DEPARTMENT OF JUSTICE

"With a Little Help from My Friends"*: Using Principles of Comity to Protect International Antitrust Achievements

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Remarks as Prepared for the
46th Annual Fordham Competition Law Institute Conference on International Antitrust Law and Policy

New York, NY

September 12, 2019

It is an honor to be here again at this great event. I always enjoy coming to Fordham and seeing so many friends, colleagues, and familiar faces.

Those of you who heard me speak last year may have picked up on the fact that I enjoy history.[1] As one of my predecessors, former AAG Wendell Berge, commented, "[i]t is valuable to revisit the past . . . because we can acquire some insight into what might happen in the future."[2] With that in mind, I'd like to spend my time with you today discussing where we've come from in the field of international antitrust. Then I'd like to focus on how we can protect against losing the progress that we've made, and work towards strengthening our bonds in furtherance of our mutual goals of free and competitive markets.

The Division has long advocated for the market, not the government, to decide winners and losers. Our role is to protect the conditions under which competition can thrive to the benefit of consumers. As my friend and then-AAG John Shenefield remarked in the 1970s, "[e]conomic regulation has been a failure in U.S. domestic markets; it is one of the few things we should not try to export."[3] We've made significant progress at harmonizing international antitrust practices

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[*] THE BEATLES, *With a Little Help from My Friends* (Capitol Records, 1967).

[1] Makan Delrahim, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, "Come Together": Victories and New Challenges for the International Antitrust Community (Sept. 6, 2018).

[2] Wendell Berge, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, Cartels and Our Future World Trade, at 4 (June 6, 1945).

[3] John H. Shenefield, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, Competition Advocacy and International Trade: A New Role for Antitrust Policy, at 6-7 (May 26, 1978).

and minimizing conflict over this view. This progress did not come without sustained international effort, including from many in this room.

I. CONFLICT OF LAWS

Let's start by going back to a time when antitrust was the least of the international community's concerns. As I was preparing today's remarks, I read a speech given by former AAG Berge in 1945. Its opening line was "We are approaching the time when Japan will join Germany in unconditional surrender. This climax of a war which has absorbed so completely the lives and energies of millions of people will mark the beginning of a new phase in modern history."[4]

Almost 75 years later, that's still about as attention-grabbing of an introduction as I've seen in an antitrust speech. It also communicates the optimism of the time that the world had turned a corner and could start building something new. Unsurprisingly, World War II caused a sea-change in the way that the United States viewed the global community. Isolationism was not just an increasingly difficult task. It was dangerous. As a result, international issues more and more came to the forefront of the Antitrust Division's thinking. Antitrust had an important role to play in making sure that we did not replace military conflict with economic conflict.

[4] Berge, *supra* n.1 at 1.

Cartels were central in the Division's crosshairs. While the goal of eliminating cartels sounds uncontroversial today, it was not widely shared at the time. Many countries credited industrial cooperation and organization with pulling them out of the depression. Rather than disbanding cartels in favor of competition, these countries tried to prevent abuse by imposing bureaucratic review of pricing and other practices. Even when there was abuse, these jurisdictions frequently turned a blind eye if it benefitted firms within their own country.[5]

By making it the stated policy of the Antitrust Division to open up global economic markets, the United States was bound to come into conflict with other countries. Many countries did not yet have competition laws. Some prioritized protectionism over competition. Others objected to the United States' attempts to apply its laws to conduct occurring outside of the United States' borders.

What followed was a period of international antitrust characterized by conflict of laws. The United States sought active extraterritorial enforcement of its antitrust laws. In response, other countries adopted so-called "blocking statutes" that prevented access to the evidence necessary for a successful prosecution. This conflict did not just prevent the Division from achieving its goal of eliminating cartels. It also required American businesses—which were still subject to U.S.

[5] *See generally* Harm G. Schröter, *Cartelization and Decartelization in Europe, 1870–1995*, 25 J. EUR. ECON. HIST. 129 (1996).

antitrust laws—to compete on an uneven playing field. Finding that our efforts were creating the very conflict we were trying to avoid, the Division set out to take a different tack.

II. OPENING A DIALOGUE

Following World War II, the United States had become heavily involved in multilateral organizations. In the 1950s, the Organization for European Economic Cooperation provided one of the first opportunities for the U.S. to exchange its views on competition issues. It sponsored a group of experts in their work on restrictive business practices, and published a guide on competition laws around the world.

The Organization for European Economic Cooperation eventually became the Organization for Economic Cooperation and Development, or the OECD. In 1961, the OECD established the first predecessor to the Competition Committee that exists today. This Committee was a high priority for the United States. AAG Lee Loevinger attended its first meeting in December 1961, and then-Attorney General Robert Kennedy enthusiastically supported the Division's participation.

The commitment to come together and discuss antitrust issues started to bear fruit. As early as 1967, the OECD's Competition Committee produced a recommendation on international cooperation in competition enforcement. A central feature of that recommendation was the requirement that agencies notify

each other of investigations that might affect each other's territory or interests. This was largely a defensive interest; a way of protecting one's businesses from the extraterritorial reach of foreign enforcers. But this recommendation proved to be an important stepping stone. Over a series of five revisions, the notification provision has continuously shrunk, as cooperation, coordination, and investigative assistance provisions have expanded.

Today, communication and cooperation are a given in the international antitrust community. In 2001, top antitrust officials from 14 jurisdictions, including the U.S. Department of Justice, established the International Competition Network, or ICN. ICN now includes more than 140 member agencies. International cooperation is a top agenda item for each of the ICN's working groups. It is also a top priority for the Intergovernmental Group of Experts of the United Nations Conference on Trade and Development. At its meeting in July this year, that group agreed on a set of guiding policies and procedures for facilitating cooperation among UN member agencies. These polices are set to be adopted next year at the UN's Eighth Conference to Review the UN antitrust rules.

This commitment to international engagement reflects our belief that when foreign governments understand what we do and why we do it, their concerns substantially diminish. These multilateral organizations were not formed to pursue any specific policy goal. Instead, they were founded on the premise that regular

conversations can identify the best answers. This approach has deep roots in American ideals, particularly in our First Amendment. As Justice Oliver Wendell Holmes wrote, the "only test of truth is its ability to get itself accepted in the marketplace of ideas."[6] Just as the truth will emerge from an open and transparent discussion of ideas, our hope and experience has been that a robust vetting of competition policies will produce the best practices.

III. SUBSTANTIVE COALESCENCE

Having opened an international dialogue, the Antitrust Division of the DOJ was able to begin working with the international competition community to converge our substantive competition rules. This was a longstanding and important goal. Former AAG Rule noted back in the 1980s that "[i]n a one-world economy, conflicting competition regimes threaten to create a regulatory 'Tower of Bab[el].'"[7] These international conflicts were not just inconveniences. They deprived consumers of efficiency-enhancing mergers. As then-AAG Rule explained, "[t]he complexity of dealing with so many overlapping but at times inconsistent rules and regulations will surely make some otherwise worthwhile economic transactions prohibitively expensive."[8]

[6] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[7] Charles F. Rule, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, The Internationalization of Antitrust, at 16 (Apr. 7, 1989).
[8] *Id.*

One of our most important and productive steps forward came during the tenure of AAG Jim Rill. He initiated our serious substantive engagement with new antitrust enforcers after the fall of the Iron Curtain. Working with our colleagues at the FTC, he established technical assistance programs in countries that were transitioning to a market-based system. Under these programs, the United States offered technical advice on the role that antitrust law could play in protecting competition in newly opened markets. These technical assistance programs continue to this day. The Antitrust Division regularly sends lawyers and economists to antitrust agencies around the world to share our learnings from decades of experience. All of this is done to further the goal set by then-AAG Rill in 1991: "[I]n an increasingly transnational business environment, the rules of the game should be as consistent as possible from place to place."[9]

Our continued engagement led to progress. By 2004, then-AAG Hew Pate noted that "[t]he search for objective, non-political principles for competition law has meant that over the last few decades antitrust has become increasingly about economics."[10] This statement highlights a few key aspects of effective rules for antitrust enforcement. If we want to approach international consensus on antitrust issues, the rules must be objective, and they cannot be political.

[9] James F. Rill, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, International Antitrust Policy—A Justice Department Perspective, at 13 (Oct. 24, 1991).
[10] R. Hewitt Pate, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, Current Issues in International Antitrust Enforcement, at 7 (Oct. 7, 2004).

This is an important lesson to remember in light of suggestions that we incorporate other areas of law or general issues of social welfare into our antitrust analysis. With global businesses and near-global antitrust enforcement, consistency is important. We cannot expect that all countries or political parties will share the same view of a desired social outcome or agree on all substantive areas of law that might interact with the antitrust laws. We can, however, limit the inconsistency when the touchstone of our antitrust analysis is fundamental principles of economics.

IV. GROWTH OF CASE COOPERATION

As we converged on a common substantive approach, we opened new opportunities to work together. Over the past 25 years, it has become increasingly common for the Antitrust Division to coordinate closely with international enforcers. This cooperation benefits the enforcement agencies, the business community, and consumers, as we are able to share views of the evidence, expected timelines, and evaluations of potential remedies.

As just one example, the Antitrust Division recently investigated the Thales/Gemalto merger, which involved components used in complex encryption systems. After completing its review, the Division decided that a divestiture was necessary to remedy the harms that would otherwise flow from that merger. Because the Division had worked closely with the EC throughout its investigation,

we understood that the EC shared many of our concerns, and would also likely require a divestiture. Thales and Gemalto both had multinational customers and distributed their products globally. Splitting the divestiture so that there was one buyer in America and a separate buyer in Europe would have made it more difficult for the divestiture buyers to compete. Recognizing the importance of finding a single purchaser, we at the Division decided to depart from our normal practice of requiring an up-front buyer. We were able to use the extra time to work with the parties and the EC to find a single purchaser that was acceptable to everyone. Our close cooperation made it possible to align on timing, provide more effective antitrust enforcement, and fully protect American consumers.

Cooperation in our cartel matters also remains of critical importance, particularly on leniency issues. The modern version of the Division's leniency policy has been in place for over 25 years. The idea is simple: it is easier to uncover and prosecute international cartels if participants have real incentives to self-report. While the language of the leniency policy has not changed since the 1990s, we have continuously evaluated the program to ensure that incentives remain in place to encourage self-reporting. To that end, in 2004, the U.S. Congress added incentives to self-report in ACPERA—the Antitrust Criminal Penalty Enhancement and Reform Act—by reducing civil damages exposure for companies that successfully apply for leniency and cooperate with civil claimants.

In the 25 years of our current leniency policy and 15 years of ACPERA, the Division has learned that leniency programs thrive when they are predictable and transparent. As the number of countries around the world that investigate and prosecute cartels has increased, the Division has worked to share these lessons with the international enforcement community. If one country's leniency program is unpredictable and lacks transparency, it could undermine our collective efforts at prosecuting international cartels. Similarly, if cooperating with multiple countries becomes too difficult or expensive, we risk unnecessarily deterring self-reporting and cooperation.

All of this means that our work isn't done. We should continue our efforts, with a renewed focus on cartel issues. We should ensure that leniency applicants can meet the competing demands of all jurisdictions where they have exposure. For example, we have found that small steps, such as coordinating witness interviews and focusing our investigations on the harms within our respective jurisdictions, can have a large impact on the costs of self-reporting. We are developing our own internal best practices at the Division, and engaging in a constructive dialogue on this topic with our enforcement counterparts. An important forum for this dialogue is the ICN Cartel Working Group, which currently is developing ways to enhance coordination on leniency matters. This

project will provide practical guidance on best practices for cross-border leniency coordination, with the goal of making enforcement more effective and efficient.

V. PROCEDURAL COALESCENCE

Coordination and cooperation, however, is only the first step. Ensuring a set of due process rights and agreeing on a set of basic procedures can be just as important.

Agreement within the competition community on antitrust process has been easy on some fronts. For example, merger notification and review procedures were one of the first subjects discussed among the ICN members. ICN has also adopted recommended practices for transparency, engagement, and confidentiality during the investigative process. Similarly, OECD has been a productive forum for discussions. Then-AAG Varney presided over a series of roundtables just a decade ago when she chaired OECD's Competition Committee Working Party 3. These roundtables helped pave the way for our more recent efforts.

When I became AAG, I made it a priority for the Antitrust Division to take these discussions to the next level. To that end, the Division led an initiative for the first-of-its-kind multilateral agreement on due process that turned into the ICN's Framework for Competition Agency Procedures, or the "CAP." The CAP sets forth a series of fundamental due process norms such as non-discrimination; transparency and predictability; timely notice and resolution; avoidance of

conflicts of interest; right of defense; and right to counsel and privilege protections. As the Head of the International Relations Unit for DG Comp recently described it, the CAP creates a "fundamental counterbalance" for parties appearing before antitrust enforcers.[11] I was very pleased that the CAP opened in Cartagena, Colombia in May with more than 60 original signatures. As of today, over 70 countries have signed on. This agreement will make us more efficient and effective competition law enforcers, and will continue to build confidence in our enforcement actions.

The CAP also builds upon our learnings from other areas of international cooperation. It includes a series of review and consultation mechanisms that will continue and even deepen the dialogue between us. Our colleagues in Europe recently encouraged companies to raise any violation of the CAP with their domestic enforcement agency, which can then address the issue directly in bilateral conversations. I join in that encouragement, and hope that companies that experience due process violations abroad will bring those issues to the Antitrust Division, so that we can take appropriate action.

Of course, our hope is that CAP fosters a positive dialogue as well. Competition agencies around the world operate in different legal and political

[11] Eddy De Smitjer, Head of International Relations Unit, DG Comp, Remarks at the International Bar Association's 23rd Annual Competition Conference (Sept. 6, 2019).

systems. The mechanics of antitrust enforcement in a common law or prosecutorial system differ from enforcement in a civil law context where there are specialized tribunals. The CAP requires that signatories publicize templates summarizing national procedures and practices. This transparency will allow the Division to understand more readily a specific jurisdiction's policies, and will help us evaluate our ability to cooperate with that country on an investigation. My hope is that the CAP will help create a feedback loop where procedural transparency and convergence creates opportunities for additional case cooperation and further substantive convergence as well.

The CAP is still in its early stage, but I have been greatly encouraged by the international reception of the agreement. It has the potential to become one of the competition community's most significant achievements in promoting due process. Still, we hear complaints that there are agencies that use the competition process to forward blatantly national goals. These complaints center on issues during the investigative process. We have more work to do. It is my hope that every major trading partner with a competition enforcer joins in efforts to improve procedural due process moving forward.

VI. WHAT'S NEXT?

Now that we've taken this whirlwind tour of international antitrust history, it's time to ask what's next. Business continues to become more global, and

additional countries continue to develop and ramp up their antitrust enforcement. Each of these factors makes international cooperation in enforcement a matter of increasing importance. As then-AAG Pate noted 15 years ago, "[a] global antitrust system in which each agency simply lines up to take its whack at the piñata is not a model that is going to serve us, or the market, very well."[12] He described the danger of such an approach when he noted that "an international system of seriatim review of controversial matters by different authorities that enables opponents of a transaction to skip across the globe until they get an answer that they like is unacceptable."[13] A few years before these comments, then-Acting AAG Doug Melamed similarly highlighted that a failure to work together with our international counterparts "risks not only needless burdens on businesses and suboptimal antitrust enforcement, but also the international politicization of antitrust disputes."[14]

This is a particular concern with intellectual property, where decisions made in one country can set the norm for global operations. The most obvious example of this phenomenon may come from outside the antitrust arena. In May of 2018, the European General Data Protection Regulation went into effect. This law required, among other things, that companies disclose if they use cookies on their

[12] Pate, *supra* n.10 at 11.
[13] *Id.*
[14] A. Douglas Melamed, Acting Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, Promoting Sound Antitrust Enforcement in the Global Economy, at 7 (Oct. 19, 2000).

websites. Despite no such law in the United States, we now constantly see such notifications appearing when we access the web as well. While this example seems likely to be benign, others are not. For instance, we have seen countries require global licensing of U.S. patents as a remedy. Such decisions have the real potential to decrease incentives to invest and to innovate. When a foreign enforcer imposes such a remedy globally, it takes away the Antitrust Division's ability to reach a different conclusion and risks harming American consumers. It also takes away the ability of every other jurisdiction to reach a different conclusion.

So, what is the solution? I think it is time to return to a topic that then-AAG Rill popularized for the antitrust community in the early 1990s: comity. Comity promotes efficiency for international businesses by avoiding unnecessary conflicts. For example, the Division has been clear that we will not seek world-wide relief where a narrower scope proves adequate. Our role is to protect competition for American consumers, workers, and entrepreneurs. It is not to play international antitrust cop where U.S. commerce is not affected. Consumers and businesses alike are best served when countries avoid using the antitrust laws to expand their sphere of influence. As our Supreme Court explained in *Empagran*, principles of comity do not permit "legal imperialism" when a country's "antitrust policies could not win their own way in the international marketplace for . . . ideas."[15]

[15] *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).

Circuit Judge Douglas H. Ginsburg, a former AAG of the Antitrust Division, recently co-wrote an excellent article on the dangers of overly broad relief, titled "The Enduring Vitality of Comity in a Globalized World."[16] I encourage you all to read it, if you haven't. As he explains, "comity requires more than avoidance of conflicting outcomes and remedies; it also requires respect for differences in the scope and commercial effect of the laws of foreign sovereigns."[17] Judge Ginsburg persuasively argues that comity is necessary if we do not want to create a race to the bottom where antitrust becomes a tool for industrial policy. In other words, comity is a necessary principle to consider and apply if we do not want to undo all of our hard work over the last 75 years.

It is important to emphasize, however, that employing principles of comity does not mean that we are tying our hands. As our Supreme Court explained more than a century ago, "'[c]omity' . . . is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other."[18] Our Supreme Court reiterated that comity is not an all-encompassing obligation in *Hartford Fire*. That opinion accepted that comity had a role to play when thinking about the Sherman Act's application to foreign conduct, but it limited comity's role to

[16] Douglas H. Ginsburg & John M. Taladay, *The Enduring Vitality of Comity in a Globalized World*, 24 GEO. MASON L. REV. 1069 (2017).
[17] *Id.* at 1090.
[18] *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

situations where it was truly necessary to resolve a conflict.[19] Most recently, in the Vitamin C case, the Supreme Court just last year unanimously rejected the view that comity *required* deference to foreign interpretation, again emphasizing the flexible nature of the comity inquiry. As the opinion notes, "a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. No single formula or rule will fit all cases . . . ."[20]

The Antitrust Guidelines for International Enforcement and Cooperation[21] make clear our ongoing commitment to applying principles of comity to our own decision making. We need to ensure, however, that comity is a two-way street. We cannot agree to subject American companies to unfair treatment under foreign laws in the name of comity and avoidance of conflict.

Any application of comity has to take into account the particular enforcer, including any history of discrimination in favor of its own domestic companies or against foreign companies. We will not defer our own investigation unless we are certain that our foreign counterparts will conduct a full and fair investigation of their own.

With these principles in mind, I have directed the Division to undertake a review of our International Guidelines. We will make sure that these Guidelines:

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[19] *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).
[20] *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018).
[21] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (2017).

(1) first, accurately reflect the latest guidance from our Supreme Court and lower courts; (2) second, adequately reflect the importance of comity to our relationships with international competition enforcers; and (3) third, adequately convey the symmetry that we expect from our international counterparts. In doing so, we hope to further strengthen our invaluable relationships with our international colleagues, as we all pursue the common goal of protecting competition.

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I want to again express my appreciation for the invitation to speak today. International antitrust issues remain vitally important to the work that we do at the Antitrust Division. I commend this event for drawing attention to these topics and providing the opportunity to engage in a dialogue regarding these issues. Thank you.