



# DEPARTMENT OF JUSTICE

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## PROMOTING SOUND ANTITRUST ENFORCEMENT IN THE GLOBAL ECONOMY

Address by

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Good morning. It is an honor to be at Fordham once again, speaking at one of the world's premier academic forums on international antitrust issues. As some of you may recall, I spoke here two years ago at the Corporate Law Institute's 25<sup>th</sup>, "Silver Anniversary," edition. While I'm not sure what precious metal will be mined this year, I do know that Barry Hawk has produced another outstanding program.

Last month, Joel Klein spoke in Brussels -- following up on thoughtful and imaginative recommendations by the Attorney General's International Competition Policy Advisory Committee (ICPAC) -- of the need to plan for increasing economic globalization and the attendant internationalization of antitrust enforcement. In addition to building on the successes of our own enforcement efforts and bilateral cooperation with Canada, the EU Commission, and others, Joel proposed that we deal with these phenomena by undertaking (together with other antitrust agencies, multilateral organizations, and other interested groups) a new Global Competition Initiative that would be inclusive of countries and organizations, oriented towards solving practical enforcement-related problems, and involve cooperation with and technical assistance for new antitrust agencies.

There appears to be widespread interest in Joel's suggestion -- an interest that I believe demonstrates increasing concern with the challenges presented by economic globalization and the resulting internationalization of antitrust. And so, in my talk today, I would like to begin by reviewing how increasing economic globalization is changing antitrust enforcement, explore various ways of dealing with issues arising from these changes, and then devote some time to thinking out loud about how a Global Competition Initiative might work and what benefits it could bring to us, as producers of international antitrust enforcement, and to most of you, as consumers of it in one way or another.

## **I. Economic Globalization and International Antitrust Enforcement**

Let me start by noting the obvious: Economic globalization is proceeding at a stunning rate. U.S. international trade (defined as exports and imports of goods and services) exceeded \$2.2 *trillion* in 1999 and now routinely accounts for roughly one-fourth of U.S. GDP; the percentage for many of our trading partners is even higher, sometimes much higher. Foreign direct investment into and out of the U.S. exceeded \$325 billion in 1998 and has risen substantially during the past two years.

Today, roughly 60,000 multinational companies and their 500,000 foreign (including U.S.) affiliates account for about one fourth of total global output.

It is thus not surprising that a great many of the 4,900 Hart-Scott-Rodino filings that we and the Federal Trade Commission received last year involved foreign acquirers, acquirees, major customers and competitors, and/or divestitures. It is not surprising that roughly 30 of our outstanding grand jury investigations involve international cartels. And it is not surprising that the great bulk of the more than \$150 million in fines obtained last year in U.S. criminal antitrust cases -- most recently, guilty pleas in our ongoing investigation of the fixing of commission rates charged to sellers of art, antiques, and other collectibles at auctions in the U.S. and elsewhere -- or of the nearly \$2 billion in fines obtained in our criminal cases over the last four years, have been obtained in connection with international cartels. In short, globalization has radically changed the focus of our work, from almost purely domestic less than 10 years ago to a heavy international component today.

Most of you are familiar with the reaction of the U.S. antitrust agencies to the increasing importance of international antitrust issues. We have focussed increasing amounts of our limited resources on international matters. We have greatly expanded our cooperation with other antitrust agencies, including cooperation on

both general antitrust issues and in specific cases and seeking evidence located abroad for use in our cases. We have entered into antitrust cooperation agreements with eight important trading partners that account for roughly two-thirds of U.S. international trade; two of them, with Brazil and Mexico, were signed in the past year. We are continuing to negotiate additional cooperation agreements, just as we seek to negotiate new antitrust mutual assistance agreements pursuant to the International Antitrust Enforcement Assistance Act of 1994. And we continue to make frequent use of the nearly 40 mutual legal assistance treaties and other legal assistance instruments available to us in criminal matters.

In the merger area, we and FTC frequently work with other antitrust agencies on matters of mutual interest, and we have developed particularly strong cooperative ties with the EU Commission's DG-COMP in a substantial number of high-profile mergers, such as *WorldCom/Sprint* and *Alcoa/Reynolds*, thanks in part to merging firms' increasingly frequent consent to our sharing confidential information in connection with our merger reviews. Bob Pitofsky's recent speech in Brussels discussed in detail the FTC's extensive merger cooperation with DG-COMP. These cooperation efforts have been an increasingly important part of our antitrust enforcement program.

But that is not the whole story. As market principles, deregulation and respect for competitive forces have been broadly embraced around the world in the last decade or so, many countries -- not just our largest trading partners -- have enacted antitrust laws and created agencies to enforce them. Nearly 90 countries currently have antitrust laws of some sort, and another 20 or so are in the process of drafting such laws; more than 60 countries have pre-merger notification requirements connected to their antitrust laws. Still, nearly one-third of U.S. international trade is with countries that do not yet have well-established antitrust laws, and it seems inevitable that these nations will have an increasing impact on U.S. commerce.

The increasing importance of global markets means that nations face an increasing prospect that their economies will be harmed by anticompetitive conduct that takes place, at least to some degree, in other countries. And it means that each country, including the U.S., has an interest in the choices other countries make about the adoption and enforcement of antitrust laws.

To take one obvious example, the growing multiplicity of antitrust laws means that some large mergers and other transactions are subject to review by numerous jurisdictions; such multiple reviews may impose real costs on the affected

parties, costs that might sometimes function as a tax on efficient transactions. As the ICPAC report explained, those costs can be especially burdensome if the number of reviewing jurisdictions is large or if they have seriously inconsistent procedural or substantive requirements.

Let me mention another example that is perhaps less obvious. We all have an interest in the enforcement of strong and effective laws to punish and deter cartels. Our experience at the Justice Department is that the combination of such laws and a sound, nondiscretionary leniency program provides the most effective means of combating cartels because that combination maximizes the likelihood that one of the cartel participants will voluntarily come forward with evidence of the cartel. But the efficacy of our leniency program can be significantly impaired if other countries with anticartel laws lack a robust leniency program, because firms might fear that voluntarily coming forward in the U.S. will subject them to increased risk of prosecution abroad.

As these examples suggest, countries that have antitrust laws must be concerned with the need to reconcile their own sovereign interests in adopting an antitrust law suitable to their specific needs, the impact their laws have on other nations, and the international antitrust issues facing other nations. These issues,

which have been discussed at Fordham in past years, when they were almost entirely theoretical, have increasing practical significance, both for antitrust enforcement and for the global economy. We need to ensure that antitrust works effectively and efficiently in the global economy. Enforcement coherence cannot be defined and decreed, once and for all, by the U.S. or anyone else. Rather, it must come from a shared understanding by antitrust enforcers in a wide variety of countries. Failure in this endeavor risks not only needless burdens on businesses and suboptimal antitrust enforcement, but also the international politicization of antitrust disputes.

## **II. Options for Achieving Coherence in International Antitrust Enforcement**

Our goal should be to achieve a reasonable degree of analytical and operational coherence in antitrust enforcement across a wide range of economies, antitrust laws, and legal cultures. Our experience has been that trying to achieve such coherence with just the antitrust agencies of our eight or ten largest trading partners poses a sizeable challenge; doing it with 90 or more antitrust agencies will be a formidable task.



There are several possible routes to this goal, which need not be mutually exclusive. The first is through bilateral discussions between two or a very few antitrust agencies. A second route is through discussions, consensus-building, and voluntary undertakings in regional and multilateral fora, such as the Organization for Economic Cooperation and Development (OECD). A third route is through negotiation of binding antitrust rules of some sort, as the EU and others have proposed (and we have opposed) in the World Trade Organization. And a fourth possibility is to build multilateral antitrust consensus through a Global Competition Initiative. I will discuss each option in turn.

A traditional -- and often very effective -- means of achieving substantial convergence among antitrust laws and policies is for antitrust agencies and practitioners to talk and work with one another informally on a bilateral basis. Bob Pitofsky has recently explained, for example, how there has been “substantial convergence in the method and content of merger enforcement in the EC and the U.S.,” as a result of case-by-case merger cooperation between U.S. antitrust agencies and DG-COMP.

Yet another example of bilateral convergence is illustrated by the new Canadian Intellectual Property Enforcement Guidelines, which will be discussed

here right after my talk. Although the pertinent Canadian law differs from U.S. law in important respects, the new Canadian guidelines were based not only on extensive public comments in Canada, but also on detailed discussions between Canadian, U.S., and European antitrust officials and other experts. The Canadian guidelines differ from ours in ways suggested by our legal differences, but there is similarity in the underlying economic analysis of the U.S. and Canadian guidelines on most points -- a good result for businesses and practitioners on both sides of the border.

The major advantage of bilateral convergence is that it tends to be non-adversarial and -- perhaps not coincidentally -- has often, as in the examples I've mentioned, yielded good practical results. We will continue to pursue convergence as a byproduct of bilateral cooperation with our major antitrust counterparts. The major disadvantage of this approach, however, is that it cannot as a practical matter be duplicated on a worldwide basis for 90-odd antitrust agencies with very different economies, legal systems, and experiences.

The second option, which the U.S. antitrust agencies have also pursued successfully in recent years, is to seek a multilateral consensus among like-minded antitrust agencies at the OECD. Over the past 20 years, the OECD Competition

Law and Policy Committee has played a crucial role in building consensus among its members -- currently, 29 in number -- on a wide range of antitrust and competition policy subjects. These efforts extend from informal exchanges of views at roundtables on, for example, competition aspects of telecom deregulation, to review of members' laws and enforcement measures, to agreed recommendations of OECD members on antitrust cooperation and hard-core cartels. One of the great strengths of the OECD is that it tackles a wide range of competition topics. But that, as well as its limited membership, are its two principal weaknesses as a vehicle for enhancing convergence on more focussed matters among the broad range of antitrust laws and agencies in today's world.

UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy and the WTO Working Group on Trade and Competition Policy also play valuable roles as multilateral educational fora, and the UNCTAD and WTO Secretariats play important capacity-building roles with new antitrust agencies. Their mandates, however, do not lend themselves to enhancing antitrust convergence on practical law enforcement issues.

The EU, Canada, Japan, and some other countries have proposed a third approach to the concerns about multiplying antitrust agencies and heterodox

antitrust laws and policies. They have suggested negotiation of binding antitrust rules of some sort in the WTO. Under these proposals in their current form, traditional WTO dispute settlement might apply to some aspects of an agreement, but not to individual decisions by antitrust agencies and courts.

As most of you know, the United States has taken the view that negotiations on binding rules would be counterproductive and, at best, premature. In our experience, sound antitrust principles must be able to adapt to new economic learning and new marketplace challenges and thus do not lend themselves either to detailed or precise codification or to negotiation and its inevitable companion, compromise. Sound antitrust enforcement requires a deep and shared “culture of competition” that will enable prudent application of economically-based competition principles to the facts of individual cases; such enforcement cannot be achieved by agreement on formal rules.

Moreover, in our view, the WTO is not, in any event, a suitable forum for negotiation of antitrust rules, and the cause of encouraging sound antitrust enforcement in world markets would be undermined by the application of WTO dispute settlement procedures to the kind of abstract rules that would result from negotiations in that forum. We have explained our views on these matters on

numerous occasions, and I will not repeat them here; I do suggest, however, that those of you who are interested in the WTO issue might want to read an article in the July issue of *American Journal of International Law* by Dan Tarullo, formerly President Clinton's senior advisor on international economic policy, which presents a thoughtful weighing of the policy and institutional difficulties with the WTO option.

In my view, therefore, while the first two options -- bilateral cooperation and consensus-building through the OECD -- should remain central components of any international antitrust policy arsenal, none of these three options offers a complete solution to the practical difficulties raised by the internationalization of antitrust. ICPAC, I note, reached the same conclusion.

### **III. Creating a Global Competition Initiative**

ICPAC's report recommended that the United States "explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations, and others can consult on matters of competition law and policy." In his recent Brussels speech, Joel Klein endorsed this

recommendation and suggested that, as a first step, interested jurisdictions and organizations (including OECD, WTO, UNCTAD, and the World Bank) “might establish a joint working group -- first for exchanging information and views” on pressing problems and priorities, and then for “fully exploring a Global Competition Initiative [or ‘GCI’] along the lines laid out in the ICPAC report. In addition, these groups should develop a coordinated and expanded commitment to technical assistance for emerging competition authorities that is essential if we are to develop a global common language” in antitrust enforcement.

These suggestions have provoked widespread interest, and they warrant further discussion and thought. They will take hold in the international community only if there develops a consensus about how to proceed, so the discussion should be widespread. As part of that discussion, let me share some of my thoughts with you.

First, some organizational issues. ICPAC itself viewed the GCI, not as a bricks-and-mortar organization with a large Secretariat and a precise jurisdiction, but as something more akin to the G-8, “but with less formality.” That strikes me as pointing in the right direction, though of course the G-8 model would be hard to transplant directly to an enterprise with vastly broader participation. We need to

recognize that the chances of getting government funding, in the U.S. or elsewhere, for an expensive new multilateral organization are very slim indeed and that creating a bricks-and-mortar organization (even deciding where to locate it) would create complex legal and jurisdictional issues, coupled with intra- and intergovernmental disputes, that would surely delay any useful work by a GCI for years.

The GCI could be supported by existing multilateral organizations interested in its mandate -- such as OECD, WTO, UNCTAD, and World Bank. Or it could be separately constituted by a membership consisting of all nations that have or are interested in economically-based competition laws. And it would presumably, of course, seek input from the private sector.

The work program could resemble, at least roughly speaking, that of the OECD. By that I mean that the GCI would be a forum for study, evaluation and recommendation. It could provide a mechanism for peer review and could work to encourage consensus for action -- much as the OECD helped forge consensus with its recommendation on hard core cartels. I do not, however, envision the GCI as a forum for the negotiation or implementation of international agreements.

The GCI could identify practical international antitrust issues that need, and are susceptible to, progress in developing analytical and/or procedural coherence

and could establish working groups on each such issue, with mandates for reporting back. If the GCI does not itself have general funding, at least some participants could undertake to provide personnel and other resources to support the individual working groups; presumably, some participants will be more interested in some issues than in others. At an agreed time, the broader GCI could debate the conclusions of the working groups to see if their views captured a sense of convergence or consensus on the issue. The result of all this would not be formal, binding rules, but rather a generally increased substantive or procedural coherence in antitrust enforcement. That, in turn, would increase the overall predictability and, I suspect, the quality of antitrust enforcement over a wide range of enforcement agencies, would reduce the likelihood of inconsistencies or frictions among nations in antitrust enforcement, and would reduce transaction costs imposed on businesses because of multijurisdictional review of their conduct.

I should note that I do not assume that, once GCI participants have achieved appropriate convergence on an issue, that issue need never be considered again. The history of antitrust in this country has been one of continuously examining the economic consequences of our antitrust policies; of abandoning policies that do not, in the light of experience, promote economic welfare; and of adopting new policies



that are better suited to do so. There is no reason why the GCI should work differently.

There is another important function that a GCI could serve, at least over the longer term, one that is also mentioned in the ICPAC report. Insofar as the GCI's work leads to a convergence in the way sovereigns see antitrust problems and solutions, we will be able to develop an increasingly shared view of the appropriate role for and methods of antitrust enforcement. Developing shared views will reduce differences in the implementation of antitrust laws and build trust among antitrust agencies; could result in greater cooperation in individual investigations; and, perhaps in some circumstances, could even lead to an increased role for deference and comity in international antitrust enforcement. If in the future we can safely conclude that deferring to another antitrust agency on a matter particularly within its jurisdiction would not sacrifice our own legitimate sovereign interests, then antitrust agencies, consumers, and businesses alike will be able to benefit from more efficient international antitrust enforcement.

A final component of a GCI would be a comprehensive program for providing technical assistance to new antitrust agencies. The ICPAC report placed a strong emphasis on the value of technical assistance; and the successful implementation of

this component of the GCI is, in my view, fundamental to the success of the whole. The basic problem here -- and it is a huge one -- is finding the financial and personnel resources to provide a reasonable amount of training to new antitrust agencies. If we continue to promote the adoption of antitrust laws by developing countries, but do not at the same time provide adequate assistance to train their new antitrust officials to apply those laws soundly, we should not complain too loudly if they do not get enforcement decisions right.

Over the past decade, the U.S. antitrust agencies, together with our colleagues in Canada, the EU, France, Germany, Japan, Norway, Sweden, the United Kingdom and other OECD countries, as well as multilateral organizations like OECD, WTO, UNCTAD, and the World Bank, have provided a wide variety of technical assistance to scores of new antitrust agencies in all areas of the world. This assistance has included sending antitrust officials to work in the offices of new agencies (the Antitrust Division and the FTC have sent attorneys and economists on long-term missions ranging from Budapest to Buenos Aires); sending antitrust officials on shorter missions to help draft legislation or deal with specific enforcement or policy problems; training foreign antitrust officials in our own agencies; and participating in seminars for large groups of new antitrust officials

from a wide variety of countries. The assistance has been beneficial to the recipients, but it has not been enough in the context of nearly 60 new agencies that often suffer from meager resources and high personnel turnover.

Unfortunately, neither the U.S. antitrust agencies nor our Canadian and EU counterparts directly receives funding for technical assistance. That situation is not likely to change. Rather, in the intragovernmental division of labor, each jurisdiction has an assistance agency (in our case, AID) that provides assistance to developing countries for a wide range of needs, from health care, to water and sewers, to antitrust enforcement. Not surprisingly, when one thinks about the other demands on AID's funds, only modest resources are available for antitrust enforcement assistance. Funding limitations aside, the U.S. antitrust agencies have limited personnel to devote to assistance, however much we might wish to provide. ICPAC recommended that "support to transition and developing antitrust regimes should be included among U.S. funding priorities, and the [U.S. government] should more vigorously pursue a variety of ways of offering such support." ICPAC also urged the government to improve our consultation and coordination mechanisms with other providers of technical assistance. These are sound recommendations,

and they could be implemented in the context of the GCI -- which, after all, will include both providers and recipients of technical assistance.

Those are my initial thoughts about what should be included in a GCI. We welcome hearing the views of others, in the United States and elsewhere, and we certainly welcome good ideas about how to obtain improved funding for technical assistance.

## **Conclusion**

For a long time, we in the antitrust community have been preaching the value of antitrust for the general economic well-being of society. In recent years, we have won many converts. Now we see that the combination of economic globalization and the widespread embrace of antitrust concepts has given rise to new and important issues for international antitrust enforcement. ICPAC has suggested, and we agree, that one useful way to address these issues is through a Global Competition Initiative. The purpose of the initiative would not be to draft a competition code or to impose one nation's antitrust laws on others, but rather to create and nourish a broad culture of competition, based on sound economics and due process, that will enhance competition and thereby promote economic well-

being around the world by making antitrust enforcement coherent and predictable across borders and by reducing needless duplication and the risk of inconsistency among enforcement regimes.