



Department of Justice

ADDRESS

BY

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BEFORE

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ASSEMBLY LUNCHEON

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Comity is a very small word that stands for a very large principle. Comity is a way of saying fair play -- that each of two parties will yield to the one which has interests that are clearly paramount. It is a word signifying a concern for common courtesy and decency in conduct toward others.

Where conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflicts with restraint, cooperation, and good will. That is the essence of comity, and today I would like to tell you what the Department of Justice is doing to foster comity between our justice system and those of foreign governments and between federal and state justice systems.

In recent decades, under the pressure of rapidly increasing international trade and a consequential increase in federal court litigation involving foreigners, the United States became concerned with formally establishing international comity. Unless the United States rendered effective judicial assistance to foreign courts, little assistance to the courts and litigants of this country would be forthcoming from abroad.

In 1964 Congress enacted a law covering such things as serving documents and obtaining evidence, subpoenaing witnesses, and transmitting requests for judicial assistance on behalf of the courts of other countries. It is one of the most forward-looking

attitudes toward international comity of any country in the world.

Although reciprocity is an implied part of comity, the United States has made it clear that the assistance that we render comes without regard to reciprocity but is given as a matter of law. There are many cases demonstrating this policy of offering assistance whenever possible, and it is safe to say that no other country in the world offers such cooperation. We have clearly set ourselves up as an example, and we hope other countries will follow suit.

It is axiomatic in law that the best way to understand a rule or doctrine is to observe it under strain. That is as true for the principle of comity as it is for any other, and nowhere is the strain greater than in the application of antitrust laws.

The Supreme Court has noted that Congress, in passing the Sherman Act, was operating to the full extent of the Commerce Clause. That law applies to interstate and foreign commerce and to trade in both exports and imports in the United States. Hence, the scope of the Sherman Act does not stop at the water's edge, and foreign businessmen -- and their sovereign governments -- view this as an extraterritorial application of U.S. laws.

We are scrupulous in not reaching beyond our authority, but our law enforcement obligation does not allow us to look the other way when an antitrust investigation

involves foreign nationals. The resulting interactions with foreign nations often involve no small amount of explaining on our part and a large measure of tact and forbearance as well.

Sometimes comity causes us to stay our hand. For instance, about two years ago the Justice Department's Antitrust Division investigated a merger in a foreign country by nationals of that country who happened to be among the world's largest producers of an important industrial product.

The firms involved exported most of their production to the United States, and significant assets of the combined firms were located here. Further, while there was no evidence of an explicit conspiracy, the marketing of the product generally followed a pattern of oligopoly pricing.

In short, there was not much question that United States courts had subject-matter jurisdiction over the merger.

Nonetheless, the Antitrust Division concluded that since the merger involved stock acquisitions of foreign companies on a public exchange in the foreign country, and since the merger primarily involved control of assets located in the foreign country, and since the government concerned communicated to us that any attempt by the United States to block the merger would be deemed a

serious infringement of a vital national interest, the Justice Department declined to assert U.S. jurisdiction on grounds of comity and foreign policy.

Another example of comity occurred last year, after the United States and Japanese justice agencies signed a mutual assistance agreement in the investigation and prosecution of any illegal activities related to sales in Japan by Lockheed Aircraft Corporation.

The Tokyo District Court sought assistance under the agreement in taking depositions in the United States from three former Lockheed officials. The Tokyo court issued letters rogatory to the Los Angeles District Court seeking assistance. The Los Angeles Court subpoenaed the witnesses, who promptly invoked their Fifth Amendment rights.

To accommodate the Japanese Government, the Department of Justice granted the witnesses immunity from prosecution under U.S. law, thus removing their Fifth Amendment grounds. It was an unprecedented exercise of the Attorney General's discretion, and it was done essentially in a spirit of comity.

On two recent occasions -- as a matter of comity -- the Department of Justice has sent documents to foreign antitrust agencies regarding possible liability by American and foreign corporations under foreign antitrust law. Those documents were not received by us under subpoena and

did not otherwise require confidentiality.

We will, in the interest of comity, continue this cooperation with foreign antitrust agencies -- even when it exposes United States firms to liability for violating foreign laws. There is no compelling United States interest in protecting United States nationals who violate foreign laws.

Two other examples of international comity may be found in the new antiboycott law and in pending legislation to prevent American enterprises from resorting to bribery of foreign officials in doing business abroad. The former, signed by President Carter in June, prevents foreign governments from binding U.S. firms to practices of racial, religious, or economic discrimination in United States commerce, thus by law reassuring nations which may be the victims of such discrimination. The latter piece of legislation, now pending in the House, would have as one of its purposes preventing American interests from utilizing illegal means to corrupt the officials of a foreign nation.

Comity may be expressed many ways. It may include notification to other governments of contemplated legal actions that significantly affect them. It may include giving other governments the opportunity to consult regarding interests relevant to the contemplated action. It may involve investigation techniques -- that is to say, in what way, and under what circumstances, to seek what kinds of information from foreign governments.

But while we try to exercise comity in enforcing antitrust laws, some nations find our position unacceptable. Several nations have passed laws to prevent persons within their territory from cooperating with the United States, and they have established criminal sanctions for those who comply with United States law in violation of these "blocking" statutes. Among those which have adopted and, from time to time, implemented such laws are the United Kingdom, the Federal Republic of Germany, Canada, Australia, and the Netherlands.

Comity should work both ways. We owe deference to other nations when their vital national interests are at stake and the conflicting United States interest carries a lesser weight. But other nations owe us, in turn, deference at least to the extent of working toward a compromise arrangement if our fundamental national interests are directly affected.

Of course, there will be unavoidable situations where two sets of interests conflict, each country viewing its own as supreme. Such situations provide a test of each nation's sense of comity, and perhaps its diplomatic skills as well.

But I see no such excuse for deliberately enacting "blocking" legislation solely to frustrate U.S. antitrust laws, without regard to the seriousness of the case or the national interest at stake. Blanket prohibitions by

foreign governments against cooperation with U.S. investigations, by their nationals or even by U.S. citizens located in their territory, are not only inconsistent with comity but may also harm those who invoke prohibitions. Cooperating with investigations is the best way of bringing exculpatory information to our attention. Cooperation by a foreign firm or government is a significant factor influencing our prosecutorial judgment. Let me make clear to you that I deem our criminal investigation of the international uranium industry and our civil investigation of the international oil industry matters of fundamental United States interest.

We are obligated to do all that we reasonably can to prosecute foreign private cartels which have the purpose and effect of causing significant economic harm in the United States in violation of antitrust laws. To my mind there is a fundamental United States interest in not having our citizens pay substantially higher prices for imports because private firms get together and rig international markets. There is also a fundamental United States interest at stake when private businesses, although foreign, get together to injure and perhaps destroy an American competitor.

Of course, I do not hold the utopian view that all international markets must be perfectly competitive. I recognize that international markets structured by explicit agreements between duly authorized government officials may be legal under United States law. In some instances such agreements may be desirable or even necessary in terms of United States economic policy.

But there is a big difference between arrangements by governments to structure markets within their jurisdictions and private cartels getting together to fix prices and allocate markets worldwide, even where those cartels have tacit support from governments.

In summary, comity cannot be a principle which the United States is bound to respect when others have valid interests and yet does not apply to others when we have at least equally valid interests.

During my six months as Attorney General, I have had occasion to observe, in a way that perhaps few other government officials can, the importance of comity. I have been working closely with the National Association of Attorneys General, and in June I addressed that organization's meeting in Indianapolis. Later in the same week, I flew to Ottawa to meet with Canadian officials about matters of mutual concern in the field of justice.

In Ottawa, we discussed Canada's concern over the use by our police of "hot pursuit" that carries across the border into Canada. I have repeatedly pledged my cooperation to state Attorneys General, and I am sure those state Attorneys General who are near the Canadian border will reciprocate by cooperating with me in working to restrain border crossings by our law enforcement officers.

So, as I observed during that June week, comity is a principle that comes into play within our borders

as well as outside. Unless our states cooperate with Washington, then Washington's ability to cooperate with other nations may be impaired.

We must practice at home what we call for abroad. I would like to mention a few things we are doing at the U.S. Department of Justice to buttress the spirit of federal-state comity:

-- We share antitrust grand jury information with states, where we have court permission to do so and where the state agrees to withhold action until the federal case is ended.

-- In matters involving the civil rights of patients or inmates in state institutions or prisons, we will give the state an opportunity to solve problems voluntarily before we file suit. If voluntary compliance falls short, we will make every effort to inform state officials before suing, so that they do not learn of the action from the news media.

-- We will continue our policy of deferring to a state in cases of dual jurisdiction, but we reserve the right to prosecute federally under civil rights laws if we feel state prosecution was insufficient.

-- We have helped to set up federal-state law enforcement committees in 22 states, and have instructed U.S. Attorneys to discuss prosecution policies with state prosecutors.

-- We are developing prison standards to help states meet requirements for such things as medical care and living space.

In a spirit of comity toward this audience, I will stop now by saying that comity is more than a legal principle. It is the expression of a civilized human being and a humane government -- a policy of courtesy, of restraint, of civility, and of concern and sympathy for those with which we deal. That is the spirit I trust you will find at the U.S. Department of Justice today.

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