News/Press releases)("[T]he goal of competition policy...is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer.").

from the increased competition.[6]

In this context, the US antitrust agencies and the European Commission agreed last September to devote substantial resources to reinvigorate our existing joint merger working group to bring us even closer together. Our working group is currently examining several issues, including merger process and timing and conglomerate mergers. DOJ, FTC, and the EC have many lawyers and economists working on these issues, proceeding largely by transatlantic videoconferences supplemented by some in-person meetings. We will complete work in some of these three areas, and make significant progress on others, by our next annual bilateral meeting.

We will use the US-EU Merger Working Group to build on our solid record of cooperation and convergence. Despite our different legal traditions and cultures, and despite substantial differences in the language of our governing laws, the US and EU agencies have been able to work togther to develop generally coherent and largely consistent competition policies, built on sound economic foundations, and directed at a common goal: to promote consumer welfare through competition.

Conclusion — Converging toward what?

As cross-border trade and investment grows, and as markets become increasingly global, there is real value in seeking to have competition authorities worldwide develop a common approach to common problems. But our convergence efforts will be empty if they lead to

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[6] *See id.* ("[W]e are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition.").

everyone simply agreeing on a sort of lowest common denominator.

With that in mind, I would like today to invite all of you to join me in considering what the essential elements of a sound global competition policy should be. To help frame the discussion, let me propose to you six core principles which I offered at an International Bar Association Conference on Competition Law and Policy in a Global Context in Capetown, South Africa, earlier this week:

- Protect competition, not competitors
- Recognize central role of efficiencies in antitrust analysis
- Base decisions on sound economics and hard evidence
- Acknowledge the limits to our predictive capabilities
- Be flexible and forward-looking
- Impose no unnecessary bureaucratic costs

Time does not allow me to elaborate on these principles, but one thing we have learned in the wake of GE/Honeywell is that even as between the United States and the European Commission, there is a considerable gap in how we understand and apply these principles in practice, not just on mergers, but in the nonmerger area as well. We have, for example, identified at least five key areas where the EC approach seems to be significantly different from our approach: treatment of efficiencies, predatory pricing, fidelity rebates and bundled discounts, essential facilities, and monopoly leveraging.

We intend to devote substantial time to exploring these issues over the coming months. We invite you to join us in working toward achieving, not merely convergence, but procompetitive convergence based on sound economic principles.

Thank you.