



# DEPARTMENT OF JUSTICE

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## **"Come Together<sup>1</sup>": Victories and New Challenges for the International Antitrust Community**

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## Introduction

Good morning, and thank you for inviting me to speak today. I would especially like to thank James Keyte for all of his work in organizing this conference, which has for over four decades been an important forum for the exchange of ideas among enforcers, academics, and members of the bar. It's an honor to follow in the footsteps of Assistant Attorneys General for Antitrust appointed by both Republican and Democrat presidents, who, at one time or another have been speakers at this conference.

A little less than a year ago, I had the great privilege of addressing an audience at NYU Law School for my first remarks as AAG. At that time, I focused on international engagement and global dialogue, which is an area of significant importance to me and to all of us here. Today presents an occasion to reflect on the past year, on the international engagement we have had in that time, and on what the international antitrust community has accomplished over the longer term. I also want to reflect on how we, as a community, have been able to achieve so much, and what we hope to do in the future.

As I was preparing to make these remarks, I recalled an article, published in the Harvard Business Review several years ago, called "How the Best of the Best Get Better and Better."<sup>2</sup> This article, written by sports psychologist Dr. Graham Jones, grabbed my attention because it deals with how humans keep improving. How do we continue to break new barriers, even when it seems that we are striving to achieve the impossible? How do we surpass what we perceive to be our limits?

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<sup>1</sup> See THE BEATLES, *Come Together*, (Apple Records / Capitol, 1969).

<sup>2</sup> Graham Jones. "How the Best of the Best Get Better and Better." Harvard Business Review (June 2008), available at <https://hbr.org/2008/06/how-the-best-of-the-best-get-better-and-better>.

English runner Roger Bannister, the first to run a mile in under four minutes, answered those questions like this: “Doctors and scientists said that breaking the four-minute mile was impossible, that one would die in the attempt. Thus, when I got up from the track after collapsing at the finish line, I figured I was dead.”

The secret, it seems, is to forget about the limits. Although Dr. Jones wrote his article for sports stars and business leaders, his advice is relevant to us as members of the international antitrust community. It explains many of our successes, and it is instructive about where we go from here.

### **Fixate on the Long Term**

The first thing we must do is focus on the long term. Dr. Jones noted that “the road to long-term success is paved with small achievements.”

As antitrust enforcers, we are required to spend much of our time making quick decisions and meeting immediate deadlines, and this may not always leave us with time to reflect on the big challenges that we face over the longer term. When I looked back at what my predecessors have said about international antitrust enforcement, both at Fordham and in other international settings, I was struck by how far we have come.

In 1978, then-Assistant Attorney General John Shenefield, my friend and colleague on the Antitrust Modernization Commission, highlighted a lack of consensus in the world of antitrust enforcement, concluding that “[s]ignificant differences in local political and economic philosophies, and the lack of an effective international administrative mechanism, preclude, for the foreseeable future, the development of supranational regulation.”<sup>3</sup> He lamented dissention among the United States, Canada and Great Britain regarding the issue of extraterritoriality, and

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<sup>3</sup> John Shenefield, Assistant Attorney General for Antitrust, U.S. Department of Justice. “The Extra-Territorial Impact of U.S. Antitrust Laws: Causes and Consequences.” (Aug. 9, 1978).

“look[ed] forward to a world where that vacuum is filled by consensus on a vigorous antitrust policy and the international mechanisms to implement it.” His remarks did not signal much optimism that consensus on the substance of the law or the scope of its application would be realized in the near term.

In 1981, we began to see some consensus on extraterritorial jurisdiction when then-AAG Bill Baxter addressed the ABA Section of Antitrust Law at Georgetown. At that time, AAG Baxter predicted that while disputes about alleged extraterritorial jurisdiction existed, “as the number of nations embracing antitrust policies expands, the number of conflicts will decrease.”<sup>4</sup>

Over the next two decades, not only were his predictions of global expansion realized, but developments in the United States clarified the extraterritorial reach of U.S. antitrust law and paved the way for better international cooperation.

In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA) to address the application of U.S. antitrust law to foreign conduct.<sup>5</sup> The “domestic effects” test contained in that law, and subsequently clarified by the U.S. Supreme Court in *Empagran*,<sup>6</sup> has proved a useful way to think about extraterritoriality, not only for us in the United States, but in many of our sister jurisdictions. Today, there is general consensus on the scope of extraterritorial jurisdiction of the antitrust laws.

While the adoption of competition laws around the world signaled increasing consensus regarding the need for antitrust enforcement, it created some challenges as well. In 1993, when Anne Bingaman was AAG, her speech at this conference recognized the diversity of laws and

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<sup>4</sup> William Baxter, Assistant Attorney General for Antitrust, U.S. Department of Justice. “Antitrust in an Interdependent World.” (Sept. 29, 1981).

<sup>5</sup> Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a.

<sup>6</sup> *Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

challenged the international community to look for new ways to cooperate.<sup>7</sup> It was just six years later, again here at Fordham, that then-AAG Joel Klein noted the exceptional convergence regarding cartel enforcement, and praised the cooperation that had resulted in the OECD's Hard Core Cartel Recommendation.<sup>8</sup>

Of course, we did not stop there.<sup>9</sup>

Acting AAG Doug Melamed said at Fordham in 2000 that "our goal should be to achieve a reasonable degree of analytical and operational coherence in antitrust enforcement," but he acknowledged that with 90 or more antitrust agencies, it would be "a formidable task."<sup>10</sup> He envisioned a "global competition initiative," which, by the time AAG Charles James appeared at Fordham in October 2001, had become a concrete proposition called the "Global Competition Network."<sup>11</sup>

Today, of course, we call this organization the International Competition Network. While it makes me feel old, I admit and even celebrate that there are many talented young lawyers at DOJ and around the world who cannot remember a time before ICN. Robust and regular international discussion and cooperation has become our way of life.

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<sup>7</sup> Anne K. Bingaman, Assistant Attorney General for Antitrust, U.S. Department of Justice. "Change and Continuity in Antitrust Enforcement." (October 21, 1993), *available at* <https://www.justice.gov/atr/speech/change-and-continuity-antitrust-enforcement>.

<sup>8</sup> Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice. "The War Against International Cartels: Lessons from the Battlefield." (October 14, 1999), *available at* <https://www.justice.gov/atr/speech/war-against-international-cartels-lessons-battlefront>.

<sup>9</sup> The Department of Justice formed the International Competition Policy Advisory Committee (ICPAC) in 1997, co-chaired by former AAG Jim Rill, to review and make recommendations regarding how the United States could best work with foreign nations to deter anticompetitive conduct. The ICPAC report, issued in 2000, is available at <https://www.justice.gov/atr/final-report>.

<sup>10</sup> A. Douglas Melamed, Acting Assistant Attorney General for Antitrust, U.S. Department of Justice. "Promoting Sound Antitrust Enforcement in the Global Economy." (October 19, 2000), *available at* <https://www.justice.gov/atr/speech/promoting-sound-antitrust-enforcement-global-economy>.

<sup>11</sup> Charles A. James, Assistant Attorney General for Antitrust, U.S. Department of Justice. "Reconciling Divergent Enforcement Policies: Where Do We Go From Here?" (October 25, 2001), *available at* <https://www.justice.gov/atr/speech/reconciling-divergent-enforcement-policies-where-do-we-go-here>.

The ICN is an example of just how much change is possible if we put our minds to it. In a recent speech at the Ronald Reagan Presidential Library in my home state of California, U.S. Secretary of State Mike Pompeo spoke about the current political and humanitarian crises in my birth country of Iran.<sup>12</sup> While Secretary Pompeo was addressing a very different set of challenges than the ones we face in the international competition community, his words resonated with me. Of tackling major obstacles, he said, “I always remind people who think [something’s] not possible or think the time horizon will be measured in centuries not hours, I always remind them that things change.”

Within the antitrust community, we have effected enormous positive change thanks to those who had the creativity and vision to conceive of long-term goals, and the tenacity to take each incremental step after incremental step. Looking back at all we have done in the four decades that we have been working together – and meeting here at Fordham – I am deeply impressed by what we have accomplished by focusing on the long term.

### **Reinvent Yourself**

A second pillar of Dr. Jones’s philosophy of constant betterment is the ability to reinvent ourselves. We must repeatedly embark on new cycles of improvement. While stability and predictability are vitally important in law enforcement and in government generally, we should never stop questioning whether we can change in ways that will improve our efficacy.

In my year as AAG, we have undertaken several initiatives aimed at reinventing our policies for the better. For example, the Division convened a series of public roundtables at which participants from all sides weighed in on issues of regulatory reform, including the issue

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<sup>12</sup> Michael R. Pompeo, United States Secretary of State. “Supporting Iranian Voices,” Remarks at the Ronald Reagan Presidential Foundation and Library (July 22, 2018), *available at* <https://www.state.gov/secretary/remarks/2018/07/284292.htm>.

of anticompetitive regulations.<sup>13</sup> We have also embarked on a project to terminate over one thousand outdated consent decrees, which have for years remained on our court's dockets, and in some cases, even created anticompetitive market conditions.<sup>14</sup>

On the international front, we have also continually revisited our views. We have attempted to articulate our international competition policy as clearly as possible, adjusting our International Guidelines to keep them timely and relevant. We issued our original Guidelines in 1977<sup>15</sup>, and then revisited them a decade later under AAG Rick Rule in 1988.<sup>16</sup> The 1988 Guidelines expressly recognized the increasing relevance of foreign competition to every aspect of enforcement, reflecting the rapid increase in internationalization.

Our 1995 Guidelines emphasized global economic interdependence, and the related issues of comity, mutual legal assistance, and the nexus between antitrust and trade.<sup>17</sup> Finally, in 2017, we issued our most recent update, reflecting a world in which case cooperation and policy discussions are almost everyday events.<sup>18</sup>

We also strive to refine and share our thinking through bilateral meetings and speeches. For example, as our International Deputy AAG Roger Alford has mentioned recently, we are giving a great deal of thought to how we implement the principle of comity not just in situations where two jurisdictions' remedies pose a direct conflict, but also in situations in which one

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<sup>13</sup> "Department of Justice's Antitrust Division Announces New Roundtable Series on Competition and Deregulation." Press Release. (March 5, 2018), available at <https://www.justice.gov/opa/pr/department-justice-s-antitrust-division-announces-new-roundtable-series-competition-and>.

<sup>14</sup> "Department of Justice Announces Initiative to Terminate 'Legacy' Antitrust Judgments." Press Release. (April 25, 2018), available at <https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

<sup>15</sup> U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977).

<sup>16</sup> U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1988).

<sup>17</sup> U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995).

<sup>18</sup> U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (2017).

country's remedy conflicts with important interests – such as the pro-innovation policies – of another jurisdiction.<sup>19</sup>

### **Find Inspiration in Others**

Another component of constant improvement is to draw inspiration from others. Dr. Jones describes this as consciously creating situations in which we push ourselves to levels we would never reach if we worked with less accomplished colleagues. It is common in sports for elite athletes to train together. Likewise, it is common in the business world for top executives to push each other to excel. While we and our international colleagues are not competing in any traditional sense, we can and do look to each other as sources of inspiration and improvement.

On Wednesday, I had the pleasure of attending the Heads of Agency Workshop that precedes this conference each year. The discussion – which ranged from the everyday obstacles we all confront to the cutting-edge issues presented by the digital economy – left me feeling invigorated to tackle the next challenge, and confident in our abilities to take it on. I notice the same effect when I engage with my international colleagues at bilateral meetings, and at ICN and OECD. As a community, we have built a stable infrastructure that ensures that we learn from each other, challenge each other, and continually improve together.

### **Celebrate the Victories and Reach for New Goals**

That leads me to the final ingredient for improvement that I want to highlight today. That is the need to celebrate our victories. Of course we all enjoy an occasion to get together, and to share a drink or a meal, but as Dr. Jones writes, “the most important function of affirming victory

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<sup>19</sup> Roger P. Alford, Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice. “Antitrust Enforcement in an Interconnected World.” (January 29, 2018), *available at* <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-p-alford-delivers-remarks-american-chamber>.



is to provide encouragement for attempts at even tougher stretch goals.” While we have much to celebrate, I submit that there are new goals toward which we can and should strive.

In a recent speech, my friend and colleague, U.S. Deputy Attorney General Rod Rosenstein, recounted an anecdote about the founding of the United States government, noting that Benjamin Franklin described the government as “a republic, if you can keep it.”<sup>20</sup> DAG Rosenstein said that Franklin “used the word ‘keep’ as an active verb. It means there are things you need to do, if you want to preserve it. What Franklin had in mind is analogous to the ‘keeper of the flame,’ a person tasked to keep the fire burning. If you are a keeper of the flame, your assignment is not just to watch. You need to take action to keep the spark alive.”

It is in this spirit that we must identify and pursue new goals. As you know, together with many of our enforcer colleagues, we at the Division are working towards a Multilateral Framework on Procedure (MFP) that will encapsulate and allow its signatories to commit to each other to adhere to the fundamental procedural norms that many, if not all, of us already recognize.

Although the agencies that have participated in the discussions so far come from different legal traditions, and operate in both administrative and prosecutorial systems, what may have seemed impossible at the outset is looking more possible every day. Earlier this week, we joined representatives from dozens of other agencies to discuss the draft text of the MFP, and I am happy to report that the areas of consensus far outweigh those that require additional discussion.

While we still have plenty of work to do, I hope that you will indulge me in imagining that fifteen years from now – perhaps at the 60<sup>th</sup> Annual Fordham Conference – we will look

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<sup>20</sup> Rod J. Rosenstein, Deputy Attorney General, U.S. Department of Justice. Remarks at the 2018 American Bar Association Annual Meeting. (August 2, 2018), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-2018-american-bar-association>.

back at the MFP as an important instrument that improved the quality of our enforcement decisions, and increased public trust in antitrust enforcement worldwide.

Fair procedures are inextricably linked to good substantive outcomes. To quote DAG Rosenstein once more, “[t]he rule of law requires us to reserve judgment until we have heard from all parties and completed a fair process. You cannot reach reliable factual conclusions unless you first weigh the credible evidence. You cannot offer reasoned legal opinions unless you consider conflicting arguments.”<sup>21</sup>

Committing ourselves to providing parties with access to evidence, transparent decision-making, and judicial review, to name a few, will help us to ensure that our decisions are thoughtful, thorough, and respected. An unequivocal public commitment to these principles will also demonstrate to our own citizens and to those of other countries that we conduct ourselves with the highest degree of integrity, and that they can have faith in both our processes and our conclusions.<sup>22</sup>

## **Conclusion**

Although I have been in my position as AAG for slightly less than one year, I have seen firsthand the enormous progress we have made together over the last two decades. As Deputy for Appellate and International in the early 2000s, I participated in one of the earliest ICN annual conferences, where some of the best minds in international antitrust enforcement gathered to chart a course for collaboration and cooperation.

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<sup>21</sup> Id.

<sup>22</sup> See Robert H. Jackson, Attorney General, U.S. Department of Justice. “The Federal Prosecutor.” Remarks at the Second Annual Conference of United States Attorneys. (April 1, 1940), *available at* <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>. (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”)

The founding of that organization was a huge accomplishment, and perhaps things could have stopped there. Instead, the best got even better, thanks to long-term planning, constant reinvention, mutual respect, and mutual inspiration. Now let's keep going. Let's actively keep that spark alive.

Thank you.