



The Federal Trade Commission

Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy

**Remarks of Chairman Deborah Platt Majoras
at the 34th Annual Conference on International Antitrust Law & Policy
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International competition policy today is reflected in nearly 100 sets of laws purportedly directed at protecting competition, along with the decisions of governing institutions – legislatures, enforcement agencies, and courts – that make, apply, and interpret these laws. And, in reality, competition policy also is made through other sets of laws, such as sectoral regulations and trade law, and through the agencies that implement those laws; as I stated here two years ago, competition enforcers do not operate in a vacuum.¹ The challenge of bringing coherence to this resulting web of individual decisions impacting competition grows with each new law passed, enforcement action taken, and court decision issued.

At this and other international antitrust conferences over the past 15 or so years, the

¹ FORDHAM CORP. LAW INST., ENFORCEMENT AUTHORITIES ROUNDTABLE, 2005 FORDHAM CORP. L. INST. 65 (Barry Hawk ed., 2006).

discussion has started and ended with a discussion and evaluation of cooperation among competition agencies, all with an eye toward finding policy coherence. I have spent the last six-and-a-half years endeavoring to build relationships, strengthen cooperation, and avoid conflicts in the international antitrust arena, beginning with, during my first week on the job at the Department of Justice Antitrust Division in 2001, the GE/Honeywell transaction, and then moving on to Microsoft, a case that remains acutely with us. (Perhaps you might ask if I was doing such a good job of avoiding conflict!)

The most important part of my job is ensuring that we are wisely spending the taxpayers' dollars in ways that will bring them the greatest benefit. Twice in two weeks, I have testified before Congress about the FTC's work and resource expenditures. We must continuously evaluate the return we are getting from our investment of resources. In taking stock of our efforts in the international arena, I reach several conclusions.

First, while our international program is run as a separate unit, the Office of International Affairs, which I created last January, in fact our work in the international arena is not a stand-alone program that could simply be de-funded without consequence to our enforcement and policy work. Rather, our efforts in the international arena are woven into the very fabric of our work today; they are necessary, and they are here to stay. Second, through significant efforts, the global competition community has made enormous progress in the search for policy coherence in a relatively short period of time. But, third, given the stakes for the world economy and the global citizenry it serves, we must recognize that we still have a long way to go – and that we are on a road that will continue to take twists and turns, and perhaps even detours, that today we cannot even anticipate. In particular, I note two areas that currently lead to potentially serious

policy conflicts: (1) the re-emergence of nationalism as a relevant factor, and (2) the treatment of firms with significant market shares.

Global Progress in Developing Competition Policy

When making decisions about the way forward, it is useful to reflect on what we have achieved – not so that we can rest on achievements, but so we can learn from and build on them. Only a generation ago, the world was divided not only between capitalist and communist systems, but also within the capitalist world, as jurisdictions differed on the role competition and enforcement should play in the economy. As a noted British jurist put it in a case that pitted U.S. interests against those of the United Kingdom, Canada, and Australia, “It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack.”² That conflict, fortunately, spawned a cooperation agreement between the United States and Australia,³ and soon thereafter, Canada and the United States reached a similar accommodation that would evolve into a modern enforcement cooperation agreement in 1995.⁴

In the 1980s, the European Commission’s enforcement of Community competition policy began more frequently to impact U.S. firms operating there, and enactment of the EC’s Merger

² *In re Westinghouse Electric Corporation Uranium Contract Litigation* [1978] A.C. 547, 617 (Lord Wilberforce).

³ Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, 29 June 1982, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,502, *available at* <http://www.usdoj.gov/atr/public/international/docs/austral.us.txt>.

⁴ Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, 9 Mar. 1984, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,503A.

Regulation in 1989 raised the specter of potential conflict between the United States and the EC in merger reviews. This led to the adoption, in 1991, of the U.S.-EC cooperation agreement, aimed at minimizing the impact of differences in our respective competition laws.⁵ This agreement resulted in close, regular, and routine contacts between the agencies in the investigation and resolution of merger and non-merger competition matters, and spawned similar agreements with other jurisdictions. Then, in 2002, the U.S. agencies and the EC signed an agreement on the process for merger enforcement cooperation, following the GE/Honeywell matter.⁶

With the fall of the Berlin Wall in 1989 came the rapid transformation of state-run economies to market-based ones. In Central and Eastern Europe, as well as in Latin America and Asia, privatization and de-monopolization were accompanied by the adoption of laws aimed at nurturing and maintaining competition, with many countries seeking assistance from developed nations like the United States in drafting laws and establishing and operating enforcement agencies. Thanks to funding from the U.S. Agency for International Development (USAID), our technical assistance program was born, as the FTC and Department of Justice Antitrust Division (DOJ) sent experienced lawyers and economists to work side-by-side in the conduct of

⁵ Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, Articles V and VI, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and O.J. L 95/45 (27 Apr. 1995), *corrected at* O.J. L 131/38 (15 June 1995) [hereinafter 1991 US/EC Agreement], *available at* <http://www.usdoj.gov/atr/public/international/docs/0525.htm>.

⁶ See Press Release, FTC, United States and European Union Antitrust Agencies Issue “Best Practices” for Coordinating Merger Reviews (Oct. 30, 2002), *available at* <http://www.ftc.gov/opa/2002/10/euguidelines.htm>; US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, *available at* http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf and <http://www.usdoj.gov/atr/public/international/docs/200405.htm>.

investigations and enforcement of the new laws with their counterparts in the new competition enforcement agencies.⁷ Now, the newly passed U.S. SAFE WEB Act⁸ enables us, finally, to permit foreign enforcement colleagues to work with us on actual case matters at the FTC.⁹

The proliferation in competition enforcement agencies understandably led to fears of greater potential for conflict among them, to the detriment of businesses and consumers alike. These concerns, along with a desire to enhance cooperation and share best practices, led the U.S. antitrust agencies, in 2001, to join with 14 other agencies to form the International Competition Network (ICN), an organization made up strictly of competition enforcers, aided significantly by

⁷ Last year, for example, the FTC sent 34 different staff experts on 30 missions to 17 countries. Costs, including salaries, still largely are reimbursed by funds provided to the agencies by USAID, and we are grateful for the opportunity to contribute to USAID's broader economic development program. Our current programs are in the Association of South East Asian Nations (ASEAN) community of ten nations in Southeast Asia, India, Egypt, Russia, Azerbaijan, and Central America. In some cases, the FTC and DOJ have provided resident advisors, who have served for several months or longer in foreign postings. Our most recent resident advisor postings have been in Indonesia (assisting the Office of the Secretary General of the ASEAN) and South Africa. While living in the region, these advisors have been able to extend their effectiveness by making regular monthly visits to neighboring countries.

We also have conducted numerous missions of about one week each, involving lawyer/economist teams that present interactive case hypotheticals that approximate real investigations, but are conducted with foreign colleagues in a classroom setting. On occasion, we have found it possible to "co-teach" such a case simulation with a regional enforcement agency that obtained its original training from participation in an earlier FTC/DOJ training exercise. This approach allows us to introduce an element of local or regional reality to the teaching, as well as to leverage the positive effects flowing from the earlier training.

⁸ U.S. SAFE WEB Act, Pub. L. No. 199-455, 120 Stat. 3373 (Dec. 22, 2006).

⁹ In the past, legal restrictions that barred access to confidential investigative materials prevented visiting colleagues from taking full advantage of the ability to learn from their stay at the FTC. Subject to appropriate safeguards and close supervision, the new legislation allows us to assign individual foreign colleagues, in residence in the U.S. for periods of up to six months, to work on specific cases selected by FTC management. Both the individual FTC Fellows and their employing agencies will be required to agree to FTC terms and conditions that limit access to confidential material. This access will not be part of any joint investigative activity, but rather, a form of training in the rigors of the U.S. investigative process. We are inaugurating this program with an experimental Pilot Program beginning in the next week or two, after which we can assess the future direction of this unique international opportunity.

nongovernmental advisors.¹⁰ The ICN was established as a venue for competition agencies from around the world to discuss common issues and to work toward procedural and substantive convergence. From years of experience with the slow pace of international agreements, we consciously determined that the ICN could accomplish the most at the fastest pace through the promotion of best practices.

On the occasion of our sixth annual meeting in Moscow in May, the ICN reported a membership of 100 agencies from 88 jurisdictions and several important achievements.¹¹ In the area of merger notification and procedure, the ICN has adopted a set of eight guiding principles and 13 recommended practices, and 37 jurisdictions have changed their merger review systems to conform more closely to these best practices.¹² The ICN also has made real progress in reaching greater doctrinal consensus on the core principles of merger analysis and the importance of anti-cartel enforcement. Perhaps our most significant challenge to date rests with the ICN's newly established working group on unilateral conduct, co-chaired by the FTC, which seeks to increase convergence in the analysis of monopolization and the conduct of dominant firms.¹³ As part of its initial work, the working group recently completed a report on the stated objectives of

¹⁰ See Press Release, FTC, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), available at <http://www.ftc.gov/opa/2001/10/icn.shtm>.

¹¹ See Press Release, International Competition Network, Competition Authorities Agree to Develop Merger and Unilateral Conduct Guidance, Emphasize Co-operation, Outreach, Implementation (June 1, 2007), available at <http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2007/06/1/28>.

¹² The full text of the Guiding Principles and Recommended Practices is available at <http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>.

¹³ Additional information on the ICN's Unilateral Conduct Working Group is available at <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>.

unilateral conduct laws among the ICN's membership.¹⁴ The good news is that out of the 33 respondents, 30 informed the group that their country's unilateral conduct laws "aim to promote consumer welfare."¹⁵ (Seven agencies identified as a goal creating or ensuring "a level playing field" for small and medium-sized enterprises, and six identified "promot[ing] fairness and equality."¹⁶) Still, we know that various classifications mask important differences in how these agencies actually execute this promotion of consumer welfare, and this likely is to be addressed as part of the group's future work on conduct. In addition to our work in the ICN, we continue to play an active role in OECD's Competition Committee and the competition bodies of APEC and UNCTAD.

Beyond multilateral organizations, the U.S. antitrust agencies together engage in formal and informal bilateral talks with many of our overseas counterparts. During 2007, I have met or will meet with senior officials from agencies from around the world, including leaders from the European Commission, the Canadian Competition Bureau, Brazil's CADE, Russia's FAS, the Mexican FCC, the Japanese and Korean Fair Trade Commissions, several Chinese agencies, both UK agencies, and the competition agencies of Hungary and Romania. And that is just me; other commissioners and FTC staff have engaged in additional contacts. For example, we recently conducted discussions with the staff of the Japan Fair Trade Commission on revisions to their

¹⁴ International Competition Network, Unilateral Conduct Working Group, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies (May 2007), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%202007.pdf.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 17-18.

merger guidelines and draft intellectual property guidelines, and on monopolization. In addition, we engaged in a substantial dialogue with the EC last year on its draft Article 82 paper. These actions afford us a better understanding of our respective analyses and enforcement and policy objectives with a view toward promoting convergence. They also help to minimize the potential for conflicting outcomes in individual cases of mutual interest.

Turning to China, the FTC, working with the DOJ, has placed a high priority on engaging with China regarding the development of its recently enacted Anti-Monopoly Law and related statutes and policies affecting competition, such as the merger review provisions of its foreign investment law. We have been pleased with the opportunities afforded to the U.S. antitrust agencies to provide our views, and we have taken advantage of that through frequent high-level contacts, including my trip to Beijing last year and a recent training program for Chinese staff involved in merger review. I also had the opportunity to represent the U.S. government in the discussion of market-based competition at the summit meeting of the U.S.-China Strategic Economic Dialogue this past spring.

The Anti-Monopoly law reflects many suggestions from the U.S. agencies, which also were consistent with recommendations of DG-COMP and others. However, like many antitrust laws including our own, the Chinese law contains many broadly worded provisions, some of which raise questions and concerns regarding their interpretation and implementation. For example, the law contains several ambiguous provisions that raise concerns about the potential for applying it in a manner that discriminates against foreign firms, protects Chinese firms in designated sensitive industries, and impinges on intellectual property rights. Issues such as the merger notification thresholds remain to be worked out through implementing regulations. The

FTC and the Justice Department will maintain the constructive dialogue we have established with Chinese officials, coordinating as appropriate with other jurisdictions like Europe and Japan, and will closely follow the issues that arise in implementing of the law.

Within this web of consultation and cooperation, the question becomes, when have we done enough? When will we know that we have reached the maximum point of coherence that we are going to reach and we should just learn to live with differences and move on to something else? I suggest that we will not reach coherence in some such defining way. The search for coherence is an ongoing process that must show significant progress along the way, not an action that ends with a victory- or -defeat-declaring event. Just as the U.S. common law system for antitrust adapts to market changes and new learning, so too will global competition policy continue to evolve, if it is to remain a relevant, market-supporting force, rather than a market impediment. Thus, even as we find consensus around certain competition principles today, we will have to keep working at it as the dynamic marketplace moves us forward.

Some say that we have no hope of ever reaching even a baseline of agreement.¹⁷ Others question whether that is even necessary or desirable, and may suggest that differences are healthy.¹⁸ I, in turn, suggest that pointing to differences as healthy provides some consolation in

¹⁷ Paul B. Stephan, *Competitive Competition Law? An Essay Against International Cooperation* (Univ. of Virginia Law & Econ Research Paper No. 03-3, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=405542.

¹⁸ Testimony of Eleanor M. Fox before the Antitrust Modernization Commission, Hearing on International Issues (Feb. 15, 2006), available at http://www.amc.gov/commission_hearings/pdf/Statement_Fox_final.pdf; J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Has the Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence, Remarks Presented at the Bates White Fourth Annual Antitrust Conference (June 25, 2007), available at <http://www.ftc.gov/speeches/rosch/070625pendulum.pdf>.

the differences that exist; it should not, however, serve as a goal in and of itself. Our goal is to protect markets by ensuring that they are free of anticompetitive restraints, private and public. If we achieve that goal, consumers win. Because the actions of every competition enforcement agency and supporting institution will impact the market, it is our obligation to take those into account as we work to protect competition. Divergence does not just lead to disputes among agencies and the hiring of compliance lawyers all over the world. It can burden the very markets we are sworn to protect. It deprives businesses of what they need most – certainty about the legal consequences of the conduct of their operations. Subjecting the marketplace to layers of potential enforcement, even if executed ultimately with only slight differences, can lead to the types of business uncertainty and lack of risk-taking that stifle innovation and new market growth. Despite what some seem to imply, accounting for the likely reaction of firms is not only not inconsistent with protecting consumers, it is essential to doing so. As the Antitrust Modernization Commission observed, when businesses are in doubt as to how to conform their conduct to divergent regulation, business planning and investment decisions can be skewed, injecting inefficiency into the global economy, ultimately resulting in consumer harm.¹⁹ Furthermore, there is no doubt that in a world in which multiple enforcers review the same conduct, the actions of the most restrictive jurisdiction will essentially set the policy for all jurisdictions.²⁰ In April of this year, German Chancellor Angela Merkel, in her role as European

¹⁹ ANTITRUST MODERNIZATION COMMISSION, ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS 221-222 (2007) [hereinafter ANTITRUST MODERNIZATION COMMISSION REPORT], available at http://www.amc.gov/report_recommendation/amc_final_report.pdf.

²⁰ Timothy J. Muris, Chairman, Fed. Trade Comm'n, Merger Enforcement in a World of Multiple Arbiters, Remarks Before the Brookings Institution Roundtable on Trade and Investment Policy, Washington, DC (Dec. 21, 2001), available at <http://www.ftc.gov/speeches/muris/brookings.pdf>.

Council President, European Commission President Barroso, and President Bush signed a framework for advancing transatlantic economic integration. Because they recognize that differing regulatory regimes on both sides of the Atlantic pose real barriers to economic advancement and growth in our economies, an important aspect of this agreement is a framework for finding ways to converge our different regulatory structures. Thus, if they could go any higher, the stakes for finding common ground in competition policy have been raised. The search for coherence in competition policy, which has been an example of progress, must continue in earnest in the United States and EU and in the rest of the world.

Significant Areas of Divergence: National Champions

There are two primary areas in which I have concerns about the levels of global divergence and believe stronger efforts at convergence are imperative. First, the globalization of the economy, together with distrust among nations, has led to the re-emergence of nationalist sentiments, which take several forms. Promoting and protecting domestic companies from foreign competition has likely been around as long as there have been governments. The temptation for businesses to seek, and governments to grant, protection from foreign competition is too great. As we all know, where benefits are concentrated and costs are diffuse, it is possible for narrow groups to enrich themselves at the expense of consumers. Governments can take this

approach because, as Wolfgang Kartte, former head of the Bundeskartellamt, is said to have remarked, “competition has no lobby.”²¹

By now it should be clear that promoting competition domestically is the best way to achieve global success for a country and its companies. Competition, regardless of its origin, begets efficient, productive firms that are better able to compete in global markets. More efficient firms in turn increase economic growth and standards of living.²² By providing subsidies to or trade barriers for a domestic champion, and prohibiting foreign ownership, a country can certainly preserve the domestic firm far longer than it might otherwise survive in the market. It thereby may protect domestic jobs, but only for those who work for the national champion. Maybe it gains a flagship company to showcase in foreign countries, but I question the wisdom of an economic policy that would place pride ahead of productivity.

The consequences of protection from competition have been documented. As described by Mr. Lewis in his book examining differentials in national wealth, Japanese industries that face

²¹ See Ulf Böge, *State-imposed Restrictions of Competition and Competition Advocacy*, Speech on the Occasion of the Opening Session of the Seoul Competition Forum, at 3, Seoul, Korea (April 20, 2004), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/04Seoul_e.PDF.

²² The McKinsey Global Institute undertook a twelve-year study, commencing in 1991, to determine why some nations remain wealthy, while others remain stagnant or poor, even after years of international aid. In his book describing lessons learned from that study, the Institute’s founder, William Lewis, explained that, “economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can’t replace less efficient ones. Economic growth slows and nations remain poor.” WILLIAM W. LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* 103 (2004). McKinsey also asked why the highly productive United States has higher competitive intensity than other nations. Mr. Lewis sums up the answer by saying that, in the United States, “Consumer is king.” More specifically, “[t]he United States adopted the view that the purpose of an economy was to serve consumers much earlier than any other society,” and we continue to “hold this view more strongly than almost any other place.” He concludes that, in fact, “Consumers are the only political force that can stand up to producer interest, big government, and the technocratic, political, business, and intellectual.”

intense domestic and international competition – automobiles, electronics, and steel – perform at productivity levels that are, on average, approximately 130 percent of the levels in the United States.²³ In contrast, Japan’s large retail sector, which is heavily sheltered from competition by tax laws, zoning requirements, and other government-imposed restrictions, functions at roughly 50 percent of U.S. productivity levels.²⁴

In his study of why companies in some nations are more successful competing internationally than those in others, Michael Porter found that Sweden’s government had tended to promote certain larger industries that operated on a global scale.²⁵ That promotion, in part accomplished through relaxed application of Sweden’s antitrust laws, Porter believes, resulted from the view that “greater scale at home is necessary to meet global competition.”²⁶ Porter concluded that the country’s policies had resulted in reduced competitiveness of Swedish firms and a reduction in innovation from those entities.²⁷ Thus, he explained more generally, “creating a dominant domestic competitor rarely results in international competitive advantage. Firms that do not have to compete at home rarely succeed abroad.”²⁸

²³ *Id.* at 25.

²⁴ *Id.*

²⁵ MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 352 (1990).

²⁶ *Id.* at 350.

²⁷ *Id.* at 351.

²⁸ *Id.* at 662. Other evidence also shows that protecting national firms come at a substantial cost. One study suggests that if post-Uruguay Round trade barriers were removed, global wages would rise by \$1.9 trillion—including increases of \$512 billion in Europe and \$537 billion in the United States. Secretary of the Treasury Henry M. Paulson, Address at the Confederation of British Industry Annual Conference (Nov. 28, 2006), available at <http://www.treas.gov/press/releases/hp178.htm>.

Consideration of industrial policy, and the temptation to support the creation of national champions, poses a challenge to advocates of consumer-welfare based competition policy around the world. In the EU, in the 1991 ATR/de Havilland merger, a majority of Commissioners rejected arguments that the merger should be approved to create a “European champion.”²⁹ But the battle was not over. Recently, the European Commission has combated efforts to create national champions in the energy industries in France³⁰ and in Spain,³¹ and in the banking sector

²⁹ See, e.g., Martin du Bois, *EC Official Seeks Shift in Handling Merger Attempts*, WALL STREET J. EUROPE, Oct. 15, 1991, p. 3 (reporting that EC Commissioner Martin Bangemann proposed “major changes in the way the EC Commission reviews mergers, . . . to ensure that EC industry-policy goals didn’t get short shrift”). The European parliament also passed a resolution in the wake of the decision expressing its belief that “the present Merger Regulation takes insufficient account” of “a wider range of considerations, including the global competitiveness of Community industry, its conclusion that the Merger regulation should be reviewed to require decisions on any proposed merger to take account of its likely impact on European industrial strength, and of its social, regional and environmental consequences,” and its call on the Commission to propose such amendments and the Council to act on them. Resolution of the European Parliament of 10 Oct. 1991 on de Havilland, O.J. C 280/140 (28 Oct. 1991).

³⁰ Press Release, European Commission, Mergers: Commission Approves Merger of Gaz de France and Suez, Subject to Conditions (Nov. 14, 2006), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1558&format=HTML&aged=1&language=EN&guiLanguage=en>.

³¹ Commission Decision of 20.12.2006 Relating to a Proceeding Pursuant to Article 21 of Council Regulation (EC) No 139/2004 on the Control of Concentrations Between Undertakings, Case No. COMP/M.4197 - E.ON/Endesa, *available at* http://ec.europa.eu/comm/competition/mergers/cases/additional_data/m4197_art21_20122006_en.pdf; *see also* Press Release, European Commission, Mergers: Commission Decides that Spanish Measures in Proposed E.ON/Endesa Takeover Violate EC Law (Dec. 20, 2006), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1853&format=HTML&aged=0&language=EN&guiLanguage=en>.

in Italy³² and Poland.³³ In the 2002 E.on/Ruhrgas merger, the Bundeskartellamt decision to block the merger as anticompetitive was overridden by Germany's Economics Minister to create a national champion in European energy markets.³⁴

In China, the passage of the new Anti-Monopoly law has been greeted with a mix of hope that the law's open-ended provisions will be applied in a sound and nondiscriminatory manner, but with concern that the law will be used to protect Chinese companies at the expense of foreign rivals. These concerns are heightened by recent statements of a Chinese academic, who has called for economic security reviews of foreign transactions,³⁵ and the recent release of a report, commissioned by the Shanghai Stock Exchange, that calls for the establishment of a comprehensive national security review system for foreign mergers and acquisitions.³⁶ Of note, the report states that Chinese economic security depends on the international competitiveness of its industries and that China should therefore restrict or ban foreign investment in infant

³² Press Release, European Commission, Free Movement of Capital: Commission Opens an Infringement Procedure Against Italy on the Issue of Acquisition of Stakes in Domestic Banks (Dec. 14, 2005), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1595&format=HTML&aged=1&language=EN&guiLanguage=en>.

³³ Press Release, European Commission, Mergers: Commission Launches Procedure Against Poland for Preventing Unicredit/HVB Merger (Mar. 8, 2006), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/277&format=HTML&aged=0&language=EN&guiLanguage=en>.

³⁴ The E.on/Ruhrgas decision is described in Germany's annual report to OECD for 2001-2002, ¶¶ 59-68, *available at* <http://www.oecd.org/dataoecd/34/6/2489057.pdf>.

³⁵ International Herald Leader Interview of Cao Jianhai (Sept. 19, 2007), *available in Chinese at* http://news.xinhuanet.com/fortune/2007-09/19/content_6752845.htm.

³⁶ See "The Relevant Overseas Rules on Foreign M&A and Sectoral Success and Issues of Concern in the Process of China's Securities Market," *available in Chinese at* <http://finance.sina.cn/stock/t/20070903/02201641255.shtml>.

industries, ban foreign investment in strategic industries, and assess social issues, such as employment layoffs resulting from these transactions, as part of a national economic security review. Already under the foreign investment law, foreign acquisitions, such as the attempted acquisition by the Carlyle Group of an interest in a Chinese construction firm, have encountered hostility and delays. Nor are we free of these pressures in the United States, where the Chinese company, CNOOC, abandoned its bid for U.S. company Unocal in the face of Congressional opposition, which was based at least in part on energy security concerns, stating that, “This political environment has made it very difficult for us to accurately assess our chance of success, creating a level of uncertainty that presents an unacceptable risk to our ability to secure this transaction.”³⁷

National champion promotion – indeed, taking into account at all the nationality of the firm in question – is simply inconsistent with the central objective of antitrust law: to promote competition to the benefit of consumers. What is more, permitting antitrust enforcers to promote national champions, rather than protect competition, undermines the important goal of producing clear and predictable antitrust law and enforcement standards. Clarity and predictability are crucial to promoting efficient resource allocation. For example, in the United States, it is understood by the business community that the FTC and the DOJ challenge only mergers that

³⁷ Press Release, CNOOC Limited, CNOOC Limited to Withdraw Unocal Bid (Aug. 2, 2005), available at http://www.cnooltd.com/en/news_info.aspx?newsid=20070620163702296. In the United States, the Committee on Foreign Investment in the United States (CFIUS) can consider whether a merger involving a foreign acquirer would be contrary to our national interest. Only one transaction has been blocked pursuant to this process, and, in 1990, China National Aero Technology Import & Export was required to sell its interest in Mamco Manufacturing Inc. In rare instances, deals have been abandoned in the face of adverse review by CFIUS or by political opposition in the U.S. Congress, including the CNOOC transaction.

they believe are likely, in the foreseeable future, to raise prices, lower output, or retard quality or innovation. We do not account for the possibility that particular firms will be harmed by a transaction, consider the nationality of the firms involved in the transaction, or weigh other factors, such as employment benchmarks, that do not relate to competition. I can provide any number of examples in which the FTC and DOJ have brought cases or sought other relief even where doing so might have been to the disadvantage of an American company, because it was ultimately to the advantage of U.S. consumers. Examples include several petroleum mergers in which the FTC has obtained relief³⁸ and the Oracle/PeopleSoft merger that DOJ sought to block.³⁹ In each case an agency decision not to take action might have promoted a U.S. national champion in the area.⁴⁰ But, taking the national identity of rivals into account would not only make for poor economics, but would inevitably make the application of the antitrust laws highly subjective, undermine the credibility of competition officials, and, over time, deprive the antitrust laws of their legitimacy.

³⁸ *In the Matter of TC Group, L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P.* (2007), materials available at <http://www.ftc.gov/os/caselist/0610197/index.shtm>; *Federal Trade Commission v. Aloha Petroleum, Ltd., and Trustreet Properties, Inc.* (2005), materials available at <http://www.ftc.gov/os/caselist/1510131/1510131.shtm>; *In the Matter of Chevron Corporation and Unocal Corporation* (2005), materials available at <http://www.ftc.gov/os/caselist/0510125/0510125.shtm>; *In the Matter of Valero, L.P., Valero Energy Corporation, Kaneb Services LLC, and Kaneb Pipe Line Partners, L.P.* (2005), materials available at <http://www.ftc.gov/os/caselist/0510022/0510022.shtm>.

³⁹ Press Release, DOJ, Justice Department Filing Lawsuit to Block Oracle's Proposed Acquisition of PeopleSoft (Feb. 26, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/202575.htm.

⁴⁰ See Deborah Platt Majoras, National Champions: I Don't Even Think it Sounds Good, Speech Before International Competition Network, at 8-9, Munich, Germany (Mar. 26, 2007), *available at* <http://www.ftc.gov/speeches/majoras/070326munich.pdf>.

Fortunately, on this issue, I believe that the U.S. antitrust agencies and the European Commission are of a like mind. As Commissioner Kroes put it earlier this summer in a speech, “Open competition—tough competition even—is essential for a dynamic market. This drives European companies on to do better—to keep adapting, innovating, and winning.”⁴¹ The work that Commissioner Kroes has done to battle the displacement of competition by governments in the European Union, both in the form of state aids and financial restraints on competition, has helped implement this vision. Here, the FTC, often in cooperation with DOJ, has increased its competition advocacy efforts, reminding all policy-makers that consumers benefit most when competition is not fettered by subsidies, special benefits, and exceptions to the rules of competition. In fact, our extensive experience has confirmed that government-imposed restrictions on competition and business practices are among the most effective and durable of all, resulting in at least as much harm to consumers as illegal private restraints. Our advocacy efforts thus focus on proposed regulations or laws that involve restrictions on price, innovation, and entry conditions, which often are presented as consumer protection measures but more typically serve to shelter traditional businesses from new and innovative forms of competition.⁴²

⁴¹ Neelie Kroes, European Competition Policy in a Changing World and Globalized Economy: Fundamentals, New Objectives, and Challenges Ahead, Speech Before GCLC/College of Europe Conference on “50 Years of EC Competition Law,” at 2, Brussels, Belgium (June 5, 2007), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/364&format=PDF&aged=0&language=EN&guiLanguage=en>.

⁴² For a list of all FTC advocacy filings, see http://www.ftc.gov/opp/advocacy_date.shtm. In recent years, the FTC’s advocacy program has yielded many successful outcomes for consumers, the most prominent of which occurred in the areas of: (1) electronic commerce, where the Supreme Court cited an FTC staff report on wine direct shipping in striking down Michigan and New York state laws that discriminated against out-of-state wine manufacturers (*see Granholm v. Heald*, 544 U.S. 460 (2005)); and (2) health care, where Governor Schwarzenegger cited an FTC staff advocacy in vetoing a bill that would have imposed certain informational obligations on pharmacy benefit managers to the likely detriment of consumers (*see* Letter of Governor Arnold Schwarzenegger to Members of the California

Significant Areas of Divergence: Unilateral Effects

The second area of concern is raised by differences in enforcement against firms acting unilaterally. No area of competition enforcement policy today creates more controversy than monopolization or dominance. This perhaps is not surprising given that distinguishing between aggressive, procompetitive conduct, which is good for consumers even when engaged in by dominant firms, and exclusionary or predatory conduct, which harms consumers, is difficult – because the conduct often looks the same. Given that identifying anticompetitive conduct by a single firm with market power is so difficult, enforcers are unlikely to get it right all of the time. Thus, the important issue becomes a jurisdiction’s tolerance for erring on the side of overenforcement versus erring on the side of underenforcement. That is, in developing competition policy as applied to monopolists, the question is whether we most fear the potential harm to consumers from overenforcement or from underenforcement. Jurisdictions calibrate their enforcement according to how they answer that question.

We must acknowledge that, while there are important similarities between the U.S. and EC approaches, we are calibrating our enforcement against unilateral conduct differently. While I do not suggest that this complex area of law can be neatly summarized in a single passage, we can find illumination on the differing approaches in recent court cases. The United States Supreme Court in the recent *Trinko* case had this to say:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an

State Assembly Returning Assembly Bill 1960 Without Signature (Sept. 29, 2004), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1951-2000/ab_1960_vt_20040929.html).

important element of the free-market system. . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.⁴³

The European Court of First Instance (CFI), last week in the Microsoft decision, reminded us that in Europe a dominant firm “[...] has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market.”⁴⁴

In reviewing last week’s decision, it is incumbent upon us not just to stop at its explicit rejection of the approach that the DOJ and U.S. courts took, throw up our hands, and declare “game over.” Rather, it behooves us to carefully analyze the specific differences between that decision and the collective liability and remedy decisions of the United States Court of Appeals for the District of Columbia Circuit (and that of the district court) and the CFI’s recent decision, sorting out what can be attributed to differences in the factual record and what can only be attributed to differences in law and policy. How do different courts with the same goal of protecting consumers reach different conclusions on how to do it?

While it always takes more than one reading to fully absorb such a lengthy decision, a couple of areas of difference strike me as worthy of discussion. First, I suggest examining the difference in how the U.S. courts and the CFI treated the question of what technical information Microsoft had to disclose to its server operating system competitors so they could interoperate with Windows. While the U.S. courts and the CFI were reviewing different underlying cases,

⁴³ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

⁴⁴ Case T-201/04, *Microsoft v. Comm’n* [2007], ¶ 229.

both upheld a remedy that required Microsoft to disclose certain information to developers of server operating systems.⁴⁵

The difference between the two remedies requiring disclosure of interoperability information comes in the breadth and implementation of the disclosures. Determining what information is necessary to allow two systems to interoperate is no simple exercise, because, apparently, there is a spectrum over which two systems can interoperate. To this end, the CFI remedy appears to require greater disclosures – the CFI’s decision mandates that Microsoft’s competitors must be able to interoperate on an “equal footing” with Microsoft’s Windows server operating system.⁴⁶ Here, the CFI defines interoperability as that which is necessary to enable competitors to “remain viably on the market.”⁴⁷ The U.S. courts, on the other hand, required that disclosures be sufficient to create a “basic link” between the two systems, rejecting competitors’ arguments that broader disclosures were necessary.⁴⁸

In no small part, this difference between the CFI and the U.S. court seems to be based on an evaluation of the effect of the remedy on Microsoft’s incentive to innovate. In response to

⁴⁵ In Europe, the CFI found that Microsoft abused its dominant position by refusing to provide certain specifications to its competitors. *Microsoft v. Comm’n* [2007], ¶ 103. Thus, the CFI upheld the Commission’s remedy that required Microsoft to provide that information to Microsoft’s competitors. *See Microsoft v. Comm’n* [2007], ¶¶ 806-809. Similarly, the U.S. court also upheld a remedy that required Microsoft to provide certain information to developers of server operating systems, but reached the issue in a different manner. The U.S. court found that Microsoft had abused its monopoly power in the operating system market, and to remedy that anticompetitive conduct, the court required disclosure of interoperability information to assist in building a platform to compete against Windows itself. *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 172-73 (D.D.C. 2002).

⁴⁶ *Microsoft v. Comm’n* [2007], ¶ 230.

⁴⁷ *Id.* ¶ 228.

⁴⁸ *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1224 (D.C. Cir. 2004).

Microsoft's argument that any disclosure, and certainly broad disclosure, would impede incentives to innovate, the CFI said that Microsoft had not proven that the disclosure obligations would negatively impact Microsoft's incentives to innovate.⁴⁹ Merely offering economic theory was not enough, and the CFI faulted Microsoft for its failure to specify exactly which technologies or products would be affected.⁵⁰ The CFI also dismissed Microsoft's concerns that forced disclosure would allow competitors to clone Microsoft's products.⁵¹ To the contrary, the CFI determined that the remedy imposed by the EC was a necessary prerequisite for differentiation to occur.⁵²

The U.S. courts' approach was based on a concern that broader disclosure of interoperability information would facilitate competitors' ability to clone Microsoft's product. The district court found that broader disclosure obligations would erroneously equate interoperability with interchangeability.⁵³ The resultant risk of cloning, according to the district court, would deny Microsoft returns from its intellectual property and inherently decrease incentives to innovate on the part of Microsoft and its competitors.⁵⁴ In describing the decreased incentive to innovate as "inherent," the court determined that no specific proof was necessary. The U.S. Court of Appeals for the D.C. Circuit agreed: "the effect on Microsoft's incentive to

⁴⁹ *Microsoft v. Comm'n* [2007], ¶ 697.

⁵⁰ *Id.* ¶ 698.

⁵¹ *Id.* ¶ 234.

⁵² *See id.* ¶ 656.

⁵³ *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 227 (D.D.C. 2002).

⁵⁴ *Id.* at 227-228.

innovate would be substantial; [and] not even the broad remedial discretion by the district court extends to the adoption of provisions so likely to harm consumers.”⁵⁵

Similarly, different approaches to a firm’s incentive to innovate underscored the tying assessments of the courts in the two jurisdictions. For example, in determining that the per se approach was inapplicable to the U.S. case, the D.C. Circuit held that the rule of reason analysis was appropriate for analyzing Microsoft’s operating system/browser bundle because “there are strong reasons to doubt that the integration of additional software functionality into an operating system” is among those arrangements that “pose an unacceptable risk of stifling competition and are therefore unreasonable ‘per se.’”⁵⁶ In particular, the D.C. Circuit noted that the application of a per se analysis in this case would create “undue risks of error and deterring welfare enhancing innovation,”⁵⁷ expressing concern that the application of the per se rule in the context of platform software might chill innovation because the first firm to merge previously distinct functionalities would bear the costs of antitrust risk associated with liability for tying.⁵⁸

The CFI also notes that “[...] the IT and communications industry is an industry in constant and rapid evolution, so that what initially appear to be separate products may subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of competition rules.”⁵⁹ Still, the CFI found relevant that there was separate

⁵⁵ *Massachusetts v. Microsoft Corp.*, 373 F.3d at 1219.

⁵⁶ *United States v. Microsoft Corp.*, 253 F.3d 34, 89 (D.C. Cir. 2001).

⁵⁷ *Id.* at 89-90.

⁵⁸ *See id.* at 93-94.

⁵⁹ *Microsoft v. Comm’n* [2007], ¶ 913.

consumer demand for, and supply of, media players and that customers continued to acquire media players from Microsoft's rivals.⁶⁰ In doing so, the CFI rejected Microsoft's argument that it was normal commercial practice to bundle operating systems and media players, holding not only that this was not the case at the time of Microsoft's initial tie, but also that some of the non-Microsoft operating system vendors "make the installation of the media player optional, or allow it to be uninstalled, or offer a selection of different media players."⁶¹

The D.C. Circuit considered the same factors, but arrived at a different conclusion. Like the CFI, the D.C. Circuit acknowledged that industry practice regarding bundling was an important consideration, as was consumer demand for being able to purchase the products separately.⁶² Indeed, as the court pointed out, this separate product test acts as a "rough proxy for whether a [tie] may, on balance, be welfare-enhancing and unsuited to per se condemnation."⁶³ The D.C. Circuit, however, recognized that inflexibly considering historic industry practice and customer behavior would penalize innovating companies that integrate products.⁶⁴ Accordingly, the D.C. Circuit decided to carefully balance the efficiencies of integration against any anticompetitive effects of such integration.⁶⁵

⁶⁰ *Id.* ¶¶ 925-933.

⁶¹ *Id.* ¶ 941.

⁶² *United States v. Microsoft Corp.*, 253 F.3d at 87-88.

⁶³ *Id.* at 87.

⁶⁴ *Id.* at 89; *accord id.* at 92 ("[T]he first firm to merge previously distinct functionalities . . . or to eliminate entirely the need for a second function . . . risks being condemned as having tied two separate products because at the moment of integration there will appear to be a robust 'distinct' market for the tied product.").

⁶⁵ *Id.* at 95.

Many have mused about why we have these differences. At this forum in 1991, now-Judge Diane Wood observed that “factors peculiar to the United States make possible the adoption of a more narrow antitrust policy . . . than ought to prevail in some other countries.”⁶⁶ Specifically she mentioned the situation in Eastern Europe, where she said that, “[a]ntitrust doctrines long placed in subordinate positions in North America and the EC have an active and important role to play in countries just beginning to make the transition to a free market economy,” particularly, she noted, as to state monopolies.⁶⁷

More recently, noted antitrust professor and former Director of Competition Enforcement at the UK Office of Fair Trading Margaret Bloom said much the same as to the difference between U.S. and EC enforcement policy as to dominant firms:

In Europe many of the big firms were previously state-controlled monopolies. They have not obtained their powerful positions through superior business performance – in contrast to most large U.S. firms. European markets are often national so there is less scope for rivalry. A third reason for more intervention is the significance of ordoliberalism in the early approach towards Article 82 with its emphasis on the structure of the market and ‘fairness’. The first two reasons could both be sound ones why slightly more intervention in Europe than in the US could enhance consumer welfare.⁶⁸

My colleague Commissioner Bill Kovacic has suggested that some U.S.-EU differences in the design of antitrust policy may be attributable to differences in the extent to which the

⁶⁶ DIANE P. WOOD, INTERNATIONAL COMPETITION POLICY IN A DIVERSE WORLD: CAN ONE SIZE FIT ALL?, 1991 FORDHAM CORP. L. INST. 79-80 (Barry Hawk ed., 1992).

⁶⁷ *Id.* at 82-83.

⁶⁸ Margaret Bloom, Substantial Antitrust Convergence: Developed Country Antitrust Enforcement Is Converging on a Consumer Welfare Basis, ABA Antitrust Section Spring Meeting, at 21 (March 30, 2005), available at <http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-convergence-final.pdf>.

jurisdictions rely on private enforcement of antitrust rules, with U.S. reliance on strong private rights of action leading the courts, *inter alia*, to develop a somewhat narrow construction of antitrust standards vis-à-vis EC standards.⁶⁹ And in a recent speech in Italy, another fellow Commissioner, Tom Rosch, suggested that differences between the U.S. and the EU result from reliance on two different schools of economic thought.⁷⁰ Tom sees the U.S. as heavily influenced by the Chicago School and its efforts to ground antitrust enforcement in price theory and efficiencies, while the EC tilts more toward the post-Chicago School and its focus on strategic game theory.⁷¹ The result, as Tom sees it, is a greater tendency to enforcement in Europe.⁷²

Of course, differences in enforcement and policy regarding single firm conduct are not limited to the United States and Europe. The Japan Fair Trade Commission, for example, has identified, as an enforcement priority, the concept of an “abuse of dominant bargaining position.”⁷³ This is not based on a firm having a “dominant” or monopolistic position in a market; rather, these “unfair” practices involve issues of bargaining power and economic

⁶⁹ See, e.g., William E. Kovacic, Commissioner, Fed. Trade Comm’n, Private Participation in the Enforcement of Public Competition Laws, Speech before the British Institution of International and Comparative Law, Third Annual Conference on International and Comparative Competition Law: The Transatlantic Dialogue, London, United Kingdom (May 15, 2003), *available at* <http://www.ftc.gov/speeches/other/030514biicl.shtm>.

⁷⁰ See J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, I Say Monopoly, You Say Dominance: The Continuing Divide on the Treatment of Dominant Firms, Is it the Economics?, Address at the International Bar Association Antitrust Section Conference, Florence, Italy (Sept. 8, 2007), *available at* <http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf>.

⁷¹ *Id.* at 3-4.

⁷² *See id.* at 4.

⁷³ Kazuhiko Takeshima, Chairman, Japan Fair Trade Comm’n, Endeavour to Establish a Rigorous Enforcement of the Antimonopoly Act in Japan, Remarks before the 4th East Asia Conference on Competition Law and Policy, at 5 (May 3, 2007), *at* http://www.jftc.go.jp/eacpf/06/6_04_01.pdf.

dependence. Conduct cited as abusive under these rules includes a large-scale retailer requiring suppliers “to send their own employees to assist product display work[s] and inventory work[s].”⁷⁴ This kind of practice is unlikely to raise concerns under the U.S. antitrust laws.

The ICN's Unilateral Conduct Working Group has begun to examine the challenges involved in addressing anti-competitive unilateral conduct of firms with market power, including the differences in approaches employed by its member agencies, with the goal of promoting greater convergence and sound enforcement of laws governing unilateral conduct. This group, co-chaired by the FTC, is in the second phase of its work, examining specific types of practices that may be deemed abusive, and has started its review with predatory pricing and exclusive dealing. The group’s conduct work is expected to last for several years, and will address other practices at a later stage. Our group has also just begun to develop guidance for agencies on the assessment of market power.

Still, I think the U.S. agencies and the EC must do more on a bilateral basis. While understanding our separate histories and institutional differences undoubtedly is important, understanding alone will not narrow or resolve our differences. We need to re-commit ourselves to cooperation and enhanced discussion in the area of single-firm conduct. As tough as this may seem, throwing in the towel is simply not an option. I look forward to building on our already productive and respectful relationship, to rolling up our sleeves, and to working together on this tough but important area of the law.

⁷⁴ *Id.*

Consideration of Comity

What about the role of comity? At a base level, international cooperation is based on the doctrine of comity among nations. Some in the business and competition communities have focused renewed attention on that doctrine over the past couple of years, and the AMC specifically addressed it in its report earlier this year.⁷⁵ Comity is a doctrine long recognized by courts and enforcement agencies through which they take into account the interests of other sovereign jurisdictions in resolving cases. But comity, it seems, can have different meanings to different people, and so it may be useful to see how it has been defined and applied in specific contexts. As the U.S. Supreme Court described it over a century ago:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.⁷⁶

In the field of competition policy enforcement, 40 years ago, the members of the OECD recognized “the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of cooperation in the field of restrictive business practices” and adopted a recommendation that has guided enforcement cooperation to this day.⁷⁷

⁷⁵ ANTITRUST MODERNIZATION COMMISSION REPORT, *supra* note 19, at 220-226.

⁷⁶ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

⁷⁷ Recommendations of the Council of 5th October 1967 [C(567)53(Final)], 2.

Respect for international comity is embodied in each of the eight formal bilateral cooperation agreements to which the United States is a party.⁷⁸ That reflects FTC and DOJ policy contained in their 1995 Antitrust Enforcement Guidelines for International Operations, in which it is stated, in §3.2,

“[I]n determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each agency takes into account whether significant interests of any foreign sovereign would be affected.”⁷⁹

Over the years, the courts⁸⁰ and the agencies have adopted factors with which to conduct a comity analysis. For example, among those included in the DOJ-FTC International Guidelines are the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; and the degree of conflict with foreign law or articulated foreign economic policies.⁸¹ These factors can be useful to help agencies make decisions either unilaterally or bilaterally. But they are only a guide and not a tie-breaker to determine who acts, and to what extent they act.

Questions concerning the application of comity principles have arisen in a number of notable cases over the past two decades. One matter that offers a simple illustration of comity

⁷⁸ See, e.g., 1991 US/EC Agreement, *supra* note 5.

⁷⁹ U.S. DEPT. OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS §3.2 (1995) [hereinafter U.S. International Guidelines], available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm>.

⁸⁰ See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-8 (3d. Cir. 1979); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

⁸¹ U.S. International Guidelines, *supra* note 79, §3.2.

was the Parma Ham case of the mid-1990s. Parma ham producers in Italy had agreed to certain production standards and production quotas, affecting all consumers of Parma ham around the world. FTC staff opened an investigation and, after notifying the Italian government under the 1995 OECD Recommendation, learned that Italy's competition authority, the AGCM, also had opened an investigation. Because (a) Italian law stipulated a short deadline for conclusion of the investigation, (b) the conduct occurred and the evidence was located in Italy, and (c) enforcement action by the AGCM could satisfy all consumers wherever located, the FTC deferred, staying its hand in investigating the matter until the AGCM came to its decision to order the Parma ham producers to eliminate the production quotas.⁸² We, of course, do not know what might have happened if the AGCM had not taken such action.

At about the same time, the EC reviewed a merger of platinum mines in South Africa. The Gencor/Lonrho merger was subject to the EC's jurisdiction because each of the firms involved in the merger sold more than 250 million ecu into the EEA, accounting for some 20 percent of world demand. The South African government and its Competition Board raised no objection to the merger. The EC blocked the merger, concluding that it would create an anticompetitive duopoly in the world market for platinum. The parties challenged the EC's decision, but the Court of First Instance upheld it, finding that the parties' sales of platinum into

⁸² Former FTC Chairman Robert Pitofsky mentioned this case in testimony before the Senate Antitrust Subcommittee on Oct. 2, 1998, at note 19 (*available at* <http://www.ftc.gov/os/1998/10/interant.htm>), and on May 4, 1999, at note 7 (*available at* <http://www.ftc.gov/os/1999/05/positivecomitytestimony.htm>).

the European Community were sufficient to establish the EC's jurisdiction over the matter, and finding further that there was no actual conflict between the EC and South Africa.⁸³

Last year's merger of Linde and BOC might have posed comity issues were it not for the close cooperation between the EC and United States. As originally structured, the merger would have created the world's largest supplier of helium, a gas found in the largest quantities in the United States, Russia, Algeria, and parts of the Middle East. The parties' helium assets consisted in part of contract rights to gas supplies owned by other firms. The transaction required review in the U.S., which accounted for sixty percent of the parties' helium sales, and the EC, which accounted for approximately 22 percent of the parties' helium sales. Although both the EC and US had significant, and potentially conflicting interests in the outcome of the review, coordination between the EC and United States resulted in a common view of the transaction's competitive implications. The FTC and EC both found the combination of the parties helium assets to be anticompetitive and negotiated substantially similar settlements. These settlements were, in fact, so similar that the divestiture packages were virtually identical but for some minor assets that the EC added to the U.S. divestiture package.⁸⁴

Another case that involved important economic interests in both Europe and North America was the proposed acquisition of de Havilland, a commuter aircraft producer based in

⁸³ See Case T-102/96, *Gencor Ltd. v. Commission*, 1999 E.C.R. II-00753 ¶¶ 78-88, 102-105, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996A0102.

⁸⁴ Commission Decision of 6 June 2006 Declaring a Concentration to be Compatible with the Common Market, Case No. IV/M.4141 - LINDE/BOC, available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4141_20060606_20212_en.pdf; *Linde AG and The BOC Group PLC* (2006), materials available at <http://www.ftc.gov/os/caselist/0610114/index.shtm>.

Canada, by ATR, a consortium of French and Italian commuter aircraft makers. The deal would have merged the world's two leading producers of commuter (20-70 seat) aircraft. The Canadian Competition Bureau cleared the merger, finding that de Havilland was a "failing firm." The EC prohibited the merger, finding that it would create a dominant position that would substantially lessen competition.⁸⁵ In its decision (at ¶ 31), the EC reserved judgment on whether a "failing firm" defense was cognizable under the EC Merger Regulation, but nonetheless found that de Havilland was not likely to exit the market – in fact, the EC noted other interested potential purchasers.⁸⁶ Public comments by commissioners after the decision indicated that some voted to clear the merger on "industrial policy" grounds – that is, that the merger would have created a European-based leader in the market for commuter aircraft.⁸⁷ The Canadian government protested the EC's decision without avail.

Finally, in a case that has been discussed in the past in this forum, the Institut Merieux/Connaught Biosciences case,⁸⁸ two French- and Canadian-based firms had sufficient

⁸⁵ Commission Decision of 2 October 1991 Declaring the Incompatibility with the Common Market of a Concentration, Case No. IV/M053 - Aerospatiale-Alenia/de Havilland, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m53_en.pdf. See George N. Addy, *International Harmonization and Enforcement Cooperation: the Canadian Experience*, Background Paper Submitted for the Symposium on International Harmonization of Competition Laws, Taipei, Taiwan (Mar. 11, 1994) (§ I(b) describes the Canadian decision), *available at* <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1048&lg=e>.

⁸⁶ Since this decision, the EC has accepted the "failing firm" defense. See Guidelines on the Assessment of Horizontal Mergers, O.J. C 31/5 ¶¶ 89-91 (5 Feb. 2004), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/c_031/c_03120040205en00050018.pdf.

⁸⁷ See *supra* note 29 and accompanying text.

⁸⁸ DEBORAH K. OWEN & JOHN J. PARISI, INTERNATIONAL MERGERS AND JOINT VENTURES: A FEDERAL TRADE COMMISSION PERSPECTIVE, 1990 FORDHAM CORP. L. INST. 5-14 (Barry Hawk ed., 2001).

sales in the United States to trigger the HSR premerger notification obligation. The FTC found that the merger would have anticompetitive effects in two product markets in the United States, one of them being rabies vaccine. Merieux had a vaccine that it sold in the United States and Canada. Connaught was an actual potential competitor, having a new generation rabies vaccine in Phase III FDA trials. The parties agreed to lease rabies vaccine production facilities to a lessee acceptable to the FTC. The Canadian Government formally expressed concern – in view of a rash of rabies cases in Ontario at the time – over maintaining a secure and sufficient supply of the vaccine in Canada. The FTC amended its consent order to allow for consultation and agreement with Canada on the selection of a divestee.⁸⁹ The important question that this has always raised is whether Canadian public health concerns outweighed the competitive concerns raised by the proposed merger in the United States.

The Antitrust Modernization Commission received testimony on the application of comity to competition policy decisions,⁹⁰ echoes of which were heard here in this forum last year.⁹¹ The AMC included recommendations on comity in its final report. Included were recommendations that, “The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and

⁸⁹ *In re Institut Merieux, S.A.*, 113 F.T.C. 742 (Aug. 6, 1990), available at http://www.ftc.gov/os/decisions/docs/vol113/Volume113_715-815.pdf.

⁹⁰ Antitrust Modernization Commission, Hearing on International Antitrust Issues (Feb. 15, 2006), available at http://www.amc.gov/commission_hearings/international_antitrust.htm (includes hearing transcript and witness statements).

⁹¹ FORDHAM CORP. L. INST., INTERNATIONAL MERGERS ROUNDTABLE, 2006 FORDHAM CORP. L. INST. 398-401 (Barry Hawk ed., 2007).

make greater use of the comity provisions in existing cooperation agreements.”⁹² The AMC also recommended that such agreements should “explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses” and “incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and cooperation, and benchmarking reviews.”⁹³

It is, of course, incumbent upon the FTC and DOJ to consider the AMC’s recommendations. In doing so, I return to where I began today: We already engage in consultation and cooperation, harmonization of remedies, benchmarking reviews and the like, extensively with our major trading partners and as appropriate with other jurisdictions. Significant divergences remind us that we can do better in some areas – currently, single firm conduct.

The tougher part is in the word “deference.” There is no doubt that in our cooperative enforcement work, some amount of deference is required and provided. Total deference – refraining from taking enforcement action at the request of another jurisdiction – is rare, however. Yet, this, I believe, is what lies at the center of calls for increased attention to comity.

⁹² ANTITRUST MODERNIZATION COMMISSION REPORT, *supra* note 19, at 221.

⁹³ *Id.* at 215. Comity is frequently described as either taking enforcement action at the request of another jurisdiction (“positive comity”) or deferring from taking enforcement action at the request of another jurisdiction (“negative comity”). The cooperation agreements to which the U.S. is a party apply the comity principle more broadly as an essential element of conflict avoidance. Most of the agreements contain the obligation, stated above in the 1995 International Guidelines, to take into account the important interests of the other party. So, for example, in developing remedies in a merger case under concurrent review by the U.S. and foreign counterparts, the reviewing agencies carefully consider the capability of potential divestees to effectively maintain or restore competition in each of the affected jurisdictions, thereby taking into consideration each jurisdiction’s interests in reaching an effective remedy as well as the parties’ interests in non-conflicting remedial obligations.

I think a dialogue on the issue would be useful and, thus, I was disappointed last year when the OECD Competition Working Party 3 members had little interest in the topic. The issue has been raised – it is out there, so we should at least have an understanding of one another’s current views on the subject. There are myriad questions in my mind, but two, in particular, relate to subjects I have already discussed. First, can a request for comity simply be used as a foil for creating a national champion? In that regard, what types of national interests justify comity – national defense? Economic security? Labor security? The U.S. agencies would not see labor, for example, as a valid reason to refrain from enforcing the antitrust laws, but does applying the doctrine of comity suggest that we should not be judging which interests may be paramount to other nations?

Second, is comity the answer when two jurisdictions have competition policy disagreements? Some commentators seem to believe that it is, at least when the “center of gravity” of the matter can be ascertained. In other words, some would ask, who has the stronger interest? This raises more questions. How is that interest evaluated? And if it is determined that one jurisdiction has a slightly greater interest, but both are nonetheless strong, can one jurisdiction realistically stand down?

As I said, comity seems to mean different things to different people. I would appreciate the opportunity to further explore the issues with my enforcement colleagues.