Nicolas Charbit
Carolina S. Malhado
Ellie Yang
Editors

Douglas H. Ginsburg

An Antitrust Professor on the Bench

Liber Amicorum

Volume I

Alden F. Abbott, Margaret Artz, Anıl Acar, Gary Born, Michelle M. Burtis, John DeQ. Briggs, Terry Calvani, James Cooper, Daniel Crane, Susan Creighton, David S. Evans, Eric M. Fraser, Jamillia P. Ferris, Damien Geradin, Ilene Knable Gotts, Gönenç Gürkaynak, John Harkrider, Joshua Hazan, Thu Hoang, Keith N. Hylton, Jonathan M. Jacobson, Bruce H. Kobayashi, Gregor Langus, Marina Lao, Vilen Lipatov, Ryan S. Maddock, Danielle Morris, Damien Neven, Barak Orbach, James F. Rill, Katarzyna Sadrak, Jana I. Seidl, Hal S. Scott, D. Daniel Sokol, Jacques Steenbergen, Richard M. Steuer, Pablo Trevisán, Esra Uçtu, Nils Wahl, Joshua D. Wright

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DOUGLAS H. GINSBURG

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Foreword

Joshua Wright

It is our great honor and privilege to present this Liber Amicorum to Judge Douglas H. Ginsburg. I admit I also introduce this volume with some hesitation. For one usually introduces a volume such as this to mark the end of a distinguished career. And a distinguished career it has been. But as a significant beneficiary of Judge Ginsburg's scholarly endeavors at Scalia Law School, his guiding hand at the Global Antitrust Institute at George Mason University, and his friendship, I am particularly fond of the status quo.

Judge Ginsburg received a Bachelor of Science degree from Cornell University and his JD from the University of Chicago Law School. He then served as a clerk for Judge Carl McGowan on the D.C. Circuit and for Justice Thurgood Marshall on the Supreme Court. Following his clerkships, Judge Ginsburg began his career in academia at Harvard Law School in 1975.

Judge Ginsburg later became the Administrator of the Office of Information and Regulatory Affairs (OIRA) and then the Assistant Attorney General for the Antitrust Division of the Department of Justice. In 1987, he was nominated to the Supreme Court of the United States. Judge Ginsburg served on the D.C. Circuit Court of Appeals for more than 30 years, including as Chief Judge from 2001 to 2008. During this time, he also taught part-time at George Mason University School of Law. After taking senior status on the D.C. Circuit, Judge Ginsburg continued his career in academia teaching full time at NYU Law in 2012. He later returned to Scalia Law School at George Mason University, where he continues to serve as a

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Professor of Law and as the Chairman of the International Advisory Board of the Global Antitrust Institute.

A robust and full Liber Amicorum could focus exclusively upon Judge Ginsburg's impactful role as a jurist, or his contributions as legal scholar, or his commitment to public service, or his mentorship as a teacher. This challenge in fully capturing Judge Ginsburg's contributions in such a volume is to explore these dimensions of achievement individually as well as to take this opportunity to reflect upon their interactions.

The essays in this Liber Amicorum take up this challenge admirably. Practitioners, economists, and legal scholars explore the multiple dimensions of the footprint Judge Ginsburg has left in antitrust's landscape. Some explore in depth the impact Judge Ginsburg's opinions and scholarship have had in specific areas of antitrust jurisprudence: horizontal restraints, the intersection of intellectual property rights and antitrust, and international antitrust. Others focus more broadly upon how we should think about Judge Ginsburg's intellectual legacy and public service. The Liber Amicorum ties together these multiple dimensions of production and service to recognize and appreciate the full fruits of Judge Ginsburg's labors in the domestic and global antitrust community.

Judge Ginsburg is remarkably generous with his time and his wisdom with colleagues, students, legal academics, clerks, and practitioners alike. He is a source of advice and counsel for those who need it, of substantive intellectual feedback for those who seek it, and of mentorship for those fortunate enough to cross his path. The beneficiaries of his generosity range from antitrust luminaries and agency leadership around the world to aspiring law students. I would be remiss if I did not acknowledge the tremendous intellectual and personal debt I owe Judge Ginsburg as a colleague, co-author, co-venturer, and friend. I intend to run that debt even deeper in the years to come as I further benefit from Judge Ginsburg's continued dedication and commitment to his work. And so I hope selfishly – but no doubt joined by the international antitrust community that benefits from Judge Ginsburg's insights and wisdom – this Liber Amicorum is necessarily incomplete and leaves room for contributions yet realized.

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Judge Douglas H. Ginsburg Biography

Career

Senior Circuit Judge Douglas H. Ginsburg was appointed to the United States Court of Appeals for the District of Columbia in 1986; he served as Chief Judge from 2001 to 2008. After receiving his B.S. from Cornell University in 1970, and his J.D. from the University of Chicago Law School in 1973, he clerked for Judge Carl McGowan on the D.C. Circuit and Justice Thurgood Marshall on the United States Supreme Court. Thereafter, Judge Ginsburg was a professor at the Harvard Law School, the Deputy Assistant and then Assistant Attorney General for the Antitrust Division of the Department of Justice, as well as the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget. Concurrent with his service as a federal judge, Judge Ginsburg has taught at the University of Chicago Law School and the New York University School of Law. Judge Ginsburg is currently a Professor of Law at the Antonin Scalia Law School, George Mason University, and a visiting professor at University College London, Faculty of Laws.

Judge Ginsburg is the Chairman of the International Advisory Board of the Global Antitrust Institute at the Antonin Scalia Law School, George Mason University. He also serves on the Advisory Boards of: Competition Policy International; the Harvard Journal of Law and Public Policy; the Journal of Competition Law and Economics; the Journal of Law, Economics and Policy; the Supreme Court Economic Review; the University of Chicago Law Review; The New York

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University Journal of Law and Liberty; and, at University College London, both the Center for Law, Economics and Society and the Jevons Institute for Competition Law and Economics.

Education

Judge Ginsburg obtained his B.S. degree from Cornell University in 1970 and his J.D. from the University of Chicago Law School in 1973.

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Global Convergence on Due Process Norms: Discussion and Recommendations

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Abstract

The proliferation of competition laws and enforcement regimes throughout the world has facilitated the development of market economies and global commerce. However, compliance with multiple enforcement regimes presents a challenge for firms operating in global markets where legal rules often conflict. In the absence of international convergence as to substantive principles, the international community should focus on building consensus on due process standards. This includes identifying and ensuring the adoption and implementation of globally accepted procedural safeguards that promote fairness and protect the rights of parties. Although significant progress has been made in this endeavor, much remains to be accomplished not only around the recommendation of best practices—especially those addressing judicial review—but also in the evaluation for the

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adoption and implementation of guidance by individual jurisdictions. This article offers several proposals to promote the convergence of sound due process norms across competition regimes.

I. Introduction

The widely recognized proliferation of competition laws and enforcement regimes throughout the world has facilitated the development of market economies and global commerce. At the same time, the multiplicity of jurisdictions enforcing antitrust laws presents a challenge to firms competing in increasingly global markets as such firms must confront numerous jurisdictions with diverse, uniquely tailored, and frequently conflicting legal rules. Many of these differences are the natural result of distinct political and cultural norms and the stage of the nation's economy. However, it is also apparent that the foundation of antitrust decisions is not always transparent and may emanate from industrial policy objectives. Additionally, not all jurisdictions offer the same appropriate safeguards of procedural fairness to protect the rights of parties. This failure in turn contributes to non-transparency of the rationale for decisions and a lack of confidence in the legal institutions.

Harmonization of substantive principles guiding competition enforcement may not be on the immediate horizon. Nevertheless, there is no reason why effective steps cannot be taken to ensure adoption and implementation of globally accepted procedural norms that ensure transparency, respect for procedural rights of parties, and even facilitate progress toward convergence of substantive standards based on sound economics and consumer welfare.

Progress toward consensus on due process standards has been made through the work of international bodies and professional organizations. Much remains to be done, however, not only in respect to development and adoption of basic principles of procedural fairness, but also in fomenting and assessing the extent to which these principles are implemented in practice. Herein we offer some suggestions in that regard.

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II. It is Increasingly Important to Promote Sound Global Standards of Procedure (and Substance) for Antitrust Policy and Enforcement with Cross-Border Effect

Since the 1990s, both the number of nations with competition, or antitrust, laws and nations that actively enforce such laws has soared, as a host of new countries have joined established competition regimes (e.g., the United States) in promoting consumer welfare. In fact, since 2000, the year of the International Competition Policy Advisory Committee's (ICPAC) report to the United States Attorney General and Assistant Attorney General for Antitrust, the number of countries with competition regimes has grown from 80 to over 120. Additionally, countries with established antitrust codes continue to develop and refine their laws, informed by increased enforcement activity over the past two decades. Membership in intergovernmental organizations has grown exponentially as well. From 2002 to 2009 alone, the International Competition Network's (ICN) membership grew to include competition agencies from originally fourteen jurisdictions to today's ninety-two jurisdictions.[1] Including non-governmental advisors, the ICN's membership totals over 300.[2]

With the proliferation of competition laws also came the development that in some instances antitrust agencies and other instruments of government—long established as well as newly created—promote industrial policy and national champions under the guise of competition enforcement. Indeed, the use of competition concerns as a pretext for fostering industrial policy has a far-reaching history. An example of this type of protectionist misuse of antitrust law is the attempt by the European Commission (EC) to block the Boeing McDonnell Douglas merger based on a desire to protect its domestic industry in the late 1990s. Then-Assistant Attorney General for Antitrust, Joel Klein, met with then-European Commissioner for Competition Policy, Karel Van Miert, in an attempt to persuade the EC to close its investigation and sanction the transaction, like the FTC had already done. But

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1 International Competition Network, *History*, http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf; *see also* ICN Factsheet and Key Messages, at 1 (April 2009), http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

2 *See* International Competition Network, *Member Directory*, http://www.internationalcompetitionnetwork.org/members/member-directory.aspx.

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it took President Clinton threatening sanctions for the EC to change course and allow the merger to proceed.[3]

Even today, industrial policy, which should have no place in antitrust law, is still invoked by competition regimes across the globe, especially those just emerging. For example, this improper consideration of non-economic principles in competition enforcement is a prominent feature of China's Anti-Monopoly Law (AML), which explicitly calls for competition enforcers to take into account industrial policy objectives, including the protection of state owned enterprises. The regime's AML Article 1 reads: "This law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and interests of the society as a whole, promoting the healthy development of the socialist market economy."[4] And leading up to the enactment of the AML, Chinese officials' statements also endorsed protectionist industrial policy. Specifically, Chinese officials noted that in their view, multinationals "exploit financial and technological advantages to dominate markets, suppress competition, and injure competitors and consumers" in China, and thus China faces "a need to impose countermeasures to regulate multinationals' anticompetitive conduct."[5]

This stance is reflected in practice in China's competition law enforcement, as was noted widely by observers who decried the Ministry of Commerce of People's Republic of China (MOFCOM) blocking of Coca Cola's proposed acquisition of Chinese fruit juice manufacturer Huiyuan Juice Group Ltd.[6] MOFCOM noted in a statement announcing the decision that its reasoning was in part informed by a concern that the transaction would harm competition in China's juice market

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3 *See* Alison Mitchell, Clinton Warns Europeans of Trade Complaint on Boeing Deal, N.Y. TIMES, July 18, 1997, at D2; Commission Decision of 97/816, 1997 O.J. (L 336).

4 *See* Anti-Monopoly Law of the People's Republic of China, ch 1. art. 1 (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 2007 (effective Aug. 1, 2008), http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

5 Fair Trade Bureau, SAIC, *Competition-Restricting Behavior of Multinational Companies in China and Possible Countermeasures*, 5 Bi-weekly of Administration for Industry and Commerce (2004).

6 *See, e.g.*, Daniel C.K. Chow, *China's Enforcement of its Anti-Monopoly Law and Risks to Multinational Companies,* 14 Santa Clara J. Int'l. L. 99, 105 (2016); Sundeep Tucker, *China Blocks Coca-Cola Bid for Huiyuan*, Financial Times (Mar. 19, 2009), https://www.ft.com/content/5c645830-1391-11de-9e32-0000779fd2ac.

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because it would hamper small and medium-sized juice companies' ability to compete.[7] MOFCOM also indicated a fear that Coca-Cola may be able to control the Chinese "Huiyuan" brand post transaction.[8]

This example, just one of many, demonstrates that industrial policy can thrive under the guise of competition enforcement where due process safeguards are insufficient and transparency of competition law enforcement action is lacking. In addition to rectifying these shortcomings, convergence on due process norms can also foster crucial convergence on substantive analysis and procedure, ensuring predictability and crucial certainty which businesses require to operate efficiently.

III. National and International Organizations Have Recognized and Attempted to Deal with These Issues

Recognizing the desirability of global consensus on competition law issues, especially due process norms, intergovernmental bodies, such as the Organization for Economic Co-operation and Development (OECD) and the ICN, as well as private organizations, including the American Bar Association, International Chamber of Commerce (ICC), and the Global Antitrust Institute, encourage the open exchange of ideas and experiences regarding competition investigations. For example, following the ICPAC report, the OECD's Business and Industry Advisory Committee and the ICC collaborated to propose merger notification and timing recommendations centered on providing fundamental due process safeguards, including transparency, a clear statement of concern, communication with the parties throughout the process, and independent review of any first instance decision. These recommendations in turn served as the basis for the ICN's and OECD's own best practices guides for merger review, adopted from 2002 to 2005.[9]

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7 *See* Press Release, MOFCOM (Mar. 18, 2009).

8 *See* Announcement No. 22, *Prohibiting Coca - Cola Company's Acquisition of Huiyuan Company*, MOFCOM (Mar. 18, 2009).

9 The ICN adopted its Recommended Practices for Merger Notification Procedures from 2002–2005. *See* ICN, Implementation of the Recommended Practices for Merger Notification and Review Procedures (April 2005), http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf. The OECD adopted its Recommendation of the Council on Merger Review in 2005. *See* OECD, Recommendations and Best Practices: Recommendations on the Council of Merger Review (2005), http://www.oecd.org/competition/mergers/40537528.pdf.

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In addition to these efforts, the OECD promotes dialogue between competition regimes and convergence in part through round tables on competition policy issues. This exchange of views is facilitated by countries' submissions and submissions of invited experts. The results are subsequently published in a best practices guidebook. Christine Varney, then-Assistant Attorney General (AAG) for the Department of Justice's Antitrust Division initiated one of these roundtable discussions in a 2009 speech before the International Bar Association's Competition Conference in Fiesole. Calling for a global focus on procedural due process norms, AAG Varney emphasized that the focus should be on "refin[ing] procedures that parties can understand and rely on as a means of removing unnecessary uncertainty from enforcement efforts."[10] What resulted were three round tables in February and June 2010 and October 2011. The first two roundtables focused on basic procedures followed by the OECD member states for guaranteeing due process and agency responses to targeted procedural fairness questions. The 2011 roundtable addressed judicial review and general developments on due process. The substance and findings of these three roundtables were consolidated and published in two reports titled, *Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings* and *Procedural Fairness: Competition Authorities, Courts and Recent Developments* respectively.[11]

The ICN similarly has focused on due process and convergence on international norms. In 2012 the ICN's Agency Effectiveness Working Group established an Investigative Process Project with the specific task of identifying the enforcement experiences of agencies in order to study different investigative processes in action. The goal of the study was to determine the effect of varying investigative principles and processes on agency decision-making to ultimately arrive at key practices to improve effective agency process. In 2015, the ICN formally adopted its guidance

10 Christine A Varney, Procedural Fairness,13th Annual Competition Conference of the International Bar Association, Fiesole, September 12, 2009, www.justice.gov/atr/public/speeches/249974.htm.

11 *See* Organization for Economic Co-operation and Development, Policy Roundtables, Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings, http://www.oecd.org/daf/competition/48825133.pdf; OECD, Policy Roundtables, Procedural Fairness: Competition Authorities, Courts and Recent Developments, http://www.oecd.org/daf/competition/ProceduralFairnessCompetition AuthoritiesCourtsandRecentDevelopments2011.pdf.

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on investigatory procedures.[12] Commenting on the "ICN Guidance on Investigative Process," then-Chairwoman Edith Ramirez noted that "[g]ood investigative process leads to better agency decision making, protects the procedural rights of parties and bolsters the legitimacy of competition enforcement."[13]

Private sector engagement in the need for procedural fairness in competition law enforcement has intensified as well. The ABA and ICC, among others, have long published their own guidelines on internationally accepted due process norms.[14] And just in the last few years, the Global Antitrust Institute (GAI) at the Antonin Scalia Law School has joined the core group of private organizations to promote convergence. The GAI is led in part by Judge Douglas H. Ginsburg, who chairs the organization's International Board of Advisors. Its mission is to foster education and thus facilitate the development of sound competition policy in existing and emerging regimes. Through economic education programs, recommendations on draft laws and guidelines, and academic conferences featuring foreign judges and competition enforcers, the GAI fosters convergence on internationally accepted best practices in competition law analysis.

All of these developments enhance movement toward a general consensus of certain due process principles, which can be summarized in five aspects: (1) the right to confront the objections and evidence, (2) a hearing before the actual decision-maker, (3) an independent decision maker, (4) a timely decision, and, critically, (5) review by an independent arbiter.[15] The first four principles are focused on guaranteeing appropriately extensive due process safeguards during

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12 International Competition Network, ICN Guidance on Investigative Process, http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

13 Dept. Justice, *International Competition Network Adopts Guidance on Investigative Process to Enhance Procedural Fairness* in Competition Cases and Cooperation in International Merger Enforcement (May 1, 2015), https://www.justice.gov/opa/pr/international-competition-network-adopts-guidance-investigative-process-enhance-procedural.

14 *See* Int'l Chamber of Commerce, Effective Procedural Safeguards in Competition Law Enforcement Proceedings 8 (2017), https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf; American Bar Ass'n, Section Of Antitrust Law, Best Practices For Antitrust Procedure–Report Of The Aba Section Of Antitrust Law International Task Force (May 22, 2015), www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.authcheckdam.pdf.

15 Douglas H. Ginsburg & Taylor M Owings, *Due Process in Competition Proceedings*, 11:1 Comp. L. Intn'l 1 (April 2015), https://www.ibanet.org/Document/Default.aspx?DocumentUid=C45C4020-65E8-48B8-8336-7E67ADC3480B.

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an initial investigation. The final principle acts as a separate safeguard that can, with proper competition regime design, also remedy any violations of the initial four principles. Thus, the crux of due process procedural safeguards has aptly been summarized as follows: "There may well be evidence to support an agency's finding of infringement, but whether the agency relied upon that evidence, or upon a horoscope or some other capricious notion, is for the agency to say and for an independent tribunal to review."[16] Adherence to these due process principles can serve to reinforce the legitimacy of competition regimes and decisions and can also foster convergence on substance.

IV. Better Mechanisms to Assess the Implementation of and Adherence to Procedural Due Process Norms Are Needed

The activities undertaken by intergovernmental and private organizations constitute steps in the right direction to allow for the development of a global consensus pertaining to internationally accepted procedural due process protection norms. But much remains to be done to advance convergence—in practice—on internationally accepted due process norms. Concerns still frequently registered by parties that competition agencies do not implement best practices throughout their competition investigations undermine the credibility of these competition regimes.[17] As such, better mechanisms are essential to assess the extent to which competition regimes around the globe are implementing due process protection norms and mechanisms that would help determine how to most appropriately and effectively foster adherence to the established internally accepted best practices. The goal is not to dictate strict adherence to prescribed, specific mechanisms invoking due

16 *Id.* at 48.

17 Prepared Statement of Koren W. Wong-Ervin, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, at 5 (May 19, 2017), https://gai.gmu.edu/wp-content/uploads/sites/27/2016/07/Wong-Ervin-Testimony_International-Antitrust_5-19-17.pdf ("Numerous other examples come to mind involving reported concerns about due process, including: failure to allow international counsel of the parties choosing; failure to notify the parties of the legal and factual basis upon which an investigation is based; failure to provide access to the investigative file, including any exculpatory evidence; failure to protect confidential information and honor legal privileges; refusal to allow parties to cross-examine witnesses at hearings; and denial of the right to appeal to an independent tribunal and to stay remedies pending appeal.").

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process—these, of course, vary depending on the structure of each country's competition law system[18]—but to ensure generally basic adherence to the five pillars of due process.

To this end, we include a number of proposals to further convergence and the promotion of sound competition law norms across regimes:

> **Best Practices.** Instead of guidance documents, the international antitrust community should publish best practice documents. Best practices, which embody affirmative global consensus, provide a clearer base for what is expected as part of sound competition policy process and procedures than do generalized guidance statements. Additionally, these best practices must go beyond the investigatory process and include best practices as they pertain to decision-making as well as judicial review of competition agencies' first instance decisions through a final decision. There is global consensus that first instance decisions should be subject to effective judicial review. However, the contours of this review, and what a meaningful review means in the interim for any remedy ordered by a competition agency's first instance decision, must be more clearly defined to avoid inconsistencies in application across regimes that could cause irreparable harm to parties subject to the very severe consequences of competition agency action.
>
> The ICC took a first step towards developing this much needed clarity when it recently updated its guidelines to expressly embody the principle of consideration of a stay of any remedy imposed pending an appeal.[19] The ICC's best practices document unequivocally recommends that "[i]nvestigated parties (and interested parties) should have the right to a full judicial review on the merits of their case, either in the context of a court's review of the agency's claims, or in the context of an appeal against the agency's decision. In the latter case, there should be a possibility for the

18 *Ginsburg & Owings*, *supra* note 16, at 1.

19 Int'l Chamber of Commerce, *Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings* § 2.7.5 (2010), https://cdn.iccwbo.org/content/uploads/sites/3/2017/06/ICC-International-Due-process-08-03-10.pdf (emphasis added).

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enforcement of the decision to be suspended during the appeal."[20] The ICC also elaborated on the appropriate circumstances for the issuance of a stay, explaining that "[c]ourts should have the power to order suspension of an agency's decision under appeal, in whole or in part, if its enforcement would have severe consequences on the investigated party or would be against public interest."[21] Other organizations should follow the ICC's lead in defining and promoting clear procedural due process safeguards to cover internationally accepted standards surrounding judicial review of initial decisions.

Cooperation and Education. Intergovernmental organizations as well as private organizations should continue their focus on round tables and other forms of exchanges focused on due process. Additionally, the U.S. Antitrust Agencies should continue to expand their role as global educators, providing technical assistance in teaching sister agencies across the globe, ultimately helping them understand the benefits of solid due process protections.

Implementation Review. Currently, there is little if any follow up to best practices documents by promoting and testing the extent of their implementation. But implementation reviews serve an important function in assessing the health of global competition enforcement systems. Here, the surveys conducted by or commissioned by the U.S. Chamber stand out as a positive example. The U.S. Chamber initially conducted a survey on transparency and due process in competition proceedings in April 2013. It then followed up with another survey in April 2017 on the extent to which regimes adhere to the ICN's Guidance on Investigative Process.[22] Continuing such surveys and improving upon them informed by prior

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20 Int'l Chamber of Commerce, *Effective Procedural Safeguards in Competition Law Enforcement Proceedings*, at 2 (2017), https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf (emphasis added).

21 *Id.* at 8.

22 *See* U.S. Chamber, Adherence to ICN Guidance on Investigative Process: A Practitioner Survey - April 2017, https://www.uschamber.com/sites/default/files/023172_adherencetoicnguidancereportfn.pdf; U.S. Chamber, A Practitioner's Survey on Transparency & Due Process in Competition Proceedings - April 2013, https://www.uschamber.com/sites/default/files/practitioner_survey_report_final_2012.pdf.

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administration would be a positive step towards ensuring an actual effect from procedural due process education around the globe.

Peer Review. The natural next step to expanding on implementation reviews, is to further develop one of the suggestions raised again recently by the E15 Policy Report: peer review.[23] As Deputy Assistant Attorney General Roger Alford recently acknowledged, "[t]o retain the confidence of both the business community governed by [a competition regime's] laws and the public [that competition enforcers] protect, [agencies] must be willing to expose [their] policies and practices to aggressive scrutiny and challenge."[24] Peer review holds competition regimes accountable, not just within their own jurisdiction, but amongst their peers globally. The OECD has already been conducting what it terms "in-depth country reviews" of various countries' competition laws and policies since 1998. In these reviews, the OECD "assess[es] how each country deals with competition and regulatory issues, from the soundness of its competition law to the structure and effectiveness of its competition institutions."[25] However, these reviews are sporadic and stretched out over time. These reviews also may not reflect developments in countries where the competition regime's practices have more recently drawn due process complaints from parties. For example, while there are numerous reports that parties recently may not have been afforded procedural due process protections in keeping with internationally accepted norms in Korea, the last time the OECD conducted a review of Korea's competition policy and implementation was in 2004.[26]

Another change to OECD country review procedures that would enhance the transparency and effectiveness of these reviews would be to permit non-governmental members of such intergovernmental bodies—i.e.,

23 E. Pérez Motta, Competition Policy and Trade in the Global Economy: Towards an Integrated Approach, E15 Expert Group on Competition Policy and the Trade System – Policy Options Paper (2016), http://e15initiative.org/wp-content/uploads/2015/09/E15_ICTSD_Competitition_Policy_Trade_Global_Economy_Towards_Integrated_Approach_report_2016_1002.pdf.

24 Remarks of Deputy Assistant Attorney General Roger Alford at China Competition Policy Forum (Aug. 30, 2017), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-china-competition-policy.

25 OECD, *Country Reviews of Competition Policy Frameworks*, http://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm.

26 *Id.*

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representatives acting in their individual capacities and not as the formal representatives of any specific member—to take part in the review. Peer review of competition agency practices, when conducted in the appropriate fashion and with the appropriate frequency, has the potential to bring about stricter adherence to international best practices and public confidence in competition agency processes and outcomes. As Justice Brandeis noted in 1914—albeit in a different context—regarding transparency: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[27]

Affirmative International Engagement. Finally, it is appropriate for the U.S. Antitrust Agencies to affirmatively assert the role of jurisdiction and positive comity by having their views known where a sister agency is engaging in a practice which constitutes a significant departure from global norms of due process procedures and where there is an effect on important U.S. interests. This principle is implicitly endorsed in the U.S. Antitrust Agencies' updated joint International Guidelines. Tellingly, the "International Cooperation" chapter includes a footnote that provides: "An Agency may continue that cooperation [with sister agencies across the globe] when either it or the foreign authority has closed its investigation. The Agencies may also engage in *general discussions* with foreign authorities on matters in which only one authority has an open investigation."[28] The FTC and DOJ should pay assiduous attention to the exercise of this participation globally.

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27 Louis D. Brandeis, Other People's Money 92 (1914).

28 Fed. Trade Comm'n and Dept. of Justice, Antitrust Guidelines for International Enforcement and Cooperation § 5, n.138 (Jan 13, 2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf (emphasis added).

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V. Conclusion

Leadership within intergovernmental and private organizations of those with the stature, respect, and intellect of individuals like Judge Ginsburg is essential to progress in the pursuit and adoption of principled procedural and substantive global antitrust norms. Considerable progress has been made around advancing due process norms in the context of competition law. Much remains to be accomplished, however, not only in the collaborative development and recommendation of best practices—especially past the investigatory stage to a final decision after judicial review—but also in the evaluation for adoption and implementation of guidance and best practices by individual jurisdictions.

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e-Competitions Bulletin

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- 2,600 authors
- 55 countries covered
- 24,000 subscribers

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INSTITUTE of Competition Law
Antitrust databases and resources

The Institute of Competition Law

The Institute of Competition Law is a publishing company, founded in 2004 by Dr. Nicolas Charbit, based in Paris and New-York. The Institute cultivates scholarship and discussion about antitrust issues though publications and conferences. Each publication and event is supervised by editorial boards and scientific or steering committees to ensure independence, objectivity, and academic rigor. Thanks to this management, the Institute has become one of the few think tanks in Europe to have significant influence on antitrust policies.

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The Institute focuses government, business and academic attention on a broad range of subjects which concern competition laws, regulations and related economics.

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