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## LUNCHEON SPEECH

# Is Cooperation Possible?

Honorable Diane P. Wood\*

It is a great privilege to be here this afternoon, in such distinguished company, back in the somewhat rarified world of international antitrust law and policy. It is a far cry from much of the nitty gritty work that comes before the federal courts of appeals, where we are so often called upon to decide how many kilos of cocaine should be attributed to a particular dealer for sentencing purposes, or whether an employer's decision to fire someone was just a pretext for discrimination on the basis of age, race, sex, disability, or another forbidden trait, or whether an administrative law judge's decision in a labor case, a black lung case, or a social security case, was supported by substantial evidence. No, here, we are dealing with the future of the world economy itself. It is an appropriately grand topic for a conference being held a mere eight and a half months from the dreaded and much-anticipated Y2K.

As I see it, the debate over "competing competition laws" is just one part of a far broader inquiry that people in country after country, region after region, have struggled with since the idea of democracy itself took hold. How much, in the name of political accountability and local differences in resources of all kinds should be left to local political units: towns, villages, provinces, states, or countries? On the other side, in the name of efficiency, global prosperity, and — shall we put it delicately, reining in the impulse to shift problems onto someone else's back — how much should be given to a higher authority that is well positioned to take the greater good into account? If we thought that the regulation of the competitive process was something like education policy, a subject that each state or locality was entitled to address as it saw fit, I doubt we would be terribly worried about the different visions of what is and is not anti-competitive as discussed by our morning speakers. There would be a shrug of the shoulders from most people, and the few who thought that the British system, or the German system, or the American system had distinct advantages would find a way of voting with their feet and choosing the

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approach they preferred.

But obviously, competition policy differs in many ways from education policy, and the sheer number alone of conferences and articles that have discussed the real world problems that result from divergent views suggest that there is a serious concern here. That problem, in a world that will sound familiar to *aficionados* of the law and economics of school of thought, is spillovers. I would add that there is also a free rider problem, though one that has been buried in the rhetoric of opposition to so-called extraterritorial application of antitrust laws. Whether we are talking about negative externalities (which is what I mean when I speak of spillovers) or positive externalities (which is what I mean when I say there is a free rider problem), the fact is that one country's competition policy often affects that of its neighbors in ways that are infinitely more immediate than the effects caused by other important internal policies. So we have no choice in the matter. We do care, because we must care, about the divergences that exist around the world in competition policy at least insofar as they threaten the regime we want for our own country or region.

Just because we recognize there is a problem does not mean that we need to do anything about it. Some problems are not urgent enough to percolate up to the top of the list. My favorite candidate for that kind of problem is the abysmal heating and cooling system in the federal courthouse in Chicago: sometimes my chambers are a brisk 58° F (14 or so if you prefer Celsius readings), and sometimes they are a toasty 86° F (30 Celsius). No amount of complaining has ever convinced the General Services Administration that this is a problem worthy of solving, and I doubt it ever will. We just use space heaters, fans, and abandoning ship as needed. For a long time, the differences around the world in competition law, including its virtual absence in most places, seemed to fit that pattern. We knew the differences were there, we knew they were genuine, but they erupted infrequently enough that their brief appearances on diplomatic agendas never amounted to much. Some problems, while plainly important enough to require attention, turn out to be so costly to solve that the proverbial ostrich approach wins out, or more optimistically, the international community inches along toward an acceptable long-term solution. Environmental issues like global warming, orbital debris, and nuclear waste disposal have at times evoked both kinds of responses.

The cost of adapting antitrust to a global setting should not, however, be prohibitive. The adaptation process is well underway, and a number of clearly defined options are already on the table. One of them will be the topic of this afternoon's discussions: the development, adoption, and implementation of a "global standard." I will save most of my comments on that for the end of the day. Another opinion is enhanced regionalism. The European Union has continued to grow, and we know that the line (or

queue as our British friends like to say, using the French word for “tail”) of countries hoping to become full-fledged members of the European Union is a long one. Not the least of the consequences of the EU’s growth already from six to fifteen countries, and maybe fifteen to twenty-five some day, has been the spread of a unified competition law regime over virtually all of Western Europe. Regional pacts in Latin America, “Down Under” between Australia and New Zealand, and even the North American Free Trade Area, have also fostered the development of harmonious competition law regimes among the participating countries. But I would like to focus my remaining comments on the third option: cooperation. Just as regionalism is already within us, so is cooperation. In that sense, it is a little odd to ask if cooperation is possible. It is like asking you if it is possible for you to eat your lunch. Most of you, I suspect, would answer that question with a bewildered “but I just did.” Is it *possible* for the United States and Europe to cooperate on an investigation of Microsoft? they did it in 1994. Is it *possible* for the United States and Canada to cooperate on a fax paper investigation, and many others? They do it regularly.

So let me rephrase the topic a bit and suggest a number of questions about cooperation that deserve attention. First, there is some minimal degree — some floor — of substantive similarity that must exist before cooperation is a serious option? Second, what are the transaction costs of cooperation, and how seriously do they diminish the effectiveness as a way of solving those externality problems that I mentioned earlier? Third, why have we not seen more in the way of cooperation like that between the United States and Canada in criminal and antitrust cases? Fourth, are there ways of improving the legal framework within which cooperation takes place that would allow better enforcement of competition rules, reduction in negative externalities, and at the same time avoid the rather considerable risks posed by global standard-setting in this area. I will look for a minute or two at each of these.

### I. THE SAME WAVE LENGTH

The word “cooperate” itself may require some definition before we get much further. For the sake of simplicity, I will assume here that we have only two countries that wish to cooperate in an antitrust enforcement action, even though plainly there may be cases with three, four, or even more players. Game theorists are far more qualified than I to tell you about the complications that arise when it becomes a multiple-player game, but I believe they would agree that the two-player model is enough to make the kinds of basic points I wish to discuss here.

Sometimes the word “cooperation” refers to consensual joint efforts to accomplish a single job. On the other hand, it can, with a very different flavor, mean, “do what I want you to do, not what you are trying to do,” as

when a police officer is urging a suspect to “cooperate” rather than to resist an arrest. Although you might think it obvious that the former definition is the one that applies to the debate about cooperation in international antitrust enforcement, matters may be somewhat more complicated than that. One of the obstacles we have faced in discussing cooperation among antitrust authorities relates to what I will call, for lack of a better term, equality of bargaining power between the agencies. If one agency is always likely to be the *demand*er, and the other the assistant, “cooperation” could look at a minimum like a euphemism for one-way support to the first party. If the *demand*er makes matters worse and backs up the request for cooperation with an assertion (made however politely you wish) of the power to enforce its laws unilaterally if necessary, then “cooperation” starts to take on an uncanny resemblance to the police officer model.

Just to be perfectly clear, I am not talking about a Godfather-like (in the Mario Puzo sense) “cooperation.” There is no getting away from the fact that sometimes larger countries will seek assistance from smaller ones, and that the sheer size of the economics of places like the United States and the European Union means that they may be investigating transnational arrangements more frequently than will most smaller countries. But two points are important to keep in mind. First, if a potentially anti-competitive arrangement comes to the attention of the Brussels or Washington authorities, and they realize that they may need some kind of lawful assistance from someone in, for example, Wellington, New Zealand, it would be wrong to assume that only Brussels or Washington will benefit from the assistance. New Zealand will surely benefit indirectly too, and it may well benefit directly, from scrutiny of the deal provided by the European Union or the United States. It will benefit indirectly because the ability to investigate thoroughly and to ferret out the truly anti-competitive arrangements from those who turn out to be innocuous helps the entire world economy to function better. It may benefit indirectly if, as often turns out to be the case, the New Zealand party was restraining competition and injuring consumers there at the same time as it had become implicated in the European or North American markets. So the mere fact that cooperation is not likely to produce tally sheets with the same number of requests for assistance and the same number of responsive acts in each column for every country does not mean that cooperation is doomed from the start.

For our purposes, then, the normal meaning of “cooperation” serves nicely. *Webster’s Third New International Dictionary* (which some people may regard as too casual about precise meanings of words, but which is a readily accessible source) defines the verb “to cooperate” as meaning: “[1] to act or work with another or others to a common end: operate jointly . . . [2] to act together: produce an effect jointly . . . [3] to associate

with another or others for mutual, often economic benefit . . .<sup>1</sup> Explicit in the first of these definitions, and implicit in the other two, is the idea of the “common end.” That idea in turn indicates that cooperation in anything — antitrust enforcement included — can only take place if both parties are agreed on a common end or on the effect they wish to produce jointly.

The question whether there must be *some* kind of common end for cooperation to make sense is thus easily answered: of course there must. But the far trickier question, and the one that has serious implications for the global standards movement, is how broad or deep those common ends must be. In my view, this is a place where we can and should be modest. We *can* be modest because cooperation in antitrust enforcement matters occurs inevitably on a case-by-case basis. If both countries have some kind of competition law, and both can agree that a particular cartel, a particular merger, or a particular course of conduct should be addressed, those countries should be able to work out a cooperative arrangement consistent with both their domestic laws. Cooperation could also occur on a much higher level of generality, if the two countries wish to share experiences about legislative drafting, industry deregulation, or detection and enforcement techniques that have proven themselves over the years. Common ends in the broadest sense of the term are enough to support this type of cooperation. We should be modest because of the great risks that attend an act of imposing, nineteenth century colonial style, a body of competition law on countries that have not yet become convinced on their own that they want such a law, or that believe their own needs require a homegrown version of the law, not something dictated from Geneva, Brussels, Washington, or Tokyo. The last thing those of us who believe sincerely in the value of competition laws would want is a law that recipient countries grudgingly accept as the price of admittance into someone else’s club. Let them come on their own to the decision that they want such a law. Those who have done so have drafted impressive laws, with the willing assistance of more experienced countries. Only in this way will the competition law have any hope of being taken seriously, both within the government and within the business communities who must learn to live with it.

## II. TRANSACTION COSTS

Ah, but you might say, it is hard as a practical matter to make cooperation work. Wouldn’t it be far smoother if we could lay a common groundwork, at least in principle, so that everyone involved in the coop-

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1. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 501 (1986).

eration efforts had the comfort of knowing we are all on the same team? I agree with both of those points: cooperation is hard work; substantial barriers, both legal and psychological diminish its effectiveness; and things would be easier if we all had the same law. The important questions to me, however, are: what are those transaction costs, what can we do to reduce them, and which approach over the long run will lead to the most durable consensus on effective enforcement of antitrust laws?

Here is a list of — undoubtedly incomplete — of some of the barriers that stand in the way of effective cooperation: (1) substantive laws that diverge too radically (for example, one nation's law focuses on the economic efficiency model of consumer welfare, while the other nation's law is concerned exclusively with regulating the behavior of very large firms); (2) disputes about the proper extent of so-called extraterritorial jurisdiction; (3) widely differing assessments about the seriousness of the conduct at issue (for example, one nation makes it a felony and imposes multi-million dollar fines on offending corporations, while another nation does not criminalize any competition law offenses at all, and has capped possible civil penalties at \$5,000 U.S. dollars per infraction); (4) language barriers; (5) different investigative tools available; (6) differing roles for public enforcement agencies, especially if one country recognizes private rights of action and the other does not; (7) different timetables for action — an issue especially in merger cases; and (8) different possible remedies. Add to these the general problem (which we know well from cartel theory) of simply coordinating everyone to march in the same direction at the same time, left foot first, and it is easy to see that the prospect of “cooperating” with another agency might seem like the most surefire way to slow down a case you could imagine.

That would be true if agencies needed to coordinate the majority of their cases with counterparts elsewhere, but the truth of the matter today is that well less than a third — maybe even less than a quarter — of the cases a national authority handles raise even a hint of a need for international cooperation. Many of that group do not require cooperation at all stages of the proceeding. In mergers, for example, national authorities with merger control responsibilities have all the power they need to require parties to submit relevant information as part of a merger review process. It is later down the line, as remedies are devised and efforts made to avoid imposing inconsistent obligations on the parties that cooperation is helpful. Even the possibility of cooperation or its milder cousin “positive comity” has the effect of toning down disputes over jurisdictional matters. Thus, while I would not expect one country to assist another in pursuing a case that the first country regarded as an impermissible effort at extraterritorial regulation, the existence of the cooperation option might transform that jurisdictional dispute into a more fruitful conversation about the possibility that

the second country might address the problem itself. Indeed, more generally, the best way to tone down sometimes excited rhetoric, to improve understanding of the variety of the approaches to competition law that exist, and to foster a natural evolution of compatible (if not identical laws) laws, is to create as many avenues for cooperative efforts as we can, and to clear away the obstacles that stand in the way.

### III. IF WE ALL AGREE ALREADY, WHY CAN'T WE WORK TOGETHER?

It has been striking to me for a long time to compare the essential similarities among the competition laws of the member countries of the Organization for Economic Co-operation and Development (OCED) with the rudimentary nature of the cooperative enforcement that takes place among those countries. (I put to one side the special case of the member states of the European Union, which are subject to supranational law for transactions that affect trade between member states or that have a "community dimension." My remarks do apply, however, to the way cooperation does and (mostly) does not occur for matters that are still regulated at the national level in those countries).

In my experience, the single most important reason why more and better cooperation does not yet occur between national authorities can be summed up in a word: confidentiality. Every country has laws that protect confidential information, and every country forbids its competition authorities from sharing protected information with *anyone* else, including another competition authority, unless special statutory authorization for that kind of sharing exists. Usually, it does not. As most of you know, in the United States, Congress passes enabling legislation for antitrust cooperation agreements in 1994, but similar legislation has yet to be passed in most other countries with antitrust laws.<sup>1</sup> Also, it is painfully obvious by now that other countries have not been pushing one another aside in order to be the first to have an antitrust cooperation agreement that comes into effect. There is an agreement on the table between the United States and Australia, but it has not yet entered into force.<sup>2</sup>

We are all familiar with the expression that actions speak louder than words. What should we assume, when countries with laws that are already as similar as those of the United States and Australia, or the United States and the European Union (or Germany, or France) approach the

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2. The agreement with Australia entered into force shortly after this speech was given, on April 27, 1999. See Department of Justice, Agreement Between *The Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance* (visited Dec. 9, 1999) <<http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>>.

signing of a cooperation agreement so cautiously? Does it mean that cooperation is impossible with those countries? Does it mean that harmonization of substantive laws will have essentially no effect, because it means little without effective coordination of enforcement proceedings? I think it does mean the latter, but I have tried not to be too pessimistic about the former. Some people mention a fear of the U.S. treble damage proceedings, but that does not explain why Germany and Canada do not have a formal, binding, cooperation agreement. Those who think information cooperation is risky do not appreciate the restrictions on the uses to which information collected by the government for public enforcement proceedings can be put outside the litigation. The government does not turn over documents, depositions, or work product to any and every private plaintiff that walks along. Indeed, I think it would be impossible for any such information to fall into the hands of a private plaintiff without the permission of the court, granted after a full hearing at which the party who originally produced the information would be heard. No one needs to worry about information gathered by a foreign party for use by the government secretly falling into the hands of a predatory private plaintiff; this is just not the way the system works.

The fact that people remain so cautious about real cooperation should stand as a warning signal about the value of pursuing global standards. Most advocates of such standards agree that the OCED countries (plus some others) already meet whatever standards would be imaginable. But the ability to enforce competition law at the same level at which business transactions take place will only be assured when effective cooperation mechanisms are in place. The fact that such mechanisms are not yet in place says two things: first, nations still value sovereign prerogatives above any added benefits for competition law enforcement, and second companies are content to live in a world in which enforcement agencies must operate with one hand tied behind their back.

#### IV. BETTER FRAMEWORK FOR COOPERATION

What can we do to improve the framework for cooperation, so that we will have the benefits of national laws without the added bureaucracy of a supranational competition regime (or, if we have such a regime, so that the lower level can operate as efficiently as possible, with as little need for appellate review as is feasible)? Once again, there are a number of steps, and countries have already begun moving in this direction.

First, the network of so-called soft bilateral cooperation agreements can be expanded. Like the agreements that exist between the European Union and the United States, and now the European Union and Canada, as well as among a number of other countries, these agreements amount to a public statement that the signatories are committed to enforcing laws that ad-

dress anti-competitive practices. The current generation of agreements embraces the principle of positive comity, and they contain a public statement that the competent agencies will share information with one another within the constraints imposed by domestic law. That is a tremendous constraint indeed, and it means that very little information sharing can occur. Still, one agency can alert another about the time when it plans to instituted formal proceedings, for example, because that information in no way reveals confidential business secrets that the parties may have been compelled to divulge. Experience with this limited form of cooperation can lay the groundwork for the true joint law enforcement efforts that are possible under certain treaties and other international agreements.

Another necessary step is for countries to pass legislation similar to — but I would suggest not necessarily identical to — the International Anti-trust Enforcement Assistance Act of 1994 (IAEAA).<sup>3</sup> Given the nature of confidentiality laws and regulations in every country, clear legal authorization must be in place to permit any form of joint law enforcement with authorities of another country. Antitrust is no exception. The IAEAA offers one way of accomplishing that, but it may have been too rigid in the requirements for enforcement cooperation agreements. Particularly when we compare the IAEAA to the counterpart legislation that authorizes the Securities and Exchange Commission (SEC) to cooperate with its sister agencies in other countries, the rigidity or compelled formality of the IAEAA looks troublesome. What may be needed is a way to authorize single-case agreements, or test protocols, so that countries can move more cautiously into the realm of joint competition law enforcement, instead of pushing each side to adopt the more sweeping framework that the IAEAA contemplates. The SEC has that flexibility, and it has used everything from case-by-case agreements to international accords that look like an IAEAA agreement. Single-case agreements would also provide a laboratory for a more elaborate treatment of the question of privileged information, which is certainly one of the most sensitive issues in this area. Especially, after the U.S. Supreme Court's decision in the *United States v. Balsys's*,<sup>4</sup> which held that the Fifth Amendment to the U.S. Constitution normally does not permit someone to refuse to testify just because she fears prosecution in a foreign country, a negotiated framework for accommodation of two countries' privileges seems to be the only promising solution.

Whatever framework for cooperation is in place, whether a general one or an *ad hoc* one should also distinguish information sharing from information use. This would be consistent with some of the law that has de-

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3. 15 U.S.C. §§ 6201-12 (1994).

4. 524 U.S. 666 (1998).

veloped in the European Union, such as in *Spanish Banks*,<sup>5</sup> and it would provide one more safeguard for countries concerned that they might be abetting investigations that turn out to be incompatible with their own national interests.

Cooperation, as I said at the outset, is not only possible, but it is with us today, and it is slowly evolving into a versatile mechanism that can address anti-competitive practices at the global level, if that is where they are being implemented. At the same time, it sends a clear message that this body of law remains grounded in national economic policy, and it permits nations to choose the kind of competition policy they wish to have. No matter how firmly someone may believe that the antitrust or competition law of a particular place has achieved final wisdom, history offers a strong message that some modesty is called for here. Internal laws must be free to develop, and countries must remain free to tailor this body of law to their own needs. A cooperative approach to international enforcement permits this to happen, while at the same time it allows effective measures against international cartels to be implemented without contentious jurisdictional disputes. It is possible. It is necessary. And no matter what else we do with competition policy, it will play a critical role in real-world enforcement proceedings.

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5. Case C-67/91, *Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada*, 1992 E.C.R. I-4785.