DEPARTMENT OF JUSTICE

INTERNATIONAL COOPERATION AND THE FUTURE OF U.S. ANTITRUST ENFORCEMENT

Address by

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Before the
American Law Institute
72nd Annual Meeting

The Mayflower Hotel
Washington, DC

May 16, 1996

Good afternoon. It is a great honor for me to address the American Law Institute. To tell the truth, it's a little daunting to address this august body during the same week that you will have heard from the Chief Justice of the United States, the President of the American Bar Association, Judge Jack Weinstein, and -- tonight -- Solicitor General Drew Days. I will try to protect myself from comparison with those very distinguished speakers by speaking to you about a subject I doubt they will touch on -- antitrust law -- and in a context that is coming to assume great importance for the United States and its trading partners around the world: cooperation by enforcement agencies in international antitrust matters.

Let me take a moment to explain why you, and Americans generally, are affected by the antitrust laws and the procedural mechanisms by which we can enforce them in international cases. Our antitrust laws -- the Sherman Act, the Clayton Act, and the FTC Act, to mention the most important -- safeguard the competitive process in the U.S. economy. Since 1890, when Congress passed the Sherman Act, our antitrust laws have played a crucial role in creating and preserving the environment of economic opportunity that has transformed America in this century, and created the most open, dynamic and competitive economy in the world. That robust competition has stimulated innovation, promoted prosperity and contributed to the international success of the U.S. economy and U.S. businesses, creating exports and jobs. Competition also has ensured that our free market economy provides U.S. consumers with a vast array of goods and services at competitive prices. It is not too much to say that America's economic vitality rests in major part on its support for a competitive economy, as reflected in our historic, bipartisan commitment to the full enforcement of our antitrust laws.

THE GLOBALIZATION OF ANTITRUST

For many years, U.S. antitrust enforcement, like U.S. law enforcement generally, focussed principally on domestic matters. That was understandable, both because the U.S. economy was still relatively unaffected by international trade, and because our enforcement tools -- grand jury subpoenas, civil investigative demands, and the Federal Rules of Civil and Criminal Procedure -- were largely tailored to a domestic environment. We assumed that we could get the evidence and the relief we needed solely through the traditional tools of the U.S. legal system.

But the globalization of the world economy means that we can no longer afford to ignore the international dimension of competition, or the need for procedural mechanisms which allow us to enforce our laws fully, in all contexts, domestic and international. In a world economy, we must be vigilant to ensure that U.S. firms and consumers play on a level playing field -- one on which foreign

firms have to compete by the same rules as their U.S. counterparts, when those firms choose to take advantage of access to the U.S. domestic market. This is particularly true today, where nearly one quarter of our GDP is comprised of export and import trade; that's double what it was in 1945. And the internationalization of U.S. antitrust enforcement has grown in the same way: roughly 40 of the Antitrust Division's current civil and criminal investigations have significant international aspects, and over 25 of the Division's current grand juries are investigating international cartel activity -- which is ordinarily prosecuted as a federal crime, a felony. These twin statistics, in today's commercial environment, have a straightforward explanation: our rich domestic market is the most open in the world to international trade -- and, accordingly, the most attractive and potentially most vulnerable to international cartels.

As explained in the our Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations put in place last year, when Congress passed the Sherman Act 106 years ago, it had the foresight (reaffirmed in clarifying legislation in 1982) to give U.S. courts jurisdiction, not merely over purely domestic conduct that harms U.S. consumers and exporters, but also over anticompetitive conduct occurring abroad that has the requisite effects on U.S. domestic or export commerce. A long line of cases -- from the famous Alcoa case[1] in 1945 to the Hartford Fire case[2] just three years ago -- holds that, with respect to foreign import commerce (typically, cartels or other price-fixing arrangements), the Sherman Act applies to foreign conduct that is meant to produce and does produce some substantial effect in the United States.

Accordingly, since the American Tobacco case[3] of 1911, the Department of Justice has been prosecuting foreign firms for anticompetitive behavior that affects U.S. domestic commerce, including cases in which some or all of that behavior has occurred overseas. During and after World War II, for example, the Department brought a series of international cartel cases involving U.S. and

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[1] *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945). The chief aim of the government's suit in Alcoa was to break up Alcoa's domestic aluminum monopoly, but the government also sought relief against cartel behavior involving a Canadian firm (formerly controlled by Alcoa) and a number of European aluminum producers. The Alcoa court concluded that the Canadian firm's participation in a cartel agreement (made outside the United States) to limit foreign imports into the United States violated the Sherman Act. 148 F.2d at 444.

[2] *Hartford Fire Ins. Co. v. California,* 113 S.Ct. 2891 (1993).

[3] *United States v American Tobacco Co.*, 221 U.S. 106 (1911). *See, e.g., United States v. Hamburg-Amerikanische AG,* 239 U.S. 466 (1916), *United States v. Pacific & Arctic Ry. & Navigation Co.*, 228 U.S. 87 (1913.

foreign firms,[4] and we are bringing such cases today, as I will discuss in a moment with regard to our fax paper and plastic dinnerware cases. Our International Guidelines emphasize that we are committed to enforcing the U.S. antitrust laws to the fullest extent of the jurisdiction that Congress has conferred on us.

As to export commerce, in 1992 the Bush Administration announced its commitment to enforcing U.S. law in appropriate cases against anticompetitive conduct, whether occurring in the U.S. or abroad, that restrains U.S. export commerce, if the conduct has a direct, substantial, and reasonably foreseeable effect on our exports. Our 1995 International Guidelines take the same position. The Supreme Court approved assertion of U.S. jurisdiction over export restraints as long ago as 1969, in Zenith v. Hazeltine.[5] A recent example of the Department's use of this jurisdictional authority is the Pilkington case, in which the Department charged a British firm and its U.S. subsidiary with monopolizing the flat glass market. Our 1994 complaint charged that Pilkington entered into unreasonably restrictive licensing arrangements with its likely competitors, and for over three decades used these arrangements and threats of litigation to prevent U.S. firms from competing to design, build, and operate flat glass plants in other countries, even though it no longer had enforceable intellectual property rights to warrant such restriction. The case was settled by a consent decree;[6] we have estimated that this enforcement action could increase U.S. export revenues by as much as $1.25 billion by the turn of the century.

This full application of U.S. substantive law to foreign nationals is tempered by a concomitant and equally strong commitment to international comity. While our Guidelines mention eight specific comity factors that we will consider, the point in our comity analysis is to take into account the legitimate interests of foreign governments in our enforcement decisions. Indeed, our dedication to cooperative, mutual law enforcement as the most effective means for remedying anticompetitive conduct abroad which substantially affects U.S. commerce is a central theme both

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[4] *See, e.g., United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951); *United States v. General Elec. Co.*, 82 F.Supp. 753 (D.N.J. 1949). .*United States v. General Dyestuff Corp*, 57 F.Supp. 642 (S.D.N.Y 1944).

[5] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). In *Zenith*, the Court found that Sherman Act jurisdiction existed in a case where the U.S. defendant conspired with a Canadian patent pool to deny patent licenses to firms, including the U.S. plaintiff, that sought to export U.S.-made goods to Canada. 395 U.S. at 114 n.8.

[6] *United States v. Pilkington plc*, 1994-2 Trade Cas. (CCH) ¶70,842 (D. Ariz. 1994).

of our 1995 Guidelines, and of our approach to these issues over the last several years in two different Administrations.

INCREASING ADOPTION OF ANTITRUST PRINCIPALS INTERNATIONALLY

Not so long ago, U.S. antitrust enforcement in international matters occurred in the context of a world where many countries did not base their economies on market principles and where, even among the countries whose economies were market-based, the U.S. was nearly alone in its commitment to antitrust enforcement. In recent years, however, most countries around the world have recognized the great advantages of market-based economics. That recognition has usually included the realization that antitrust laws are a crucial guarantor of the integrity of free markets. Over 60 countries, representing more than 80% of the world's GNP, have now enacted antitrust laws, many of them within the last few years. This represents enormous progress in agreeing on the ideal shape of the playing field. But leveling the field in today's global economy means more than just adopting antitrust laws; it means enforcing them.

Those of you who have been involved in international litigation know that it is all very well for U.S. courts to possess jurisdiction over a matter in theory, but quite another thing for a litigant, government or private, to obtain relief against persons resident abroad, or where important evidence is located abroad. International litigation often raises questions of personal jurisdiction and service of process, and often presents great difficulties in obtaining documentary and testimonial evidence located abroad. These are problems of special relevance to antitrust enforcement, because our broad "effects" jurisdiction, coupled with historically lower priorities for antitrust enforcement in other countries, has sometimes caused differences of opinion between the United States and its trading partners about the outer limits of our jurisdiction. These differences, in turn, sometimes have frustrated our efforts to obtain foreign-located evidence, thereby thwarting full application of our law -- and consequent damage to both our import and export commerce.

Antitrust law enforcement is a very fact-intensive exercise. As any antitrust litigator can tell you, "If you can't get the facts, you don't have a case." When we encounter a situation where we cannot successfully prosecute a violation of our antitrust laws because we cannot gain access to the necessary evidence, American consumers and businesses bear the cost.

INTERNATIONAL COOPERATION: CHALLENGES AND PROGRESS

In many cases -- destined only to increase in number and importance to our economy -- the evidence that we need to prosecute a cartel or file a civil complaint challenging anticompetitive conduct abroad affecting U.S. commerce is located outside the United States. Remedies contemplated by foreign authorities looking at the same conduct can have effects in this country, just as our decrees and judgments can have effects in theirs. Further, the antitrust authorities in those countries normally have compulsory process, and the ability to obtain documents relevant to an investigation which we could have no realistic hope of obtaining. We also sometimes find that anticompetitive conduct abroad that threatens U.S. firms and U.S. markets can be more readily remedied by foreign antitrust authorities than by us. Needless to say, we cannot get the help we need unless we are both willing and able to help others. In antitrust, as in many other areas, law enforcement agencies, like U.S. businesses and citizens, face the challenge of adapting ourselves to an increasingly globalized economy. Just in the last three years, we have taken important new steps to do just that.

The concept of international law enforcement cooperation is not new, of course. For centuries, governments have worked together in law enforcement when it has been in their mutual interest, as when fugitives seek to evade punishment by fleeing the jurisdiction. The United States signed its first extradition treaty in 1794. Since the 1970s, the Department of Justice and the State Department have made it a high priority to negotiate mutual legal assistance treaties (MLATs), which provide for comprehensive reciprocal assistance between the United States and foreign governments in criminal matters. Among other things, these MLATs provide for obtaining documents, physical evidence, and testimony located in foreign countries for use in U.S. criminal prosecutions. We have MLATs in force with 19 countries on four continents, agreements with ten other countries are signed and awaiting ratification, and several other MLATs are being negotiated. Scores of requests for assistance are made (and granted) each year under these MLATs.

In addition, the United States has recently begun to work cooperatively with foreign governments through mutual assistance agreements in the tax and securities areas. Acting pursuant to 1988 federal legislation, the Securities and Exchange Commission has entered into nearly 20 such agreements, which have significantly enhanced its ability (and that of its foreign counterparts) to deal with cross-border securities fraud.

In short, even though the United States is occasionally accused of inappropriate "unilateralism" in international affairs, the fact is that the United States is by far the world's leading exponent and practitioner of cooperative efforts in law enforcement.

Cooperation can take many forms, and we are pursuing many different efforts around the world. As foreign governments come increasingly to understand the value of competition and antitrust enforcement, the U.S. antitrust agencies have provided assistance to countries that want to enact, and learn to enforce, antitrust laws. Over the past several years, the Department of Justice and the Federal Trade Commission (with funding from the Agency for International Development) have worked with over 25 countries in Eastern Europe, Latin America, Asia, Africa, and the former Soviet Union to advise on drafting antitrust legislation and enforcement guidelines, improving investigative and analytical techniques, and the like. We have sent our staff attorneys and staff economists to work for long periods in the offices of new antitrust agencies in Warsaw, Bratislava, Budapest, and Vilnius, and we will soon send people to Bucharest -- and perhaps to Kiev and Moscow. We have helped to turn swords into antitrust codes, and Eastern Europe and the world is a better place for the effort.

On a multilateral level, we have worked for years in the Organization for Economic Cooperation and Development (OECD) to build a consensus in that important body for sound antitrust laws and vigorous antitrust enforcement. Most recently, we have been working in OECD to emphasize the need for improved cooperation in enforcement; last summer, OECD adopted a new Recommendation that gives a high priority to such cooperation. Closer to home, the working group on trade and competition issues established under the North American Free Trade Agreement (NAFTA) is discussing how to improve antitrust cooperation among the NAFTA partners. Likewise, in March the 34 countries in the Free Trade Area of the Americas (FTAA) established a working party to examine the competition policies of FTAA countries and ways in which those countries can cooperate on antitrust matters. And the 18 countries in the Asia-Pacific Economic Cooperation group (APEC) are focussing on the importance of competition policy as a part of APEC's trade liberalization objectives.

In all these fora, the United States and many other countries are building the necessary foundation for meaningful antitrust enforcement cooperation -- a broad international consensus that sound antitrust enforcement benefits both individual countries and the international community as a whole.

In addition to these efforts, the United States has devoted substantial attention to building bilateral relationships with foreign antitrust agencies that are specifically directed at enhancing enforcement cooperation and reducing potential tensions or difficulties that may arise in particular proceedings. These relationships are reflected in our bilateral antitrust agreements with Germany (1976), Australia (1982), the European Union (1991),and Canada (1995). But, none of these agreements changes U.S. or foreign law, and thus none permits the exchange of the kind of confidential documents and testimony that is at the heart of antitrust analysis. But these agreements have encouraged more general exchanges of views on approaches to antitrust enforcement matters, and conflicts, and created the climate of trust that is crucial for joint enforcement action in the future.

I am happy to report that that climate of trust is now blossoming into full fledged cooperative prosecution of cases -- truly joint and parallel law enforcement. Let me give you some very recent examples.

First, joint civil enforcement with the EU. Our agreement with the EU does not permit us to share confidential information that is protected by U.S. and EU confidentiality statutes. But we have been able to conduct joint investigations where the private parties involved have agreed to waive confidentiality restrictions. Thus, in 1994, we and the EU were able to conduct an historic first-ever joint investigation, of Microsoft cooperation, and to arrive at a single coordinated remedy,[7] implemented by a virtually identical decree in the U.S. and undertaking in the EU, because Microsoft agreed to waive its confidentiality rights to permit sharing of confidential data held by each jurisdiction. Microsoft did so because it judged its own commercial interests as best served by a single, world-wide set of licensing rules -- underscoring the importance to business of meaningful cooperation by international enforcement agencies. Several other major coordinated investigations with the EU have followed in rapid succession with similar waivers from the affected parties, and currently are underway. It is fair to say that this shift in the U.S.-EU relationship from bilateral consultations about past cases to coordinated investigations of current cases, where the parties have consented, is an historic one to which both the U.S. and EU are committed. The benefits to consumers on both continents from a cooperative approach to international antitrust enforcement can, and I predict will, be immense.

[7] *See United States v. Microsoft Corp.*, 1995-2 Trade Cas. (CCH) ¶71,096 (D.D.C. 1995).

Our cooperative relationship with Canada offers a second example of true joint prosecution to the mutual benefit of both the U.S. and Canada, in the area of criminal antitrust enforcement. Our MLAT with Canada, which became effective in 1990, permits us to share evidence in criminal matters, and the recent thermal fax paper, plastic dinnerware, and ductile pipe cases show how cross-border cooperation has led to successful prosecution of international antitrust crimes.

In the last three years, we have worked closely with Canadian authorities in the fax paper cases. The U.S., in 1994-1995 charged six Japanese firms, one U.S. firm, two U.S. subsidiaries of Japanese corporations, the U.S. subsidiary of a Swedish firm, five Japanese executives, and one U.S. executive with price fixing in the $120 million a year fax paper market. So far, seven of the corporate defendants and one individual defendant have agreed to plead guilty in the U.S. and to pay a total of nearly $10.5 million in fines. Some of these same defendants have pleaded guilty to criminal violations of Canadian law and have agreed to pay substantial fines there as well. These convictions in both countries were possible only because of the sharing of confidential information which otherwise would have been available only to one of the two countries.

Similarly, in the plastic dinnerware price fixing case, the FBI and the Royal Canadian Mounted Police simultaneously executed search warrants in 1993 on both sides of the border, ultimately leading to U.S. guilty pleas in 1994 by three U.S. corporations and seven executives, including two Canadians, with fines totaling over $9 million and jail sentences for all seven individuals. That investigation is continuing. Finally, the Department and the Canadians conducted parallel investigations into anticompetitive behavior in the ductile pipe industry. While we concluded that we did not have sufficient evidence to prosecute under U.S. law, the Canadian authorities assembled a different body of evidence that was sufficient to obtain a guilty plea and record criminal fine last September from a Canadian subsidiary of a U.S. firm. As with Microsoft on the civil side with the EU, the fax paper, plastic dinnerware and ductile pipe cases are the first criminal cases investigated jointly with the full cooperation of a foreign enforcement agency, here the Canadian Bureau of Compeititon.

Taken together, these examples of successful civil and criminal cooperation against cross-border illegal conduct show the benefits of cooperation to both cooperating countries. Indeed, the concept of reciprocity -- of law enforcement value from the relationship for both parties -- is central to the success we and our sister agencies have enjoyed in these cases.

THE IAEAA AND THE FUTURE OF ANTITRUST COOPERATION

As many of you know, the traditional means of obtaining foreign-located testimony or documents -- in government or private litigation -- has been through letters rogatory, whereby a court in one country requests assistance from a court in another country. As many of you also know, no strong institutional relationship is created by the letters rogatory process, and that process, which is usually slow and quite unpredictable in result, is a very imperfect tool for cooperation. (I should note that the Department has, on occasion, successfully used letters rogatory to obtain foreign - located antitrust evidence.)

In 1993, we determined that the increasing globalization of the U.S. economy demanded that we try to put in place an improved mutual assistance mechanism for antitrust. (MLATs, while very useful, apply only to criminal matters, and only the Canadian MLAT specifically includes antitrust crimes.) So we looked at the MLAT model and to the very successful legislation that the SEC has used to enter into mutual assistance agreements in the securities area. What we particularly needed was Congressional authority to share with foreign governments business information that -- very properly -- is protected by strict statutory confidentiality constraints. In July 1994, Attorney General Janet Reno asked Congress for antitrust mutual assistance legislation that would cover both civil and criminal matters. Congress quickly responded, with overwhelmingly bipartisan support, and testimony from James Rill, my predecessor in the Bush Administration, by passing the International Antitrust Enforcement Assistance Act (IAEAA), which President Clinton signed into law in November 1994.

This new law gives the Department authority, along with the FTC, to enter into agreements with foreign antitrust agencies to exchange evidence on a reciprocal basis, for use in antitrust enforcement, and to assist each other in obtaining evidence located in the other's country, while ensuring that confidential information will be protected. The statute places some limits on the types of evidence we may exchange (for example, we may not disclose information obtained under our premerger notification statute), and we must decide with respect to each specific request whether the U.S. public interest supports providing the requested assistance. But it is clear that the IAEAA -- with its mandates of reciprocity and confidentiality -- will be a powerful tool for dealing with anticompetitive conduct occurring in a cross-border context. Mutual assistance agreements made under the statute will permit governments to come to grips with international cartels and other transnational anticompetitive conduct, in the growing number of cases where there is a shared and

material interest in cooperation -- cases in which each country will gain from the cooperation granted by the other.

I said the IAEAA "will be" a powerful tool because most other countries will need new legislation before they can enter into one of these agreements, just as we did. But we are receiving a very positive response from some of our major trading partners. For example, the Canadian government has announced that it is considering legislation that would amend its Competition Act in a parallel fashion to our new law; under their current schedule, legislation would be submitted to Parliament this Fall. An IAEAA agreement with our largest trading partner (Canada) obviously would be very important to us. Similarly, the Netherlands -- the third-largest source of foreign investment in the United States -- is considering new competition legislation that would permit the Dutch antitrust agency to enter into antitrust mutual assistance agreements based on reciprocity.

And we were gratified to see last July that a group of experts appointed by EU Competition Commissioner Karel Van Miert recommended in a report that the U.S.-EC antitrust cooperation agreement should be broadened to allow the exchange of confidential information, along the lines authorized by our IAEAA. The report cited not only "the importance of transatlantic relations," but also emphasized "the role fulfilled by the EC/US Agreement as a model for the development of cooperation between each of the two partners and other countries in the world." We could not agree more completely with our colleagues at the EU.

CONCLUSION

The accelerating pace of globalization of the economy must be accompanied by better procedural mechanisms to allow full international cooperation in antitrust. As business becomes increasingly transnational, two results will follow: first, more cases will involve conduct that occurs in one country but has anticompetitive effects in another; and second, more cases will require parallel and/or joint enforcement action in two or more countries (as in the Microsoft and fax paper cases). It is in no country's interest to ignore the first kind of case, or to have the second kind handled with the different national authorities sealed off from one another, in splendid -- and ineffective -- isolation.

Only a sustained commitment to international cooperation in antitrust enforcement will give us the global competitive economy that will benefit all the world's citizens. It will be fully consistent with developments in other areas of international law enforcement. And it will enable us to achieve one of the core missions of our antitrust laws in today's economy -- ensuring healthy competition in global markets for the benefit of American consumers and businesses. Thank you.