Department of Justice

REMARKS OF

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AT THE

INAUGURAL SESSION OF THE EXECUTIVE COUNCIL

INTER-AMERICAN BAR ASSOCIATION

Mexico City

Wednesday, May 7, 1980

10:00 a.m.

During the 1970's, we witnessed an expansion of international commerce and the growth of transnational enterprises. The development and success of these enterprises leads us to expect a continued expansion of international trade and the role of these enterprises during the 1980's.

I suggest that the growth of transnational enterprises should be encouraged because they furnish substantial benefits, across a wide spectrum, to both home and host countries. The economic benefits include increased employment and wages, increased gross national product, larger markets, and increased tax revenues.

Coupled with multinational economic development, technological advances in communication and transportation have produced a de facto cooperation among nations in a wide variety of social fields. Mutual economic benefits and the regular opportunity for appreciation and understanding of the value of each nation's customs, products, and services increases the admiration and respect among people too. However, economic growth and de facto cooperation will not obliterate the differences among nations. Each country has special cultural and social values born out of its unique historical experience. The interplay of modern technological development and economic growth on the one hand, with respected social values on the other, places strains on the fabric of traditional conduct. The benefits to be derived from

rapid economic growth are desirable, but they must be carefully balanced to preserve all of our traditional values as well as the best characteristics of our basic national identities. Consequently, multinational enterprises, like people, must recognize these sensitivities as well as the formal obligations imposed by the laws of each nation. I believe that most multinational enterprises do, in fact, meet these responsibilities.

Obviously, there are exceptions to good conduct. Some enterprises, like some individuals, engage in conduct which violates the criminal law. What is a new and growing problem as to transnationals is the exent to which such misconduct transcends national boundaries.

The expansion of the role of these enterprises and the technological advances about which I have spoken have been successfully exploited by contraband traffickers, swindlers, and other types of serious criminal offenders. Thus, new and difficult international enforcement problems are created for both home and host countries.

The responsibility to prevent or deter transnational criminal conduct must first be acknowledged by the home country because it originates the enterprise and has the greatest control and influence over it. If the multinational is a corporation, most of its principal employees, officers, and business records

are located in the home country. Fundamentally, host countries are at a distinct disadvantage in attempting alone to control transnational criminal conduct. The host country has a primary duty to enforce its own laws to protect its citizens. Recognition of these bilateral responsibilities to control transnational crime is as obvious as is the need to work collectively to develop better cooperative methods to meet these responsibilities more effectively.

The complexity of much of this criminal conduct requires innovative and cooperative law enforcement efforts. For example, often when an enterprise from one country engages in corruption of an official from another country, the payment is arranged and made in a third, fourth, or even fifth country. Without evidence secured from each of the other jurisdictions, prosecution of the payor wrongdoer by its own government can generally be expected to fail. Conversely, successful prosecution of the corrupt official by his own government will often not be possible unless that government is also able to prosecute the employees of the foreign company who perpetrated the corruption or, at the very least, to have the testimony of those employees available for use at the trial. On this most basic level, success in such investigations depends on close cooperation among all affected governments. Fortunately, some progress has been made over the last five years.

The United States Congress undertook to meet our obligations

as a home country to control one form of transnational criminal conduct by enacting the Foreign Corrupt Practices Act in December of 1977. That Act makes it a criminal offense for American-based companies and individuals to engage in bribery of foreign government officials. Violation of the Act subjects the offender to very substantial criminal fines and jail terms.

While implementing this new law, the United States asked other nations to help control this type of transnational criminal conduct. Following a United Nations General Assembly Resolution in December, 1975, which called on all countries to cooperate to eliminate corrupt practices, the United States, in March, 1976, proposed a treaty on illicit payments at the U.N. Commission on Transnational Corporations. In July, 1976 the U.N. Economic and Social Council established a Working Group on Corrupt Practices charged with developing the agreement. By May, 1979, due to increasing cooperation among member nations in the Working Group, a draft treaty was virtually completed. There are only a few issues which still await agreement on language.

The convening of a diplomatic conference to conclude the treaty has been postponed in order to first consider agreement on a non-binding Code of Conduct, now under discussion in a Working Group of the Commission on Transnational Corporations. Unfortunately, the drafting of the Code of Conduct began only in January of this year, and despite the progress of that Working

Group, no complete draft text is likely to emerge for another year. We are committed to continue to work as expeditiously as possible to produce an agreed text of a Code. The effects of corruption in international commercial transactions are of concern to all nations. Further delay in convening a diplomatic conference on the illicit payments treaty, despite the value of an agreed Code of Conduct, is unwise.

The successful negotiation of this multilateral treaty on illicit payments would be a major achievement by the international community. Contracting states would be obligated to assist each other in the prosecution of illicit payment cases. However, the treaty would not establish any new international mechanisms to facilitate such assistance.

The successful prosecution of almost all international crimes is dependent upon existing mechanisms to obtain access to witnesses and documentary evidence in affected countries. Indeed, it is often necessary to initiate extradition proceedings to obtain custody of the offender to be prosecuted. These existing mechanisms are not adequate to the increasing needs.

In the field of extradition, for example, nations have traditionally granted assistance to each other by the legal processes of arrest and return of fugitives. However, we need to modernize our extradition treaties to deal with current

realities. New extradition treaties should deal with modern crimes: terrorism, hijacking, foreign bribery, and new forms of extortion, as well as computer, financial, and contraband crimes, many of which were unheard of when most of the current extradition treaties were negotiated fifty years ago.

The current international mechanisms for the rendition of testimony and evidence from one country to another in civil and criminal cases also require a complete overhaul and rebuilding. Ironically, it is far easier and quicker to return a fugitive from a foreign country than it is to obtain the evidence necessary for his trial.

The traditional international mechanism for obtaining evidence from abroad, letters rogatory, was developed centuries ago. Letters rogatory are requests by a judge of one country to a judge of another country to perform a judicial act, such as ordering oral testimony or the production of documents or other evidence. They are still valuable, but the letters rogatory procedure, conceived when communications between governments traveled by ship and persons accused of crimes stayed in jail indefinitely awaiting trial, is inadequate to meet today's needs. In theory, letters rogatory should allow necessary evidence to be obtained no matter where it may be found. In practice, they do not.

Letters rogatory involve unnecessary formalities, unacceptable delays, unresponsive channels of communication, and ineffective

procedures for obtaining evidence in a form for timely use.

For example, in order for a judge in the United States to request the assistance of a judge in another country:

-- The Attorney General must certify that the signature on the letter rogatory is really the signature of the judge;

-- The Secretary of State must certify that the signature of the Attorney General is genuine;

-- Then the foreign consul in Washington or the United States consul in the foreign country must certify that the signature of our Secretary of State is genuine.

Letters rogatory generally must be sent and received through diplomatic channels. Because each of the many offices and departments handling them requires time to process the letters in accordance with its own bureaucratic routine, it is not at all unusual that the complete transfer of the letters rogatory may require six or seven months or more. In an age of worldwide jet travel and satellite communications systems, that antique process does not serve the multiple needs of international trade, our governments, and law enforcement officials.

Delay is not even the worst of the problems with letters rogatory. More and more, the execution of letters rogatory is prevented by a one-party presentation of technical legal issues in the foreign court.

For example, the United States often sends letters rogatory to request the production of bank records. Tracing money through bank accounts is an essential part of most transnational criminal investigations.

When the receiving judge summons the bank to produce the records, that summons often produces more lawyers than documents. The banks argue, with disturbingly frequent success, that the technical requirements of bank secrecy laws prevent the execution of the letter rogatory, or that the certification of signature is somehow defective.

The interests of the requesting country are not represented in the proceeding. The court decides the matter based only on the legal arguments made by the person opposing the letters and the requesting court's written request for assistance. The internal laws of most countries have become so diverse and complex that letters rogatory cannot be effectively executed without the help of an expert in the local law. But the time and expense of regular counsel in letter rogatory proceedings is frequently prohibitive and always inhibiting. Some small but important changes have been made. For example, if a foreign court sends a letters rogatory request for evidence in a criminal case to a United States court today, the Department of Justice makes its lawyers available without cost to effect the execution of the letters rogatory provided that the country in question will

reciprocate that service. Our lawyers who are expert in international judicial assistance work closely with the requestor by telephone or in person, to insure that the foreign court derives maximum benefit from letters rogatory to the United States.

But I would like to propose a more modern solution. We need to replace the antiquated system of letters rogatory with a new international structure composed of treaties for mutual legal assistance. Such treaties would permit requests for international assistance to be communicated through the designated authority in one country directly to the designated authority in the requested country. Ordinarily that authority would be the Ministry of Justice of each country. Thus, the channel of communication would be direct from one lawyer to his counterpart, thereby eliminating confusion and unwarranted delays.

The common law tradition places heavy emphasis on the examination of witnesses by opposing trial counsel. By contrast, the civil law tradition relies heavily on witness examination by the court. Naturally, rules of evidence are different in the two systems. Indeed, admissibility rules differ markedly among countries. Such differences must be overcome so that we can effectively assist each other in the prosecution of transnational criminal offenders. The negotiation of bilateral mutual legal assistance treaties will allow legal experts of both countries

to remove evidentiary roadblocks and spell out solutions which meet their mutual needs.

The United States has developed considerable experience with bilateral mutual legal assistance treaties. The first such treaty, with the Government of Switzerland, became effective in 1977. Officials of our Department of Justice work directly with their counterparts in Switzerland. For the first time, there was a successful marriage of an English common law evidentiary system and one following the Napoleonic code tradition. Our treaty with Switzerland has been used in about 75 cases since it went into effect in January of 1977, and it has been a success for both countries.

Bilateral mutual legal assistance treaties are useful particularly to resolve the problems of bank secrecy laws. As I suggested earlier, the control of transnational conduct will never be effective unless law enforcement authorities and courts can obtain access to the essential evidence contained in the bank records of offenders, their criminal associates, and their legal entities.

The banking community of Switzerland has long had a reputation for maintaining the strictest of bank secrecy. It had been the law in Switzerland that a Swiss court could not compel the production of Swiss bank records for use in a foreign prosecution, though naturally a Swiss prosecutor could obtain

bank records for use in a Swiss prosecution. Therefore, both national and international criminal offenders frequently hid the proceeds of their crimes in Swiss banks. Our treaty now affords each country the full powers of the courts of the other country to compel production of evidence, including the records of banks, and we regularly obtain Swiss bank records for use as evidence in American criminal prosecutions.

The success of the Swiss treaty, combined with the growing need for an effective substitute for the letters rogatory system, has led us to initiate similar treaty negotiations with a number of other countries. Our Senate has recently approved a treaty on mutual legal assistance, as well as a modernized extradition treaty, with Turkey. We are in the last stages of negotiations with Colombia and The Netherlands for treaties on mutual legal assistance and have made proposals to Canada, the United Kingdom, and Sweden for similar treaties.

We have had extended and worthwhile discussions on the same subject with representatives of the Mexican government and we hope that those discussions will lead to a treaty in the near future.

There has been considerable progress over the last decade in the field of international judicial assistance with respect to <u>civil and commercial</u> litigation as well. In 1969, the United States was one of the first countries to ratify the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. The Convention is now in force between the United

States and 18 nations (including most countries of Western Europe and Israel and Japan).

Three years later, the United States ratified the 1970 Hague Convention on the Taking of Evidence Abroad. That Convention is now in force between the United States and 12 nations. In the United States, as in most partners to the Convention, the Department of Justice is charged with responsibility for implementing its provisions. Thus, both Hague Conventions make it possible for civil litigants in one contracting State to obtain prompt service of documents in, and evidence from, another contracting State without the need to proceed through time-consuming and uncertain diplomatic channels. Last year, the Department of Justice received well over 2,000 foreign service requests and almost 200 evidence requests from our Convention partners. The Latin American countries did not join the Hague Conventions, but an overwhelming majority of the member States comprising the Organization of American States decided upon a separate treaty regime for the Americas. Representatives of the Organization met in Panama in January, 1975, at the Inter-American Specialized Conference on Private International Law and adopted two conventions -- the "InterAmerican Convention on Letters Rogatory" (dealing primarily with service of documents) and the "InterAmerican Convention on the Taking of Evidence Abroad."

These Conventions differ in a number of important respects from the two Hague Conventions. In an effort to bring the Inter-American Conventions into harmony with the two Hague Conventions, certain protocols were proposed to the Inter-American Conventions. In May, 1979, an acceptable protocol to the Letters Rogatory Convention was adopted at a meeting in Montevideo. We are now in the process of seeking the approval of the United States Senate to the ratification of the Inter-American Letters Rogatory Convention and its Additional Protocol.

I am pleased to inform you that just a few weeks ago a group of experts on private international law met in Washington under the auspices of the Organization of American States and agreed on an additional protocol to the second Inter-American Convention on the taking of evidence abroad. We are very hopeful that this protocol, too, will be adopted by the full Conference, and that in due course the United States will join its Latin American partners in a comprehensive convention regime on the taking of evidence in civil and commercial litigation.

Let me return to mutual legal assistance treaties. We welcome initiatives from all countries who are interested in negotiating such instruments. Just as we can benefit greatly from the growth of international trade and the enterprises engaged in it, we must provide expeditious means to prevent and detect international abuse of such trade when it operates to the detriment of all of our people.