



# DEPARTMENT OF JUSTICE

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## IMPROVING BILATERAL ANTITRUST COOPERATION

Remarks by

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This past October, the United States and Japan entered into an antitrust cooperation agreement. The agreement is similar to those entered into but United States with the EU in 1991 and with Canada in 1995.

Some observers thought it remarkable that the United States and Japan would enter into an antitrust agreement, in view of the recurring controversies between the two countries over allegations of market access impediments attributable to anticompetitive conduct in one or another Japanese market. Others thought it remarkable that it took more than 50 years from the inception of antitrust in so large an economy and so important a trading partner as Japan for us to agree on a framework for antitrust cooperation.

This morning, I want to talk about the ways in which antitrust cooperation has developed between United States and Japan, and to describe that development alongside its parallel development in the cases of Canada and the EU -- two key trading partners with which antitrust cooperation has reached an extensive and sophisticated level of development. Despite the substantially similar terms of the three cooperation agreements, our working relationships with the authorities in these jurisdictions have developed very differently. These differences suggest some generalizations about antitrust cooperation — or more accurately, they point up the risks of generalizing too readily in so complex an environment.

### Canada

Perhaps not surprisingly, in view of our long common border, the United States has been dealing longer with Canada on antitrust matters than with anyone else. In earlier years, the U.S.-Canada antitrust relationship was largely a contentious one. In the late 1940s, U.S. antitrust investigations into the Canadian paper industry led to the enactment of the first blocking laws,

those of the Canadian provinces of Ontario and Quebec. In the 1950s, the Canadian government reacted adversely to a U.S. investigation of a patent pool among Canadian radio and television manufacturers designed to exclude U.S.-manufactured products from the Canadian market.

The latter controversy led to the first effort of the two governments to work out a *modus vivendi* for antitrust matters – the Fulton-Rogers understanding of 1959. To describe this understanding as an antitrust cooperation agreement, however, would be generous. It did not in any way provide for enforcement cooperation as such.

Rather, what the Fulton-Rogers understanding did was to put in place a communications channel to manage disagreements that might arise when U.S. enforcement activities and Canadian industrial policies clashed with one another. It established between the U.S. and Canada the world's first antitrust notification and consultation mechanism, which became the prototype for the notification and consultation regime embedded in all subsequent U.S. bilateral antitrust agreements and in successive iterations of the OECD antitrust cooperation recommendation.

Antitrust arrangements between the U.S. and Canada became increasingly elaborate over time. Our proximity ensured that there would be a steady stream of potential conflicts to resolve, reaching their peak in the uranium controversy of the late 1970s and early 1980s. These later arrangements – the informal Mitchell-Basford understanding of 1969 and a fully elaborated bilateral agreement in 1984 – all focused on conflict avoidance or management.

The real change occurred after Canada's adoption in 1986 of a new Competition Act, which redirected Canada's resources and policies to establishing an effective Canadian antitrust regime. For the past dozen or so years, the emphasis has been on how the U.S. and Canada can mutually reinforce one another's efforts in antitrust enforcement.

This cooperation was facilitated enormously by the U.S.-Canada Mutual Legal Assistance Agreement, which came into effect in 1990. Mutual Legal Assistance Agreements – “MLATs” – are agreements that provide generally for assistance in criminal law enforcement, including the obtaining of evidence and sharing of information. The United States now has 36 MLATs in force, and another 15 signed but not yet ratified or in effect. Both the U.S. and Canada prosecute hardcore cartels as criminal offenses, and both countries recognized in the MLAT an opportunity to take antitrust cooperation to a new level. There had never been an instance before of one country’s seizing or compelling the production of antitrust evidence for the benefit of a foreign antitrust authority, but we and the Canadians saw in the MLAT an opportunity to cooperate in that way to make sure that cartels operating across our border had no opportunity to use the border as a shield.

That cooperation has been remarkably successful – although it is so well established that by now it may be less remarkable and better described simply as gratifying. In fact, anti-cartel enforcement has become the main playing field for the U.S. and Canada – the area in which we deal with each other on a continuous basis to a greater extent than is the case on mergers or on non-merger civil matters, although certainly not to the exclusion of significant cooperation in those areas as well.

The products of this cooperation have included coordinated searches on both sides of the border as well as other searches by one side on behalf of the other, and cases by both us and our Canadian counterparts that would have been far more difficult, if possible at all, to conclude successfully but for the other’s assistance. In fact, Canadian international cartel prosecutions of cartels first uncovered by the Antitrust Division have led in recent years to the imposition of fines

in Canada for violation of Canadian antitrust law of nearly US\$100 million.

### The European Union

Cooperation between the U.S. and the EU did not start with the two jurisdictions' 1991 agreement, but contact before then was sporadic. Interestingly, the only instances up to that point in which the U.S. had asked for consultations with a foreign antitrust authority in connection with a foreign antitrust case against U.S. companies had both involved the EU. These consultations involved the Commission's actions in the early 1980s against IBM and the Pulp, Paper and Paperboard Export Association, a U.S. Webb-Pomerene association.

The 1991 agreement was a European initiative, proposed by Sir Leon Brittan in a meeting the previous spring with then-Assistant Attorney General James Rill. The U.S. agreed from the outset that an agreement between the two was called for – not because problems had arisen in the past, but because it was clear that the growth of European antitrust enforcement would draw us closer together in the future. The European 1992 program to complete the common market was in full swing, bringing with it an increase in the powers and visibility of the Commission. The European Merger Regulation had just been adopted. The European Court of Justice had recently confirmed the international reach of European antitrust law in the Woodpulp case. All of these developments made it likely that we and the Commission often would find ourselves looking at the same conduct or transaction.

That has certainly proved to be the case, and especially so in the merger area. Virtually any sizable transaction involving international businesses these days is likely to be subject to review both in the U.S. and under the European Merger Regulation. The globalization of business and the merger wave of recent years have brought more than enough work to both of us.

And in cases in which the U.S. and EU are reviewing the same transaction, both jurisdictions consider themselves as having a stake in reaching, insofar as possible, consistent, or at the very least non-conflicting, outcomes.

The reasons for this should be evident. Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicions that can extend beyond the antitrust arena – as we witnessed in the Boeing/McDonnell Douglas matter. The Boeing/McDonnell Douglas experience led the agencies on both sides to draw a deep breath and commit themselves to extra and sustained efforts to make the coordination process work as well as it possibly can.

This effort is succeeding extraordinarily well. The close coordination on facts, analysis and remedies between the Antitrust Division and the Commission in our respective investigations of the MCI/WorldCom, Halliburton Dresser, and the recent Alcoa/Reynolds mergers are cases in point, but not the only ones. The FTC and the Commission have a similar track record in successive mergers they have both examined. The trust and level of cooperation we have established in these stand as a model of how the process ought to work. One indication of the point we have reached is the Administrative Arrangement worked out last spring in which the U.S. agencies and the Commission agreed, in cases in which both sides are examining the same matter, to let one another's officials attend the Commission's hearing or the U.S. agencies' final "pitch meetings," as the case may be – subject to the parties' consent and appropriate safeguards.

This last point leads me to insert a necessary footnote to this account. The depth of

cooperation I have just described has only been possible in those cases in which the merging parties have agreed to let it happen, by giving permission for the U.S. and European agencies to share with each other the information they have supplied to one or the other agency. That is happening increasingly often, however, as companies are often concluding that it is in their interest as well as that of the agencies to facilitate this kind of coordination.

One product of this cooperation has been a significant amount of substantive convergence. Simply put, although there are jurisprudential differences between U.S. and EU merger law, when we're fully engaged with one another in analyzing the same transaction for its impact on competition in the same markets, we have tended – not invariably, but with a high degree of consistency – to come to the same conclusions.

Of course, U.S.-EU cooperation is not limited to mergers, although it has developed most fully and occurs most often in these cases. In fact, the groundbreaking 1998 U.S.-EU positive comity agreement does not apply to mergers subject to U.S. Hart-Scott-Rodino procedures or to the EU Merger Regulation. But this agreement, as important as it is, does not generate the regular stream of coordinated matters that flows from our merger review responsibilities.

One area in which U.S.-EU cooperation has not developed as fully as one might wish is in anti-cartel enforcement. I won't belabor the emphasis the Antitrust Division gives to detecting and prosecuting international cartels, an effort that brought in more than \$1 billion dollars in criminal fines last year, and which continues to uncover cartels that have victimized consumers on all continents in enormous amounts over many years. EU antitrust law parallels our own in its unambiguous condemnation of these conspiracies, and the Commission, particularly in recent years, has invigorated its commitment to the pursuit of cartels by creating a new cartel unit,

among other steps.

What the U.S. and the EU lack, however, is the ability to share evidence they get in their cartel investigations – the kind of cooperation possible under our MLATs, or under the U.S.-Australia IAEAA agreement. As a consequence it is not possible, for example, for the U.S. and the Commission to coordinate searches in international cartel cases and pool the evidence obtained by our respective efforts -- something that would enhance both jurisdictions' anticartel efforts. Both U.S. and Commission officials often have noted that the absence of such a mechanism is a serious hindrance to effective anticartel cooperation, but so far the critical mass of member state support required on the European side has not been forthcoming – despite the fact that many European countries have themselves provided this kind of support in connection with our international cartel investigations under their national laws. This is something for the future – we hope the near future.

### Japan

Although the U.S.-Canada and U.S.-EC antitrust agreements are similar, U.S. cooperation with Canada and the EU thus far has developed along different paths. Although the new U.S. agreement with Japan is similar to the Canada and EU agreements, the U.S.-Japan antitrust relationship has developed along yet a third path.

The U.S. was, of course, closely involved in the inception of Japan's antitrust law in the years following World War II; and regular contact between the antitrust agencies in the two countries picked up again in the late 1970s, when U.S. antitrust officials flew to Tokyo for the first of what have become annual consultations, alternating between the U.S. and Japan, between the two countries' antitrust authorities.

In fact, the U.S. first broached the idea of entering into a U.S.-Japan antitrust agreement as long ago as 1979, and continued to raise the idea periodically during the '80s and '90s; but it was not until the mid'90s that serious discussions and eventually negotiations began, leading to the agreement we signed this past October.

An intense engagement on antitrust issues between the U.S. and Japan of a kind that has been unique among our bilateral relationships began with the Structural Impediments Initiative some ten years ago. The SII was an exercise in which the U.S. sought, among other things, to persuade – indeed, to negotiate – changes in Japan's antitrust regime that would make antitrust enforcement in that country more effective and more credible. The U.S. was driven in that negotiation by a perception that antitrust was less a force in Japan than was called for in as large, modern and strong an economy, and as important a partner in the world trading system, as Japan is.

These and more recent U.S.-Japan discussion aimed at strengthening antitrust in Japan, through the ongoing Enhanced Initiative on Deregulation and Competition Policy talks — which we have always viewed as a win-win objective for both countries — have been marked by significant successes, but have not been entirely without their costs. On the very substantial plus side of the ledger, during this period the penalties for violations of Japanese antitrust law have been significantly increased; the JFTC's budget and personnel strength have grown significantly, even during a period of fiscal austerity; criminal cartel prosecutions were reinstated, and there are signs of a new aggressiveness in anticartel enforcement generally.

At the same time, I think it has to be acknowledged that these successes have been

accompanied by a certain wariness between the U.S. and Japanese antitrust authorities that may have been an unavoidable consequence of finding ourselves on opposite sides of the trade negotiating table, however well-intended and even mutually beneficial the objective may be. And I think that is one reason, although undoubtedly not the sole reason, that day-to-day enforcement cooperation has developed more gradually between the U.S. and Japan than between the U.S. and its other largest trading partners.

There is every reason to hope and, I think, to expect, that this sort of cooperation will expand in the coming years, in the wake of the new cooperation agreement. We have already seen it start to happen, in serious exchanges we have had since the agreement was signed on anticartel enforcement and merger analysis. We have also seen the JFTC begin to focus seriously on the international cartel problem. Both we and the JFTC have, I believe, a newly energized determination to help each other in this common effort.

I don't, however, want to leave the impression that U.S.-Japan cooperation is a new or wholly undeveloped phenomenon. On the contrary, the Japanese authorities have gone to great lengths to cooperate in obtaining Japan-located evidence in Antitrust Division criminal cartel investigations, including searches and seizure of documents on the premises of companies in Japan. This kind of assistance is becoming more and more common in antitrust investigations, having begun under the U.S.-Canada MLAT and having spread now to some half dozen other countries; but Japan's help in one of our cartel cases, the Thermal Fax Paper prosecution, came early in the game and was an innovative and highly appreciated breakthrough at the time. While much of the assistance of this kind we've received has been recent and in ongoing investigations, and therefore can't be described in detail if at all, I am told that the Japanese newspapers carried

reports not long ago of another search and seizure in Japan carried out in response to a request from U.S. antitrust authorities.

#### Other Cooperation Arrangements

Canada, the EU and Japan are not, of course, the only jurisdictions with which the U.S. cooperates in antitrust matters, and the agreements to which I've referred are not the entire story of the United States' bilateral antitrust cooperation. To round out the picture, let me summarize the other ones.

The U.S. currently has nine antitrust agreements in place (or, in the case of two of them, signed but awaiting the completion of formal procedures in the other country) with seven jurisdictions. The oldest agreements are those with Germany (1976) and Australia (1982). The 1991 EU agreement, which became the model on which most subsequent agreements have been based, was followed by similar agreements with Canada (1995) and, last year, with Israel (signed but not yet in effect), Brazil (signed but not yet in effect) and Japan. In addition, in 1998 the U.S. and EU supplemented their 1991 agreement with an agreement elaborate on positive comity procedures which put in place a "who goes first" arrangement for certain kinds of cases. The U.S. and Canada are discussing a similar agreement.

All of these agreements are "soft" agreements — "soft" in the sense that they are executive agreements that are subordinate to and don't change or override the existing laws of either party — including, in particular, confidentiality laws that restrict the sharing of information. In 1994, at the Justice Department's urging, the U.S. Congress enacted and the President signed the International Antitrust Enforcement Assistance Act. This legislation authorizes antitrust agreements under which otherwise confidential information can be shared, and antitrust

authorities can use their investigative powers on one another's behalf. We signed the first of these agreements in 1997 with Australia, and the agreement went into effect in November of last year.

In addition, as I mentioned earlier, there are now 36 MLATs in force and 15 others signed but awaiting approvals or ratification, most of which potentially cover criminal antitrust matters. The list of instances in which other jurisdictions have obtained documents through subpoenas or searches-and seizures, or questioned witnesses, in connection with criminal cartel investigations, under an MLAT or as a discretionary matter under domestic authorizing legislation, is growing monthly. This assistance has been of tremendous help in our efforts to uncover cartels that have victimized not only U.S. consumers and business, but consumers and businesses around the globe.

### Conclusion

This is a far from exhaustive survey of the antitrust cooperation landscape, but I think these illustrations demonstrate some important points.

First, the growth in closeness and effectiveness of antitrust cooperation – and I refer here to cooperation in the sense of mutual assistance on individual investigations or cases – and the increase in the number of jurisdictions involved, has picked up dramatically in recent years. This growth is reflected, among other ways, in the work we've done on cartels with Canada; our cooperation on mergers with the EU; our emerging cooperation with Japan; the large number of countries that have asked our help in following up on the international cartel cases we have brought to light; the new U.S.-Australia IAEEA agreement; the proliferation of antitrust-ready MLATs and the terrific responses of many jurisdictions to our requests for assistance in getting evidence of cartel activity. There is every indication that this trend will continue.

Second, the job is far from completed. I mentioned one important gap in the present

matrix – the inability of the U.S. and EU authorities to share evidence with each other, particularly in cartel cases. There are other areas in which we think enhanced cooperation is needed, and we continue to work on these.

Third, there is no single template for antitrust cooperation. Each of our bilateral relationships has developed along a unique path, sometimes in ways neither party would have predicted. Each jurisdiction has its own laws, procedures, priorities, and legal culture, and these and other factors take cooperation in different directions. Our objective is always to work with our partners as effectively as we can to accomplish our basic shared mission – sound and effective antitrust enforcement – using the instruments that are available to us and creating new ones when they are needed.