# DEPARTMENT OF JUSTICE

**STATEMENT**

of

**JOEL I. KLEIN**

Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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Good morning, Mr. Chairman and members of the Subcommittee. I am pleased to be back before you to continue our discussion of antitrust enforcement in the global economy, and what we are doing to meet the challenges it presents.

As trade and commerce become increasingly global in scale, vigorous international antitrust enforcement is key to helping ensure that American businesses have the opportunity and the incentives to compete successfully and that American consumers and business purchasers are protected from anticompetitive conduct. Effective international antitrust enforcement requires not only that our own enforcers remain vigilant and active, but also that we are able to obtain assistance, where needed, from foreign antitrust enforcement authorities.

In the last few years, we have worked to strengthen the international enforcement tools at our disposal. With the help of this Subcommittee, we were able to obtain passage of the International Antitrust Enforcement Assistance Act of 1994, which enables us to enter into agreements with our foreign counterparts to share information and provide assistance on a reciprocal basis. Last week, we signed the first agreement under the 1994 Act, with Australia, which we hope to be a model for other such agreements. In March, we signed a more traditional antitrust cooperation agreement with Israel, along the lines of our 1991 agreement with the EU and our 1995 agreement with Canada. These

agreements, the 1994 Act itself, and the growing number of more general mutual legal assistance treaties to which the United States is a party, combined with the favorable ruling we obtained two years ago in United States v. Nippon Paper Industries Co. Ltd., reaffirming that Congress indeed has given us jurisdiction to prosecute anticompetitive activities that take place off U.S. soil but that have significant effects here, give us important building blocks for our continuing efforts to build an effective international antitrust enforcement regime and make effective use of it.

We have achieved some remarkable successes recently, including unprecedented levels of criminal fines.

From a practical standpoint, the increasing globalization of markets leads to increased complexity in our investigations, making it more difficult, time-consuming, and costly to pursue an investigation to its ultimate conclusion. Often, we must have the assistance of authorities in other countries in order to obtain crucial evidence. It is therefore particularly important, as Congress recognized in passing the 1994 Act, and as the Senate affirms on a broader law enforcement front when it ratifies additions to our growing network of mutual legal assistance treaties, that we be able to cultivate and maintain constructive working relationships with our foreign counterparts.

Although the United States can rightly claim a large share of the credit for the adoption around the world of competition as a foundation for commercial

relationships, each country's antitrust law is necessarily tailored in part to its own legal system and culture. That variation in approaches to antitrust enforcement, in a world where countries zealously protect their sovereignty, creates a number of difficult challenges in building an international antitrust enforcement regime that works effectively, challenges which have been brought to the forefront with the increasing globalization of markets.

As you know, in the fall of 1997 the Attorney General and I established an International Competition Policy Advisory Committee to look at these challenges with a fresh perspective, giving particular attention to three key issues. First, how can we build and strengthen a consensus among competition enforcement authorities around the world for prosecuting international cartels? Second, at a time when increasing numbers of mergers involve international transactions that directly affect competition in more than one country, how can the various competition enforcement authorities best coordinate their merger review efforts, while preserving their sovereignty, to achieve results that are sound and efficient, both for the parties to these mergers and for consumers in the countries affected by them? And third, how can we ensure that, as our international trade agreements remove governmental impediments to free trade, those impediments are not replaced by anticompetitive schemes on the part of private firms to impede market access? Getting the right answers to these questions is essential

to the maintenance of free and fair international commerce, and its attendant benefits for the U.S. economy.

The Advisory Committee continues its work under the leadership of co-chairs Jim Rill and Paula Stern, former Assistant Attorney General for Antitrust and former International Trade Commission Chairwoman, respectively. It has held a number of meetings and hearings, and has heard from numerous witnesses representing a wide range of viewpoints. It plans to submit its final report this fall, and I expect it to be of tremendous value to the Department of Justice and to this Subcommittee as we continue our efforts to internationalize basic antitrust principles and make them the foundation for the burgeoning commercial relationships among nations.

Meanwhile, we are continuing to pursue our enforcement responsibilities vigorously in the international arena. Let me now say a few words about the three major facets of our international enforcement agenda: international cartel enforcement, international merger enforcement, and positive comity.

**International Cartel Enforcement**

Vigorous enforcement against international cartels is a top priority for us. As a result of our aggressive overall criminal enforcement efforts against hard-core antitrust violations such as price-fixing and market allocation, we have set records in the last two fiscal years in the level of fines collected. In fiscal year

1997, criminal fines totaling $205 million dollars were secured in cases brought by the Antitrust Division. This total is five times higher than during any previous year in the Division's history. We broke that record in fiscal year 1998, with more than $267 million in fines secured. Of the roughly $472 million in fines secured in the last two fiscal years, nearly $440 million -- well over 90 percent -- were in connection with the prosecution of international cartel activity, a graphic illustration of the increasingly international focus of our criminal enforcement work, and our success in cracking international cartels.

This focus is well justified. International cartels typically pose an even greater threat to American businesses and consumers than do domestic conspiracies, because they tend to be highly sophisticated and extremely broad in their impact -- both in terms of geographic scope and in the amount of commerce affected by the conspiracy. The massive international cartels uncovered in citric acid, lysine (an important livestock and poultry feed additive), sodium gluconate (an industrial cleaner), and graphite electrodes (used in steel making) are prime examples. The criminal purpose behind these and other conspiracies investigated and prosecuted by the Division has been to carve up the world market by allocating sales volumes among the conspirators and agreeing on what prices would be charged to customers around the world, including customers in the United States.

International cartels victimize a broad spectrum of U.S. commerce, costing American businesses and consumers hundreds of millions of dollars a year. For example, citric acid, which is used in products ranging from soft drinks and processed food to detergents, pharmaceuticals, and cosmetics, is found in virtually every home in the United States. Sales in the United States during the course of the citric acid conspiracy were over $1 billion. In each of these cases, American consumers -- and, in cases where the U.S. government is the victim, American taxpayers -- ultimately foot the bill.

The international cartels uncovered by the Division have often been governed by elaborate agreements among the conspirators to ensure that each conspirator understood its role in suppressing competition and increasing prices in the varied markets of the world where the goods and services were sold. The cartel agreements, which were formed by high-level executives and carried out through conspiratorial meetings around the globe, included the following features: agreed-upon prices; agreed-upon volumes of sales worldwide; agreed-upon prices and volumes (market share allocation) on a country-by-country basis; exchanges among the conspirators of all types of otherwise competitively sensitive information, such as monthly sales figures by geographic area, prices charged (or bid) to customers in particular geographic areas, and prices to be charged (or bid) to specific customers; and sophisticated mechanisms to monitor and police the agreements.

Thus far, while much remains to be done, we have had great success in prosecuting these international cartels. In the food and feed additives industry alone, our efforts have resulted in criminal convictions or plea agreements against 9 companies and 10 individuals from 6 countries, and nearly $200 million in fines imposed or agreed to in the past 2 fiscal years -- including a $100 million fine imposed on Archer Daniels Midland Company and a $50 million fine imposed on Haarmann & Reimer Corporation, the U.S. subsidiary of the German-based pharmaceutical giant Bayer AG.

In our investigation in the graphite electrodes industry, in February of 1998 we charged Showa Denko Carbon, a U.S. subsidiary of a Japanese firm, with participating in an international cartel to fix the price and allocate market shares worldwide for graphite electrodes used in electric arc furnaces to melt scrap steel. The company agreed to plead guilty, cooperate in the Division's ongoing investigation, and ultimately paid a fine of $32.5 million. In April of 1998, another participant in that cartel, UCAR International, agreed to plead guilty and pay a fine of $110 million, the largest fine imposed in antitrust history. Last Thursday, another participant, the Japanese firm Tokai Carbon Co., agreed to plead guilty and pay a fine of $6 million. Sales of graphite electrodes in the United States during the term of the conspiracy were well over a billion dollars. This investigation is continuing.

Last fall, we achieved a tremendously important victory in our battle against international cartels, when the jury returned a verdict of guilty against three top executives of Archer Daniels Midland for masterminding their company's participation in the lysine cartel. These convictions send a strong deterrent message around the world that our commitment to vigorous enforcement against hard-core cartels includes prosecuting the top corporate brass in appropriate cases.

Notwithstanding our recent success, I am convinced that these prosecutions represent just the tip of the iceberg. At present, more than 30 U.S. antitrust grand juries -- approximately one-third of the Division's criminal investigations -- are looking into suspected international cartel activity. The subjects and targets of these investigations are located on five continents and in over 20 different countries. In more than half of the investigations, the volume of commerce affected over the course of the suspected conspiracy is well above $100 million; in some of them, the volume of commerce affected is over $1 billion per year.

The investigation and prosecution of international cartels creates a number of imposing challenges for the Division. In many cases, key documents and witnesses are located abroad -- out of the reach of U.S. subpoena power and search and seizure authority. In such cases, national boundaries may present the biggest hurdle to a successful prosecution of the cartel. For that reason, we

are aggressively pursuing cooperation agreements with foreign competition authorities to step up cooperation aimed at hardcore cartels.

To that end, we have been working in the Organization for Economic Cooperation and Development (OECD) to encourage OECD members toward more systematic and effective anti-cartel enforcement and international cooperation. Last spring, the OECD endorsed at the ministerial level our proposal encouraging member countries to enter into mutual assistance agreements to permit sharing evidence with foreign antitrust authorities, to the extent permitted by national laws, and to take another look at provisions in their laws that stand in the way of these cooperative efforts.

**International Merger Enforcement**

As trade and commerce have become increasingly globalized, inevitably there have been increasing numbers of mergers that cross international boundaries and thus are subject to review by more than one country's antitrust authority. To minimize the burden placed on merging parties by multi-jurisdictional antitrust review, and to minimize the conflicts that can result from differing conclusions regarding a merger, it is important that we establish and cultivate good relations with foreign enforcers and understand each other's merger enforcement policies and practices, and coordinate where we can. Given each jurisdiction's understandable interest in reviewing mergers that impact its markets, and in applying the substantive and procedural rules it deems

appropriate, navigating these waters is not easy. After our experience with the Boeing/McDonnell-Douglas merger -- where U.S. and European Commission authorities reached sharply differing conclusions regarding the merger -- we redoubled our efforts to minimize that kind of conflict, if not eliminate it altogether. I believe that our more recent experiences with the MCI/WorldCom merger and the Dresser/Halliburton merger, in which we and the EC shared our independent analyses of the transactions as they evolved, and ultimately reached essentially the same conclusions, are a good model for how close consultation in international merger enforcement can and should work.

**Positive Comity**

Let me now turn to positive comity. It grows out of a recognition that, because of legal and practical constraints that may come into play, effective enforcement in the global economy may require action by more than one country's antitrust authority.

Under a positive comity agreement, the antitrust authority of one country makes a preliminary determination that there are reasonable grounds for an antitrust investigation, typically in a case in which a corporation based in that country appears to have been denied access to the markets of another country. It then refers the matter, along with the preliminary analysis, to the antitrust authority whose home markets are most directly affected by the matter under investigation. After consultation with the foreign antitrust authority, and

depending on what conclusions the foreign authority reaches and what action it takes, the referring antitrust authority can accept the foreign authority's conclusions, seek to modify them, or pursue its own action.

Such an approach has many helpful aspects. First, competition authorities have a great stake in taking each other's referrals seriously, not only in the interest of promoting cooperative relations, but because their own consumers are affected. Second, such a process maximizes the likelihood that the kind of evidence necessary to properly decide such cases can be obtained, as the antitrust authority in whose country the conduct takes place generally has greater leverage to obtain it. Finally, this process can defuse trade tensions by providing a sensible, systematic approach to fact-gathering, reporting, and bilateral consultation among competition authorities.

We currently have cooperation agreements in place with the European Union, with Canada, and most recently with Israel, that have positive comity provisions, and we expect soon to have one in place with Japan. And as you know, last June we signed an enhanced agreement with the EU that provides additional details and outlines a formal protocol for referrals. We hope to reach agreements with other competition authorities as well.

As was discussed in the Subcommittee's hearing last fall, we now have a positive comity request pending with the European Commission regarding possible anticompetitive conduct by several European airlines that may be

preventing SABRE and other U.S.-based computer reservation systems from competing effectively in certain European countries. In January 1997, we requested that the EC investigate the matter, and we have been in regular contact with the EC to monitor progress. The EC issued a statement of objections against one of the European airlines, Air France, in March, which is a preliminary determination that the airline has anticompetitively discriminated against SABRE. Under EC procedures, Air France now has an opportunity to respond to the statement of objections, after which the EC will make a final decision. Subsequently, SABRE has reached agreements with two other European airlines, Lufthansa German Airlines and Scandinavian Airlines System (SAS), that provide for those airlines' enhanced participation in the SABRE system. We will be continuing to follow the EC's progress in this matter, and will take a close look at their supporting analysis for whatever decisions they reach regarding whether to take further action.

The computer reservation systems referral, our first such referral, has, I believe, thus far been a successful one, demonstrating that positive comity can be an important tool in the international antitrust enforcement arsenal. We have also gained valuable experience that we can apply in future referrals. This Subcommittee has played an important and constructive role in this process. Let me now turn to four steps we plan to take in future referrals, in light of our

experience and the input we have received from this Subcommittee and elsewhere, to help improve the positive comity process.

First, we agree that it is a useful idea to establish an intended time frame for completing an investigation that has been referred under a positive comity agreement. Our 1998 agreement with the EC provides for a presumptive time frame of six months. Based on our experience, we can now see that such a time frame will be unrealistic in some if not most cases. Indeed, many of our own investigations have taken considerably longer. We believe a better approach is to engage the foreign antitrust authority to whom we make the referral, after they have had a chance to familiarize themselves with the matter, but as soon as practicable, and arrive at an educated estimate. We would do so in full realization that the course of an antitrust investigation may take unpredictable turns and encounter unanticipated obstacles; but we would use the estimate to gauge the progress of the investigation as it goes forward.

Second, we agree that it is a useful idea to maintain regular contact with the foreign antitrust authority to which a matter has been referred under a positive comity agreement. Suggestions have been made that an update every six weeks, or more frequently in the event of a major development, and we believe that is a helpful and workable schedule to adopt.

Third, we agree that it is a useful idea that the complainant be kept generally apprised of progress in the matter. There are limitations on what we

can reveal to the complainant without compromising the investigation. We have a obligation not to reveal information provided to us in confidence by our foreign counterpart. But I think at a minimum we can convey to the complainant that we have been in recent contact with the foreign antitrust authority to whom we referred the matter, and, as appropriate, at times we may be able to provide more information. The complainant may also want to take advantage of whatever rights and opportunities it has in the foreign forum to directly obtain information; in some instances, it may thereby be able to obtain information directly that we would not be in a position to furnish, as well as obtain other important procedural rights.

Fourth, we agree that, having established a time frame for the investigation under a particular positive comity referral, when that time frame has run its course it is appropriate to take stock of where things stand and how we and our foreign counterparts can most effectively proceed. Of course, we would normally and will continue at all stages of a positive comity referral to consider these questions internally and to discuss them with our counterparts abroad. It should be kept in mind that, while we always reserve the right to initiate or resume our own investigation, there may well have been limitations on our own authority or practical ability to pursue the matter that led us to make the referral in the first place. If it was not feasible for us to pursue the matter ourselves initially, it may not become any more feasible later. And there may be very good reasons why

an investigation is taking longer than anticipated. But we would expect to reassess any referral we make at appropriate junctures, and the running of the agreed-upon time frame would certainly be one such juncture.

Positive comity is but one tool in our antitrust enforcement arsenal, a relatively new tool, and one that may not be practical to employ very frequently. But we believe it can be a useful tool in appropriate circumstances, and that its successful use is an important part of our effort to further strengthen international antitrust enforcement cooperation in general. We are committed to making it work as effectively as possible, and we appreciate the Subcommittee's interest and assistance.

**Conclusion**

Opening markets around the world to competition will require a sustained effort on the part of antitrust enforcement authorities in many countries. We are committed to that effort, and appreciate the continued support of this Subcommittee. We look forward to meeting the ongoing challenge to ensure that businesses can compete without being subject to anticompetitive behavior and that consumers can benefit from competition that produces low prices, high quality, and innovative goods and services.