



DEPARTMENT OF JUSTICE

“Algo Esta Cambiando”*: Innovation and Cooperation Among Antitrust Enforcers in the Americas

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I. Introduction

Good afternoon. I want to thank the American Bar Association for the invitation to give the closing keynote address. I understand that this year's "Antitrust in the Americas" event has been a long time in the making, and the impressive array of speakers is a testament to the importance of the region in the global competition enforcement community.

I am particularly grateful that Argentina is our host for this event. As most of you know, last year was a banner year for competition law in Argentina, with the passage of the Competition Act and creation of a new enforcement agency, the National Competition Authority. That Act also provided the creation of a specialized Court of Appeals to review the NCA's rulings on competition matters, a pre-merger review system and fast-track procedure for certain transactions, an increase of fines for criminal conduct, and a brand new leniency program.¹

On behalf of the United States, I congratulate you for these valuable reforms. As the great Argentinian football player, Lionel Messi, has said, "The day you think there [are] no improvements to be made is a sad one for any player." I couldn't agree more.

What some of you may not know is that Buenos Aires has an American antitrust scholar-in-residence at the U.S. Embassy: U.S. Ambassador Edward Prado. Before his appointment, Ambassador Prado served with distinction as a judge for over three decades, sitting on the Western District of Texas and on the Fifth Circuit Court of Appeals. During his time on the bench, Judge Prado wrote multiple opinions interpreting and applying the U.S. antitrust laws.

For example, in 1988, Judge Prado oversaw the resolution of the merger between two competing solid-waste hauling companies, which involved divestitures aimed at remedying the

* JULIETA VENEGAS, *Algo Esta Cambiando* (RCA Internacional 2003).

¹ Frederico Volujewicz, Argentina: Competition Authority, Global Competition Review, Sept. 3, 2018, <https://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2019/1173674/argentina-competition-authority>.

transaction's likely anticompetitive harm.² More recently, as a Circuit Judge in 2004, Judge Prado wrote an opinion upholding liability in a Sherman Act refusal-to-deal case, while recognizing that "[c]ourts admittedly must be cautious in finding exception to the right to refuse to deal."³ I would echo Judge Prado's words of caution.

Perhaps my favorite antitrust case decided by Judge Prado was in the early 2000s. It involved allegedly anticompetitive conduct in an industry that was about to undergo a rapid transformation: video store chains.⁴ In that case, a group of independent video retailers sued Blockbuster and the home-video affiliates of the major Hollywood movie studios because they provided videos to Blockbuster on more favorable terms than Blockbuster's competitors could obtain.⁵ Judge Prado, when he was on the district court, granted the defendants judgment as a matter of law in the middle of trial. He found no evidence of conspiracy among the movie distributors, and concluded that the distribution practices did not meet the requirements for showing unlawful price discrimination.⁶

Today, the story of the Blockbuster litigation might strike us as a historical curiosity. A company that enjoyed tremendous market power across the United States now has a single remaining storefront.⁷ Innovations in telecommunications, digital markets, and video distribution created dynamic competition that rendered the video-store model obsolete. Consumers worldwide

² Final Judgment, *United States v. Waste Management, Inc.*, at 5-8 (W.D. Tex. Nov. 22, 1988), <https://www.justice.gov/atr/case-document/file/969796/download>; Competitive Impact Statement, *United States v. Waste Management, Inc.*, at 2 (W.D. Tex. Sept. 1, 1988), <https://www.justice.gov/atr/case-document/file/969781/download>.

³ *Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Group, Inc.*, 93 Fed. App'x 1, 9-10 (5th Cir. 2004).

⁴ *Cleveland v. Viacom, Inc.*, 166 F. Supp. 2d 535 (W.D. Tex. Sept. 10, 2001).

⁵ 166 F. Supp. 2d at 536.

⁶ See *Cleveland v. Viacom, Inc.*, 73 Fed. App'x 736 (5th Cir. 2003) (upholding Judge Prado's ruling).

⁷ See Jon Porter, *The Last Blockbuster in America is Now the Last in the World*, TheVerge.com, Mar. 7, 2019, <https://www.theverge.com/2019/3/7/18254381/last-blockbuster-usa-world-australia-closing>.

now can access thousands of movies from the comfort of their couches. Of course, our nostalgia for scouring video and DVD rentals on the rack will always remain.

We see similar stories of dynamic competition and technological changes uprooting established industries and monopolists almost every day. Our role at the Antitrust Division is to encourage this process of innovation and new competition by ensuring that entrenched companies compete on the merits against new entrants, rather than using their market power to quash them. As Octavio Paz, the Mexican poet, once put it, “Wisdom lies neither in fixity nor in change, but in the dialectic between the two.”

All of you here today also face similar industry trends, whether you represent companies or individuals in private practice or serve your home countries as enforcers. Indeed, if I can point to one overarching theme from this conference, it is that enforcers and the companies that do business in this region are grappling with increasingly complex, multi-jurisdictional investigations and mergers.

Many of these challenges stem from new economic innovations themselves; as enforcers, our role is to innovate how we do our jobs so that consumers, ultimately, benefit from free market competition. For our part, the most important tool for innovation is cooperation across agencies in the Americas and around the world.

Indeed, we take pride in our relationships with the competition agencies that have emerged in the Americas in the past 20 years. Our counterparts in the Americas have made remarkable strides to implement effective enforcement programs. In my remarks today, however, I’d like discuss the ways in which the enforcement community in the Americas can respond to some of the concerns that have been raised about how that expansion of antitrust jurisdictions may pose greater costs and uncertainties for the business community and enforcement agencies themselves.

II. A Procedural Fairness Milestone in Competition Law Enforcement

As I address these issues, I first would like to highlight one of the greatest achievements that we, as antitrust enforcers, have witnessed on a global stage: the adoption of a global set of procedural fairness norms for competition law enforcement.

As you may know, in June of last year, we announced our cooperation with a group of leading competition agencies from across the globe, big and small, on an initiative for a Multilateral Framework on Procedures, or “MFP.” The initial group of competition agencies that developed this initiative included Brazil’s CADE, Canada’s Competition Bureau, Chile’s FNE, and Mexico’s COFECE.

The goal of our joint initiative was to establish fundamental procedural norms that are truly universal, and to achieve commitment from participating agencies to abide by these norms. The MFP initiative combined a set of widely accepted procedural fairness norms, such as transparency, non-discrimination, access to counsel, and judicial review, with an adherence, cooperation and review mechanism.

Our initial announcement of the MFP was one year ago. How far we have come!

Following a series of discussions within the initial MFP group, in the summer of last year we introduced our proposal to the global community of competition agencies, and we had calls and meetings to explain the proposed text with many of them. In September, we met with a group of around three dozen agencies in New York, and in November we held another large meeting in Paris that was attended voluntarily and with enthusiasm by close to 50 competition agencies from around the globe.

We received unanimous support for the substantive principles set forth in our proposal from all agencies engaged in these discussions. Several partner agencies suggested to implement

the proposed arrangement within the International Competition Network, to increase the speed of adoption by more participants.

Implementing the MFP within the ICN represented a serious challenge. Historically, the ICN has focused on issuing recommendations and guidance to its member agencies. The framework initiative, however, was designed to reflect actual commitments by its participants to uphold fundamental procedural fairness norms, combined with meaningful review and cooperation mechanisms. It went far beyond anything the ICN has done in the past.

Nevertheless, over the last few months we worked closely and tirelessly with the ICN chair and other members of the ICN Steering Group to find a way to implement both the strong substantive norms contained in the MFP proposal, as well as meaningful adherence, review, and cooperation mechanisms within an ICN instrument.

I am pleased to report that our joints efforts came to fruition when, on April 3, the ICN Steering Group adopted the proposal in form of the “Framework on Competition Agency Procedures,” or CAP.

Notably, the CAP is open to all competition agencies worldwide, both ICN members as well as non-member agencies. By joining the framework, agencies commit to adhere in good faith to the fundamental principles on procedural fairness set forth in the document.

The CAP is a major milestone for the ICN and for global competition enforcement in general. The U.S. Justice Department wholeheartedly supports the CAP and has encouraged our partner agencies around the world to join the framework.

On May 1, the CAP formally opened for competition agencies to register as participants. The framework will come into effect at an inauguration ceremony next week in Cartagena, Colombia. A significant number of competition agencies from around the world have already

registered as participants, among them several agencies that are not yet members of the ICN. We expect that dozens of agencies will join the CAP by May 15.

Over the last year we have been proud to witness a broad consensus emerge among competition agencies across the globe regarding the importance of fair and transparent procedures in competition law enforcement. Indeed, there is a shared recognition that procedural fairness is a prerequisite to the legitimacy of any enforcement action, and that such principles help improve the quality of antitrust enforcement overall.

More work lies ahead, but for now, we are pleased to see such remarkable progress with such import and such speed. On behalf of the United States, I would like to thank each of the leaders in this room for their contributions to this global milestone.

III. New Challenges and Innovations in Criminal Cartel Leniency Programs

Even as we embark on a new era of international cooperation on basic procedural fairness norms, we continue to face new challenges—and innovations—on the enforcement front.

In particular, on the criminal front, there has been a proliferation of leniency regimes in the Americas. The Antitrust Division has several important tools for detecting cartels, but the leniency program has proven to be our most effective tool by far. Under the Antitrust Division's Corporate Leniency Policy, the company (and any cooperating employee) that first reports its involvement in illegal activity can qualify for a complete pass from criminal prosecution in exchange for providing comprehensive cooperation to the Antitrust Division during its investigation.

Though this innovation in disrupting criminal cartel activity originated in the United States, it has blossomed around the world, as many other jurisdictions have taken note of the success of the Antitrust Division's leniency program and have created their own leniency programs. As of now, over 80 jurisdictions across the globe have developed leniency programs, including nine so

far in Latin America. These programs have changed the landscape of antitrust enforcement throughout the Americas.

Shortly after Peru's INDECOPI created its new leniency guidelines in 2017, for example, it used the program to identify and sanction a decade-old cartel in its *Toilet Paper* case.⁸ I understand the collusion in this *Toilet Paper* cartel resulted in overcharges to Peruvian consumers of more than 20 percent,⁹ so a great deal of consumers' hard-earned money was, you might say, just flushed down the toilet.

Similarly, in 2014, Brazil's CADE Tribunal imposed a record \$1.8 billion fine in its *Cement* case. This investigation was initiated upon a leniency application by a former employee of one of the cement companies.¹⁰

Leniency also has played a pivotal role in CADE's *Car Wash* bid rigging cases, which has the distinction of being one of the biggest and most harmful political corruption and collusion cases in the history of Latin America. According to the OECD, in just a two-year period during the course of its *Car Wash* investigation, CADE almost doubled its total numbers of leniency and leniency plus agreements.¹¹

The proliferation of leniency programs has undoubtedly contributed to our increased ability to detect and deter cartel activity worldwide. Some observers have questioned, however, whether the competition enforcement community is becoming a victim of its own success.

⁸ Jesus Eloy Espinoza Lozada, Peru: National Institute for the Defence of Free Competition and the Protection of Intellectual Property, *Global Competition Review*, Sept. 3, 2018, <https://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2019/1173691/peru-national-institute-for-the-defence-of-free-competition-and-the-protection-of-intellectual-property>.

⁹ *Id.*

¹⁰ OECD, *Peer Reviews of Competition Law and Policy: Brazil 2019*, 56, <https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm>.

¹¹ *Id.*

In particular, as the number of jurisdictions with active leniency programs has increased, some companies and practitioners have noted that the costs of applying for leniency across all of the jurisdictions where they may have exposure are simply becoming too great.

Just as significantly, companies face increasing costs from related civil litigation. As more jurisdictions allow civil damages, the costs of civil litigation grows. Some practitioners have opined that, in fact, costs have become so high that they sometimes advise their clients *against* seeking leniency, even despite the potential consequences for their employees with their own exposure.

We are mindful of these increasingly complex realities, and we take these concerns seriously. We want to ensure the continued healthy functioning of our leniency program in the U.S. and in Latin America. With this goal in mind, the Antitrust Division has begun focusing on potential ways to improve and evolve our leniency practices to better ensure that leniency applicants are able to meet the competing demands of the jurisdictions where they have exposure.

We are taking a hard look at our own program at the Antitrust Division, and we are working to pull together our own best practices for working with leniency applicants, and coordinating, as appropriate, with enforcement counterparts in cross-border investigations.

One area where we are taking steps to improve is to protect against the imposition of duplicative penalties. We hope to ensure that each jurisdiction imposes penalties that reflect the specific harm to its own markets and consumers. One simple way to achieve this goal is for enforcers to have open discussions about our methodologies for calculating fines in specific cases. These dialogues not only may help prevent overlapping fines and decrease unnecessary burdens on parties, but also can ensure that penalties cover the full scope of the harm caused by the cartel.

IV. Rethinking the Agencies' Treatment of Compliance Programs

While we are on the topic of improving the efforts of our criminal cartel detection and enforcement programs, I would like to share a few thoughts on corporate compliance, a topic that I recently addressed at a conference at Fordham University.¹²

In an ideal world, corporate compliance programs prevent wrongdoing altogether. If violations do occur, robust compliance programs should lead to prompt detection, which not only nips the conduct in the bud, minimizing the harm to consumers, but also gives companies the greatest chance of winning the race for leniency. If a company does not win the race for leniency, then it has an opportunity to be an early-in cooperator and receive a substantial penalty reduction for timely, useful, and thorough cooperation.

For some companies, the commitment to a culture of compliance following cartel investigations is readily apparent. We can see the changes over the course of our investigations, and they matter to us when we are making our decisions about how to resolve possible charges against them. In the past, the Antitrust Division has credited *extraordinary prospective compliance* measures that truly reflect a commitment by the corporation “to chang[ing] its corporate culture and instill[ing] a new attitude toward compliance and good corporate citizenship.”

We also recognize, however, that there are companies taking proactive steps and currently making significant investments in their compliance programs which raises the question whether there is more we could be doing to reward these efforts and to incentivize others to do the same. As Mexican film director Alejandro Gonzalez Inarrutu once said, “To question your own process is a necessity. If you don’t question yourself, it’s impossible to improve.”

¹² Makan Delrahim, AAG, Antitrust Division, Department of Justice, Don’t “Take the Money and Run”: Antitrust in the Financial Sector, (May 1, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law>.

To that end, last April, the Antitrust Division hosted a public roundtable on criminal antitrust compliance and we benefited from hearing a range of perspectives on the question of what we might do differently. Since then, we have spent the past year considering whether and how to further incentivize compliance.

One option would involve formally recognizing that even a good corporate citizen with a comprehensive compliance program may nevertheless find itself implicated in a cartel investigation. While we have credited extraordinary *prospective* commitment to corporate compliance before, we are also considering how to credit robust compliance programs at the charging stage, even when efforts to deter and detect misconduct were not fully successful in this particular instance.

Of course, these questions are not unique to the U.S. experience and I am sure you all grapple with many of the same issues at your agencies. I have no ready answers today to these important questions.

What I can clearly say is that the Antitrust Division shares the Department of Justice's commitment to ensuring that good corporate citizens who invest in compliance, self-report, and remediate get a "fair shake." The changes we plan to make in the future will be informed by this commitment.

The Antitrust Division long has been home to the ultimate credit for an effective compliance program that detects and allows prompt self-reporting—leniency. Going forward, however, leniency will no longer be the only benefit.

Whatever the exact nature of our policy changes, the Division will move away from its previous refrain that leniency is the *only* potential reward for companies with an effective and

robust compliance program. In line with the Department of Justice and its other components, we can and must do more to reward and incentivize good corporate citizenship.

V. Working Together To Streamline Merger Review Processes

Just as leniency and cartel detection programs have proliferated, so too have merger enforcement regimes across the Americas and around the world. This expansion of global antitrust enforcement largely has been a success story for international case cooperation for agencies and parties alike. In merger investigations, case cooperation between enforcers often results in exchanges of information and evidence, creating opportunities for enforcers to learn facts not previously considered, incorporate information on new developments, and test potential theories. Cooperation promotes efficiency for the agencies, but businesses and consumers also benefit when our investigations and remedies are consistent and predictable.

At the same time, however, we must recognize that the proliferation of new enforcers in recent years also has created new challenges. The increase in enforcement by competition agencies and other industry-specific regulators has resulted in an uptick in investigations globally, making the enforcement landscape more crowded.

We hear with some frequency that as merger notification filings have become mandatory in more jurisdictions, parties struggle to comply with a greater number of filing requirements. Parties are spending significantly more money in efforts to comply with filing obligations, and their counsel must continuously adapt to greater numbers of agencies' merger review timetables. As a result, merger reviews are taking longer to complete and are more expensive. Many in the business community believe this is a problem, and we must examine this issue.

Our mission as competition enforcers is to protect competition for the benefit of our consumers, and this means ensuring pro-competitive mergers are not unnecessarily delayed or unnecessarily expensive.

I believe each of our agencies would benefit from taking a hard look at its merger review procedures, timetables, and results. To that end, in September 2018, we announced that the Antitrust Division would undertake a number of significant changes to streamline and to expedite the merger review process. I identified specific steps to improve each stage of the review process. Each of our agencies' processes differ in important respects. I want to highlight a few that I think may also be relevant to other enforcers in the region.

One improvement is to make the review process more transparent and make it easier for parties to plan ahead. In the United States, the Antitrust Division and FTC often ask for the voluntary production of important information during the initial waiting period. Last Fall, the Antitrust Division published a model voluntary request letter on its website. Our hope is to give parties a head start in identifying the kinds of information they should collect, so that they can be proactive and submit it early in the review process.

Another improvement is the modernization of our agreements for the timing of compliance with a second request for information. In the United States, we provide a "model" timing agreement to parties as a resource to help them prepare and gather documents that will likely be sought in the second request. In recent months we have made changes to the model agreement, and in exchange for earlier production of documents and data by the merging parties, the Antitrust Division has committed to seeking fewer documents and depositions. By doing so, we hope to reduce the burdens on parties of complying with a Second Request, and to provide greater predictability.

A third improvement is a commitment to improve cooperation and coordination with other enforcers in parallel investigations. To lessen burdens on parties facing parallel merger investigations, the Antitrust Division will encourage parties to align timing with other jurisdictions, and when appropriate, we will try to work with other enforcers and directly assist with timing alignment.

I am encouraged to see that the U.S. agencies are not alone in working to improve merger review processes and reduce unnecessary burdens on parties. I understand that Chile's Fiscalía Nacional Económica (FNE) is already undertaking a review of its Merger Notification Regulations, which originally were published just two years ago, and has solicited input on how to make its regulations more streamlined.

Likewise, Brazil's CADE has already done much to improve its merger process, first by adopting a pre-merger notification system and then fast-track procedures. CADE's internal regulations also adopt clear and strict timeframes for merger review.¹³

Argentina in its new competition law has created a pre-merger control system, and it has clarified and increased notification thresholds to reduce the number of notifications for transactions that are unlikely to substantially affect competition.¹⁴

These improvements are commendable. As public agencies we must continue to improve. One particular suggestion for examination is whether more agencies can do more to clarify when they will have jurisdiction, and make clear in their rules that jurisdiction will be based on an

¹³ OECD, Peer Reviews of Competition Law and Policy: Brazil 2019, 87, <https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm>.

¹⁴ Frederico Rossi, Argentina's New Competition Law: The Modernisation of the Argentinian Competition Law Regime, Competition Policy International, May 2018, <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/LatAm-Column-May-Full.pdf>.

“appropriate nexus” with the proposed transaction. I also believe we can do more to lessen burdens on parties for those transactions that are unlikely to substantially affect competition.

VI. Conclusion

To conclude, by now, it may seem cliché to note that with changes in technology, the rise of digital markets, and increasing globalization, our jobs as antitrust enforcers have become more important—and more difficult. This sentiment is well-founded, and our ability to innovate at the agency level will determine whether we are up to the task.

For all of the agencies in the Americas to keep up, it is crucial that we continue our collaboration and technical support, so that we all can develop and hone the skills necessary to be effective enforcers. Sharing the knowledge and experience between competition agencies benefits us all.

Thank you again for the invitation to be here and thank you for your service to competition.