



DEPARTMENT OF JUSTICE

THE WAR AGAINST INTERNATIONAL CARTELS: LESSONS FROM THE BATTLEFRONT

Address by

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Good morning. It is a real pleasure to be here at Fordham with antitrust enforcers and counsel from both sides of the Atlantic, and an honor to be addressing this forum for a third time. Once again, Barry Hawk has devised an exciting program, and I confess that I am especially interested in hearing what my good friend Karel Van Miert says later this morning. When he was EC Commissioner for Competition, Karel was well known for his forthright statements of view, and so now that he has been liberated from the constraints imposed by government service, I know that no punches will be pulled; I just hope Karel doesn't throw any at me.

The Antitrust Division has been very busy during the past year. We and the Federal Trade Commission processed nearly 4,700 Hart-Scott filings in the fiscal year that just ended, and the Division alone challenged 46 mergers, including filing 21 merger cases; nearly all of these matters were resolved by consent decree, or by the unilateral action of the parties in abandoning the transactions or restructuring them to solve the competitive problems. (Bob Pitofsky will discuss the FTC's merger enforcement successes later in this program.) Aside from merger work, the Division filed several important civil non-merger cases, including the *Dentsply* case, where we sued the dominant manufacturer of false teeth in the U.S. -- yes, false teeth -- for unlawfully maintaining its monopoly by depriving its rivals of effective distribution networks. As you may know, we also filed a lawsuit against American Airlines for monopolizing and attempting to monopolize airline passenger service to and from DFW Airport; in our view, hub carriers cannot be permitted to use predatory tactics to keep new entrants out of their markets. And, as you cannot help but know, we are now awaiting the district court's issuance of findings of fact in our landmark *Microsoft* litigation.

I. THE WIDENING WAR AGAINST INTERNATIONAL CARTELS.

As important as all these matters are, I'd like to focus today on an area of antitrust enforcement that is not, I think, taken sufficiently seriously in some quarters, including many boardrooms -- the problem of international cartels. Now, some of you may say, "You guys from the Antitrust Division talk about your problems and successes in international cartel enforcement every time you come here. Why is this different?" Based on our own recent experiences, I am convinced that it *is* different, that in part because of our successful prosecutions this year in the *Vitamins* case, we are seeing the dawn of a new era in anti-cartel enforcement around the world -- not just in the U.S. And I believe that we can derive, from our recent common experiences with international cartels, some broader lessons about international antitrust enforcement at the end of this century.

Let me start with the obvious: cartel behavior (price-fixing, market allocation, and bid-rigging) is bad for consumers, bad for business, and bad for efficient markets generally. And let me be very clear: these cartels are the equivalent of theft by well-dressed thieves, and they deserve unequivocal public condemnation. Remarkably, even today, a few lonely ideologues argue that cartels really do no harm, that they are inherently short-lived and ineffectual. As I understand their position, these misguided souls believe that the savvy cartel conspirators who spend so much time and effort creating, maintaining, and concealing their fraudulent agreements are simply deluding themselves in thinking that they understand their own businesses or that they could possibly have any collective effect on prices or output.

My response: get real, just look at our cases. (We have a handout here today to help you do that.) In the *Lysine* case, prices went up about 70% in the first three months of the conspiracy alone, in a market with roughly \$500 million in annual sales worldwide; as a result of the *Citric Acid*

conspiracy, list prices were raised by more than 30% to U.S. customers, resulting in hundreds of millions of dollars in added revenue to the conspirators. And take our most recent example, the *Vitamins* case. The *Vitamins* conspirators are large, sophisticated firms that spent millions of dollars and thousands of employee hours to implement and hide their cartel for a decade. They have agreed to pay many hundreds of millions in fines to the U.S. and Canada, have seen their executives go to jail, and now face the serious prospect of paying very large additional sums in civil damages to the customers they have cheated. Can anyone argue with a straight face that these firms are tragically mistaken in their recognition that they have done serious wrong and caused real harm to consumers?

Fortunately, I am not alone in my views. In the past several years, people all over the world have come to realize that cartels, and particularly international cartels, are a true scourge of the world economy. Last year, for example, the Organization for Economic Cooperation and Development approved a Council Recommendation Concerning Effective Action Against Hard Core Cartels. The OECD branded hard core cartels “the most egregious violations of competition law,” which “injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. . .” Or to use street-talk for a second, as a character in the famous 1976 movie *Network* shouted, “We’re mad as hell and we’re not going to take it any more.”

How did we get to this point? Not quickly or easily. As most of you know, the United States Department of Justice has been prosecuting international cartels for a long time. Almost a century ago, in 1907, in the *American Tobacco* case, the Department filed charges against 94 U.S. firms and individuals and two British firms, challenging creation by the defendants of a private

tobacco monopoly in the U.S. One part of the illegal conduct was an agreement between U.S. and British tobacco firms that they would stay out of one another's "home" markets and divide up the rest of the world. Sound familiar? The British firms argued that their conduct was not covered by the Sherman Act, but our Supreme Court disagreed, holding that the conduct of defendants, American and British alike, was illegal.

Over the next 40 years or so, especially during and just after World War II, the Department filed numerous cases (some criminal, some civil) against a wide range of international cartels involving U.S. and European firms. The terms of the challenged cartel agreements varied from case to case, though many were along the lines of the one in *American Tobacco*: U.S. firms agreed not to sell in Europe, European firms agreed not to sell in the U.S., and other arrangements were made to limit competition in third-country markets. The relief the Department obtained against these cartels varied -- further implementation of the cartels in U.S. markets was forbidden, and significant criminal fines were sometimes imposed on firms and individuals.

After the early 1950s, however, our international cartel cases became few and far between. This was not because of any conscious policy to avoid cartel cases -- the Reagan and Bush Administrations successfully prosecuted many domestic price-fixing and bid-rigging conspiracies during the 1980's and early 1990's, and in 1990, at the Bush Administration's request, Congress increased the maximum corporate fine for price-fixing ten-fold, to \$10 million. No, we didn't bring any cases simply because we didn't have any evidence that *international* cartels continued to be a problem.

In the last several years, of course, that has all changed. Let me focus first on developments in the U.S., and then I'll talk about the extremely important developments abroad.

To begin with, as you all know, our international cartel prosecutions have increased exponentially since 1995. In that fiscal year, the Antitrust Division set a new U.S. record by securing over \$40 million in fines in criminal price-fixing cases, and two Canadian business executives agreed to plead guilty and serve time in U.S. prisons for their role in the *Plastic Dinnerware* cartel. After an “off” year in 1996, we amazed even ourselves by obtaining \$205 million in criminal fines in fiscal 1997, including a \$100 million fine imposed on one company (Archer Daniels Midland) and \$50 million on another (a U.S. subsidiary of Bayer AG) in connection with our *Food Additives* investigation.

We broke the record again in 1998 with more than \$267 million in fines, including a new single-firm record of \$110 million imposed on a U.S. firm, UCAR, in the *Graphite Electrodes* investigation. And in a very important victory for antitrust enforcement in this country, three former high-ranking ADM executives were convicted by a Chicago jury in the *Lysine* cartel case and subsequently were sentenced to serve significant jail terms. The court of appeals recently denied the executives’ request to remain free while their convictions are appealed, and they reported to prison last week. I certainly hope that sends a strong message to the cartel masters throughout the world.

Of the nearly \$500 million in fines secured in 1997 and 1998, well over 90 percent were in connection with the prosecution of international cartel activity. To put those numbers in perspective, the fines in those two years were roughly equivalent to the total fines imposed in all of the Antitrust Division’s criminal prosecutions, domestic and international, over the previous 20 years.

Even against that remarkable background, however, the cases we have brought during FY99

(which ended two weeks ago) have been truly precedent-setting and record-shattering. During the past 12 months the Division has secured over \$1.1 *billion* in criminal fines -- almost all of them in international cartel cases -- including a \$500 million fine from a single (Swiss) firm, a \$225 million fine from another (German) firm, a record \$10 million fine from an individual (a German CEO), and precedent-setting agreements by two European executives to plead guilty and go to jail in the U.S.; one of these executives is already serving time in a prison facility in West Virginia.

Most of these penalties have been imposed in our *Vitamins* cases, the most pervasive and harmful criminal antitrust conspiracy ever uncovered. But important and successful prosecutions also have occurred this year in our *Food Additives*, *Graphite Electrodes*, and other cases. During this past year, the Division has secured more criminal fines than we had previously secured in the entire 109-year history of Sherman Act enforcement; as a matter of fact, the \$500 million fine paid by Hoffmann-LaRoche for its part in the enormous *Vitamins* conspiracy is the largest fine ever secured in any Justice Department proceeding under any statute. And if more emphasis on the seriousness of these violations were needed, a business law publication recently issued a report on the "Top 100 Corporate Criminals of the 1990s." Of the 100 listed firms that had been convicted of various types of crimes, three of the top four firms on the list and six out of the top ten were multinational firms that had been convicted of Sherman Act violations for engaging in international cartel activity.

Finally, we strongly believe that an important part of the deterrent value of our criminal enforcement program involves insisting on the accountability of corporate officials who are criminally involved in cartel activity. Our record this past year leaves no room for doubt on this score. I have already mentioned the jail sentences currently being served by the ADM executives

convicted by a jury last year in the *Lysine* case, the sentences being served, or soon to be served, by two Hoffman-LaRoche executives involved in the *Vitamins* cartel, and the \$10 million fine imposed on the German CEO of SGL Carbon AG for his role in the *Graphite Electrodes* conspiracy -- far and away the largest individual fine in Sherman Act history. In addition, two of the American coconspirators in *Graphite Electrodes*, one the former CEO of UCAR International, pled guilty just last month and agreed to pay fines of \$1.25 million and \$1 million, respectively, and to serve 17 and 9 months in prison for their crimes. Serious personal accountability for serious crimes.

Nor are we near the end of the Division's international cartel prosecutions. After the guilty pleas from ADM and its Japanese, Korean, and European co-conspirators in the *Food Additives* cases, we publicly referred to our many ongoing grand jury investigations and said that we had seen only the "tip of the iceberg." After *Graphite Electrodes*, *Vitamins*, and a few other recent cases, we can say that we've now seen quite a bit more of the iceberg. But there's still an awful lot of illegal activity below the waterline. We have, for example, uncovered an international cartel operating in a manufacturing industry affecting over \$1 billion in U.S. commerce; it would appear that the conspirators agreed to raise prices by over 60% to customers in the U.S. and abroad during the term of the conspiracy. The Division also is investigating an alleged international cartel operating in a metals industry; the suspected conspiracy apparently affected roughly \$750 million of U.S. commerce, and prices are believed to have increased by over 20% as a result of the alleged cartel agreement. I can't say any more about these matters at this time because they are under investigation. But suffice it to say, there is more to come.

II. LESSONS AND PROSPECTS.

What accounts for these successes? What lessons can we draw from them? I'll hazard a few guesses. First, it's fair to suggest that economic globalization and the lowering of government trade barriers as part of worldwide trade liberalization have created strong incentives among some firms to deal with the globalization through cooperation rather than competition. This view was boldly put forward by an ADM executive who told his international co-conspirators: “[O]ur competitors are our friends. Our customers are the enemy.” Regrettably, there really do seem to be a lot of cartels out there these days, so we have a target-rich environment for uncovering them.

Second, these prosecutions directly result from the indefatigable efforts of our Criminal Deputy, Gary Spratling, who is on a panel here tomorrow, Jim Griffin, our Director of Criminal Enforcement, Scott Hammond, my Senior Counsel for criminal matters, and hundreds of career Division attorneys and other employees in our seven regional offices and Washington. They do the hard work necessary to turn leads into investigations, and investigations into successful prosecutions in even the most complex factual and legal circumstances. If it were not for the extraordinary competence, long hours, and devotion of Gary and his colleagues, coupled with their well-earned reputation for integrity and tenacity, we would not have been nearly so successful.

Third, I am convinced that the significant revision of the Division's Corporate Leniency program in 1993 to make it more user-friendly, and the greatly increased corporate fines of recent years, have provided important incentives for multinational firms involved in international cartels to come to us and reveal their own wrongdoing and that of their co-conspirators. That is what happened in the *Vitamins* case, and it is continuing to happen in a wide range of other cases. In this respect, success has bred success, as corporate executives have come to realize that they're likely to

get caught eventually and so they'd better get in early and cut a good deal.

Last -- but far from least -- many of our international cartel cases would have been much less successful if we had not had the assistance of foreign law enforcement agencies, including some of the agencies whose officials are in this room today. That factor, and the common enforcement interests that flow from it, are what I'd like to spend the rest of my time today discussing.

Let me start with a simple, but critical, observation: antitrust agencies truly have a shared interest in working together to obliterate this blight on our economies. After all, they don't just hurt consumers in the U.S. or any other single country. Almost by definition, they hurt consumers world-wide. The same vitamins that were sold in the U.S. pursuant to a global conspiracy were sold everywhere else as well. So, this is not a situation where one country should cooperate with another simply on a good-Samaritan basis. This is a situation where we're all getting hurt and so we must work together. In other words, the conspirators are working globally, so antitrust enforcers must do so as well.

Despite that fact, however, for many decades, the United States stood almost alone in the world in our commitment to antitrust enforcement. Until quite recently, a not infrequent reaction of foreign governments to news that the Antitrust Division was investigating the activities of international cartels was to leap to the defense of "their" firms, accuse the U.S. of "extraterritorial" tendencies in defending our consumers, threaten to invoke blocking statutes, and express astonishment that any country should even want to have antitrust laws, much less enforce them.

Happily, the global environment in which we work today is radically different. In the past decade, a strong interest in having free markets defended by sound antitrust laws and sound antitrust enforcement has spread throughout the world. Over 80 countries now have antitrust laws -- most of

them enacted during the past five or ten years -- and nearly 25 other countries are in the process of drafting such laws. There are many differences in the purposes and details of these laws, some of them quite significant. And there are enormous disparities in the enforcement resources and priorities in these various countries. But one thing on which just about everyone agrees is that “hard core” cartels are pernicious and should be uncovered and stopped. One important result of this is that there are a steadily shrinking number of safe havens for cartel conspirators. With rare exceptions, foreign governments no longer even try to defend the indefensible, so long as antitrust enforcers treat the foreign subjects of an investigation fairly. That means that our focus in criminal cartel cases can be on the evidence and the harm to consumers, and not on politics.

If I may mention just a few examples, recent years have seen important actions (either civil or criminal) against domestic and/or international cartels in jurisdictions as diverse as France, Germany, Israel, Japan, Mexico, and Spain. Some countries, such as the Netherlands and the United Kingdom, have recently enacted strong new antitrust laws and are putting anti-cartel enforcement policies in place. For some years now, the European Commission has successfully prosecuted numerous Europe-wide cartels, often imposing very significant fines (totalling over \$100 million in some cases); indeed, the Commission is investigating some of the same cartels we have prosecuted, including the *Graphite Electrodes* and *Vitamins* conspiracies. Moreover, the former DG-IV (now DG-COMP) has recently created a new anti-cartel unit that will further improve its ability to fight international cartels, and the Commission has proposed that it receive new investigatory powers and an enhanced ability to cooperate on cases with EU members’ antitrust agencies. (This important proposal will be discussed by a panel later today.) Finally, in recent years, our Canadian neighbors have established a very impressive record of prosecuting international cartels, including, not

surprisingly, many of the same ones we have encountered. Just last month, the Canadians announced some very important criminal prosecutions, and record criminal fines, in their own *Vitamins* investigation.

There are at least two other important lessons that we can draw from this recent experience. First, as I said at the beginning of my remarks, I believe that the *Vitamins* cases have turned the consensus about international cartels that has been building for years among antitrust enforcers and policymakers into a new worldwide consumer movement -- one that makes the detection and destruction of cartels into a matter of high national priority in many jurisdictions.

And, second, if this *is* to be the dawn of a new era, we in the field of antitrust enforcement must seize this opportunity to ensure that we have the tools and attitudes we need to enforce our individual antitrust laws effectively. What does this mean in practice?

One thing it surely means is that we all need to have the investigative tools, enforcement policies, and statutory penalties necessary to uncover and successfully prosecute cartels, and to impose penalties that will deter the formation of cartels in the future. Not everyone does, although many antitrust authorities have significantly bolstered their anti-cartel arsenals in recent years. These measures vary from enacting strong new antitrust statutes, like the U.K. and the Netherlands; to allocating significant new resources to anti-cartel enforcement, like in the US and EU; to threatening criminal prosecution of cartel behavior, as in Ireland and Mexico; to promulgating and improving corporate leniency programs, as in the U.S. and Canada.

But looking to the future, we need to improve our ability to work together effectively on cartel enforcement matters. I'm not going to repeat my usual "antitrust cooperation is crucial" speech here, because many of you have heard it several times already, and you will be discussing

these issues in some detail in the course of this program. But we in the U.S. have worked hard for many years to improve our formal and informal cooperative relationships with many countries on antitrust matters.

We have a large and growing network of bilateral mutual legal assistance treaties (MLATs), some less formal mutual assistance arrangements available in criminal matters generally, one antitrust-specific mutual assistance agreement (with Australia), and bilateral antitrust cooperation agreements with five countries and the EU, and more under negotiation. Earlier this year, we signed a new cooperation agreement with Israel, and just last week, Attorney General Reno signed an antitrust cooperation agreement between the United States and Japan. I fully expect that these agreements will promote a new level of cooperation between U.S. antitrust agencies and our foreign counterparts in investigating practices that harm competition in our markets. David Tadmor, General Director of the Israel Antitrust Authority, is on a panel here tomorrow, and may have something to say about cooperation from his perspective.

It is fundamentally important to understand that antitrust cooperation is not just a U.S. priority, and that it would not be sustainable if it were. Some countries (*e.g.*, Australia) had the foresight years ago to enact enabling legislation for mutual assistance, while other countries (such as the U.S. in 1994 and the Netherlands in 1997) have recently enacted antitrust-specific mutual assistance legislation. Other countries have their own networks of MLATs (*e.g.*, Canada) and bilateral cooperation agreements (including the long-established Franco-German agreement and the new Canada-EU agreement).

The Justice Department has benefitted a great deal from the various agreements and arrangements in which we participate, not just from the evidentiary assistance we have received

from many of your governments -- and I want to thank them for all they have done and continue to do -- but also in establishing sound day-to-day law enforcement relationships of trust and mutual interest. In addition to the formal ties that I just mentioned, which are crucial to the sharing of statutorily-protected evidence, there are a wealth of methods by which agencies may cooperate informally. Antitrust cooperation between sovereign states is not always easy, and differences in laws and legal cultures sometimes create unexpected problems. But you don't need a formal agreement to pick up the telephone and share public information about cases on a bilateral basis, to ensure that one agency's investigation does not unnecessarily get in another agency's way. You don't need a formal agreement to talk about the pros and cons of particular investigatory tools or the efficacy of particular penalties. And antitrust officials do, of course, have useful discussions with one another on a broad range of subjects in a variety of multilateral fora, including the OECD, the Free Trade Area of the Americas, the Asia-Pacific Economic Cooperation, and the World Trade Organization's trade and competition working group, just to name a few.

There are other things we can and should do to build on this momentum. Two weeks ago, for example, the Antitrust Division hosted a two-day International Cartel Enforcement Workshop in Washington for our own senior anti-cartel litigators and nearly 50 anti-cartel enforcers from nearly 30 other jurisdictions on six continents. The subjects discussed ranged from leniency policies, to investigatory and prosecutorial mechanisms and policies, to cooperation among antitrust agencies in cartel cases, to methods of building an anti-cartel enforcement program; the panelists represented over a dozen different enforcement agencies. Since we organized the program, I shouldn't brag about it too much (and Barry, I wouldn't dare to compare its value to Fordham) but I strongly believe that there is a separate and critical role for programs like that one -- programs

devoted to the real nitty gritty of law enforcement against international cartels, where frontline enforcers can meet one another and try to solve common practical problems. In the last couple of years, we have started doing this within the Antitrust Division in our Senior Litigators' Conferences, and they have tremendously improved our cartel enforcers' understanding of the problems they face. I hope that other antitrust agencies will organize similar anti-cartel workshops in the near future, both for themselves and for others.

We obviously have not solved all our problems with respect to international cartels. Indeed, the International Competition Policy Advisory Committee that Attorney General Reno and I created in 1997 is looking at how the Department can strengthen the emerging consensus among the world's antitrust enforcement agencies in favor of vigorous prosecution of international cartels. Co-Chairs Jim Rill -- who is on a panel later in this program -- and Paula Stern tell me that we can expect ICPAC's recommendations on this and other issues soon, and we are very eager to see what they have to say.

Already, though, some antitrust agencies are beginning begin to apply some of the practical lessons we are learning from working together against cartels to other aspects of our work, such as merger enforcement. With this in mind, Bob Pitofsky and I last week agreed with Alex Schaub and his EU colleagues to set up a joint committee to study how to systematizee some of the practical lessons the Division, the FTC, and DG-COMP have learned during our numerous cooperative endeavors in international merger enforcement over the past few years. At this point in time, there is not the same degree of consensus among a wide range of antitrust agencies on merger enforcement -- and much less civil non-merger enforcement -- that there is in cartel enforcement, but our cooperative work with the EU on mergers is a good beginning.

CONCLUSION.

In closing, let me reiterate one fundamental point: At the end of the Twentieth Century, governments should be every bit as willing to work together on fighting cartels as they are to combat securities fraud, tax fraud, and other types of international fraud and theft. To reach that result, we in the antitrust enforcement community have a great deal of work to do, and a lot still to learn. But, speaking for myself, I have never been more optimistic. This will be remembered as a time when the enforcers decided that *anti*-cartel meetings are every bit as important as the violators believe cartel meetings to be. We are, in antitrust jargon, levelling the playing field between us and them. Once that field is level, I have no doubt who will prevail. And in the unlikely event that we should get tired as we move forward in this war against international cartels, it's nice to know that we will at least be able to take *non-price-fixed* vitamins to lift our flagging spirits.

Thank you.