



DEPARTMENT OF JUSTICE

Towards a Closer World: A Look Back at International Cooperation in the Obama Administration

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Introduction

Thank you, James, for that introduction. And my thanks as well to the Fordham Competition Law Institute for inviting me to be this morning's keynote speaker.

As we near the end of the Obama Administration, we start to gain perspective on how our approach to international cooperation has evolved over these past eight years. From day one, increased international cooperation in antitrust investigations has been a priority. Since the beginning of this Administration, through the hard work of the highly talented folks at the Antitrust Division, and our colleagues around the globe, the Division's case cooperation with our foreign counterparts has metamorphosed from one-off exchanges of information to ongoing, mutually enriching relationships. Years of working closely with our international counterparts at all levels of the Division has led to better understanding and deeper engagement with our cross-border colleagues.

That's good for enforcers – working together more closely on a matter gives us the benefit of one another's expertise and understanding of the markets involved. That's good for business – cooperation means more consistency across jurisdictions, speedier resolutions, and less duplicative efforts. And ultimately, that's good for consumers – more efficient government is more effective government.

The nature of international cooperation

In an age in which more businesses operate across more borders, foreign enforcers have proven to be valuable partners in both civil and criminal investigations. Hearing the views of our counterparts can give us a fuller picture of the merger or conduct under investigation and its

potential competitive effects. We can obtain information we might not otherwise get, such as the views of local industry, the outcome of market testing conducted in another jurisdiction, or, in some cases, the views of recalcitrant third parties. We can also obtain information more quickly than we otherwise might, which can speed up our investigations through better-targeted document requests or searches of parties. On fast-paced merger investigations, cooperation sensitizes us to other jurisdictions' investigative timelines. In our criminal investigations, it enables us and our counterparts to continue developing the best cases possible during the covert phase of our investigation, without compromising the other agency's case by going overt too early.

Working closely with other jurisdictions also avoids the prospect of multiple jurisdictions' propounding conflicting theories of harm or adopting inconsistent remedies. As a matter of good government, we want to make sure that parties can actually comply with a remedy that may be imposed by multiple jurisdictions. Cooperation also opens up channels for inventive, and more efficient, relief. We have accepted plea agreements, for example, that allowed a defendant to serve his sentence in another investigating country. In other instances, parties were able to have the same person appointed as a compliance monitor in consent agreements with multiple investigating agencies.

The many forms of international cooperation

You might think that language would be the biggest obstacle to effective international cooperation, but that's one that we can easily overcome. Far more important is a willingness by each jurisdiction to engage; respect for the confidentiality of the agency and party information to be obtained; and, most critically, the requisite authority to cooperate, whether expressly authorized by statute, permitted by waivers from the parties who are under investigation, or as a part of the law enforcement mandate of the cooperating jurisdictions.

International cooperation takes many forms. Some of it has been done formally and at the highest levels of the Division and its counterparts. We entered into cooperation agreements or memoranda of understanding with six new jurisdictions over the past eight years: Chile, China, Colombia, India, Korea, and Peru, almost doubling the number we had at the start of this Administration. We hold bilateral meetings on a regular basis with several foreign partners, including Canada, China, the European Commission, Korea, Mexico, and our oldest partner, Japan, with whom we held our 35th bilateral meeting earlier this year. We continue to engage in cooperation through multilateral organizations – such as the Organisation for Economic Cooperation and Development and the International Competition Network – and are active participants in their working groups and committees. These two organizations in particular have been instrumental in not only steering us towards convergence in antitrust law, but also in providing fora for getting to know our counterparts.

Sound policy development has helped us build deeper international cooperation. A series of phone conversations over a two-year period with the FTC and EC on merger remedies resulted in a better understanding of the similarities and differences between our practices. The highlights are featured in an article written in a nifty bit of international collaboration between the Division's Director of Civil Enforcement Patty Brink and her counsel, Anne McFadden, the FTC's Dan Ducore, and Johannes Luebking from DG Comp. It was published in the International Bar Association's Competition Law International in April of this year, and I strongly commend it to you. We also released revised best practices for international cooperation on merger investigations that reflect the experience and knowledge accumulated from our long-standing partnerships with the EC and Canada.

Cooperation also takes the form of ongoing dialogue. We have built rapport with our northern neighbor through our U.S.–Canada Working Group, and we extend a warm *bienvenido* to Mexico, who will be joining the group this fall.

Cooperation is an investment

As an institution, we have committed an array of resources to cultivating long-term relationships. On the Front Office side, my predecessor Bill Baer tapped Patty Brink, a senior career employee, to serve as coordinator of our civil case cooperation, ensuring that the leadership of other agencies has a consistent and familiar point of contact at the Division.

But nothing beats face-to-face interaction. During this Administration, we have built a successful staff exchange program, hosting enforcers from the EC, Japan, and the UK, through our Visiting International Enforcer Program, and sending several Division managers to other agencies to work on matters and learn firsthand other jurisdictions' policies and practices.

Our attorneys and economists have also nurtured professional and personal ties with the staffs of many agencies around the world via technical assistance missions. Over the past 8 years, 140 attorneys and economists have completed 123 training and assistance missions on the ground in 31 different countries.

Closer to home, we've deepened our own international bench. With their linguistic and geographic expertise, our Foreign Commerce attorneys serve not only as a resource to our investigating and litigating attorneys, but also as knowledgeable point-people for other jurisdictions' enforcers. We also established an internal Division working group on international criminal matters that serves as a platform for our attorneys to share information and best practices

across offices, creating an up-to-date resource of collective knowledge on international cooperation that our entire criminal staff can access.

Daily and weekly interactions among case teams on multi-jurisdictional investigations have forged strong ties and left enduring friendships, such that our people can reach out to their non-U.S. counterparts on subsequent matters. Each time we work with our international colleagues, we're doing more than just working on the case at hand – we are laying the groundwork for fruitful future collaboration. Relationships are often overlooked, but they are very important in our profession, where, as you well know, you often find yourselves working with the same people again. Take, for example, Cecilio Madero Villarejo, with whom I worked 15 years ago on the *Microsoft* case when I was a section chief and he was head of Directorate C, and again now that we're the Acting Assistant Attorney General of the Antitrust Division and the Deputy Director-General of DG Comp, respectively.

How cooperation works in a civil context

To see how it all fits together, let me walk you through one such example involving a merger. When we receive a merger filing, one of the first inquiries we make is to ask whom else the parties will be notifying about their transaction. As appropriate, we seek waivers from the parties to allow us to share their confidential information with enforcers in other jurisdictions, and then reach out to those jurisdictions, typically setting up a regularly occurring call. These calls allow us to share updates on timing, theories of harm, and results of economic analyses. In recent cases, we have shared documents, invited foreign enforcers to attend our depositions, and held multi-day meetings with counterparts to allow us to better understand each other. We also work closely together in evaluating proposed remedies.

You may be familiar with our recent investigation of Halliburton's proposed acquisition of Baker Hughes, a transaction that would have combined two of the three largest globally-integrated oilfield services providers in the world. What you may not know is that our case team coordinated extensively with competition enforcement agencies from nine different jurisdictions over the course of the year-plus investigation. This multi-jurisdictional undertaking involved hundreds of hours of person-power, including over 100 separate staff-to-staff calls, many calls between Division management and their counterparts in other agencies, and several days of in-person meetings with international counterparts. The quantity of product and geographic markets implicated, as well as the complexity of the transaction and the world-wide remedies being proposed by the parties, was staggering. The cross-border relationships we'd built were critical for sharing ideas, testing theories of harm, and achieving a common understanding of the impacts of the transaction and the proposed remedies. As a result, we were able to file in court a compelling complaint detailing the merger's competitive effects, which helped provoke the parties ultimately to abandon the transaction.

How cooperation works in a criminal context

We also cooperate extensively with our foreign counterparts on criminal matters. In the early stage of an investigation, before a grand jury has been opened, we will talk to our competition counterparts about leads or complaints we are working on and suss out what they've heard in return. Later on, should we receive a leniency application, one of our first questions we pose to the applicant is whether they've sought a marker in any other jurisdiction, to whom we then seek permission to talk. Though we generally don't exchange a party's actual documents, we regularly discuss important issues, such as volume of commerce, the types of charges that can be brought in each jurisdiction, and potential sources of evidence. We also confer on procedural steps, strategy, and logistics, including the timing of going overt in our investigations, drop in interviews, and dawn

raids. We can also share and seek evidence via formal requests as enabled by Mutual Legal Assistance Treaties (MLATs) or by court order. And we seek assistance from our counterparts in apprehending fugitives through INTERPOL red notices and extradition requests.

In the last several years, cooperation among enforcers has led to the successful prosecution of executives for price-fixing, obstruction of justice, and fraud. In 2014, for example, we secured the extradition of Romano Piscioti, a former executive at a marine hose manufacturer headquartered in Veniano, Italy, on charges of conspiring to fix prices and rig bids. This was the first successfully litigated extradition of a person on antitrust charges. Piscioti eventually pled guilty and was sentenced to two years in prison. And earlier this year, John Bennett, former CEO of a Canadian hazardous waste company, was convicted in a New Jersey court and sentenced to more than five years in prison for his role in a Superfund cleanup kickback scheme following his extradition from Canada in November 2014.

Recently, international cooperation helped us achieve a guilty plea from Nishikawa Rubber Co. Ltd. in connection with its role in a price-fixing scheme involving automotive products. The Division worked closely with the Competition Bureau of Canada in identifying affected sales of automotive parts manufactured in the U.S., shipped to Canada for assembly into cars, and then imported back into the U.S. After realizing that the effects were felt primarily in the U.S., Canada deemed our \$130 million criminal fine a sufficient remedy for both jurisdictions, obviating the need to separately pursue additional enforcement action against Nishikawa in Canada.

Cooperation in single-jurisdiction investigations

Sometimes we cooperate on cases that only the foreign jurisdiction is investigating. Why? Because assisting when only one jurisdiction is investigating is still a long-term investment in that relationship, and ultimately, we will benefit.

Many times, our staff has been asked to brief another jurisdiction on the facts and theories from a past investigation of relevance to one of their current cases. On occasion, we will walk them through our economic modeling. We have also provided “benchmarking” for other agencies on our approaches to various theories of harm and to remedies: how we approach non-compete agreements, for example, or what kind of remedies we seek in specific sectors.

And we benefit by receiving the same in return. It is not uncommon – in order to find out whether there are competitive implications in the U.S. – for our staff to reach out to a foreign enforcer after reading about their criminal investigation. Our international counterparts have generously connected us to colleagues at other regulatory and law enforcement agencies. They have alerted us to pending legislation that might impact market conditions. And they have willingly distilled and translated information from complicated foreign-language technical and legal texts, saving our staff valuable time and energy.

What's next?

Looking ahead at the next eight years, I think you'll see deeper, more frequent, and more extensive case cooperation. And in the longer term, cooperation will encompass increased legal assistance. Some of our practices on the criminal side are good examples.

The Division currently has an array of tools for obtaining (and providing) international assistance in criminal investigations. MLATs, which I mentioned earlier, are agreements between the U.S. and foreign governments to assist one another in criminal law enforcement matters. The U.S. government is currently a party to more than 80 of these agreements. They are particularly useful for gathering evidence located in another country. In recent years, we've used them to obtain email and other internal company records located on foreign servers or in foreign physical locations, bank records, phone records, and witness interviews. We have used them to serve court papers. And of course we have also responded to requests made by other jurisdictions under MLATs, providing evidence that they would have otherwise been unable to obtain.

MLATs are treaties of general applicability; depending on the jurisdiction, some require that both jurisdictions have criminalized the offense in question in order for assistance to be available. As more and more jurisdictions criminalize cartel conduct, an increasing number of jurisdictions will be able to assist us in our criminal prosecutions, and vice versa, including extraditions like those I mentioned earlier.

We are also authorized to enter into agreements to provide assistance to, and receive assistance from, other jurisdictions on both criminal and civil investigations under the International Antitrust Enforcement Assistance Act of 1994 (IAEAA). Currently, we have one agreement, with Australia, under which we have both provided and received assistance in the past. It's possible that we may see more agreements under the IAEAA in the future, which would provide another avenue for assistance in obtaining documents and information to which we otherwise would not have access.

On the civil side, waivers regularly granted by parties and third parties in our merger investigations mean that we don't have as far to go in terms of cooperation. We also frequently

collaborate with our counterparts on conduct matters, even in the absence of waivers. But there may be additional tools that would enhance the assistance we could provide one another. We look forward to engagement on these issues with our counterparts and the business community worldwide.

Conclusion

Ultimately, all enforcers have essentially the same goals: to evaluate mergers and conduct in light of all the information available, and to achieve results that protect competition. Cooperation helps us do this more effectively than we could by ourselves when it comes to global conduct. It also drives substantive and procedural convergence among jurisdictions; a great example of this is in the widespread and continuing adoption of leniency policies across the globe. Given the factual and legal differences in our jurisdictions, cooperation won't always yield identical results. But it does minimize discord, and it helps preserve and strengthen the relationships that will be so crucial to successfully working together in the future. By working more efficiently, we work more effectively, easing the burden on the companies and individuals who appear before us, and ultimately benefiting the competitive process and the general public whom we serve.

Thank you.