International Cooperation – A New Era

ABA Antitrust Spring Meeting – April 2025

Sean Heather
Senior Vice President,
International Regulatory Cooperation & Antitrust
U.S. Chamber of Commerce

Presentation Outline

Background on Cooperation & Chamber Involvement

- The U.S. Chamber became an advocate for international cooperation among antitrust agencies around 2007, six years after the creation of the International Competition Network (ICN).
- Several things animated the US business community's interest. Europe was a source of frustration. Former FTC Commissioner Bill Kovacic, known for his globetrotting competition advocacy, often noted that much of the world had adopted European style statutes, but that the application of those statutes was still up for influence and debate.
- Similarly at the time China's Anti-Monopoly Law (2008) was coming online and soon after India's Competition Commission (2009). Both jurisdictions would be important for American business.
- At the time, the FTC had a far more significant international program compared to the DOJ. The DOJ had directed few resources to its international engagement in comparison to the FTC, which ran a very robust program on a tight budget.
- International cooperation was less about the need for money to hire staff, but more about the need to pay for airplane tickets, hotels rooms, meals, and associated travel expenses. A few hundred thousand dollars more could go a long way.
- The congressionally chartered Antitrust Modernization Commission recommended that the DOJ/FTC receive more money

for technical assistance[1]. The Chamber took that recommendation and made it happen. The Chamber successfully lobbied Congress to get an additional money for the FTC to spend on international cooperation.

- Similar support was available to the DOJ, but ultimately the DOJ failed to formally endorse the need for the resources before their Congressional appropriators, so additional funds were never granted.
- When the Obama administration took over the Chamber was approached to try again with the Congress, however, political winds towards spending had changed, making such "earmarks" much more difficult.
- Even with additional resources, the level of engagement the agencies wanted to pursue with China was insufficient. The Chamber lent its support to create a project through US Trade Development Agency (USTDA).
- The USTDA grant would only have been possible with the endorsement of the business community as USTDA money could only be used to promote US exports. The Chamber made the credible case to use the money for the United States to influence China's AML to liberalize the Chinese marketplace so U.S. companies could sell goods and services.
- Further, the Chamber helped bring private resources to the table. The private sector covered incidental costs associated with the USTDA program, including the expenses for academics to participate in various training sessions in China.
- For India, the Chamber sponsored an entire delegation of first-generation CCI employees to come to Washington DC for training. The Chamber recruited leading antitrust experts, all of which had previous agency experience, to run nuts and bolts sessions covering the basics of how to run an antitrust investigation.[2]

---

[1] https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf

[2] The CCI staff was originally draw from India's "IRS" and familiar with running a investigation into unpaid taxes.

- The Chamber also set aside time for government-to-government sessions where the private sector was not in the room.
- From a policy standpoint the Chamber's objectives were to advance the role economic analysis plays in antitrust enforcement (out of concern that antitrust not become a tool for industrial policy) and the need for procedural fairness in antitrust investigation (as too many jurisdictions were procedurally deficient, operated as black boxes, and lacked meaningful judicial oversight).
- For the due process/procedural fairness agenda, the Chamber was the advocate for roundtables at the OECD that ultimately led to the ICN Recommended Practices for Investigative Process as well as the launch of the ICN Framework for Competition Agency Procedures. The Chamber also worked to include a robust series of due process provisions in US trade agreements.[3]
- All this work, for more than a decade, was advanced in cooperation with the FTC and DOJ. In fact, the Chamber was recognized by the ICN (awarded Non-Government Advisor of the year) for its work in surveying practitioners globally on due process topics and their experience with their jurisdiction.
- In short, the Chamber has been very active in fostering cooperation and has had a front row seat to watching it evolve for the last 18 years.

---

[3] https://www.oecd.org/en/publications/procedural-fairness-and-transparency-key-findings_17f27597-en.html

https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_Guidance_InvestigativeProcess.pdf

https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/

21_Competition_Policy.pdf

- However, in this current moment cooperation is at cross-roads, and the previously defined need for and direction of cooperation is increasingly difficult to justify.

Diminishing Returns: ICN/OECD & Technical Assistance

- For most of the 20th century there were only a handful of competition agencies around the world. By the turn of the century there had been an explosion in the number of jurisdictions with competition laws and agencies.
- The United States evangelized the value of market economies and need for antitrust enforcement. In large measure American international economic policy worked to stand up antitrust enforcement around the world.
- For several decades the U.S. provided technical assistance to jurisdictions with nascent agencies, a service that is not always readily welcomed by agencies that feel they have developed sufficient expertise.
- In 1997, AG Janet Reno commissioned the International Competition Policy Advisory Committee (ICPAC) to address "global antitrust problems" that were problematic to things like cartel enforcement, merger review, and bilateral trade.[4]
- This work led to outputs at the OECD and the launch of the International Competition Network.
- In the early days of the ICN, the group focused on establishing important best practices in the form of merger notification and merger analysis recommendations.
- Today's fellow panelist, John Fingleton, for a time nobly led the ICN as it had grown from a nascent body to one that now encompasses more than 140 jurisdictions.
- He gave an important speech at the ICN's 10th anniversary, querying what the ICN had accomplished and where it should head in its second decade.

[4] https://www.justice.gov/atr/icpac

- His speech was focused on the importance of cooperation efforts measuring "outcomes" not "outputs".[5]
- He wanted to see the ICN's members focus more on adherence to and adoption of the best practices the body created.
- It's been another decade and a half since John's speech, but it's still far easier to measure ICN outputs, than to identify meaningful outcomes.
- Beyond multilateral forums, the U.S. agencies entered into roughly two dozen bilateral cooperation agreements.[6]
- Many of them include "enhanced" comity arrangements.
- When was the last time comity arrangements were used to address anticompetitive concerns occurring in the territory of one of the Parties that was adversely affecting the interests of the other?
- Don't think too long, it rarely happens.
- These agreements serve a ceremonial function, they do not control cooperation, nor do they signal who the U.S. decides to cooperate with.
- Cooperation has become increasingly unmoored from its original purpose.
- The ICPAC launched US cooperation efforts to support market liberalization and spur economic growth, free from anticompetitive behavior without chilling procompetitive conduct.
- Yet today, M&A clearance can too easily become costly and complicated, not more streamlined and predictable.
- Differences in law and its application have not narrowed, and best practices, an output from cooperation, often remain selectively installed.
- Given that demand for technical assistance has subsided and the current budget environment calls for belt tightening, it's not clear

[5] www.internationalcompetitionnetwork.org/wp-content/uploads/2020/01/SpeechChairFingleton2010.pdf

[6] https://www.ftc.gov/policy/international/international-cooperation-agreements

that the promise of cooperation has a justifiable ROI going forward.

Gamesmanship: Blurring the Line Between Merger Cooperation v. Collusion

- The Chamber FOIA'd communications between the FTC and foreign agencies surrounding the Illumina-Grail transaction.
- Because Grail had no measurable sales outside the U.S. it was difficult to see what cross-border enforcement cooperation could be justified.
- The FTC worked to block the Chamber's FOIA request arguing that the foreign jurisdictions were effectively a consultant to the transaction.
- While captured communications might be eligible for redaction, they are not exempt under FOIA law from disclosure.
- The Chamber sued and as part of the litigation the FTC was forced to hand over its communications.[7]
- What was discovered the WSJ editorial board labeled collusion[8].
- The emails showed the FTC reaching out proactively (not in response to inbound inquiries) to foreign jurisdictions to discuss the case, a case that had no legitimate nexus with any of the jurisdiction the FTC contacted.
- Extensive emails and phone calls happened before the merging parties signed a waiver.
- The early and often cross-border consultation played out in a way that ran the clock out on the deal. In the end, Europe's prohibition of the deal was overturned in European courts, on the grounds that Europe had no jurisdiction to review this US merger in the first place. Obtaining that decision took 2.5 years after Europe got involved.
- Meanwhile, after a month-long trial, the FTC's own ALJ sided against the FTC's case, and while the Fifth Circuit Court of

[7] https://www.uschamber.com/antitrust/ftc-records-for-illumina-grail-transaction
[8] https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-grail-acquisition-a78e03d0

Appeals ultimately deferred to the FTC Commissioners' findings that the transaction could be problematic, the Court vacated the Commissioners' opinion for applying the wrong legal standard in considering the open offer the parties had made as a potential and acceptable remedy.

- The merging parties ultimately called off the deal. Time had run out.
- The FTC successfully maneuvered, relying on "cooperation" with the European Union, to scuttle a deal outside of a U.S. court room.
- Questionable cooperation efforts also ensued around Microsoft-Activision and Amazon-iRobot.
- The Chamber has FOIA'd these communications and the FTC has refused to comply.
- To this date, the FTC has never publicly explained or justified its use of merger cooperation to Congressional committees during oversight hearings or to Congressional investigators as part of formal investigations[9].
- A congressional staff report from the House Oversight Committee found:

> "On Chair Khan's watch, the FTC has turned on American companies and turned to European authorities to achieve the Commission's ends when FTC authorities under U.S. law have not supported Commission-desired outcomes."

Ends Justify the Means: Retreat from Procedural Fairness

- As previously mentioned, the Chamber has put a premium on due process in antitrust proceedings and worked to advance international best practices to ensure transparency and afford targets of investigations an opportunity to defend itself.
- The FTC/DOJ agreed with the importance of this work and led credible workstreams at the OECD, ICN, but also within trade agreements.

---

[9] https://oversight.house.gov/release/oversight-committee-releases-staff-report-finding-ftc-chair-khan-abused-authority-to-advance-the-biden-harris-administrations-agenda/

- Then came the last four years. AAG Kanter and Chair Khan worked with USTR Ambassador Tai to erase America's commitment to these principles embedded into the competition chapter of international trade agreements.
- The Chamber exposed a "secretive" letter Kanter/Khan wrote to Tai claiming that such provisions interfered with the agency's ability to investigate[10].
- Nothing could be further from the truth, the provisions in trade agreements had not only been written by the agencies but were signed off by Congress, most recently in the US-Mexico-Canada agreement.[11]
- Initially the agencies actively worked to hide the letter from being openly shared with Congress, and in oversight hearings neither Khan nor Kanter ever explained their concerns with the non-binding commitments found in trade text.
- It became apparent, largely through private conversations, that the agencies didn't want foreign jurisdictions to be obligated to afford due process when they were targeting certain disfavored American companies.
- The Department of Justice and the Federal Trade Commission had turned its back on defending core Constitutional principles in favor of supporting its enforcement agenda in overseas markets.

---

[10] www.uschamber.com/assets/documents/230417_IntlCompettionPolicy_NEC_NSC.pdf

https://www.youtube.com/watch?v=RECMTk6gW3A

https://www.wsj.com/articles/lina-khan-federal-trade-commission-european-union-u-s-companies-congress-gina-raimondo-7ade1f6c

https://www.congress.gov/118/meeting/house/116568/documents/HHRG-118-JU05-20231114-SD001.pdf

[11] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/21_Competition_Policy.pdf

- If the agencies can't be full throated, unabashed champions for transparency, due process, and procedural fairness, it's impossible to support U.S. agencies engaging in international cooperation.

Anything Goes: Abandonment of Consumer Welfare & Economic Analysis

- The last four years also saw the DOJ and the FTC work to actively reject the consumer welfare standard and divorce antitrust law from economic analysis.
- This message was disruptive to responsible enforcement here at home, and reckless as a message to send abroad.
- Adherence to whatever "market realities" means and a quest to establish bright line rules instead of a reliance on the rule of reason, combined to form a belief that antitrust is without limits.
- This view runs counter to the message the United States has sent to the world for the last two decades – a message that antitrust is a limited tool to liberalize markets, not regulate them.
- Further, the rejection of the consumer welfare standard and the role of economic analysis is most importantly inconsistent with US law.
- Efforts to "cooperate" abroad and espouse messages that are inconsistent with US law is another reason to reign in US cooperation.

Group Think: Cooperation in the Era of "Platform Regulation"

- Cooperation is not simply for cooperation's sake; it should be about getting policy right.
- Agendas of conference around the world organized by or attended by enforcers all show a clear bias in support for platform regulation.
- Perhaps something is needed to regulate competition in certain tech-enabled markets, but the policy conversation is sophomoric. There is little intellectually honest debate.
- Approaches that target companies instead of conduct are neither good regulatory, good competition, or good trade policy.

- For example, if it's good for competition to grant small-businesses certain privileges on e-commerce platforms, why not require all e-commerce platforms to award such privileges?
- If competition is enhanced by capturing the largest economic actor in a market, wouldn't the objective of spurring more competition be further enhanced if it captured all economic actors in that market?
- Since when did it become a good regulatory practice to simply capture one economic actor, not regulate across the sector?
- Where is the discussion on whether such ex-ante approaches that target gatekeepers will lead to making gatekeepers more essential, not less?
- If a gatekeeper captured under an ex-ante law is required to support its competitors on its own platform, what incentive is there for those competitors relying on that platform to use the platform of a non-designated gatekeeper?
- These proposals are clearly not aimed at empowering the marketplace to come up with the next competitor to the current market leading platforms.
- Having been to many conferences, antitrust enforcers aren't asking these difficult questions.
- Instead, like lemmings, they follow the other's circular arguments.
- Precious little is discussed about how these regulatory proposals are less about promoting competition among platforms and more focused on managing competition on a platform.
- What ever happened to the debate about two sided markets? It's dead, platform regulation is all rage!
- Every country that is considering platform regulation and that has engaged in a public consultation follows the same script.
- Each consultation points to all the other countries in the world that are considering an ex-ante approach to regulating American companies. The consultations read like teenagers justifying their actions by saying "look everyone is doing it".

- Further, every consultation complains that antitrust enforcement is too hard, takes too long, if only the agency were given more power to reign over markets.
- This trope ignores the fact that conduct cases are difficult because the conduct in question has procompetitive justifications, it's not a simple naked restraint of trade.
- All of this suggests a much different type of cooperation is now underway, with red lines being crossed.
- In 2023, in a press release following a meeting with the EU, the DOJ and FTC announced they would be assigning staff to support implementation of Europe's DMA against American companies:[12]

    > "The agencies also announced planned liaisons of agency experts from the Antitrust Division and the FTC in Brussels, with each agency sending an official to assist with implementation of the Digital Markets Act (DMA)."

- Even if you are a fan of the DMA, this is impossible to justify. Europe doesn't need American taxpayer funded help to enforce its laws.
- Further, no enforcers should be active in supporting the laws of another country where those laws have been rejected by the enforcer's home country. It's nonsensical.
- Yet the DOJ and the FTC announcement did precisely this. Congress rejected DMA like legislation in the American Innovation and Online Choice Act, members of Congress made clear Europe's DMA was unacceptable, and the wider Biden administration publicly and privately have made its concerns known.[13]
- "Cooperation" has clearly lost its way.

---

[12] https://www.justice.gov/archives/opa/pr/justice-department-federal-trade-commission-and-european-commission-hold-third-us-eu-joint-0

[13] https://drive.google.com/file/d/1nPYCDYR1Tw69XmeqtpihoFcZyFxwJotR/view

https://subscriber.politicopro.com/article/2021/12/raimondo-us-has-serious-concerns-about-eu-digital-rules-3992830

"Club" Mentality: Lack of Accountability

- When was the last time you saw open critiques by competition enforcers over enforcement decisions made by other enforcers?
- Where were the US agencies in calling out the European Union on its misuse of Article 22 to "call-in" Illumina-Grail?
- The ICN merger recommendations require a local nexus.
- Meaningful cooperation doesn't prevent an agency from walking and chewing gum.
- The honorable thing to have done would have been to vocally criticize Europe, while the FTC under US law proceeded to challenge the Illumina-Grail transaction.
- Another example, the US revised HSR rule that recently went into effect requires all foreign language documents be transmitted into English.
- Where was the rest of the world's agencies calling the US out for violating the ICN recommended practice (that the US helped write) that steers agencies away from such mandates?
- Back in 2001, Europe famously blocked the GE-Honeywell merger after the US cleared the transaction.
- Criticism of Europe's decision was intense. Deborah Majoras, then a Deputy Assistant AG at the DOJ, gave a strong speech stating[14]:

> "The Antitrust Division has been open, both in private discussions with our counterparts at the European Commission and in appropriate public fora, in our disagreement with the EU's decision and the bases for it. Indeed, we have been criticized by some as being overly critical. We respectfully disagree. In our view, for cooperation to be meaningful, *i.e.,* for it to contribute significantly to effective global antitrust enforcement, it must include honest discussion of areas of agreement and disagreement, and careful dissection of divergent decisions."

[14] https://www.justice.gov/atr/speech/ge-honeywell-us-decision

- It's hard to imagine such remarks coming these days as antitrust enforcers are more interested in "going along to get along."
- In the early years of China's use of the AML it became quickly clear that industrial policy decision drove enforcement outcomes.
- The Chamber routinely heard FTC/DOJ officials tell us "we need to be patient" as the US made mistakes with its enforcement history.
- While true, asking for patience ignores the whole point to technical assistance, which should be geared to help a new agency avoid making mistakes based on U.S. experience.
- As time passed, the FTC/DOJ suggested they were offering private critiques, but also were self-aware that those assessments were falling on deaf ears.
- A reluctance against public criticism had set in. Absent public criticism, various governments over the years have attempted to play off Chamber led criticism suggesting they don't hear about these things from their FTC/DOJ counterparts.
- In other instances, often with more established agencies, the FTC/DOJ would make clear to the Chamber and its members that there was a hesitancy to push back because it might dampen the FTC/DOJ cooperative relationships.
- Today, being a member of the "club" has become arguably more important than publicly speaking up.

Conclusion

- Today's session is aptly named*, International Cooperation – A New Era.*
- The Chamber still believes in importance of cooperation, but we believe in cooperation with a purpose.
- In my remarks, I've been intentionally provocative and one-sided.
- Cooperation has not always been "broken."
- International cooperation has been important to merger remedies and the ICN has developed some good, recommended practices, for example around pre-merger notification.
- Thankfully, lots of mergers are filed, reviewed, and cleared across multiple jurisdictions without making headlines.

- But US agencies have violated the trust that the business community had long placed in them to guide international cooperation.
- Without a significant reset, there is good reason to limit U.S. participation in international antitrust cooperation going forward.
- A sensible path toward a reset would entail:
    - Due process is not negotiable. The FTC and DOJ should always advocate for due process/transparency in all competition regimes that investigate US companies. Our trade agreements should demand that our trading partners provide these essential rights, which should include opportunities for a full merits appeal.
    - The FTC and DOJ should remain committed to the proper goals of competition law; consumer welfare and the role of economic analysis in competition enforcement.
    - International cooperation should be about sharing best practices and driving outcomes that create business certainty. It should not be about "leading" or "following" or achieving objectives externally that cannot be accomplished domestically.
    - As global markets evolve at an increasingly rapid pace, ex-post enforcement should be the norm, not ex-ante regulation. And if regulation is necessary, it should be focused on conduct that empowers market participants to innovate and evolve, not to rein in any specific market participants.