The Federal Trade Commission

Remarks of Deborah Platt Majoras
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before the U.S. Chamber of Commerce
on the launch of its Global Regulatory Cooperation Project

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Defending Competition Principles on a Global Basis

Good morning. I appreciate the opportunity to offer some comments on the occasion of the launch of the Chamber's Global Regulatory Cooperation Project.

The Project's goal of promoting market-oriented policies both here at home and abroad is right on-target. Ensuring robust competition based on free market principles is the most effective means by which to maximize consumer welfare. Through my now six-and-a-half year tenure as a U.S. antitrust enforcer, I have become keenly aware that enforcing our antitrust laws, while critical, is not enough. Rather, as I frequently remind our staff and have stated before the membership of the International Competition Network, we must serve as ambassadors and defenders of competitive markets ; that means standing up for competition in the face of business interests seeking government protectionism and over-intervention. It also means that U.S. and foreign competition

enforcers have an obligation to consider each other's interests and seek to minimize conflicts in our rules and decisions.

The Project comes at a time of tremendous activity and change – and thus, opportunity – in global competition policy. To evaluate where we are, it is useful to review where we have been. Only a generation ago, the world was divided not only between capitalist and communist systems, but also, within the capitalist world, as jurisdictions differed on the role competition should play in the economy. As a noted British jurist put it in a case that pitted U.S. interests against those of the United Kingdom, Canada, and Australia, "It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack."[1] That conflict, fortunately, spawned a cooperation agreement between the United States and Australia, and soon thereafter, Canada and the United States reached a similar accommodation that would evolve into a modern enforcement cooperation agreement in 1995.

In the 1980s, the European Commission's enforcement of Community competition policy began more frequently to impact U.S. firms operating there, and enactment of the EC's Merger Regulation in 1989 raised the specter of potential conflict between the United States and the EC in merger reviews. This led to the adoption, in 1991, of the U.S.-EC cooperation agreement, aimed at minimizing the impact of differences in our respective competition laws. This agreement resulted in close, regular, and routine contacts between the agencies in the investigation and resolution of merger and non-merger competition matters, and it spawned similar agreements with other jurisdictions.

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[1] *In re Westinghouse Electric Corporation Uranium Contract Litigation* [1978] A.C. 547, 617 (Lord Wilberforce).

With the fall of the Berlin Wall in 1989 came the rapid transformation of state-run economies to market-based ones. In Central and Eastern Europe, as well as in Latin America and Asia, privatization and de-monopolization were accompanied by the adoption of laws aimed at nurturing and maintaining competition, with many countries seeking assistance from developed nations like the United States.

We reviewed and commented on draft laws and offered suggestions on the establishment and operation of enforcement agencies. Then, with funding from the U.S. Agency for International Development (USAID), our technical assistance program was born, as the FTC and Department of Justice Antitrust Division (DOJ) sent experienced lawyers and economists to work side-by-side in the conduct of investigations and enforcement of the new laws with their counterparts in the new competition enforcement agencies.

The proliferation in competition enforcement agencies understandably led to fears of greater potential for conflict among them to the detriment of businesses and consumers alike. These concerns, along with a desire to enhance cooperation and share best practices, led the U.S. antitrust agencies, in 2001, to join with 14 other agencies to form the International Competition Network, an organization made up strictly of competition enforcers, aided significantly by nongovernmental advisors (including the Chamber).[2] The ICN was established as a venue for competition agencies from around the world to discuss common issues and to work toward procedural and substantive convergence. From years of experience with the slow pace of international agreements, we consciously

[2] *See* FTC press release at http://www.ftc.gov/opa/2001/10/icn.shtm.

determined that the ICN could accomplish the most at the fastest pace through the promotion of best practices.

So where are we today? On the occasion of our sixth annual meeting held in Moscow in May, the ICN reported a membership of 100 agencies from 88 jurisdictions.[3] The FTC is a member of the ICN's Steering Group, chairs its subgroup on Merger Notification and Procedures, and co-chairs the ICN's newly-established working group on unilateral conduct, which seeks to increase convergence in the analysis of monopolization and the conduct of dominant firms.[4] The Merger Notification and Procedures group's work led to adoption of a set of 8 guiding principles and 13 recommended practices, and 37 jurisdictions have changed their merger review systems to conform more closely to these best practices.[5] The ICN has made real progress in reaching greater doctrinal consensus on the core principles of merger analysis and the importance of anti-cartel enforcement. With DOJ, we also continue to play an active role in OECD's Competition Committee and the competition bodies of APEC and UNCTAD.

Beyond multilateral organizations, the U.S. antitrust agencies engage together in formal and informal bilateral talks with many of our overseas counterparts. During 2007, I have met or will meet with senior officials from agencies from around the world, including leaders from: the European Commission, the Canadian Competition Bureau, Brazil's CADE, Russia's FAS, the Mexican FCC, the Japanese and Korean Fair Trade Commissions, several Chinese agencies, both UK agencies, and the competition agencies

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[3] *See* International Competition Network press release at http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2007/06/1/28.

[4] Additional information on the ICN's Unilateral Conduct Working Group is available at http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct.

[5] The full text of the Guiding Principles and Recommended Practices is available at http://www.internationalcompetitionnetwork.org/index.php/en/publication/294.

of Hungary and Romania. And that is just me; other Commissioners and FTC staff have engaged in far more contacts. For example, we recently conducted discussions with the staff of the Japan Fair Trade Commission on revisions to their merger guidelines and draft IP guidelines, and on monopolization. In addition, we engaged in a substantial dialogue with the EC last year on their draft Article 82 paper. These actions afford us a better understanding of our respective analyses and enforcement and policy objectives with a view toward promoting convergence. They also help us to minimize the potential for conflicting outcomes in individual cases of mutual interest.

Our work in China continues. China has been developing its new Anti-Monopoly Law for the last decade, and Chinese officials have recently sought advice and comment from competition authorities throughout the world. The FTC and DOJ have taken advantage of this opportunity and provided the Chinese with a number of comments, including emphasizing the importance of not allowing administrative monopolies to circumvent competition policies, and the need to apply competition laws only to conduct that potentially impacts the Chinese economy and consumers. The Chinese have expressed interest in continuing a constructive dialogue with the FTC as they continue to finalize, and eventually implement, their new competition law. In fact, next week, the FTC's General Counsel, Bill Blumenthal, with Deputy Assistant Attorney General Jerry Masoudi from the DOJ, will meet with senior government officials in Beijing to discuss the outcome of the second reading of the draft law in the National People's Congress, and a joint FTC-DOJ team will conduct a week-long merger training program in Jilin. We also participated in the US-China Strategic Economic Dialogue this year, where U.S. officials encouraged China to adopt policies that support market-based competition.

Our technical assistance work continues. Last year, for example, the FTC sent 34 different staff experts on 30 missions to 17 countries. Costs, including salaries, still largely are reimbursed by funds provided to the agencies by USAID, and we are grateful for the opportunity to contribute to USAID's broader economic development program. Our current programs are in the ASEAN community of ten nations in Southeast Asia, India, Egypt, Russia, Azerbaijan, and Central America. In some cases, the FTC and DOJ have provided resident advisors, who have served for several months or longer in foreign postings. Our most recent resident advisor postings have been in Indonesia (assisting the Office of the Secretary General of the Association of South East Asian Nations (ASEAN)), and South Africa. While living in the region, these advisors have been able to extend their effectiveness by making regular monthly visits to neighboring countries.

We also have conducted numerous missions of about one week each, involving lawyer/economist teams that present interactive case hypotheticals that approximate real investigations, but are conducted with foreign colleagues in a classroom setting. On occasion, we have found it possible to "co-teach" such a case simulation with a regional enforcement agency that obtained its original training from participation in an earlier FTC/DOJ training exercise. This approach allows us to introduce an element of local or regional reality to the teaching, as well as to leverage the positive effects flowing from the earlier training.

The new SAFE WEB Act[6] has enabled us, finally, to implement a form of technical assistance that is very much in demand -- sharing our experience and skills in conducting real investigations with foreign enforcement colleagues. In the past, legal restrictions that barred access to confidential investigative materials prevented visiting

[6] U.S. SAFE WEB Act, Pub. L. No. 199-455, 120 Stat. 3373 (Dec. 22, 2006).

colleagues from taking full advantage of the ability to learn from their stay at the FTC. Subject to appropriate safeguards and close supervision, the new legislation allows us to assign individual foreign colleagues, in residence in the U.S. for periods of up to six months, to work on specific cases selected by FTC management. Both the individual FTC Fellows and their employing agencies will be required to agree to FTC terms and conditions that limit access to confidential material. This access will not be part of any joint investigative activity, but rather, a form of training in the rigors of the U.S. investigative process. We expect to inaugurate this program with an experimental Pilot Program as early as this autumn, after which we can assess the future direction of this unique international opportunity.

Having explained where we are in the international competition enforcement world, let me make a few observations. First, while the proliferation of competition regimes clearly has the potential to lead to over-intervention and costly differences in the global marketplace, we should not lose sight of that fact that, thus far, we have managed to avoid this occurring on a widespread basis, despite varying legal structures and cultures that distrust markets. Without a doubt, the different U.S. and EC decisions in GE/Honeywell and Microsoft have been costly. The GE/Honeywell transaction, though, led to increased efforts to cooperate on merger review. Working groups established for that purpose contributed to the issuance of Best Practice Guidelines on cooperation in merger investigations[7] as well as to revisions of the EC Merger Regulation.[8] In the six years since the GE/Honeywell case, the FTC alone has consulted with the European

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[7] Text of these best practices is available at http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm.

[8] *See* Articles 2(2) and 2(3) as well as Recital 25 of the EC Merger Regulation, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_024/l_02420040129en00010022.pdf.

Commission in over 50 merger investigations, resulting in the coordination of compatible enforcement remedies in 17 of them, including matters such as Boston Scientific's acquisition of Guidant and Sanofi's takeover of Aventis.

Perhaps the most notable area of convergence in competition policy is in the field of cartel enforcement. Today, the EC cooperates closely with DOJ in transatlantic efforts to bust cartels.

Much work remains, particularly in the area of single-firm conduct. But we must learn from what we have accomplished thus far.

Second, all enforcers charged with protecting markets have an obligation – regardless of whether cross-border agreements exist – to consider other jurisdictions' regulatory and enforcement regimes and how they impact the market and the conduct or merger at issue. Done correctly, antitrust analysis must be based on market facts. This means that *the fact* of a regulatory constraint or impact, whether here or abroad, must be taken into account.

Third, to be most effective in advocating for convergence around sound competition principles, we must have policies worth emulating and avoid hypocrisy. It's fairly simple: no one cares if you talk the talk unless you also walk the walk. This means that we must continually ensure that our antitrust enforcement policies remain focused on consumer welfare and are based in sound economic thinking. Through the recent public hearings on single-firm conduct that we held with DOJ,[9] our advocacy in the U.S. Supreme Court, which has "updated" old antitrust case law in a series of recent decisions, our research on gasoline markets, etc., we endeavor continuously to improve our policies

[9] For more information on and transcripts of the single-firm conduct hearings, *see* http://www.ftc.gov/os/sectiontwohearings/.

and enforcement decisions. We also must take care not to simply opine on what not to do, but show what we believe to be sound enforcement.

But my point goes beyond the antitrust agencies. We have a market economy that is the envy of the world, and yet distrust of markets and the effectiveness of competition in protecting consumers still infect policy-making. While it is easy – and correct – to condemn those abroad who speak, for example, of protecting so-called "national champions," we also need to work to keep our own house clean. Try to imagine if you will how many times I have had the negative reaction of U.S. politicians to Chinese company CNOOC's efforts to buy Unocal thrown back in my face; or the times that I have listened while overseas competition officials ridicule U.S. policies that protect U.S. industries. Sound market-based policies also are threatened as we consider enacting gasoline "price-gouging" legislation, rather than face the difficult questions that ever-growing demand and tight and potentially unstable supplies pose. To be most effective in advocating in the international competition arena, we must ensure that our own policies are sound. This means recognizing that all barriers to competition are suspect, whether private or government-imposed, and our job as competition champions requires identifying and, where possible, working to eliminate all such restrictions. Over the past three years, the FTC has increased our efforts at identifying and defeating government proposals that restrict competition to the detriment of consumers.

Fourth, however, we cannot be afraid to speak out about what we believe to be the virtues of our policies. Without question, effective, cooperative relationships require diplomacy, mutual respect, and listening. Sometimes, though, I have watched as Americans, including in the private sector, are so afraid to be tagged as pushy, know-it-

all “ugly Americans,” that they pull their punches in advocacy over what constitutes sound competition policy. This is counter-productive. We can be strong advocates without being disrespectful.

Fifth, in international cooperation efforts, as in most things, there is no substitute for relationships. Our ability to avoid divergences and to bring policies closer together is significantly enhanced through the strong relationships we build. You typically only see what the newspapers print -- agency disagreements. What I see are counterpart agency officials who know each other well enough to pick up the telephone and to talk things through. Building these relationships begins at the top and requires great person-to-person effort – or, as my great friend, former Assistant Attorney General for Antitrust, Hew Pate, used to say of multi-lateral meetings, ”You have to show up and get your butt in the seat.” Recognizing this, my fellow commissioners and I, as well as many others within the agency, have spent countless hours on the road building the necessary bridges in the international competition arena.

Sixth, if supportive of the goals of the Chamber’s Project, U.S. businesses should consider the impact of their own decisions on the regulatory landscape. Business officials must make decisions that are in the best interest of shareholders, of course, and they lobby governments for favorable policies and enforcement decisions not only here but abroad. Over the past 5-10 years, this has included forum-shopping to find the most favorable regime to attack a competitor’s conduct or merger. A business has a right to do this, and many have been successful in achieving their objectives. Still, you may want to consider that when in our discussions with overseas counterparts we assert that perhaps a particular action may protect a competitor but not consumers, we have many times been

told that the complainants all were U.S. companies complaining about other U.S. companies. There is no harm in that if the conduct harms consumers. If it does not, though, the advocacy may help in one instance but contribute to the formulation of policies that are harmful to markets in the long run.

Finally, we are, I believe, at a crossroads in our technical assistance programs. The growing list of new regimes has led to greater demand for assistance from nations, like ours, with track records of experience. USAID has been generous, but funds are limited and there are some countries that we cannot reach with USAID money. In addition, while we know that resident advisors are most effective in providing assistance, they also require the most resources. Demand for consumer protection assistance also rapidly grows, and such assistance is particularly critical as the Internet, unfortunately, enables the rapid dissemination of fraud and deception along with legitimate products and services. It is time to re-evaluate our program – from priorities to funding to techniques. As always, public input will be critical to this evaluation, and you will be hearing more from us in the coming months.

I look forward to working with you on breaking down regulatory and other barriers to free markets and competition.