

**TESTIMONY OF JAMES R. ATWOOD
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BEFORE THE ANTITRUST MODERNIZATION COMMISSION**

Hearings on International Issues

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EXECUTIVE SUMMARY.....	1
TESTIMONY.....	2
I. The Private and Public Costs of Divergence in Antitrust Standards.....	2
II. The Current Role of Comity in International Antitrust Enforcement.....	5
III. The Limited Effectiveness of Current Comity Arrangements.....	8
IV. Proposed Steps Towards Enhanced Comity.....	13
V. Clarifying the Extraterritorial Reach of U.S. Antitrust Law Under the Foreign Trade Antitrust Improvements Act	15

EXECUTIVE SUMMARY

Regulatory divergence imposes a large cost on the U.S. economy. Divergent antitrust standards contribute to this burden and threaten to become an even more significant drag on economic efficiency and consumer welfare as the globalization of commerce, and the growing number of jurisdictions enforcing antitrust laws, increase the costs for businesses, governments, and the society at large.

Comity -- the deference given by an agency or tribunal of one nation to an act or decision of another -- has long been recognized as an important method for avoiding, or at least minimizing, conflicts between different jurisdictions arising from divergent national approaches. To its credit, the United States has played a leading role in recent years in embedding comity principles in multilateral instruments and in a network of bilateral antitrust cooperation agreements with other jurisdictions. But comity's promise is not being fully realized, particularly in areas such as merger control and single-firm conduct, where the interests of the relevant jurisdictions are not always aligned. The risks of future conflicts across an array of jurisdictions are steadily mounting, threatening to halt, and even reverse, recent progress in international cooperation.

To avert this outcome, U.S. antitrust authorities should explore the scope for enhanced comity mechanisms, drawing both on experience to date in the antitrust field as well as the cooperative approaches applied in other regulatory fields. In this testimony I make a number of specific suggestions for advancing that objective with the hope that the Commission will encourage further progress through our government.

TESTIMONY

I am grateful for this opportunity to testify on international issues. I will focus in this testimony on the need for enhanced comity arrangements between U.S. and foreign antitrust enforcement authorities. I previously submitted comments to the Commission on the same subject that I and others had prepared on behalf of a number of leading global corporations representing a variety of distinct industry sectors.¹ In the course of my comments, I will, however, also touch on some of the other international issues on which the Commission has solicited public input.

I. The Private and Public Costs of Divergence in Antitrust Standards

As commerce becomes ever more globalized, the cost that regulatory divergence imposes on society is increasingly apparent. The U.S. Chamber of Commerce, citing a number of recent studies, estimates that regulatory divergence between the United States and the EU alone “costs the United States 1-3% of GDP per capita year after year.”² If the United States’ other trading relationships -- many with economies far less like-minded than the EU -- are taken into account, the total cost of regulatory divergence to the U.S. economy may be even higher than this already striking figure suggests.

¹ I refer to the August 12, 2005 comments submitted on behalf of Bertelsmann AG, General Electric Company, Microsoft Corporation, Pfizer Inc., Royal Philips Electronics, and Time Warner Inc. Today’s testimony, however, represents my own views alone.

² Statement on the U.S.-EU Economic Relationship before the U.S. House of Representatives Committee on Financial Services, Subcommittee on Domestic and International Monetary Policy, Trade and Technology, by Gary Litman, Vice-President, Europe and Eurasia, U.S. Chamber of Commerce, June 16, 2005.

Divergent antitrust standards contribute to this burden and threaten to become a significant drag on economic efficiency. As Congressman John Sensenbrenner reminded this Commission when it started its work in July 2004, “the global reach of American industry has given rise to conflicting antitrust enforcement regimes that subject American businesses to multiple and potentially discriminating enforcement burdens.”³ Just last month, the Court of First Instance upheld the European Commission’s decision to block the GE-Honeywell merger previously approved by the U.S. authorities, and the Korean Fair Trade Commission imposed remedies on Microsoft that conflicted with the already divergent requirements imposed by the United States and EU. These decisions serve as stark reminders of the uncertain regulatory environment in which large multinational businesses operate. As the global economy becomes increasingly interconnected, the problems created by divergent antitrust standards are likely to worsen. Business transactions, operations and conduct will increasingly extend beyond national boundaries. At the same time, companies will have to comply with distinct and sometimes inconsistent antitrust requirements in a growing number of jurisdictions. Already, more than 100 countries have antitrust laws and approximately 70 provide for merger pre-notification and/or review. Former Assistant Attorney General Pate was correct when he noted: “this global expansion . . . brings new challenges” and “the multitude of reviewing jurisdictions creates the risk of inconsistent results.”⁴

³ Comments of Hon. F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, Antitrust Modernization Commission, July 15, 2004 Public Meeting, transcript p. 6, *available at* <http://www.amc.gov/pdf/meetings/transcript040715.pdf>.

⁴ R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, “Securing the Benefits of Global Competition,” Presented at Tokyo American Center, Tokyo, Japan (Sept. 10, 2004).

The potential for conflict arising from the divergence of antitrust standards governing both merger transactions and non-merger conduct imposes significant costs on business. Among the problems created are:

- uncertainty over the legal consequences of cross-border transactions or investments, thereby hindering business planning and skewing investment decisions by diminishing the anticipated competitive rewards of innovation;
- the inability of companies to rely on a remedy imposed by a competition authority in one country in a context where that remedy potentially affects its operations worldwide;
- the risk of inappropriate or inconsistent substantive outcomes and remedies, perhaps resulting from forum shopping by complainants seeking the jurisdiction that will impose the most burdensome requirements upon a competitor;
- higher transaction costs in the form of increased legal fees and other administrative burdens.

Although a problem for all companies active in the global marketplace, U.S. businesses are disproportionately exposed to these costs of divergent antitrust standards. The United States is the world's largest source of foreign direct investment. Many of the world's leading multinational corporations -- the firms most burdened by divergent antitrust standards -- are American. And the U.S. economy's comparative advantage in information-intensive sectors means that U.S. firms have more to lose than others from a regulatory climate that deters innovation.

Divergent standards also create costs for government and society generally:

- greater reluctance of business entities, faced with conflicting requirements or inconsistent remedies, to cooperate with antitrust agencies, to utilize leniency or amnesty programs, and to negotiate and agree to remedies;
- misallocation of scarce legal and administrative resources by enforcement agencies duplicating each other's work or trying to resolve conflicting approaches to the same issue;
- increased political tension that may reduce support for global trade and cooperative bilateral relations;

- economic inefficiency associated with companies' foregoing procompetitive conduct and transactions as a result of uncertainty.

Again, the United States has more to lose than most other countries. The U.S. antitrust enforcement agencies have been among the world's most successful in detecting and breaking up cartels, due in large part to the effectiveness of the Department of Justice's leniency program. And, over the last 15 years and more, the United States has invested more than any other country in developing cooperative relationships with foreign antitrust authorities, with a view to improving the effectiveness of international antitrust enforcement. Further growth in international cooperation in the antitrust sector will further advance these goals, whereas growing conflicts – the path we may now be on – will undercut objectives already achieved.

II. The Current Role of Comity in International Antitrust Enforcement

For much of the second half of the twentieth century, the United States was unique in the rigor of its antitrust laws, the vigor with which it enforced them, and the expansive definition of commerce that it considered within its jurisdiction. Indeed, U.S. attempts to apply its law to international conduct having effects on U.S. commerce provoked strenuous objections by key trading partners, some of which enacted blocking legislation designed to deter what they considered unjustified extraterritorial enforcement. Against this background, the changes in the international antitrust climate over the last 15 years or so represent a major advance from the U.S. perspective. In many cases based on the encouragement of U.S. authorities, it is increasingly the norm for foreign countries to have strong antitrust laws and active enforcement programs. Moreover, antitrust agencies around the world have made significant progress in reducing conflicts by increasing cooperation, information sharing, and networking. The concept of comity has played an important role in these efforts. As described below, however, the failure

to fully develop comity's potential as an effective conflict-avoidance mechanism risks allowing conflict between different antitrust authorities to reemerge in a new form.

For over 100 years, public international law has recognized the concept of comity as a means for resolving clashes between states resulting from a decision of one state that has effects in another. Traditional comity requires no change in a jurisdiction's domestic laws; rather, it relates to the degree of deference given by a domestic agency or tribunal to an act or decision of a foreign government. As the U.S. Supreme Court stated in 1895, comity 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."⁵

In more recent years, comity has also been invoked as a means of defusing international friction caused by the application of the antitrust laws of more than one country to the same conduct. In the 1970s, federal courts began invoking comity as a justification for declining to exercise jurisdiction over antitrust cases when a foreign state's interest in the case predominated over that of the United States.⁶ However, subsequent cases, in the U.S. and EU courts limiting the judicial application of comity dampened early hopes that this "jurisdictional rule of reason" might provide a widely-available mechanism to deal with conflicting claims of jurisdiction over anticompetitive conduct with international reach.⁷

⁵ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

⁶ *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

⁷ *See Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (limiting the application of a comity analysis to situations in which a defendant is subject to conflicting legal obligations under the laws of the states concerned); *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R.

(continued...)

The exercise of discretion based on principles of comity among the various national enforcement agencies has, in practice, been a much more important factor than judicial comity in improving the quantity and quality of international cooperation on antitrust issues over the last two decades. At the multilateral level, the 1995 Recommendation of the OECD Council, *Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade* (“OECD Recommendation”), was a significant milestone in encouraging antitrust authorities to work together. This internationally-agreed set of principles recognized “the need . . . 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 anticompetitive practices.” Comity principles are also reflected in bilateral cooperation agreements in which many jurisdictions have agreed to consider limiting their enforcement activities when foreign interests are involved. The United States played a pioneering role in this regard and currently has cooperation agreements with Canada, Germany, Australia, the European Union, Brazil, Israel, Japan, and Mexico. In addition, several of the United States’ Free Trade Agreements with other countries include provisions providing for consultation and cooperation between antitrust authorities.⁸

The OECD Recommendation and the various bilateral comity agreements distinguish between two different types of comity. First, negative comity, which the OECD Recommendation describes as the principle that a country should (i) notify other countries when its enforcement proceedings may have an effect on the other countries’ important interests, and (ii) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs

5193 (declining to consider a comity argument because defendant was not under contradictory obligations).

⁸ See, e.g., United States-Singapore Free Trade Agreement, art. 12., available at http://www.ustr.gov/Trade_Agreements/Section_Index.html.

without harming those interests. Provisions encouraging the parties' antitrust authorities to exercise this "negative comity" in respect of each other are an integral part of all the United States' bilateral cooperation agreements. In addition, however, many of these agreements also reflect a newer "positive comity" principle. Positive comity permits either party to ask the other party to take appropriate actions regarding anticompetitive behavior occurring in its territory that affects the important interests of the requesting party, where that behavior violates the competition laws and regulations of the host party.⁹

III. The Limited Effectiveness of Current Comity Arrangements

It is generally agreed that some elements of the United States' bilateral agreements have largely been a success. Antitrust authorities routinely notify each other of investigations, share information, and coordinate in conducting investigations. Not surprisingly, international cooperation between antitrust authorities has been particularly fruitful in those areas where the national interests of the respective parties are most clearly aligned. For example, as consensus has developed over the costs to society of hardcore collusive behavior, cooperation in the fight against international cartels has blossomed, leading to a series of notable enforcement successes in recent years.

Even in the promising area of cartel enforcement, however, much remains to be done to deliver the full potential of international cooperation. In particular, it is disappointing that some twelve years after the enactment of the International Antitrust Enforcement Assistance Act of 1994, the United States has been able to take advantage of the authorization provided by

⁹ I continue to be skeptical about the long-term value of the positive comity concept. *See Positive Comity - Is It a Positive Step?*, 1992 PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 79 (1993). My focus in this paper is on the traditional, or "negative," form of comity.

the Act to conclude only one agreement -- with Australia -- facilitating the sharing of confidential information. The announcement by U.S. and EU leaders, at their summit in June 2005, that their respective antitrust authorities would “explore ways to allow them to exchange certain confidential information, including with respect to international cartels,” is long overdue. Hopefully, the agencies concerned will follow up quickly with a meaningful agreement and, just as important, use its provisions regularly and to good effect.

Moreover, international cooperation has failed to deliver commensurate results in areas of antitrust enforcement where national interests are not so convergent and may, in some cases, conflict. This is the case, for example, with merger control, as illustrated by the very public disagreements between the EU and U.S. authorities over the Boeing/McDonnell Douglas and GE/Honeywell mergers. Indeed, given the high stakes involved in large-scale international mergers like these, differences in the approaches taken by the respective antitrust authorities can cause diplomatic friction, as well as imposing costs on business.¹⁰ As emerging economies such as Brazil, China, and India become more active in the field of antitrust regulation, it is easy to envisage these types of disputes over proposed mergers proliferating in the future.

Recent advances in international cooperation have similarly failed to prevent inconsistent treatment of single-firm conduct by antitrust authorities around the world. Microsoft is a leading example of the limited influence of comity in this area of antitrust law, having been subjected to three different sets of remedies for essentially the same allegedly anticompetitive conduct by the United States, EU and Korea in succession. The Department of

¹⁰ See, e.g., Steven Pearlstein & Anne Swardson, *U.S. Gets Tough to Ensure Boeing, McDonnell Merger; Retaliation Plan in Works as Europe Threatens*, WASH. POST, July 17, 1997, at C1.

Justice's public statement last month criticizing the decision by Korea's Fair Trade Commission as going "beyond what is necessary or appropriate to protect consumers" is indicative of the apparent ineffectiveness of existing cooperation arrangements where single-firm conduct is at issue. Against this background, it is disappointing that, although both the EU and United States are currently reviewing the legal rules they apply to single-firm conduct, neither set of antitrust authorities has identified the need for international consistency in enforcement of those rules as an issue requiring attention. Indeed, to the extent that the Commission's draft guidelines on the application of Article 82 give general application to one of the more controversial remedies imposed on Microsoft by the EC -- the requirement to share, and ultimately surrender control over subsequent distribution of, trade secrets related to proprietary protocol technology -- they risk sowing the seeds of further discord.¹¹ There is thus legitimate concern that Microsoft will become the first in a long line of cases in which inconsistent regulatory requirements undermine the ability of successful multinational companies -- many of them American -- to innovate for the benefit of a world market.

It is in areas like merger control and single-firm conduct, where real or perceived national interests do not always coincide, that comity between enforcement agencies is most needed and has the most to offer. Yet, as these recent examples of discord among antitrust authorities show, the comity provisions of the bilateral cooperation agreements, and the more general application of traditional comity principles, have proved less successful in practice than other methods of cooperation. It is particularly disheartening that the EU and United States have

¹¹ European Commission, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Section 9.2.3 (Refusal to Supply Information Needed for Interoperability) (Dec. 2005).

still not worked out a methodology for resolving differences of approach over individual cases. When these two leading, long-established antitrust authorities have open and public disputes, other countries -- often with less mature antitrust regimes -- will feel little constraint in pursuing their own divergent remedies, designed perhaps to serve parochial or protectionist interests rather than the objective of maintaining an open and competitive global market. The United States and EU must set a strong example by respecting the principle of comity, for otherwise companies that operate multinationally will find themselves increasingly subjected to conflicting and constraining national regulations, sometimes posing as antitrust enforcement but in fact serving very different objectives.

The belief that comity principles can be strengthened in the field of antitrust is supported by the cooperative measures that nations have adopted in other regulatory fields. By comparison to at least some other transnational settings, the comity mechanisms reflected in the OECD Council Recommendation and embodied in the various bilateral antitrust agreements appear ripe for further development. It would be unwise to assume that methods of cooperation that have succeeded in a different regulatory setting can simply be transplanted to the antitrust environment. However, other areas of government activity provide examples of enhanced comity arrangements (albeit phrased in different terminology) from which the international antitrust enforcement community could potentially learn. For example:

- Cross-border insolvencies. The Model Law on Cross-Border Insolvency, adopted by UNCITRAL in 1997 and enacted into U.S. law in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, incorporates a number of enhanced comity mechanisms. These include a requirement, when there are multiple recognized foreign insolvency proceedings and no bankruptcy proceedings pending in the United States, that U.S. courts should grant relief consistent with the recognized proceedings occurring in the country where the debtor's center of interest is located.
- Air transport. Under the Model Open Skies Agreement, a state party concerned about the pricing practices of an airline of another state party must request consultation with

the other; the two parties must cooperate to secure information relevant for resolving the price issue, and; if the parties reach agreement on the appropriate resolution, each must use its best efforts to implement it.

- Drug safety regulation. Under a September 2003 confidentiality agreement between FDA and its EU counterpart, the European Agency for the Evaluation of Medicinal Products (EMA), the two agencies adopted an implementation plan in 2004 providing for enhanced information exchange and other regulatory cooperation. As part of this plan, the agencies launched a pilot program for parallel scientific advice which permits a drug sponsor to request parallel advice meetings at which it can learn the requirements and viewpoints of both agencies on important drugs during the testing and approval process.
- Conformity testing. In 1997, the United States and the European Union concluded an Agreement on Mutual Recognition, specifying the conditions under which each party would accept the results of tests conducted by the other party to determine whether specified goods complied with relevant legislative, regulatory and administrative requirements. As initially negotiated, the agreement's provisions applied to imports from one party to the other of such products as telecommunication equipment, medical devices and recreational craft.

These examples are especially instructive in that they address issues associated with divergent regulation that exist equally in the field of international antitrust enforcement: the need to avoid conflicting remedies or, better still, fashion joint remedies or harmonized regulatory regimes; the desirability of consultation before action is taken by one jurisdiction against a company based in another jurisdiction and active in many more, and; the advantages to companies and enforcement agencies in opening a dialogue early on.

Given the magnitude of the existing burden imposed on business and society by conflicts between antitrust jurisdictions, and the likelihood that this burden will increase as the globalization of commerce continues, the antitrust enforcement community should be considering now what more needs to be done to make comity an everyday reality. For the reasons described above, the United States has a strong interest in advancing this objective and the capacity to play a decisive role in generating change.

IV. Proposed Steps Towards Enhanced Comity

Comity principles can and should be applied at each stage of the work of antitrust authorities dealing with transactions or other business conduct with cross-border implications, from initiation of a merger review or investigation through creation and enforcement of potential remedies for competition law compliance. To this end, the United States should reactivate the debate over comity with other key antitrust jurisdictions. The following ideas could serve as options for consideration in this respect:

- *Revise existing cooperation agreements to recognize explicitly the importance of facilitating global trade, investment, and consumer welfare.* The United States' various bilateral cooperation agreements recognize that effective enforcement of antitrust laws is important to the efficient operation of markets and to economic welfare. The agreements do not acknowledge, however, that trade, investment and welfare can be impeded by divergent government competition policies and inconsistent antitrust remedies. The existing agreements could be amended to make this point explicitly and to call for this cost to be taken into account as an important feature of comity analysis.
- *Review the application of comity in other regulatory and transnational settings.* As indicated above, comity has been embraced and used much more widely in other regulatory and administrative settings. The U.S. antitrust authorities could review a number of those examples to develop "best practices" and tools that, with the cooperation of counterpart authorities in other countries, might be adapted for antitrust policy.
- *Agreement to a presumptive deferral of a remedy where the deferring party's interest is slight relative to that of the other party.* The United States could agree with its trading partners that when a competition authority in a jurisdiction with a more substantial nexus to the transaction or conduct at issue orders a remedy, there will be a strong presumption that the other jurisdiction's competition authority will defer to its counterpart.
- *Agreement to avoid inconsistent remedies.* Recognizing that particular harm may ensue if companies are subjected to inconsistent or conflicting remedies in different parts of the world, the United States could agree with its trading partners that, to the extent consistent with their respective antitrust laws, neither party will impose remedies inconsistent with those imposed by the other. A variation would be for the United States and its partners to agree that when investigating a transaction or conduct previously examined by the other party's antitrust authority, an antitrust authority should not impose divergent remedies without prior consultation with its counterpart.

- *Agreement to fashion remedies on a joint basis.* If a competent authority is unwilling to defer completely based on comity principles, then there still might be an opportunity to formalize an alternative procedure in which, at a minimum, the antitrust authorities jointly fashion an appropriate remedy. The parallel investigations by the United States and EU of General Electric's purchase of Instrumentarium in 2003 provide a good example of the principle involved. In that case, the U.S. and EU antitrust authorities made a clear effort when drafting their respective decrees not to create inconsistent obligations, for example by using common definitions, drafting complementary common trustee provisions and consulting during the divestiture process.
- *Consultation at request of affected entities.* The United States could agree with trading partners that they will consult with each other at the request of commercial entities that make a credible prima facie showing that they are potentially subject to divergent or inconsistent rules or remedies that may impair their efficient operations in the global marketplace.
- *Benchmarking reviews in instances where both jurisdictions impose remedies.* In any instance where the U.S. and foreign antitrust authorities are unable to reach agreement on the appropriate treatment of a merger or other business conduct under investigation, at a minimum they should agree to conduct ongoing benchmarking reviews of the matter and of the impact of the parties' divergent decrees. The purpose of the reviews would be for the authorities to exchange information and views, with an eye toward ensuring that future remedies – in that proceeding or others – will be framed in a manner least likely to create conflicts or business inefficiencies.

Each of these features could be applied to the United States' antitrust enforcement relationship with each of the countries with which the United States has a bilateral cooperation agreement. Given the significance of transatlantic trade and investment flows, the importance of the EU and United States setting an example for other nations with less developed antitrust regimes, and the fact that an EU/U.S. institutional framework already exists in which these comity proposals could be discussed, there would be particular value in the United States' working closely with the European Union to enhance the comity framework that governs their cooperation efforts. The EU and the United States have been leaders in shaping antitrust policy and instrumental in putting it on the global agenda. Through their Initiative to Enhance Transatlantic Economic Integration and Growth, both jurisdictions are aggressively

promoting EU-U.S. regulatory cooperation, including in the field of competition policy and enforcement. An “Enhanced Comity” initiative would provide a targeted, practical, and forward-leaning undertaking likely to yield tangible benefits for business, consumers, and regulatory authorities in a realistic timeframe. I urge this Commission to support such an approach.

V. Clarifying the Extraterritorial Reach of U.S. Antitrust Law Under the Foreign Trade Antitrust Improvements Act

Against the background of the preceding discussion of enhanced comity, I would also like to comment briefly on the Commission’s question as to whether the FTAIA should be amended to clarify the circumstances in which the Sherman Act and the FTC Act apply to extraterritorial anticompetitive conduct. As noted above, the relatively cooperative relationships that now exist between U.S. antitrust authorities and their foreign counterparts are in marked contrast to the hostility with which many of our trading partners previously responded to U.S. enforcement action against extraterritorial anticompetitive conduct with effects on U.S. commerce. With enforcement agencies now in the habit of working together on investigations of international cartels, the risk that U.S. public actions targeting extraterritorial collusion will prompt adverse reactions from third countries has to some extent diminished. However, as the proliferation of amicus briefs by foreign governments in the *Empagran* case showed, private actions relating to extraterritorial conduct still have considerable potential to generate jurisdictional conflict with our trading partners. Expansive interpretations of the extraterritorial reach of U.S. antitrust law under the FTAIA fuel such conflict and may, in particular cases, be at odds with comity principles encouraging deference to jurisdictions with a stronger interest in the case at hand.

Although the Supreme Court's decision in *Empagran*¹² left unresolved some important interpretive questions with regard to the FTAIA, I do not believe that further legislation is the best way to resolve continuing uncertainties over the extraterritorial reach of U.S. antitrust law. As the decision by the D.C. Court of Appeals on remand from *Empagran* has shown,¹³ the courts – through the traditional common-law approach to the development of antitrust doctrine under the broad congressional framework provided by the Sherman Act – are capable of dealing with the open FTAIA issues in a sensible manner. And, as the FTAIA experience itself shows, legislative initiatives do not always solve the problems that they set out to address. Allowing the outstanding questions to be addressed in the course of continuing judicial development is, in my view, likely to be more effective, as well as being more consistent with the dominant role of the common law in shaping our antitrust jurisprudence, than efforts at further legislation.

Submitted: January 30, 2006

¹² *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

¹³ *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 417 F.3d 1207 (D.C. Cir. 2005).