Department of Justice

INTERNATIONAL ANTITRUST POLICY -- A JUSTICE DEPARTMENT PERSPECTIVE

REMARKS OF

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I am delighted to be here this morning. This program, which Barry Hawk has been running so successfully for so long, has always been a special forum for discussion of cutting-edge international issues. These issues become all the more important as international antitrust issues increasingly have become a featured aspect of international economic policy.

These observations may seem self-evident to this internationally-oriented audience; they are apparent every day in the Antitrust Division's enforcement activities and the policy issues that concern us. This morning I intend to talk about some of the ways in which this globalization has come upon us. Then I want to identify a number of initiatives in which we are involved to meet these challenges -- among them, our new antitrust agreement with the Commission of the European Communities. Finally, I will have some observations about where we are headed and where it seems to me we ought to be headed.

I said a moment ago that the influence of international factors has become pervasive in our enforcement work. Our merger enforcement work is a good example of an area in which that has occurred. Mergers and acquisitions commonly involve foreign buyers or sellers. Mergers between U.S. firms commonly transfer ownership of subsidiaries or operations not only in the United States, but around the world. Information we need about the transaction and the markets involved regularly has to be sought from sources in many countries. These things have been true for many years, though never to the extent they are today.

A more recent development is the growing number of cases in which mergers we are reviewing under the Clayton Act also are being evaluated by our Canadian colleagues under Canada's Competition Act, and by our colleagues in Brussels under the new EC merger regulation -- or if the merger falls below EC thresholds, in London, Paris or Berlin. This increasing overlap in enforcement activity presents both opportunities and risks; and we are intent on finding new avenues for cooperation in this situation, rather than increased incidence of conflict. Our antitrust agreement with the European Commission, which I will describe in more detail shortly, is an important step in this direction.

International factors are not limited to the merger side of our enforcement work. Increasingly, they are playing a role in our enforcement against cartels as well. As a matter of general policy, where cartels aimed at fixing prices or allocating markets in this country are launched from abroad, we will not hesitate to prosecute their foreign as well as American participants, both individuals and firms. We have done so in the past and we will do so in the future. One very welcome new tool we have in this area is the treaty between the United States and Canada that went into effect last year, providing for mutual assistance in criminal law enforcement. Both the U.S. and Canada deal with hard-core antitrust offenses under criminal law, and our early experience with the treaty has been promising. Individuals and firms that victimize consumers in either Canada

or the United States clearly are going to have a harder time avoiding detection or conviction by hiding across the border.

These are examples of how our antitrust enforcement efforts have become increasing internationalized. On the other side of the coin, competition policy is playing an ever larger role in the international economy.

One area in which this has been so has been the Structural Impediments Initiative talks in which the United States and Japanese governments have been engaged for just over two years. As their name suggests, these discussions have been aimed at identifying and dealing with impediments in the structure of our economies and economic relationships that stand in the way of the fully-open, freely-competitive trade that ought to exist between the U.S. and Japan. One of the talks' central subjects has been competition policy. There is a widely-held view that a significant part of the rigidity and hostility to new entrants that many perceive in the Japanese market results from anticompetitive practices -- collusion, restraints on access to the distribution system, or other forms of anticompetitive behavior. To the extent they are present, these practices harm not only American and other foreign businesses seeking to sell into or operate in Japan, but harm Japan's consumers, who pay higher prices and are deprived of the opportunity to choose between domestic and foreign-produced goods and services.

Accordingly, we have strongly urged the Japanese government to make its antitrust enforcement system more effective; and the Japanese government has made significant commitments to move in that direction, although only time will tell how effective they are in practice. These commitments include the clarification of enforcement policy through the issuance of guidelines, including distribution guidelines on which the U.S. government, coordinating its efforts through the Antitrust Division, offered extensive comment through the drafting process; a commitment to make the process more transparent, by giving more publicity to enforcement actions; a commitment to take formal action rather than informal, non-public action, in most cases; an increase in deterrence of anticompetitive conduct, through higher fines and surcharges, and more frequent use of the rarely-invoked criminal antitrust provisions in Japanese law; and a commitment to explore ways to make it easier for firms or individuals that are harmed by anticompetitive practices to obtain remedies through private actions in the court system.

Competition policy is emerging as a critical factor in the structure of developing economies as well -- and in particular, the new capitalist economies in Eastern and Central Europe. From the earliest stages of these courageous nations' transition from political totalitarianism and central economic planning, there has been an acute realization that competition policy as embodied in Western antitrust laws is a critical aspect of the legal and institutional infrastructure they need to put in place as their

economies develop and become integrated with those of the developed market economies.

At the request of the Polish and Czechoslovak governments, the Antitrust Division and FTC have lawyer/economist teams in place in Warsaw and in Bratislava. Their mission is to provide technical assistance to the fledgling antitrust agencies in those countries as they tackle the novel and enormously complex issues of demonopolization, and the maintenance of competition as it emerges.

We have also been prepared to assist the Soviet Union and its republics. This past summer, shortly before the dramatic events in the Soviet Union in early September, we hosted a competition policy seminar for ten officials of the Soviet Union and the Russian, Ukraine and Khazakstan Republics, as part of a dialogue we hope can be resumed in the not-distant future.

This surge of interest in competition policy is not limited to Europe. In the last two years Chairman Steiger and I, or other Antitrust Division and FTC officials, have taken part in serious discussions of competition policy and antitrust enforcement in Mexico, Brazil, Venezuela and Kenya. There is, of course, every indication that this focus on markets rather government planning will expand even farther, and every reason why it should. As that occurs, I expect that we and our colleagues at the FTC will find ourselves increasingly called

upon to offer technical assistance, and will continue to contribute to this extraordinary evolution. To help meet these challenges, I have established a new Competition Policy Section in the Antitrust Division, whose main function will be to provide economic support for international activities.

Meeting the challenges presented by this globalization of antitrust is a priority. We are continually reexamining our activities and the tools available to us to make sure they are the right ones for the job.

I have already mentioned some of the other initiatives we have taken to meet this challenge: our efforts to establish a level antitrust playing field with Japan to help achieve an open and competitive trading and investment environment; our commitment to providing solid technical assistance to the governments, and particularly to the fledgling antitrust agencies, in Eastern and Central Europe; and our new antitrust cooperation agreement with the EC. Our agreement with the EC is just over a month old, and is an important and positive step toward more effective antitrust enforcement in the global economy.

Why is the agreement an important one? Quite apart from its specific provisions, the agreement is important because the U.S.-EC economic relationship is important, and because antitrust is a critical aspect of economic policy for both of us. The EC is our

largest trading partner, the largest source of direct investment in the U.S. and the largest recipient of U.S. direct investment. In this setting, the way in which each of us enforces our antitrust laws can have a significant impact on the other's economy. Happily, we and the EC share a deep-seated commitment to competition, and to antitrust as the way to preserve and enhance it. This agreement provides a mechanism for reinforcing each other's efforts to keep our markets open and efficient through sound antitrust enforcement, for the benefit of our consumers and industries.

The agreement provides for improved antitrust enforcement cooperation and coordination, and sets out principles for avoiding or minimizing differences that might arise. Under the agreement:

1. Each side will notify the other of antitrust enforcement activities or competition advocacy filings with regulatory agencies that may affect the other's important interests.

2. EC and U.S. antitrust officials will meet regularly.

3. We will exchange information relevant to antitrust enforcement and policy, subject to our respective laws governing confidentiality -- for example, grand jury

information, or information from civil investigative demands or premerger filings.

4. Each side will take the other's important interests into account in enforcing its antitrust laws, with the aim of avoiding or minimizing the possibility of working at cross purposes.

The EC agreement is similar to our other agreements in its basic objectives: enforcement cooperation and conflict avoidance. Like our other agreements, it provides for notification and consultation as the key mechanisms for triggering cooperation and avoiding misunderstanding.

But the EC agreement goes beyond our earlier agreements in three very important ways:

-- It provides for coordinated investigations where we and the European Commission are looking at related conduct, if both sides conclude it would be advantageous to enter into that sort of arrangement.

-- We can ask the EC to take action under its antitrust laws against conduct in Europe that harms both its consumers and our exporters, and they can ask us to act if the situation is reversed.

-- The agreement describes in more detail the factors each side will take into account in trying to carry out its enforcement responsibilities in a way that accommodates conflicting interests of the other side.

We have been referring informally to this latter provision as the "positive comity" provision. Ordinarily we think of comity in the international antitrust context as a principle that may lead one side to defer in order to avoid harm to significant interests on the other side. The "positive comity" concept contemplates not that one side will defer, but that it might affirmatively take action against anticompetitive conduct that injures the other party as well.

It is far too early to describe with complete confidence what forms cooperation and coordination under the agreement will take, how extensive they will be, or how successful we and the EC will be in avoiding conflict as our antitrust policies increasingly overlap on this shrinking globe. Experience teaches us that the full impact of these agreements cannot be predicted just by analyzing their text. For example, our 1982 antitrust agreement with Australia brought about a sea change in our antitrust relations with that government -- even though few of the specific conflict-avoidance mechanisms provided in the agreement have ever been invoked. Yet from the day the agreement was signed, in an intangible but unmistakable way our governments

moved from an atmosphere of wariness over extraterritoriality issues to one of trust and cooperation in antitrust.

Similarly, one of the most important outgrowths of our 1984 Canadian agreement would have been hard to predict just from reading its text. Much of the Canadian agreement deals with avoiding and resolving conflicts, in response to well-known differences over jurisdiction that had arisen from time to time between us. The agreement has been highly valuable in that realm.

Equally important, however, the agreement spawned a remarkable degree of day-to-day cooperation across the full range of our enforcement activities. That cooperation continues to grow. Shortly after I came to the Antitrust Division we initiated annual consultations at the head-of-agency level among Howard Wetston, Chairman Steiger and myself; and we quickly found that our agenda was so full that we now hold these meetings twice yearly. The next one will occur this coming week in Canada.

This history, and the close relationship we currently enjoy with our EC counterparts, make me optimistic about prospects for cooperation under the new EC agreement. The agreement provides for semiannual meetings between us, and the first of those sessions since the agreement was signed will take place in Brussels the week after next. I know there is enthusiasm on our side, which I have every reason to believe is matched in

Brussels, to get off to a running start with an exploration of effective and innovative forms of procedural and substantive cooperation.

Before leaving the subject of the EC agreement, which as you can see I am very positive about, I want to address some recent commentaries about its implications. Some of you may have seen suggestions in a Wall Street Journal editorial and in reports of speculation by unnamed commentators in Brussels that the agreement is meant as a vehicle for the U.S. and the EC in some way to combine forces against Japan. That speculation is completely unfounded.

Antitrust cooperation is aimed at fostering competitive, open and efficient markets. That is the sole objective of our antitrust relations with the EC, with Japan, with Canada, and with our other trading partners. The target of our cooperation is anticompetitive conduct, whatever and wherever its source. The notion that cooperation between the U.S. and the EC will somehow result in a combination against Japan has no foundation in the agreement itself or in common sense.

Our EC agreement does not, of course, bring us to the stage of a harmonized antitrust scheme for the U.S. and the EC. Speculation during the course of negotiations that we were moving in that direction was, I am afraid, far from what was realistically intended. But I firmly believe that antitrust

harmonization -- not just bilaterally, but among at least the world's major trading nations -- is the objective toward which we should be working. I would like to spend the time I have remaining this morning saying something about it.

Harmonization has become a popular theme in the antitrust world recently. It was the major focus of the very fine report finished this summer by a Special Committee on International Antitrust of the American Bar Association's Antitrust. The OECD Ministerial Meeting earlier this year noted that "recent work in [OECD] on competition law and policy provides the foundation for greater policy convergence and progress toward updating and strengthening existing rules and arrangements (including both policy principles and procedures) for international cooperation in this area."[1]

The OECD's Committee on Competition Law and Policy, whose working party on antitrust cooperation traditionally has been chaired by the Assistant Attorney General in charge of the Antitrust Division, will meet two weeks from now to engage in concentrated efforts to carry out this mandate. The European Community and the EFTA countries have been negotiating to create an enlarged European Economic Area, a key feature of which would be a merger of competition law. Australia and New Zealand have moved in that direction with their Closer Economic Relations

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[1] OECD Communique at Par. 24.

Agreement. And some very respected figures in the field have even suggested that it is time to think about a world antitrust law and supranational antitrust agency, perhaps as part of the GATT -- a modern version of the still-born post-war Havana Charter.[2]

Several factors account for this recent surge of interest in antitrust harmonization. Chief among them is the simple and correct intuition that in an increasingly transnational business environment, the rules of the game should be as consistent as possible from place to place. Competition law is increasing in importance as one of the key rules of the game, as a key tool in combatting anticompetitive conduct that impedes economic efficiency and can act as an invisible trade barrier. The reinvigoration of Canadian antitrust law with the enactment of the 1986 Competition Act, the new EC Merger Regulation, the new energy that has begun to emerge in Japan's antitrust enforcement, and our own continuing dedication to sound and vigorous enforcement, are examples. But the recognition of the importance of competition policy is far more widespread than these examples. In recent years countries as diverse as Czechoslovakia and Brazil, Poland and Italy, and the Russian Republic and Kenya,

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[2] See 61 Antitrust & Trade Reg. Rep. (BNA) 322 (Sept. 12, 1991 (Interview with Prof. Dr. Wolfgang Kartte, President of the German Federal Cartel Office; Address by the Right Hon. Sir Leon Brittan to the EC Chamber of Commerce, New York, Competition Policy in the European Community: The New Merger Regulation, March 26, 1990; Alan Riding, Top Official at Gatt Faces a Round in Crisis, New York Times, Dec. 3, 1990, at D10 (GATT Director-General Arthur Dunkel).

have enacted new antitrust laws and created agencies to enforce them.

This expansion of antitrust enforcement in an increasing number of jurisdictions has prompted a variety of concerns. One set of concerns arises from the possibility that different rules will be applied from country to country to the same or similar transactions. These variations may create inefficiencies -- if, for example, a firm has to use different kinds of distribution systems from country to country to comply with different antitrust authorities' approaches to vertical restraints. This is a legitimate concern; but of course, antitrust rules are just one of many legal requirements and differing consumer preferences to which firms must adjust from market to market. It would take a degree of legal and cultural homogenization that is unachievable, and is probably not desirable, to eliminate these differences entirely.

Another concern is that some countries may simply not have gotten their antitrust rules, or the way in which they are applied, right. If antitrust enforcement is supposed to promote competition and enhance efficiency, and two jurisdictions are enforcing differently in regard to the same kind of conduct, one of them may be wrong -- and to that extent, it may be imposing inefficiencies on the marketplace and harming firms that compete in it. Where foreign firms are particularly disadvantaged as a result, and international trade and investment are distorted,

this concern takes on an international dimension. Our bilateral Structural Impediments Initiative talks with the Japanese government have addressed issues of this kind. Similar concerns of a more general nature have led some observers to suggest the need for harmonized global antitrust standards.

Still another concern that has fed the recent interest in harmonization is the possibility that one country's antitrust enforcement may clash with significant interests of another country. I have been following, as I expect many of you have, the controversy over the EC's decision early this month to prohibit the acquisition of De Havilland, a Canadian manufacturer of turboprop aircraft, by a rival French-Italian consortium. The decision has stirred -- more accurately, renewed - an intense debate within the Community over whether merger decisions should be based on industrial policy as well as competition considerations. But it has also been controversial in Canada, where the government appears to have favored the transaction in order to ensure the survival of the ailing De Havilland. One former Canadian trade official cited the De Havilland episode as demonstrating the need for a supra-national body to make decisions in cases that cross national boundaries.[3]

All of these concerns are real, and call for serious and immediate work toward the goal of harmonizing antitrust

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[3] Remarks of Sylvia Ostry, reported at 61 Antitrust & Trade Reg. Rep. (BNA) 434 (Oct. 10, 1991).

principles and procedures. I am not, however, among those who believe the time is ripe for a binding international antitrust code or a supranational antitrust agency. To begin with, while we are approaching a broad and important global consensus about the importance of competition policy, we cannot lose sight of the fundamental differences that remain. These are not differences of detail, but fundamental differences about the objectives of competition policy.

Even among jurisdictions that would seem to have, and ought to have, a basically similar approach, these differences are significant. Consider the United States, the EC and Canada. In the United States, it is generally accepted that the object of our antitrust laws is to enhance consumer welfare -- although even here the consensus is less than perfect, and has certainly not been consistent throughout our 100-year antitrust history.

In the EC, however, the basic objective of competition law is the integration of the economies of the Community's member states, an objective which is generally but not necessarily consistent with its secondary objective of promoting effective competition. Canada's 1986 Competition Act is intended to maintain and encourage competition in Canada, but is also expressly intended to expand Canadian firms' opportunities to participate in world markets, and to protect small and medium-sized firms. More generally, as the Financial Times recently noted, "[o]nly half of OECD members have merger policies,

enforced with varying rigour and according to differing criteria. Attitudes to restrictive trade practices diverge still more widely."[4]

These are not minor differences, and in many cases -- especially the hard ones -- they may well determine the outcome. For all the recent discussion of the need for harmonization, I do not see evidence of a movement to compromise these basic policies for the sake of uniformity, or to cede discretion to apply them to a supranational body.

To be sure, although I would be reluctant to compromise our hard-won achievements in antitrust law and policy in the interest of global uniformity, I could be tempted to try to sell the rest of the world on enacting the Sherman and Clayton Acts and interpreting and enforcing them the way we do.

But I wouldn't expect totally to succeed, nor am I sure it would be a good idea even if it were possible. Whenever I am inclined in that direction, I think about what the antitrust world would look like if we had succeeded in, for example, 1970 in achieving a global agreement to enforce antitrust laws everywhere in precisely the way we were doing it then.

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[4] Antitrust in Global Markets, Financial Times, Sept. 27, 1991, at 16.

One could have nightmares thinking about an antitrust world and with Schwinn[5], Von's Grocery[6], and without GTE Sylvania[7], General Dynamics[8], Broadcast Music[9], Hyde[10], Monsanto[11], and Sharp[12]. And while I think we have managed in the United States in 1991 to come close to where we ought to be, we should be cautious about tying our successors' hands by making future evolution dependent now on achieving global consensus about its direction.

That said, much progress has been made, and there is much that can be done, to promote the substantive and procedural harmonization of antitrust rules. To take a few examples, the U.S. and Canada take a generally similar analytic approach to merger analysis under our respective merger guidelines, a similarity that facilitates business planning in the increasingly integrated North American market. The EC is still evolving its

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[5] U.S. v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

[6] U.S. v. Von's Grocery, 384 U.S. 270 (1966).

[7] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[8] U.S. v. General Dynamics Corp., 415 U.S. 486 (1974).

[9] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[10] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

[11] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

[12] Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

substantive approach to merger analysis, and will of course make choices based on the dictates of its domestic law and policies. But it clearly is in our common interest to have as consistent an approach as possible to mergers, and I believe the cooperation and consultation that will occur under our new antitrust agreement will move us toward convergence.

The ABA Antitrust Section's International Antitrust Task Force, to which I referred earlier, recommended efforts to harmonize not only substantive standards but the timing and content of premerger notification requirements. I agree: it should not be necessary for firms engaged in international mergers to have to answer the same questions in different ways several times over in Washington, Ottawa and Brussels. It ought to be possible for the agencies to develop a common approach in the way we seek similar information for similar purposes, and I would like to see discussions along these lines as an item on our near term agenda.

In another area of convergence, an increasing number of countries are recognizing that price fixing and bid rigging are a serious economic threat that can only be deterred by serious penalties. I would like to think the success of our own enforcement activities, and the efforts we have made to convince our colleagues abroad, have been influential in bringing this change about. In the past few years the EC, Germany, France, Japan and Canada have been among the jurisdictions that have

imposed multi-million dollar fines for these offenses, and the trend is accelerating.

Jurisdictional approaches are converging, as well. Not long ago, the United States was one of the few jurisdictions unashamedly to hold the view that effective antitrust enforcement in a world of transnational business could not be limited to conduct confined within one's own borders. Today, the EC's jurisdiction to reach offshore conspiracies implemented in the common market is firmly established, and countries from Australia to Czechoslovakia have antitrust laws that can reach across borders. The challenge is no longer to win disputes over jurisdictional principles, but to manage sensitively and cooperatively those antitrust investigations and proceedings that have transnational impact.

The United States has for some time relied on the principle of comity in its international enforcement -- an undertaking to hear and to take account of the interests of our trading partners in antitrust matters that significantly affect them. We have done so under the 1986 OECD Recommendation, and have incorporated similar two-way obligations into our bilateral antitrust agreements. In our new antitrust agreement with the EC, the European Commission has for the first time formally committed itself to apply similar principles. We expect they will provide a solid foundation for a cooperative and constructive antitrust relationship.

I would like to see us, and our colleagues abroad, capitalize on consensus we seem to be reaching in these two areas -- that covert collusion among competitors should not be tolerated, and that antitrust enforcement cannot be confined to local conduct. As the ABA report recognized in another of its recommendations, the time is ripe for a shared commitment to detect, eliminate and deter private cartel activity that operates across borders, and for increased international cooperation toward that end. The U.S. - Canada mutual legal assistance treaty, in the context of a shared commitment to these principles, will help us accomplish that objective in North America. I would like to see progress toward the day when there are no other borders to hide behind.

Antitrust enforcers and the business community have a common interest in harmonization, because they have a common interest in what it will bring about: sounder rules of the game, more open and efficient markets, and more efficient enforcement from the standpoint of those who apply the rules and those to whom the rules are applied. But it is important to remember that harmonization is not an end in itself. Harmonization around sound rules and procedures can represent a major gain for all concerned; harmonization around unsound ones can be very costly.

How do we achieve harmonization based on sound principles? Unfortunately, there are no magic bullets. We will have to work

areas in which there is consensus and look for ways in which relatively simple alterations in policies, methods or procedures will have significant impact.

We are involved in the OECD in an examination of ways to achieve greater convergence of antitrust rules and procedures, and I am optimistic that our work there will produce significant results. Beyond the existing mechanisms for engagement, I would like to see more contact among the top antitrust policy officials of the leading industrial nations to explore these themes, to discuss priorities, and to realistically and candidly examine the potential for expanded cooperation. I know that a number of our counterparts share that view.

We are living in an extraordinary period. Few would have predicted the events of the past two years in the Soviet Union and Eastern Europe, the recent pace of integration in Western Europe, the fervor with which planned or developing economies in other parts of the world have begun to look toward market economics, or the pace at which technology is shrinking the globe. Those of us involved with competition policy are privileged to have important roles in these unfolding events, and a responsibility to be sure our substantive and procedural tools are up to it. I welcome the challenge.