



DEPARTMENT OF JUSTICE
Antitrust Division

**ANTICIPATING THE MILLENNIUM:
INTERNATIONAL ANTITRUST ENFORCEMENT
AT THE END OF THE TWENTIETH CENTURY**

Address by

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Good morning. It is an honor to be here again to speak about international antitrust issues before this distinguished audience, and on a panel with my friends Karel van Miert and Hideaki Kobayashi. Our slogan at the Antitrust Division these days is "globalization, doctrine, and deregulation." Fordham, of course, is very much a place to discuss the impact of globalization on the work of the Division, and that's what I will do this morning, although I will mention some of our work on doctrine and deregulation as well, because it would be foolish to pretend that international and domestic enforcement issues are neat and exclusive categories that have little to do with one another.

When I was here two years ago, I discussed three components of a program for ensuring effective antitrust enforcement in an age of global markets: one, the traditional U.S. model of applying one country's laws to conduct occurring wholly or partly outside that country, but where the effects of the conduct are felt in the enforcing country; two, the model of cooperation and coordination; and three, the model of positive comity. After being in the Antitrust Division for two years, it is even clearer to me now than it was then that these three components form a useful basis for discussing the successes and problems of international antitrust enforcement, although -- once again -- these components are not mutually exclusive, and in many individual cases will overlap. During the past year, the Antitrust Division has participated in important developments concerning all three components.

Our Enforcement Record in the Past Year

In several ways, the past year has been an annus mirabilis for the Antitrust Division (they told me that you people at Fordham would understand Latin). First and foremost, the amount of fines imposed by federal courts in FY97 in our criminal antitrust cases totalled over \$205 million; that number is roughly five times the previous record of FY95. In one sense, our enforcement

success is a tremendous achievement, and a great tribute to the hard-working men and women of the Antitrust Division. In another sense, however, it is a wake-up call for us, for other antitrust enforcers, and for victimized consumers, because the vast bulk of these fines was imposed, not in the domestic bid-rigging cases common in the 1980s and early 1990s, but in large international price-fixing conspiracies. Despite the fact that over 70 countries now have antitrust laws that prohibit cartel behavior, and that several large countries, including the United States, Canada, Japan, and Brazil, treat price-fixing as a crime, our experience during this last year has forcefully demonstrated that there are lots of people out there -- including many high-ranking officials of major multinational firms -- who are not getting the message. It is for this reason, among others, that we are giving serious consideration to asking Congress to increase significantly the current standard maximum fine for criminal antitrust violations.

Most of you already know -- and so I will not repeat -- the details of the Division's food additives price-fixing investigation, in which guilty pleas have been entered by Archer-Daniels-Midland, two Japanese firms, a Korean firm, a U.S. subsidiary of another Korean firm, two Japanese nationals, and one Korean national, all for participating in a conspiracy to fix the price of lysine worldwide; criminal charges are still pending in that case against three senior ADM officials (all U.S. citizens) and one Japanese citizen. In the related investigation of a conspiracy to fix the prices of citric acid worldwide, guilty pleas have been entered by ADM, a U.S. subsidiary of a German firm, two Swiss firms, one German national, and one Austrian national; and that investigation is continuing. Some of the fines in these cases were very large -- ADM paid \$100 million for its role in the two conspiracies and Haarman & Reimer, a U.S. subsidiary of Bayer AG, paid \$50 million for its role in the citric conspiracy -- but they were thoroughly justified, given the impact of these conspiracies on U.S. consumers. And just last month, two Dutch firms and two

Dutch nationals pled guilty and were sentenced to pay over \$10 million in fines for their part in a conspiracy to fix the price and allocate market shares worldwide for sodium gluconate, a type of industrial cleaner. That investigation also is ongoing.

Indeed, over 20 grand juries currently are looking into suspected international cartel activity, and the subjects and targets of these investigations are located in over 20 different countries on four continents. Some of the markets we are looking at involve hundreds of millions, or even billions, of dollars in annual sales worldwide. Obviously, in the food additives and sodium gluconate cases I just mentioned, we were able to assemble the evidence we needed to obtain convictions using our own enforcement powers. Just as obviously -- as our GE/DeBeers case three years ago demonstrated -- that will not always be so. And the impact of these cartels is felt not only by U.S. consumers, but by consumers around the world, and thus should be of concern not only to U.S. antitrust enforcers, but to our foreign counterparts. Those are the reasons that the Antitrust Division, both today and under former AAGs Jim Rill and Anne Bingaman, has placed so high a value on international antitrust cooperation and coordination.

While I'm on the subject of using our own enforcement powers, I want to turn for a moment to one of those doctrinal segments I promised you. In 1996, a district court in Boston dismissed criminal price-fixing charges against Nippon Paper Industries, a Japanese firm, for want of subject matter jurisdiction, based on that court's view that the indictment failed to charge any relevant conduct by the defendant in the United States. This unprecedented ruling greatly surprised us, because the grand jury had indicted Nippon Paper and others for conspiring with competitors in Japan to fix fax paper prices expressly for the purpose of raising prices to customers in the United States.

We appealed, and last March the First Circuit reversed the district court and reinstated the indictment, ruling --as we had urged -- that the Supreme Court's Hartford Fire decision "definitely establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States...", in criminal matters as well as in civil ones. United States v. Nippon Paper Co., 109 F.3d 1 (1st Cir. 1997). Nippon Paper has sought Supreme Court review, which the Department has opposed. As the Court of Appeals explained, in words that speak eloquently to our discussion today, "[w]e live in an age of international commerce, where decisions reached in one corner of the globe can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in [Nippon's] favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect." We agree. Needless to say, this case is very important to the Division's efforts to use U.S. antitrust laws against international cartels that harm U.S. consumers.

Before I become completely immersed in international issues, I do want to summarize, by way of context, the many other things the Division is doing these days. On the merger front, we and the FTC processed a record of over 3,700 Hart-Scott filings last year, and the Division brought 14 merger cases, all but one of which were settled by consent decree. We have pursued several important civil non-merger cases, including the Delta Dental case, in which our Health Care Task Force clarified an important area of antitrust law by establishing that most favored nation clauses are not always legal, but must be analyzed based on their effects. On another doctrinal matter, I was fortunate enough to argue on behalf of the United States last week in the Supreme Court case of State Oil v. Khan, in which we urged the Court to overrule its 30-year-old decision that maximum resale price maintenance is per se unlawful.

With respect to deregulation, the United States is continuing to deregulate long-regulated industries, and the Antitrust Division has an important role to play in ensuring that, by enhancing competition, deregulation lives up to its promise of providing consumers with lower prices, increased product quality and variety, and more innovation. As you know, the Division has long played a critical role in the deregulation of telecommunications markets, and we are playing a leading role in the continuing telecom deregulation now underway pursuant to last year's Telecom Act. In particular, we are working with the FCC and the states to develop rules for competition in local telephone service, we are working with the FCC to ensure industry compliance with the Telecom Act's market-opening steps and, as always, we are protecting the competitive process through enforcing the antitrust laws. Separately, we are beginning to work on the complex competitive issues raised by the increasing deregulation of U.S. energy markets, particularly electricity markets. In short, in purely domestic matters as in international ones, there has never been a time when competition, and the work of the Antitrust Division, were more varied, complex, or important to U.S. economic welfare than they are today.

International Cooperation and Coordination and the WTO

Even though Nippon Paper confirms -- as the Department has long believed -- that Congress has given us adequate subject matter jurisdictional tools to defend U.S. consumer interests against international cartels, most of you are well aware of the serious problems that international antitrust enforcement faces: our frequent inability to obtain crucial evidence located abroad, the possible lack of personal jurisdiction (not a big problem with multinational firms, but see DeBeers, but often a problem with smaller firms and culpable individuals), and the risk of arousing foreign sovereignty concerns. That is why cooperation and coordination between and among national antitrust authorities can play such an important role in enhancing the ability of U.S. and foreign antitrust

agencies to protect consumers. This is an area that has seen important developments in the last year, and important questions raised.

You have heard me and others talk about how crucial it is to get better tools for obtaining foreign-located evidence in antitrust cases. For a variety of reasons, our ability to do so is most highly developed in criminal cartel cases. Many of you probably know that the United States now has nearly 20 mutual legal assistance treaties (MLATs) in force, many of which cover assistance in antitrust matters, and roughly 15 other MLATs have been signed but not ratified. What is probably less well-known is that in the last couple of years, the Division has sought and received assistance in cartel investigations, not only from our good friends in Canada, but from many other countries as well (including Japan, I should note), pursuant to both MLAT requests and more traditional letters rogatory. This assistance -- which has included searches and seizures of documentary evidence, witness interviews, and other things as well -- has been of great value in several of our investigations, and we are enormously grateful for it. The United States also has a comprehensive network of extradition treaties, some of which (including those with Canada and Japan) contemplate extradition for antitrust crimes; while we have not sought to extradite people in the past, we will not hesitate to do so in appropriate cases. We also have continued to work closely with the European Commission's DG-IV on a number of civil law enforcement investigations in which the parties have permitted the two agencies to exchange confidential information -- two examples are the well-known Microsoft case and the more recent Nielsen case, which I will discuss in a few moments.

As you know, in 1994, at the Department's request, Congress enacted the International Antitrust Enforcement Assistance Act ("IAEAA"), 15 U.S.C. 6201-6212, in order to permit the Division and the Federal Trade Commission to negotiate antitrust mutual assistance agreements applicable to both criminal and civil matters. We have made some progress in attracting interest

among our foreign counterparts in possible antitrust mutual assistance agreements. In April, we and FTC announced that the United States and Australia have reached a proposed IAEEA-type agreement, under which the two countries' antitrust agencies would exchange evidence on a reciprocal basis for use in antitrust enforcement, and assist each other in obtaining evidence located in the other's country, while assuring that confidentiality information would be protected. We are very pleased with the proposed agreement, which we hope will be a model for future agreements with other major trading partners. We have published the proposed agreement in the Federal Register, and both we and the Australians are now reviewing the comments we have received and are pursuing our respective procedures for finalizing the agreement.

The process of developing a network of IAEEA agreements has been slower than we anticipated in 1994, in large part because most countries lack mutual assistance legislation that would permit their governments to negotiate IAEEA-type agreements. (Australia was an obvious first choice, among other reasons, because it already had the necessary legislation.) The Canadian antitrust authorities have been giving serious consideration to seeking IAEEA-like legislative authority, but -- as the Competition Bureau's Don Mercer explained here last year -- such a decision has been delayed by the pendency of non-antitrust litigation in Canada that has raised questions about the government's powers to seek foreign assistance in criminal enforcement matters generally.

While these developments are encouraging, they do not suggest that we will soon have a broad network of comprehensive IAEEA-type agreements, which is what I believe we ought to have in a globalizing world economy. Since I'm a pragmatist, though, I'm willing to look at practical alternatives, and it may be that cartel-only assistance agreements may be possible in some

cases where broader agreements are not. Given our recent experience, a focus on cartels would be thoroughly justified from the standpoint of law enforcement priorities.

Our proposals for antitrust mutual assistance agreements sometimes have triggered questions in foreign government and business circles because of two sorts of overlapping concerns. First, some of our foreign counterparts express concern, in a mutual assistance context, about what they refer to as U.S. extraterritoriality -- that is, they worry that we would use evidence they provide to bring market access ("footnote 159") cases against firms based in their countries, even though the principal harm to consumers would be in their own countries and the chief U.S. interest would be in protecting U.S. exporters; in short, there is concern about assisting the U.S. in antitrust enforcement matters that may look like trade cases. Second, there clearly are widespread concerns over sharing the types of confidential business-sensitive information that are important in many civil and merger cases. While I believe both of these concerns are vastly exaggerated, we nevertheless understand them: our pursuit of positive comity solutions -- which I will discuss below -- is in part a response to the first concern, and we certainly have no desire to impugn the validity of international antitrust enforcement by misusing sensitive business information; indeed, Congress included strong safeguards in the IAEAA against improper use of confidential information.

But neither of these concerns should exist with respect to assistance in cartel matters. As I have indicated, nearly all competition laws prohibit cartel behavior, and the evidence we seek in cartel cases rarely involves the type of business-sensitive information whose possible misuse is said to cause concern. (I will assume for present purposes that the business sensitivities in question do not extend to all information that might be evidence of criminal behavior. Firms involved in price-fixing may consider that sort of evidence sensitive, but not for reasons that generate much

sympathy among antitrust enforcers here or abroad.) Accordingly, if some of our trading partners have difficulties with full-blown IAEAA agreements for the reasons stated above, and given the increasingly serious threat that international cartels pose to the world economy, we are fully prepared to enter into mutual assistance agreements that cover only hard-core cartel behavior.

In order to advance the cause of effective anti-cartel enforcement, we have been working over the past year in the Organization for Economic Cooperation and Development (OECD) to underline the importance of enforcing national competition laws against hard-core cartels, and to encourage OECD members toward more systematic and effective anti-cartel enforcement cooperation. Last October, we introduced a paper seeking support for this concept, and next week I will participate in an important discussion at OECD of a proposed Recommendation that member countries have competition laws that effectively prohibit and deter hard-core cartels, with effective sanctions, enforcement procedures, and institutions, and that OECD countries cooperate to the extent possible, consistent with their important interests, in combatting such cartels. More specifically, the proposed Recommendation would encourage member countries to enter into mutual assistance agreements that would permit the sharing of evidence with foreign antitrust authorities, to the extent permitted by national laws, and would encourage members to take another look at provisions in their laws that stand in the way of these cooperative efforts. I have the impression that there is widespread support among OECD members for this important initiative. Although the proposed Recommendation would be advisory and actual bilateral agreements would have to be negotiated by individual countries, we hope that attaining an OECD consensus on the importance of vigorous enforcement action and cooperation against hard-core cartels will give momentum to this fight. To return to the lysine, citric acid, and sodium gluconate cases I mentioned earlier, those conspiracies involved many European and Asian firms, and surely inflicted

serious injury on European and Asian consumers. I would hope that European and Asian antitrust agencies would want to redress any such injury. The kind of cooperation contemplated by the proposed OECD Recommendation would help them do so.

Continuing with the subject of cooperation and coordination, I want to talk for a moment about what is surely the best-known example of dual antitrust enforcement during the past year: the Boeing/McDonnell Douglas merger case, in which the FTC and the EU antitrust authorities reached famously different conclusions. I'm not going to get into the merits, both because it was not a Division matter and because both Bob Pitofsky and Karl van Miert are here today and I suspect they will want to discuss it. But, as DG-IV's review process was drawing to a close, I did take part in consultations that the U.S. government requested with the European Commission pursuant to our cooperation agreement, and we had those consultations in Brussels, during which we explained how an EU prohibition of the merger could harm important U.S. interests.

Now, it is neither surprising nor objectionable that different national competition authorities could reach different results on a given merger, which may well have different competitive effects in different product or geographic markets in different countries. We have worked with other countries' antitrust agencies in numerous cases where our results differed from theirs in some way. What was unusual about Boeing is that the FTC and the EU reached different results in analyzing the same market: the worldwide market for large commercial aircraft. The point I want to make here is that however difficult this matter was for both U.S. and EU antitrust enforcers, our discussions would have been far more difficult had we not already established a strong relationship based on common antitrust enforcement interests.

Barry Hawk recently made a speech in which he noted that "[s]ome have suggested that the public controversy between the U.S. and the E.C. may result in a cooling of enforcement

cooperation between their respective competition authorities. However, it is more likely the opposite will occur." At the risk of agreeing too readily with my host, Barry is absolutely right on this one. As Barry suggested, the Boeing experience has made officials -- including, at least on this side of the Atlantic, officials outside the antitrust agencies -- keenly aware that, as much as we have in common, there remain important differences between U.S. and European antitrust law and enforcement philosophies. If we antitrust enforcers fail to manage these differences through effective cooperation and coordination mechanisms, there will be a greatly increased risk that particular antitrust disputes will become politicized, with the obvious adverse effects on sound and predictable antitrust enforcement. For my part, continuing to build a two-way relationship of understanding and trust with the European Commission is crucial to sound U.S. antitrust enforcement policy; indeed, as Commissioner Van Miert has indicated elsewhere, Antitrust Division and DG-IV staff recently have been exchanging ideas on the proposed American Airlines/British Airways transaction, which is of obvious interest to both agencies.

The mention of differences between U.S. and EU law and policy brings me to another subject of current interest bearing on cooperation and coordination: the recent creation of a World Trade Organization working group on trade and competition policy. I've discussed this development in several speeches over the past year, so I'll give you the short version today, and briefly explain why the United States takes a cautious approach to this WTO exercise.

In response to a proposal by the EU and other WTO members to initiate a work program on trade and competition in the WTO, last December's WTO Ministerial Declaration in Singapore included an agreement to "establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework." After two years,

the WTO General Council will determine how (or whether) the work of the group should proceed; as the Singapore Declaration stated, "[i]t is clearly understood that future negotiations, if any, regarding multilateral disciplines in th[is] area, will take place only after an explicit consensus decision is taken among WTO members regarding such negotiations." At this point, the new working group, under the expert leadership of Frederic Jenny of France, has met twice and is focussing on educating the many WTO members on basic competition law concepts.

I have serious reservations about expanding the current WTO exercise to encompass negotiations on some sort of competition rules, although I know that Commissioner van Miert has thought deeply about this issue and supports WTO negotiations in this area. As should be absolutely clear by now, the United States places a very high value on the practical law enforcement value of developing bilateral mutual assistance agreements and other cooperative efforts among antitrust agencies. I would hate to see our energy and attention diverted from these practical efforts at improving enforcement, particularly against international cartels, diminished by an unwieldy and theoretical WTO exercise. Indeed, a premature effort to negotiate rules at the WTO is fraught with risk; as Dan Tarullo, Assistant to the President for International Economic Policy, explained in the Financial Times in August, "a world competition code is not a good idea."

First, as the Boeing case illustrates so graphically, it would be very hard to reach agreement in the WTO on sound competition rules, which depend so much on the strict application of neutral legal and economic principles. If the U.S. and the EU diverge substantially in their views of important merger enforcement rules (and on related monopolization/abuse of dominance rules), imagine how difficult it would be for the 120-odd members of the WTO, roughly one-half of which do not have competition laws, to sort these issues out in a principled way. Second, precisely because it would be so difficult to do so, what one could expect instead would be a lowest-common-

denominator outcome in the development of WTO competition rules; that is, any WTO standards could end up legitimizing weak and ineffective rules, which certainly would not serve the goals either of trade liberalization or antitrust enforcement. Finally, although a universal commitment to the adoption and enforcement of competition laws, and cooperation in antitrust enforcement, are worthy goals, I believe that they go beyond core WTO concerns. How would the WTO even identify, much less remedy, violations of any multilateral competition obligations? I strongly suspect that nearly all of the world's 70-odd competition laws (accounting for nearly all important trading nations) would likely meet the requirements of any minimum substantive rules the WTO could adopt. So what is the point? On the other hand, if WTO dispute settlement were extended to individual decisions taken by national competition authorities -- setting aside the question of how the WTO would acquire the (often disputed) evidence required for a proper competition analysis -- this would interfere with national sovereignty concerning prosecutorial discretion and judicial decision-making, and could involve WTO panels in inappropriate reviews of witness credibility and highly confidential business information. For all these reasons, in my view the WTO working group should encourage participation by competition experts from around the world, foster among Members a common understanding of the relationship of competition matters to the WTO framework, and remain neutral regarding any conclusions that may be reached at the end of the group's two-year life. That is the course it has taken so far.

Positive Comity

Insofar as some people see the WTO exercise as a way to deal with market access problems that result from foreign anticompetitive conduct, I suggest that the "positive comity" approach offers a more practical and immediate way to deal with these problems. It is an option that I am

strongly committed to pursuing in market access cases, at least with respect to countries that have a history or tradition of strong and independent antitrust enforcement.

The positive comity concept is not a new one, having its roots in a 1967 OECD Recommendation on Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade. The term "positive comity" itself was coined by our EU colleagues and given emphasis in the 1991 U.S.-EU antitrust cooperation agreement; it is also a prominent feature of the 1995 cooperation agreement between the U.S. and Canada. Under these positive comity agreements, the antitrust agency of the country that believes its firms are being excluded from another country's markets as a result of private anticompetitive behavior reaches a preliminary conclusion that there are reasonable grounds for an investigation of the matter, perhaps under its own competition law but, in any event, under the competition law of the country in which the conduct is occurring. It then refers the matter, along with its preliminary analysis, to the competition authority whose home market is directly affected and that authority conducts the investigation and reports to, and consults with, the referring authority as to the nature of its investigation, its findings, and any remedy it is considering. The referring authority can then accept these results, seek to modify them, or take appropriate action under its own laws.

Let me mention two recent examples of how positive comity can work. We announced last December that we had closed an investigation into the way that AC Nielsen, a large U.S. firm, contracted its services for tracking retail sales, because Nielsen entered into formal undertakings with the European Commission, as a result of a DG-IV investigation, that would alleviate any competitive concerns. Our investigation had looked at whether Nielsen offered customers more favorable terms in countries where Nielsen had market power, if those customers also used Nielsen in countries where it faced significant competition. These contracting practices occurred mostly

outside the U.S., but they may have an adverse impact on U.S. export commerce by preventing exports by Nielsen's U.S. competitors. On the other hand, since most of the conduct occurred in Europe and had a direct impact on consumers there, the European Commission obviously had an interest in remedying the problem. And from the close contact between our respective investigative staffs, it became apparent that the Commission would effectively remedy the situation. In that context, it clearly made sense to let DG-IV take the lead.

In late April, we announced our first formal positive comity request to the EU under our 1991 agreement. In that matter, we asked DG-IV to investigate possible anticompetitive conduct by certain European airlines that may be preventing U.S.-based computer reservation systems from competing effectively in certain European countries. In looking at this matter, it became clear that the European Commission was in the best position to investigate because the alleged conduct occurred in Europe and consumers there would suffer if conduct has been diminished. Accordingly, we concluded that this was an appropriate case in which to use our positive comity mechanism. Alex Schaub recently announced that DG-IV was actively pursuing the matter.

The positive comity approach has several things to recommend it. First, competition authorities tend to have a stake in taking such complaints seriously, even if they do involve foreign access, because they also involve alleged harm to consumers in the country where the conduct is occurring. Second, such a process makes it much more likely that the evidence required to decide such cases properly can be obtained, since the conduct is occurring in the requested country, and jurisdictional and practical limitations may limit the ability of the requesting country to obtain the evidence. Finally, the positive comity approach should increase the credibility of competition laws and competition authorities, since this approach can address at least some market access issues through a systematic competition law-based approach.

Our serious commitment to positive comity is reflected in the fact that we, FTC, and European Commission officials have provisionally agreed on the text of a new agreement that would add to the positive comity provisions in our 1991 agreement a presumption that positive comity would be used in certain situations, and also would add details about each party's responsibilities. This agreement, which we hope to finalize soon, will not solve all the problems of cooperation and coordination that I have discussed today. In particular, it does not apply to merger reviews because of the short statutory deadlines on both sides of the Atlantic, and thus would not have been directly applicable to the Boeing matter. I believe, however, that the agreement will be an effective and important tool for both the U.S. and the EU antitrust agencies

Conclusion

As we approach the millenium, we need to build on the practical experience of the last few years to improve our ability to work with our foreign counterparts to do a better job of combatting anticompetitive behavior on a global scale. I am committed to doing so, through formal cooperation agreements and informal cooperation coordination, through positive comity referrals, and through use of the enforcement tools that Congress has given us. I suspect that the coming years will bring occasional controversies and misunderstandings as we find our way from broad theory to case-specific practice, but I am convinced that these challenges will be far outweighed by the benefits from the growth of sound antitrust enforcement, and of antitrust cooperation, throughout the world. And I am absolutely sure that as international antitrust enforcers, we will -- in the words of Benjamin Franklin -- either hang together or hang separately. Thank you.