U.S. DEPARTMENT OF JUSTICE
Antitrust Division

COOPERATION AMONG COMPETITION AUTHORITIES IN THE GLOBAL MARKET

Address by

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I am pleased to be here this morning with you and to have the opportunity to discuss the latest developments in the international antitrust enforcement activities of the United States Department of Justice. I shall devote the greater part of the time I have to our new International Antitrust Enforcement Assistance Act, because of the very great interest that legislation has inspired, and because it is my impression that there may be some misapprehensions or uncertainties about the legislation that I may be able to dispel.

I shall begin by explaining why it was that we, along with the strong bi-partisan support of the Congress, the support of a distinguished task force of the American Bar Association's Antitrust Section and the support of significant business interests in the United States, concluded that the time had come to seek authority to expand our ability to cooperate with foreign competition agencies. I shall also try to give you a flavor of the concerns and objections raised by the American business community during the period when we were developing our legislative proposal, and then later while the Congress was considering the bill. With that background, I shall turn to a more detailed description of the law itself (the unhappily named IAEAA), noting for you how the balance was struck between legitimate law enforcement needs (on the one hand), and the equally legitimate concerns of the business community (on the other). In a more forward-looking sense, I shall offer some predictions about the ways in which we believe the new tools made possible by this legislation will actually operate. Finally, I shall give you a rapid overview of some other major developments in United States antitrust enforcement. Time does not permit me to give any kind of detailed exposition of these, but you should feel free to ask me about them, or others of interest to you that I have omitted,

during the question and answer period.

I. Why a New Tool for International Cooperation Was Needed

No one can doubt the importance or the extent of business operations in today's world that affect more than one country. Globalization is already with us today, and the pace of increased global commercial activity is itself growing rapidly, due to the advent of the "information age," and the exciting new technologies that will form the "Global Information Infrastructure," or GII. In the United States, export and import trade today account for nearly one-quarter of our gross domestic product -- an impressive two and a half times as much as the comparable figure thirty years ago. [See Economic Report of the President, February 1994, at 206-207, and H.R. Rep. 103-772 at 11.] The figures are even more impressive here in Europe, if one takes into account the intra-European Union trade as well as trade external to the Union. It has therefore become nearly a truism that business today operates on a global scale.

Competition enforcement agencies, in contrast, have continued to operate on the national level. The United States, as you know, has long taken the position that this national jurisdiction extends to activities abroad that have significant effects in the United States market. We explain the current law on this question in our new draft International Enforcement Guidelines, which are among the materials I have left with the organizers. But I should perhaps remind you that this position dates back literally to the inception in 1890 of the Sherman Act, the principal U.S. antitrust statute. The debates leading up to the enactment of the Sherman Act reveal a serious concern on the part of the U.S.

Congress about possible circumvention of our law. The paradigmatic situation was the case of cartel members active in the United States market choosing to schedule their meetings, to conduct their business or to store their documents outside the U.S., in Canada, Britain, or elsewhere, so that they could remain safely outside the practical reach of the U.S. authorities. Congress clearly indicated that our jurisdiction would reach such activities, by specifying in the law that activities "in foreign commerce" were covered to the same extent as activities in domestic commerce.

The audience will recall that there have been differences of opinion between the United States and other countries from time to time on the outer limits of this type of "effects" jurisdiction. In this respect, the experience of the U.S. Securities and Exchange Commission is instructive. Like the antitrust enforcement agencies (and there are two of us, the Antitrust Division of the Department of Justice and the Federal Trade Commission), the SEC faced globalized markets and the need to enforce the law against parties who were participating in our markets, wherever they were located at the moment. Again like the antitrust agencies, the SEC found itself from time to time in more or less confrontational situations vis à vis its foreign counterparts.

The SEC responded in 1988 by persuading the Congress to enact legislation that would allow it to enter into reciprocal arrangements for the sharing of information with foreign securities agencies. Its view was simple: first, if you want to receive, you had better be able to give; second, cooperation is inherently better than confrontation; and third, information sharing would have to be done under very carefully controlled conditions, due to the

sensitivity of the data that the Commission regularly handles.

The Antitrust Division took the lesson of the SEC to heart, and when Anne Bingaman became the Assistant Attorney General in June of 1993, she made it a top priority first to study the procedural problems encountered in foreign commerce cases and then actively to seek comparable legislation for the antitrust enforcement agencies. Throughout the fall of 1993 and the spring of 1994, we worked on drafts of a possible bill to submit to the Congress, and we consulted widely with the legal and business communities in the United States. (I should note parenthetically that many of the companies represented were multinational companies, and thus were well aware of the same issues that will occur to you.)

As a result of these consultations, and of the hard work from the staffs of both the Republican and Democratic members of the two Judiciary Committees, the bills that became the IAEAA were simultaneously introduced in both houses of the U.S. Congress on July 19, 1994. In the Senate, the bill was co-sponsored by the Chair of the Subcommittee on Antitrust, Monopolies, and Business Rights of the Judiciary Committee, Senator Howard Metzenbaum, with Ranking Minority Member Strom Thurmond, and Senators Kennedy, Biden, Leahy, Simon, Simpson, Grassley, Hatch, and Specter. In the House of Representatives, it was co-sponsored by then-Chairman Jack Brooks, of the Committee on the Judiciary and the Subcommittee on Economic and Commercial Law, and then-Ranking Minority Member Representative Hamilton Fish. This strong bi-partisan support was possible only because of the extensive work that had already occurred, which was designed to meet the

concerns that interested parties had expressed.

Republicans and Democrats alike, businesses and lawyers, all recognized in the end that this new law is about effective enforcement of the antitrust laws. It may be worthwhile to step back for a moment and recall why we have antitrust laws, and why countries without quite as long an antitrust tradition as the American one have been strengthening their competition enforcement institutions and enacting their own competition laws.

The simple fact is that cartels and monopolies hurt economic welfare. They impoverish society as a whole, by creating distortions in the allocation of resources and by leading to transfers of wealth from consumers (or producers, in the case of monopsonistic behavior) to the cartel or monopolist. These losses can run into the billions of dollars. Competition also produces a more innovative environment, as firms strive to be the winner in the competitive process. There are almost countless ways in which cartels and monopolists can inflict these harms, although broadly speaking they fall into the category of over (or under) charges (and conduct equivalent to this, such as production allocations or cutbacks, customer allocations, and the like), and the category of exclusionary practices, which harm competition when they result in the destruction of competitors. Firms with substantial market power must be prevented from engaging in these exclusionary practices, and there is no doubt the world over that horizontal competitors must not be permitted to cartelize -- that is, to work together to restrict what is available on the market and to reap higher prices from consumers, rather than to engage in productive activities that will yield more choice and more competition.

Speaking personally, I have observed both through my academic work and through my attendance at OECD meetings for a year and a half now that there is great deal of common ground among the world's major competition laws, and among the agencies that enforce them. I believe that this has occurred and has succeeded precisely because no one was forcing anyone to take these steps. Instead, each country or region independently came to the decision that competition policy was the best economic policy to follow, for all the reasons I have just reviewed.

The new U.S. law that I am about to describe for you is designed to build on the common ground that we have already achieved, and at the same time to recognize the differences that we still may have. I have heard the suggestion that our law "has things backwards," and that we should wait for perfect substantive convergence before we try to cooperate more closely with our counterpart agencies. I must respectfully disagree with that viewpoint. If we had envisioned a system of international agreements under which we would have been obliged to help our partner agencies when requested, then I would agree that substantive convergence would have been a necessity. But, that is not at all what the IAEAA does. By creating a framework within which purely voluntary cooperation can take place -- a framework in which the requested agency can always say no, if it believes its national interest or its law is incompatible with the particular assistance sought -- we have a structure that precisely meets the implicit goal of those who believe substantive convergence must precede cooperation. In fact, cooperation will only take place under the new law where the convergence is sufficiently strong to support it. So that you can see why this is so, let me turn now to a more detailed review of the

provisions of the IAEAA. I shall begin with a review of the law's overall structure, and then I shall address the protections for enterprises that it contains.

II. The International Antitrust Enforcement Assistance Act

The IAEAA is a statute that will lift the prohibitions against cooperation that presently apply to the Antitrust Division and the FTC, under carefully controlled circumstances. First, no cooperation at all can take place pursuant to this statute unless and until a validly created antitrust mutual assistance agreement with the other country is in place. Second, on a case-by-case basis, the three controlling principles of (1) reciprocity, (2) protection of confidential information, and (3) the public interest, must be satisfied. It is impossible under the kind of agreement that we must have under this law for either party to be "forced" to provide assistance in any case. Thus, for example, the United States would never use one of these agreements to obtain antitrust evidence in a case that allegedly reflects trade policy concerns more than antitrust concerns. Let me stress initially that we simply do not bring such cases. We are independent from the trade agencies of the Executive Branch, and we are committed to strict enforcement of the antitrust laws. However, if for whatever reason, a foreign agency chose to characterize a U.S. case that way, it would refuse to assist us. By the same token, if we thought that a foreign proceeding appeared more motivated by industrial policy concerns or a desire to protect state-owned enterprises, we would be perfectly free to decline assistance as well. The structure here, as I said before, is designed to lift prohibitions against assistance and to be available when both sides agree it should be used.

In order to reach the final goal of effective case-by-case cooperation, three steps will be necessary. The first step is the basic legislative authorization to "hold up our end of the bargain," and to be in a position to assure appropriate treatment of information that we receive. In the United States, we have now taken that step, through the enactment of the IAEAA. Most other countries do not today have the same kind of general authorizing legislation (although a few do). For them, it will be necessary to decide whether this kind of across-the-board authorizing legislation is best, or whether they would prefer to proceed country-by-country (using something more like the treaty route). The second step will be the negotiation of the antitrust mutual assistance agreements required by the IAEAA. Finally, the third step will always be the decision on a case-by-case basis whether cooperation in those particular circumstances can take place, what its form should be, how extensive it should be, what particular conditions make sense, and so on.

The statute is quite specific about the content of the antitrust mutual assistance agreements. Section 12(2), which is nominally a definitional provision, sets forth these required provisions. The agreements themselves may be concluded either as government-to-government agreements, or as agency-to-agency agreements. An agreement must include an assurance of reciprocity (section 12(2)(A)). This does not mean literal tit-for-tat reciprocity, but a more general assurance that the arrangement will be a genuine two-way street. Our Mutual Legal Assistance Treaty with Canada has certainly worked out that way in the antitrust field, and we have every reason to believe that the new agreements would do so too.

The statute also requires "[a]n assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received under [the law] and will give protection to antitrust evidence that is not less than the protection provided under the laws of the United States to such evidence" (section 12(2)(B). This is a crucial part of the entire structure. You will note that the U.S. business community's concerns about the actual level of protection in foreign agencies are reflected here, in the requirement for a level of protection that is no less than the U.S. level. There must also be a listing of the relevant laws respecting confidentiality on both sides, and a similar listing of the antitrust laws included.

Next, the statute specifies the use limitations that must accompany exchanges of information. In a nutshell, information that is exchanged may be used only for the administration or enforcement of the foreign antitrust law in question. The only exception is that the foreign agency may seek the prior written consent of the Attorney General or the Commission for an additional significant law enforcement use of the evidence, if strict requirements of necessity and preservation of confidentiality are satisfied. The same would of course be true from the foreign agency's perspective: a U.S. recipient (either the Antitrust Division or the FTC) could use the information only for antitrust enforcement, unless the foreign agency specifically agreed in writing to a particular additional use.

The next several provisions address confidentiality issues again. The law requires the return to the United States of all evidence, and all copies of

evidence, at the conclusion of the proceeding, assuming that it is still "under the control" of the foreign antitrust authority. If that evidence had been introduced in a court proceeding, it would have passed from the antitrust agency's control, and thus would not fall within this rule.

Two sections deal with breaches of confidentiality. If a breach occurs, and adequate action is not taken by the foreign government to minimize the harm that resulted and to ensure that no breach will occur again, the agreement must be terminated. Furthermore, if a breach occurs, the foreign agency must notify the Attorney General or the Commission promptly, and the U.S. authority in question must notify the party who provided the evidence.

These provisions must be part of every antitrust mutual assistance agreement. However, it is likely that agreements with particular countries will also include provisions that tailor the agreement to the specific requirements of the laws in question.

Before the U.S. agencies are authorized to enter into an agreement, they are required by section 7 of the statute to place the proposed agreement on the public record for a 45 day period of public comment. The purpose of this extraordinary procedure -- unprecedented to my knowledge in U.S. international law practice -- is to make sure that the agencies know about the business community's experience with particular countries. It is part of the response the Congress made to the concern about sharing information without an elaborate system of prior notice in place. Ex ante, everyone will know the countries with whom we have such agreements, and companies will be able to

take this fact into account from the start.

When we turn to the case-by-case cooperation, the law again contains significant restrictions, which are set out for the most part in section 8. Cooperation must be for purposes of "antitrust enforcement" (according to sections 12(5), (7), and 12(2)(E)). The evidence in question must be "antitrust evidence," as that term is defined in the law (section 12(1)). Antitrust evidence for the U.S. includes evidence "in the files," which is treated under Section 2 and includes all evidence collected for our own investigations, and evidence collected on behalf of a foreign authority using the procedures of section 3 and 4. For the foreign side, the term includes the analogous evidence. The statute assures that the U.S. authorities will have full power to protect foreign evidence received under an agreement. (8(b)).

Finally, and most importantly, all exchanges of information must satisfy five criteria, set forth in section 8(a): (1) the reciprocity assurances of the agreement (8(a)(1)(A), (2) the confidentiality protections of the agreement (8(a)(1)(B), (3) the use provisions of the agreement (8(a)(1)(A), (4) the limitations on exchanges set forth in section 5, and (5) the public interest determination.

The first three of these follow logically from the text of the agreement, and I shall not elaborate further on them. The section 5 limitations and the public interest determination, however, require some further explication.

Under section 5 of the statute, there are certain categories of information

that may not be exchanged, or that may be exchanged only in particular ways. Easily the most important of these is the information collected during our pre-merger notification process, known as Hart-Scott-Rodino information. Although that is information "in our files," and thus would otherwise have been exchangeable under section 2, section 5(1) withdraws that category of information from the scope of section 2. This was a key concern of our business community, both because of the sensitivity of pre-merger information and because of the voluminous nature of such information in cases where further investigation is needed. Instead, if we are to assist a foreign agency in a merger proceeding we must send out a specific CID or institute a section 4 court proceeding. This will be much more targeted than a section 2 request potentially is, and it has the added benefit to the company of disclosing exactly what is being sought, and on whose behalf.

The second type of restricted information is a matter occurring before a grand jury. In the United States, grand juries conduct their investigations in criminal cases in total secrecy. Their task is only to determine whether there is probable cause to bring a criminal prosecution. The statute does not absolutely prohibit the sharing of grand jury material in criminal cases -- often our most egregious cartel cases -- but it does require us to obtain a court order to allow disclosure to a foreign authority, upon a showing (ex parte) to the court that the foreign authority has a particularized need for it. This places foreign authorities on roughly the same footing as the state authorities for general purposes of grand jury disclosures.

Finally, we are absolutely prohibited from sharing classified, national security information, and information classified under the Atomic Energy Act -- fairly self-explanatory, in my view.

The public interest standard of section 8 is deliberately wide-ranging. The statute itself mentions only the need to take into account whether the foreign state holds any proprietary interest that may benefit or be affected by the investigation. However, the House Report, pages 20-21, gives additional detail. How much evidence should be turned over, how sensitive the evidence is, whether the party who provided it should be given notice, whether the party who provided it was given immunity from criminal prosecution in exchange for the evidence, whether the evidence comes from a third party or a target, are all factors to take into account. In addition, although the law does not require strict dual "liability," the foreign investigation must be within the broad scope of antitrust law. Paradoxically, the broad scope of this provision is precisely what we think will make the agreements workable in practice, and acceptable to others who may agree entirely with much of our work, but not with all. It gives the discretion to each side to cooperate where cooperation is in that side's best interest.

III. Protections in Law of Company Interests

Although I have touched on most of this in my general exposition of the law, let me review here the numerous provisions of the IAEAA that responded to the business community's concerns about the protection of confidential information.

FIRST, the exclusion of Hart-Scott-Rodino materials from section 5 assures companies in merger cases that their merger filings will not be disclosed, and that they will know about any proposed assistance in such cases.

SECOND, under the mechanism of sections 3 and 4, notice and an opportunity to challenge the assistance are automatic. They follow from the character of the proceeding we would be using. With respect to section 2, of course, they can also challenge our original collection of the information which we undertake for our own purposes.

THIRD, the IAEAA specifically preserves, for sections 3 and 4, all legally applicable rights and privileges, in 3(d) and 4(c). That means every privilege under U.S. law, and potentially foreign legal privileges as well.

FOURTH, the confidentiality on the foreign side must be "not less than" it would be on the U.S. side. Section 12(2)(B). Thus, submission to the U.S. authorities will not entail any greater risk of disclosure than is already present.

FIFTH, the various protections that I described that are triggered if there is a breach of confidentiality are significant. I should add here that the SEC has had no problems with its own agreements, and we have no reason to expect any, but the protections are here nonetheless.

SIXTH, there will be legislative oversight of the entire process. We are required to file a report with the Congress three years after the effective date of the law, and the Congress is always empowered to hold oversight hearings.

Thus, the advice and guidance contained in the two congressional reports have real teeth, and we regard ourselves as bound to follow it.

IV. Future of Cooperation

As I mentioned earlier, the President signed the IAEAA into law on November 2, 1994, about three and a half months ago. We are working hard to lay the groundwork for the mutual assistance agreements authorized by the law, but I am not in a position today either to announce any such agreements, or even to announce formal negotiations. This can hardly be surprising, given how recently the law in the U.S. was enacted, and given the fact that the majority of other countries will need to follow the same process we did or find another way to seek specific legislative authority for such an agreement.

We are optimistic, however, that we shall succeed within a reasonable time in concluding some agreements. As I stressed before, we believe on a pragmatic level that they will be most useful, and most used, for the cases where both countries see the problem the same way. That means, in all likelihood, hard-core cartel cases. Remember: each side can ALWAYS say "no" in a specific case, even when one of these agreements is in force. If a country or authority from which we sought assistance objected somehow to our investigation -- on jurisdictional grounds, on substantive grounds, on broader public policy grounds -- it would simply decline the particular request. We, of course, would be free to do the same.

This freedom means that an antitrust mutual assistance agreement can

never be used in a manner that is offensive to the requested country. Accordingly, this device may not help much in our export market cases, judging from the tenor of the comments on that topic we have received on the draft International Guidelines, and knowing the reactions that followed the Bush Administration decision to repeal footnote 159 of the 1988 International Guidelines. Because these agreements, and whatever enabling legislation is necessary in each country, just lift a disability against cooperation, they are a sensible first step toward responding to the globalization of commerce that we have all witnessed.

If the national antitrust authorities, and the authorities of regional organizations such as the European Union, build some experience cooperating in cases where the two sides see eye-to-eye, we will learn a great deal about need for more formal substantive convergence. Put the other way, if even this step is impossible, the notion of world-wide agreement on substantive standards with oversight somehow at the WTO is quite unrealistic. Among OECD countries, at least, I would guess that virtually all already have competition laws that would meet any standards that the WTO could promulgate. Monitoring specific enforcement decisions of national authorities -- especially decisions NOT to take action -- would be an delicate task indeed, and one that would entail its own risks to the confidentiality of the file on which the national authority relied.

This is why we believe so strongly that we should approach "world competition" law one step at a time, and that the first step must be the creation of mechanisms for genuine, in-depth cooperation between national authorities.

We and our counterparts are aware of the legitimate concerns of the business community, but you must also bear in mind the legitimate needs of the law enforcement agencies. We think that the IAEAA has struck the proper balance between those competing concerns, and we are confident that the agreements we conclude can address more specific problems that arise under different national laws.

V. Other New Developments

Before relinquishing the floor, let me point to several other recent developments in the United States about which you may have questions.

FIRST, on October 13, 1994, we issued draft International Guidelines. You should have a copy of the public comment version with your material. The comment period has closed, and we hope to have the final version out in early spring.

SECOND, last August we issued draft guidelines for the licensing and acquisition of intellectual property. After reviewing the public comments we received on those, we are now very close to releasing the final version, although I cannot give you a specific date.

THIRD, I understand that there has already been some discussion here about Judge Sporkin's decision to reject our proposed consent decree with Microsoft. As you know, we will be appealing that decision to the U.S. Court of Appeals for the District of Columbia Circuit, and we will be seeking an

expedited hearing from that court. I would be happy to answer general questions about the U.S. laws and procedures here, although you will understand that I cannot say too much about the details of the appeal.

These are just a few highlights that I am sure are of interest to this audience. Please feel free to raise any other subject relating to U.S. enforcement, and I shall be happy to say what I can about it. Thank you very much. I look forward to your comments.