DEPARTMENT OF JUSTICE

International Antitrust Policy: Economic Liberty and the Rule of Law

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I. Introduction

Thank you so much Eleanor for that kind introduction. It's an honor to help set the stage for this conference featuring conversations with distinguished competition enforcers and colleagues from around the world. Thank you all for being here and for joining in this important dialogue about competition policy internationally and in developing countries.

We're in an ideal setting for a global dialogue. NYU Law School has a truly outstanding program in international, comparative, and foreign law, bringing together amazing faculty like Eleanor Fox and Harry First, wonderful global faculty like Fred Jenny, and brilliant young students from around the world. We have much to learn and to share from one another's experiences. I will add that my Front Office has several NYU alums, like my International Deputy Roger Alford, my counsel David Lawrence who is here today, Julia Schiller, and others. In fact, we have opened an investigation into NYU Law's dominance in the Antitrust Division leadership.

We're also in an ideal place to talk about competition policy. As a major center of global finance and business, New York City has long represented the dynamism of the free market, and it has a special energy that epitomizes the competitive spirit. All throughout this city, even as we speak, small and large businesses are striving to attract consumers, enhance market opportunities, and compete for business. In so doing they're driving the advancement of innovation, opportunity, and human welfare. Ultimately, that's the process that antitrust law seeks to protect.

The world of New York City and the world of antitrust intersect in the person of Theodore Roosevelt. As New York City police commissioner, Roosevelt was famous for

his vigorous efforts to clean up the gritty, corrupt city of his birth. As President, he was famous for his vigorous enforcement of our antitrust laws, the first great trust buster in American history. In both jobs, it has been said, Roosevelt was "[n]ever quiet, always in motion, perpetually bristling with plans [and] suggestions." [1] That's not a bad model to emulate as the top antitrust cop for the United States Department of Justice.

Let me begin my remarks by saying how excited I am to return to the Antitrust Division. I've enjoyed reconnecting with the dedicated members of the career staff I got to know in my prior service as a Deputy Assistant Attorney General, and I've also met a number of talented lawyers and economists who have joined the Division in the intervening years. One thing that hasn't changed about the Division: it remains the best place to work in the federal government, with its incredible combination of interesting cases and inspiring colleagues. I'm humbled that the President selected me to serve in this role, and honored that the Senate voted to confirm my appointment.

When I was last at the Antitrust Division, I focused a lot of my energy on international engagement. Indeed, in 2004 I spoke about international issues in antitrust right here in Greenberg Lounge in what I recall was an excellent symposium put on by Professor Fox and the Annual Survey of American Law. I said then, and believe now, that "respect and accommodation on our part will generate respect and cooperation from our foreign counterparts in return…."[2] That is a sentiment I hope is shared here today.

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[1] Richard Zacks, Island of Vice: Theodore Roosevelt's Doomed Quest to Clean Up Sin-Loving New York, 5 (2012).

[2] Makan Delrahim, Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct, 61 N.Y.U. Ann. Surv. Am. L. 415, 431 (2005).

Although I'm now overseeing a broad set of program areas, our International Section will continue to be a point of emphasis. In fact, I've been on the job just over a month, and I've already undertaken efforts on this front. I brought on Roger Alford, one of the pre-eminent U.S. scholars in International Law, to serve as the Division's International Deputy Assistant Attorney General. I've also renamed our Foreign Commerce Section the International Section to emphasize the breadth of its work. And of course, I chose this forum today to give my first published remarks as AAG, to underscore my commitment to international engagement on competition enforcement.

With your permission, I will discuss three topics today. First, why antitrust enforcement is such an important part of a free market system. Second, the progress we've made in sharing the value of effective antitrust enforcement around the world. And third, a few thoughts on what I hope we can achieve in the future. On all these points, I hope to emphasize the fundamental role of the rule of law and procedural fairness in the application of the antitrust laws.

II. The Values of Antitrust Enforcement

If you knew my background, you might think I was an unlikely candidate to represent antitrust enforcement in the United States when, as a child, I emigrated from Iran. In 1979, my parents brought us here from Tehran not only to escape political upheaval, but to seek out a better life for our family. In the years that followed my father, as well as other family members, succeeded here as entrepreneurs, and proudly my first job was at my father's gas station in Southern California. That early insight into the struggles and triumphs of watching my family build a business set me on a path to what, so far, has been a wonderful journey in the law and in public service.

The great historian David McCullough has spoken insightfully about the connection between the entrepreneurial spirit and the foundations of this country. In an interview several years ago, he told the Harvard Business Review that "[w]hen the founders wrote about life, liberty, and the pursuit of happiness, they didn't mean longer vacations and more comfortable hammocks." Instead, McCullough said, the founders sought to create a nation where all are free to pursue "improvement and excellence."[3] For my family, as for so many others, America provided the opportunity to pursue a better life—the pursuit of improvement and excellence—through entrepreneurship.

That life experience makes me a firm believer in the American Dream. And can there be any doubt that the American Dream has at its core a well-functioning free market economy? The free market enables entrepreneurship and rewards innovation—it is the engine of opportunity.

Competition enforcement plays a critical role in supporting the free market system—antitrust ensures the engine of opportunity remains in good working order for everyone's benefit. Historic examples of market failure from collusion and consolidation demonstrate how important an antitrust regime is to the long-term stability and success of the free market. When it's done well, antitrust enforcement maximizes efficiency, supports the integrity of the market, and ensures the opportunity for everyone to compete on the merits.

That's a point that warrants emphasis—the values of antitrust enforcement are core American values. Antitrust helps our free market economy maximize overall

[3] David McCullough, *Harvard Business Review* Jan.-Feb. 2013, *available at* https://hbr.org/2013/01/david-mccullough.

welfare and, as the Supreme Court has said, serves as a "comprehensive charter of economic liberty."[4] Promoting the general welfare and securing liberty…those are values enshrined in the Constitution itself. Antitrust is not merely a technocratic exercise, in fact it is an ingenious body of law supporting sound economics that serves our most important values.

In addition to reinforcing basic economic values, antitrust enforcement is fundamentally about promoting the rule of law. At its core, antitrust law has an inherent equilibrium—wary of infringing on economic liberty, but willing to intervene to correct market failures. Sensitive to the imposition on liberty inherent in government intervention, we apply a law enforcement framework to competition policy. That approach carries with it all the benefits and constraints of the rule of law: we publicly promulgate laws, apply them equally to all, and pursue impartial adjudication from independent courts. Market participants know what to expect, and organize their behavior in accordance with the law.

Prior to serving as a Justice on the U.S. Supreme Court, Robert Jackson served as Assistant Attorney General for the Antitrust Division, and let me read an excerpt from one of his speeches. In remarks in 1937 he said: "The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to save government from the conflicts and accumulation of grievances which continuous price control would produce and to let it confine its

[4] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

responsibility to seeing that a true competitive economy functions." [5] This, Jackson said, "is the lowest degree of government control that business can expect."[6]

Indeed, competitive markets are generally self-regulating. Competition reduces the need for intrusive industry-wide regulation with the attendant risks of bureaucratic overreach, agency capture, and unintended consequences. Unlike a centrally planned economy, or a highly regulated one, antitrust employs law enforcement principles to maximize economic liberty subject to minimal government imposition.

The challenge is to strike the right balance between over- and under-enforcement. For example, with merger reviews, antitrust authorities spend a great deal of time thinking carefully how the transaction would affect competition. That's an important part of the process, because blocking a procompetitive transaction can be as dangerous as clearing an anticompetitive one. The goal should be to promote, not stifle, competition.

Another important benefit of antitrust enforcement is ensuring the integrity of the competitive process itself. For just that reason our criminal enforcement program has been and remains a core priority. When companies fix prices, rig bids, or allocate customers, they attack the very premise of the free market system—the competitive process. Cartel activity not only harms consumers by raising prices and reducing output, but it undercuts their faith in the free market system. To prevent and deter the corrupting influence of collusion, we use a transparent, unambiguous per se rule for the most harmful agreements among competitors.

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[5] Robert H. Jackson, AAG for the Antitrust Division, 71 U.S.L. Rev. 575, 576 (1937) (address before the Trade and Commerce Bar Association and Trade Association Executives, Sept. 17, 1937), *available at* https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised/.

[6] Id.

So you can see why we at the Antitrust Division are so passionate about competition enforcement. The Department of Justice is uniquely named for an ideal. Indeed, justice is a moral ideal. Our role in the Antitrust Division is the pursuit of justice in the marketplace. When we do our jobs correctly, we protect the competitive process around which our economy is organized and on which the American Dream is premised. And we do so through law enforcement consistent with limited government and the rule of law. It's a compelling mission.

III. Progress in Sharing Those Values Internationally

It's equally important that we share the benefits of antitrust enforcement with other countries around the globe. Pursuit of economic opportunity through free market competition is by no means a uniquely American goal. With the global movement towards market-based economies, we've seen a worldwide embrace of how free markets raise standards of living and enable the quest for a better life. Today we live in the most prosperous time in human history, with more economic freedom than ever before to work, produce, consume, and invest.[7]

With market economies developing around the world, the need for antitrust enforcement has expanded internationally. Developing economies find themselves newly grappling with the threats to competitive markets that have challenged U.S. enforcers for over a century. We all face the same challenges, and we're eager to share what we've learned and to learn from other countries' experiences.

American consumers and businesses benefit when we share the values of antitrust enforcement internationally. Just as it does at home, competition in markets abroad

[7] 2017 Index of Economic Freedom, *available at* http://www.heritage.org/index/about.

drives innovation and quality, and reduces price. Given the global reach of modern supply chains, effective competition enforcement abroad leads to cheaper and better goods for U.S. consumers.

American businesses, too, find themselves participating in global supply chains and competing in markets all around the world. When those markets are open to competition, they're open for American businesses to compete on the merits. We believe in the ability of every company to strive to succeed. And we expect them to be treated with the same fundamental procedural protections that we accord to foreign-owned companies doing business on our shores.

Of course, I'd hope this audience doesn't need much convincing on the importance of international engagement in competition enforcement. We all share this goal. Let me now turn to some of the progress we've made on that front.

A. The International Competition Network

When I last worked at the Antitrust Division, the international competition community was much smaller. The International Competition Network (ICN), founded in 2001 just shortly before I joined the Department, was then a young, upstart organization. ICN grew rapidly, and by the time I left the Department, it had roughly 90 members from 80 jurisdictions. Now the network numbers more than 130 members.

ICN has become a platform at the forefront of global antitrust convergence, and it has been a far greater success than many anticipated. In the coming years, and perhaps using the recent work on unilateral conduct as a model, I hope that ICN will continue to press forward in bringing us closer towards convergence around shared principles.

Where differences exist, I hope ICN will provide forums for explaining the rationales driving differences in our laws.

One issue ripe for deeper discussion is the intersection of intellectual property and antitrust, and I would strongly support efforts in ICN to make progress in this area. We need to be sure that antitrust enforcement does not impede the incentives for innovation that intellectual property laws provide.

B. The OECD

I should mention OECD as well—it has made similar strides in advancing international collaboration on antitrust. When I was last at the Justice Department, a highlight of my work was the opportunity to engage with OECD members. Many of the issues at the forefront of OECD's work today are built upon the foundations of work we began years ago, including work on hard core cartels, a study of information sharing in cartel cases, and enhancements of procedural fairness. I am thrilled to again have this opportunity to work with OECD—especially with my friend Fred Jenny—and to re-engage on these issues.

C. Bilateral Agreements

We have also made great progress in entering into bilateral cooperation agreements. Today we have fifteen such agreements, including with many of the countries in attendance today. I will renew efforts by the Antitrust Division and our colleagues at the Federal Trade Commission to evaluate existing agreements. There also are a number of competition chapters in FTAs, and I'm happy to report that earlier this month we closed the competition chapter in the new NAFTA negotiations that the President initiated this year.

D. Case Cooperation

Whether subject to an agreement or not, the Antitrust Division has long welcomed case cooperation on overlapping investigations, and these efforts will continue to have my full support. When I was last at the Department, case cooperation was typically not as deep nor as routinely effective as I understand it to have become today. The U.S./EU divergence on the GE-Honeywell decision was then still fresh, and in one of my speeches I raised alarms about "the assertion of overlapping antitrust responsibilities by multiple jurisdictions" and how it had the "the potential to harm the very competitive values that antitrust is meant to protect."[8]

Case cooperation helps alleviate the potential for conflict that has grown as more and more jurisdictions have adopted competition laws. It also enhances the effectiveness of our enforcement efforts by making us more efficient; it oftentimes enables us to get information more quickly and helps to inform our decision-making. Case cooperation with other jurisdictions now plays a role in nearly a quarter of our merger challenges, and in our criminal program, roughly half of our investigations are international in scope. That's good progress that we should be proud of collectively and take every effort to build upon.

IV. International Engagement Goals

While all these efforts have facilitated greater procedural and substantive convergence, the proliferation of competition regimes around the world has brought new challenges. With around 130 separate agencies, we have our share of differences in

[8] Remarks of Makan Delrahim at the ABA Administrative Law Section Fall Meeting, Oct. 22, 2004, *available at* https://www.justice.gov/atr/file/518036/download.

substantive laws and enforcement decisions. Many of our international counterparts have different views about what constitutes sound antitrust enforcement. Even within the United States we sometimes disagree on this issue, although we have had the good fortune of widespread bipartisan consensus on the basic contours of antitrust enforcement.

I welcome those discussions. Collegial dialogue on areas of disagreement grows our understanding of antitrust law. But I respectfully submit that there should be no debate about fundamental approaches to the just administration of the antitrust laws, such as non-discrimination, procedural fairness, and transparency. I'd like to pause on that topic for a moment, because it is of paramount importance. We must develop a worldwide understanding that antitrust enforcement has no exemption from universal procedural norms for law enforcement.

A. Non-Discriminatory Treatment

The first such universal principle is non-discrimination. Non-discriminatory application of the laws has been a fundamental aspect of rule of law systems all around the world for centuries. This bedrock principle of our legal system has its roots in the Magna Carta dating back to the 12th Century.[9] In 1774 at the birth of the United States, one of our founding fathers, Ben Franklin, recognized the import of these norms when he remarked that "[a]n equal dispensation of protection, rights, privileges, and advantages, is what every part is entitled to, and ought to enjoy."[10] Two hundred years later esteemed

[9] William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John, 375 (2d ed. 1914).
[10] Benjamin Franklin, Emblematical Representations, ca. 1774, *The Complete Works of Benjamin Franklin* (New York: G. P. Putnam, 1887), 5:417.

U.S. Supreme Court Justice Frankfurter wrote in *McNabb v. United States* that the "[h]istory of liberty has largely been the history of observance of procedural safeguards."[11] Today, principles of equality and procedural fairness are reflected in almost every constitution in the world.[12]

Non-discrimination has also been widely recognized as a universal value in international law. The Universal Declaration of Human Rights, for example, proclaims that "all are equal before the law and are entitled without any discrimination to equal protection of the law."[13] The Inter-American Court "considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it [as] a fundamental principle that permeates all laws."[14] Likewise in the European Union, the principles of equality and non-discrimination constitute an important part of the general framework of law applied by the Court of Justice. Other examples abound, without dissent, on this clear principle: non-discriminatory treatment is a fundamental component of any rule of law system.

Unfortunately competition agencies in some countries may have, from time to time, treated antitrust as somehow exempt from the fundamental requirement of non-discrimination, using it to favor domestic companies or discriminate against foreign firms. When they do, they not only violate universal norms, but they engage in short-sighted and counterproductive public policy.

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[11] *McNabb v. United States*, 318 U.S. 332, 342 (1943).
[12] David Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Calif. L. Rev. 1163, 1200-1201 (2011).
[13] Universal Declaration of Human Rights, art. 7 (1948).
[14] Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, Juridical Condition and Rights of Undocumented Migrants, ¶ 101.

Consider the so-called national champion, a company protected from competition by discriminatory antitrust enforcement. Absent the pressures of the marketplace, these companies typically grow stagnant. They deliver less value to domestic customers, and fare poorly on global markets. Instead of creating a champion to compete and win business worldwide—as competitive markets can do—companies protected by discriminatory antitrust enforcement sap local economies of energy and entrepreneurship.

On that point, let me take a moment to commend our colleagues in Brazil, who I understand are taking a harder stance in antitrust enforcement, and applying it even-handedly to Brazilian as well as foreign corporations.

Harvard economist Michael Porter has studied the relationship between competitiveness and economic development. After looking at how certain companies became successful on a global scale, he concluded that "[n]ational prosperity is created, not inherited. It does not grow out of a country's natural endowments, its labor pool, its interest rates, or its currency's value, as classical economics insists. A nation's competitiveness depends on the capacity of its industry to innovate and upgrade."[15]

The principle of non-discrimination carries international policy implications as well. The existence of global supply chains and global business activities means every country benefits from non-discriminatory enforcement, and that every country has the power to harm overall welfare through discriminatory treatment. When a foreign firm is punished for its success, or discriminated against because of its nationality, its costs are distorted, impacting productivity on a global scale. Everyone loses.

[15] Michael E. Porter, "The Competitive Advantage of Nations," *Harvard Business Review* March-Apr. 1990, *available at* https://hbr.org/1990/03/the-competitive-advantage-of-nations.

The stakes here are high and very real: we need to work together on a mutual consensus toward non-discriminatory enforcement of antitrust laws worldwide.

B. Procedural Fairness and Transparency

Procedural fairness and transparency are also important for many of the same reasons. As competition enforcers we act as referees. It is our job to create an environment where rules are clear, rather than opaque and arbitrary. When we create clear rules and enforce them fairly, we create a playing field where innovation and ingenuity can thrive.

It is important that we have the confidence of both the public that we serve and the business community that is subject to our rules. To build support, we must be willing and able to open up our policies and decisions to review and challenge. We live in a globalized economy and with so many different competition enforcement agencies it is routine now that conduct or a merger will be reviewed by multiple agencies. Different outcomes matter less if the decision-making process was transparent and fair. The legitimacy of all of our agencies' decisions is strengthened by a collective commitment to transparent and fair decision-making processes.

V. Executing on Shared Goals

To conclude my remarks I'd like to now share a vision for how I hope to translate these priorities into action in the coming years.

A. Trade Agreements

As you've seen in the news, the U.S. Trade Representative has prioritized the renegotiation of trade agreements, and discussions are underway to revisit NAFTA and the U.S.- Korea Trade Agreement (KORUS). Recent trade agreements have competition

chapters that set forth basic standards and protections, and these protections help to ensure that when U.S. companies are investigated by competition authorities overseas, or when foreign companies are investigated here in the United States, they will all be treated fairly and afforded certain fundamental rights to procedural fairness. We look forward to working successfully with USTR and our trade partners to craft competition chapters that fulfill objectives of affirming basic rules of procedural fairness in competition law enforcement.

When I last worked at the Department of Justice in 2005, we recognized the significance of trade law, but there was a common belief that trade law had minimal overlap with antitrust law. This is no longer the case; there is an intersection between trade and antitrust. Upon my nomination in March, one of my first decisions was to reach out to Professor Roger Alford to become the International Deputy Assistant Attorney General. His entire career has been devoted to issues relating to international economic law, and he has deep knowledge and understanding of trade issues. I have known Roger for over twenty years, and I believe he will bring new energy and ideas to the Antitrust Division and our international efforts.

B. International Engagement and Assistance

Roger and I plan to continue to invest in the Antitrust Division's International Section, and will look to build upon its resources, increasing its ranks and recruiting highly experienced attorneys. Though we can expect belt tightening throughout the U.S. government in the coming years, I will look to ensure that the International Section has the resources it needs to execute upon these priorities.

In the coming months I also look forward to strategizing around how the Antitrust Division might best prioritize its technical assistance and support to developing competition authorities. In recent years the Antitrust Division has increased its engagement and support for newer competition agencies around the world. That benefits consumers and businesses both abroad and here in the United States.

It is to our collective benefit to engage regularly with newer enforcers, and to encourage the development of sound analytic frameworks and procedurally fair investigative processes. To this end, the International Section will encourage newer agencies to come to us directly with requests for assistance. That's an open invitation: please let us know how we can help.

I am also looking for ways to modernize the Antitrust Division's facilities in ways that will encourage greater engagement. I hope to invest in new equipment and technology that will make engagement via videoconference and distance learning routine.

C. Bilateral Relationships

The strength of the relationships between the Antitrust Division and our enforcement counterparts is also essential to our enforcement mission, and because of this, I will devote resources to examine our bilateral relationships and explore where they might be further strengthened. As I noted above, I hope we can build on and strengthen our use of cooperation agreements.

I am also thinking about new types of agreements with close partners that would focus specifically on principles of non-discrimination, procedural fairness, and transparency. I hope to explore whether we can enshrine points of consensus around

these principles into firm, enforceable commitments. I believe that by doing so we would take the next step in developing international competition principles.

This is a full international agenda, but we were similarly ambitious during my last tenure at the DOJ, and experienced significant success. Fifteen years ago, creating soft law commitments through ICN and OECD seemed like a daunting task. But the global competition community did it with such resounding success that, looking back, it seems almost easy. I think we should pick up the mantle again and see how far we can run with more and better hard law commitments.

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To conclude, let me say that today is the perfect opportunity to continue that work. I'm familiar with many of the presentations for this conference, and I'm aware there's a lot of skepticism about competition policy as we know it today. I hope you'll take my remarks as an invitation to collegial dialogue on our areas of disagreement, and as a reminder of how much we have in common.

For our part, in addition to our international engagement, we at the Antitrust Division have an ambitious agenda on the domestic front as well. As our initiatives here at home bear fruit I hope they'll also advance the international dialogue. I look forward to sharing more on that in the months to come—for now, thank you for your time and I hope you enjoy the rest of the conference.