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!)

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

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[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

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[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 Act[8] 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

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

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[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

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[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%2007.pdf.

[15] *Id.* at 9.

[16] *Id.* at 17-18.

merger guidelines and draft intellectual property guidelines, and on monopolization. In addition,

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

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[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

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

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]

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 France[30] and in Spain,[31] and in the banking sector

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[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 competitivity 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 Italy[32] 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

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[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.

industries, ban foreign investment in strategic industries, and assess social issues, such as

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 relief[38] 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.

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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

> 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,

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[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.

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

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]

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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.

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

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[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.

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[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]

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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 courts[80] 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

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

79 U.S. DEPT. OF JUSTICE & FED. TRADE COMM'

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

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

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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.