

Testimony of ELEANOR M. FOX

Walter J. Derenberg Professor of Trade Regulation
New York University School of Law

Before the Antitrust Modernization Commission

Hearing on International Issues
Washington, D.C.
February 15, 2006

as revised
March 2, 2006

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INTERNATIONAL ISSUES

EXECUTIVE SUMMARY

I am grateful for this opportunity to testify before the Antitrust Modernization Commission.

The four main points of my testimony are:

1. Coordination and cooperation. The U.S. Department of Justice and Federal Trade Commission are admirably rising to the challenge of coordinating efforts, especially on international mergers and cartels. They are constantly pushing forward the state of the art on cooperation and assistance. More can be done, and I present for consideration of the Commission several proposals, including proposals of ICPAC that have not yet been implemented. Among other things, I recommend mutual recognition of pre-merger filings and an agreed path to resolve systems clashes.
2. Convergence and comity. Convergence, in my view, is not a goal in its own right, but it is helpful when it happens, and it is occurring through much useful dialogue. Keeping open the channels for diversity and change also is valuable. Comity, in my view, is not a helpful term; it needs to be unbundled. A better challenge than seeking “more comity” is deepening joint efforts to facilitate competitive markets and eliminate unnecessary antitrust regulation, trying roughly to approximate global welfare in the case of global transactions and restraints.
3. The Foreign Trade Antitrust Improvements Act of 1982. Paragraph 2 of the FTAIA has been wrongly construed as a standing provision governing foreign-buying plaintiffs. Evolving jurisprudence of the lower courts adopts a pseudo-proximate cause analysis to flesh out standing. I suggest a more rational test for causally connecting victims who buy abroad with harm to the U.S. market: “Plaintiffs must show that their harm has been proximately caused by the illegal acts that harm the U.S. market and is inextricably bound up with the affected U.S. commerce.”
4. Big picture issues. Certain daunting but critical big issues, such as hard core export cartels (“the hazardous wastes of antitrust”), should be kept on the radar screen.

TESTIMONY

I. A Perspective: Where we have come from

Half a century ago, economic divergence of nations and therefore the potential for real antitrust conflict was extreme. There were only a handful of antitrust jurisdictions in the world. The biggest challenge to our competition system was the fact that most of the world accepted cartels, not competition, as the rule of trade. When the United States sought to protect itself from off-shore cartels, our trading partners invoked international law and comity to argue that cartels legal where formed should be insulated from challenge abroad.

Famously, in *Alcoa*,¹ the United States adopted the effects doctrine. Just as famously, from 1989 forward, most the rest of the world embraced markets, and most antitrust jurisdictions adopted some form of the effects test.² They adopted the effects test to protect themselves. Were there not effects jurisdiction, the world would surely need, and already have, an international antitrust regime.

From the time of the fall of the Berlin wall in 1989, the U.S. antitrust agencies among others touted the importance of antitrust law in free market economies. Today, approximately 100 nations have antitrust (or “competition”) laws.

Predictably, there would be some costs of success. There would be some procedural and substantive differences among the antitrust laws of the antitrust family of nations. In a globalizing world, there would be overlaps of jurisdiction and conflicts of law. Some of those differences would be a matter of principle, related to capacity and to stage of economic

¹ United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

² Ahlström Osakeyhtiö & Ors v. Commission (Wood Pulp), [1988] ECR 5193.

development. Some differences would be related to different impacts of the same transaction in different markets. Some differences would derive simply from lack of knowledge or perspective, or would reflect unimportant details, emerging from the fact that a number of nations reinventing the same wheel are bound to use different units of measure.

In my view, the U.S. antitrust agencies and the other mature agencies of the world have risen admirably to the challenge. They collaborate intensely with jurisdictions that are vetting the same transactions and pursuing the same cartels. They provide transparency and cross fertilization. The U.S. and the EU authorities have particularly close relations, backed up by a document detailing best practices.

Merger collaborations have had many successes. One well known example is the cooperation between the United States Department of Justice and the European Commission in the case of the merger of World Com and MCI. Enabled by confidentiality waivers, the agencies coordinated requests for information, jointly met with the parties, and concluded settlements that met the concerns on both sides.³

In this new era of cooperation, both the OECD and the International Competition Network (ICN) play important roles. For many years, the OECD and its forums have advanced the state of knowledge and cooperation. ICN is the new – and successful – experiment. Formed in 2001 as a network among the world’s competition agencies to explore avenues for convergence and assistance,⁴ ICN is a ground-up network that focuses on the low-hanging fruit; it pursues tasks that are capable of achievement and promise to make a difference. Initial efforts were devoted to harmonizing details of practice that are not matters of principle, where

³ Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (ICPAC Report) (2000), p. 66.

⁴ An international competition network (then named The Global Competition Initiative) was one of the principal recommendations of the ICPAC Report (2000). *See* ICPAC Report, Chapter 6, Preparing for the Future, pp. 281-287, 300-301.

divergence imposes significant and unnecessary costs; e.g., the earliest date on which pre-merger filings can be submitted, and the required nexus of the merger to the jurisdiction seeking pre-merger filings. Other early and important efforts included information sharing; e.g., providing web-linked information whereby each nation's merger filing requirements are organized into a common template and posted in this common form by each jurisdiction, allowing ease of comparison. Later efforts and on-going projects are more ambitious. They include substantive standards for merger control. Projects have been launched to assist developing countries, including a pilot project whereby volunteering agencies (including the DOJ and FTC) agree to be "on call" to answer questions and provide information needed by newer agencies. Our Department of Justice and Federal Trade Commission have been leading actors, and sometimes the leading actor, in virtually all of these enterprises.

In terms of cooperation and the formation of shared norms, there is more to be done; there is always more to be done. I provide a few ideas in Part VI below. First, I reflect on convergence and comity; I comment on the jurisdictional status quo under the Foreign Trade Antitrust Improvements Act of 1982; and I note important big issues that cannot be solved tomorrow but should be accounted for prominently in the antitrust vision.

II. Substantive convergence

Substantive convergence of the antitrust laws of the world is, in my view, not an independent goal. It is good when it happens through the enlightened choices of the jurisdictions, for convergent law can produce more business certainty and it saves transactions costs. But diversity has its benefits, and keeping open the channels for experimentation and adjustment serves important ends, as witnessed by the American exceptionalism in the 1940s and 1950s

holding that cartels were evil and that extraterritoriality was a necessary tool to catch them. Even within the United States, antitrust diversity thrives. Third Circuit law and D.C. Circuit law are not the same. The Clinton Administration's view of efficient and appropriate relief in the *Microsoft* case and the Bush Administration's view of efficient and appropriate relief in the *Microsoft* case differed significantly. Not only does diversity have positive values; acknowledgment of diversity is a concession to reality.

For transactions that are truly global, there is a case to be made for a single rule of law or framework for law, adopted multilaterally; all other things being equal. There is a credible argument that one standard should govern global mergers. The United States has strongly opposed this idea. One of its arguments, among others, is that different nations have different standards; there is not one standard fit for or accepted by all.⁵ If we are not prepared to adopt a single standard by multilateral efforts, then there is reason to question both the efficacy and legitimacy of a single standard through an imperative of "convergence."

Sunlight and engaged discussion are invaluable. They can lead to convergence, but they may not. They may lead to better understanding of and respect for differences. In that vein, the European Commission staff Discussion Paper on Abuse of Dominance (Article 82 of the EC Treaty) is an important contribution not only within Europe but to the world conversation. The Discussion Paper reflects the influence of economics on European Commission analysis. It evidences much convergence of EU with U.S. law. On certain issues, however, it reflects a European foundational perspective that is different from the philosophic perspective enunciated

⁵ See Joel Klein, No Monopoly on Antitrust, *Financial Times*, Feb. 13, 1998, p. 20.

by Justice Scalia in *Verizon Communications v. Trinko*.⁶ This is not unfortunate; it is illuminating.

III. Comity

Comity is a concept of reciprocal deference. It holds that one nation should defer to the law and rules (or dispute disposition) of another because, and where, the other has a greater interest; a greater claim of right. It is a concept founded on process, not outcome. It is irrelevant that the outcome may not be the preferred one of the deferring country. Indeed, that is the point.

Comity is an ambiguous concept. Invoking the word does not reveal its practical meaning. Whether one nation has a greater claim of right than another is usually not obvious in cases in which duties of deference are likely to be asserted.⁷

Comity is a horizontal, nation-to-nation concept, seeking – by reciprocal deference – to maximize the joint interests of the affected nations or to split their differences through repeated interactions. It may play into the hand of nationalism and the nurturing of national champions. If, in the *Hartford Fire* case,⁸ the U.S. Court had refused to exercise jurisdiction over the claims against the Lloyds of London reinsurance defendants on grounds of comity, which it did not, it

⁶ 540 U.S. 398 (2004). These issues include duties to deal, software interoperability, and bundling.

⁷ See *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

Thus, invocation of “comity” does not answer the following questions: Should the United States have deferred to the European Community when it examined conduct by IBM-Europe that (the Europeans thought) was anticompetitive and harmed Europeans? Or should the European Commission have deferred to the United States when it withdrew the similar U.S. complaint against IBM-US at an advanced stage in the litigation when Administrations had changed and observers were predicting a U.S. Justice Department victory? In *Microsoft*, should Europe and Korea have deferred to the United States even though they determined that conduct subsequent to the subject of the U.S. *Microsoft* case was anticompetitive and harmful to their citizens? Or should the United States defer to the decisions by other jurisdictions?

⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

would have been saying to the UK and the alleged co-conspirator boycotters: Go ahead and boycott our companies (the U.S. primary insurers); it is okay for you to do so because your law allows it and indeed the UK law affirmatively recognizes your autonomy by handing over the reins of (self) regulation to the industry.⁹ This would not have been a wise move, nor was it an imperative one, in view of the now recognized shared interest of nations in norms of competition.

“Comity” is often a “throw away” word. It sounds good. Through all the years from *Timberlane*¹⁰ – the parent of the U.S. antitrust comity “doctrine” – to the present,¹¹ in cases in which the United States had a real antitrust interest at stake, not one U.S. court ever found that the interest of another nation outweighed the interest of the United States.¹²

In view of the enormous and helpful convergence of the law and policy of nations towards common competition norms, the important question is not: When should we defer to the inconsistent interests of other nations?, but: How can the antitrust jurisdictions of the world work together to maximize their shared interest in competitive markets, to the benefit of consumers and robust or potentially robust business?¹³ Our markets are global but we have only national law. This means that, in the absence of law that is as broad as the affected market,

⁹ See E. Fox, National Law, Global Markets, and *Hartford*: Eyes Wide Shut, 68 Antitrust L.J. 73 (2000).

¹⁰ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

¹¹ *Hartford Fire*, *supra* note 7, hinted at the unhelpfulness if not irrelevance of comity where offshore action is intended to affect and significantly affects the regulating nation. *But see* *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd. (Empagran)*, 542 U.S. 155 (2004), using principles of comity in the construction of a statute.

¹² See E. Fox, Extraterritoriality, Antitrust, and the New Restatement: Is Reasonableness the Answer?, 19 NYU J. Int'l L. & Pol. 565 (1987).

The antitrust agencies are better placed than courts to take account of (non-nationalistic) interests of other nations, as well as to take account of other agencies' or courts' analysis of the same issues, and they try to do so. See E. Fox, The European Court's Judgment in *GE/Honeywell* – Not a Poster Child for Comity or Convergence, ANTITRUST (forthcoming, Spring 2006).

¹³ This effort includes protecting against overregulatory outcomes, while giving room to competing perspectives. Overregulation also harms efficiency and consumers.

we must stretch our minds to mimic a law that would span the whole market. We must contemplate maximizing world welfare.¹⁴ We should devise methodologies that take account of antitrust harms beyond any one nation's borders. The national law governing jurisdiction and remedies should be broadened so that, for example, national authorities in a jurisdiction with the greatest contacts or the largest consumer market can provide a forum in which smaller affected nations can be heard, can take account of outside antitrust harms, and can afford relief that covers those harms. See Point VI *infra*.

In sum, the comity concept is horizontal – nation-to-nation. The better paradigm is overarching or global. National antitrust should operate in the shadow of the true global market.

IV. Extraterritoriality and the limits of U.S. jurisdiction

The Foreign Trade Antitrust Improvements Act of 1982 (the FTAIA) was meant to clarify that U.S. courts do not have subject matter jurisdiction over acts that do not, with sufficient directness, hurt U.S. competition. In cases in which subject matter jurisdiction exists, the law was not meant to decree which plaintiffs can sue.¹⁵

In *Empagran*¹⁶ the Supreme Court interpreted the FTAIA. *Empagran* dealt with the worldwide vitamins cartel. The Supreme Court rightly held that, if a foreign market is independent from the U.S. market, foreign plaintiffs who buy price-fixed goods in the foreign market cannot invoke the U.S. antitrust laws. This is a correct holding because there is no subject matter jurisdiction over a foreign cartel that is independent of the U.S. market. But, to

¹⁴ See E. Fox and J. Ordover, The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action, 19 World Competition L. & Econ. Rev. 5 (December 1995).

¹⁵ See E. Fox, Extraterritoriality in the Age of Globalization; Conflict and Comity in the Age of *Empagran* (“*Empagran*”), Antitrust Report 3 (Issue 4, 2005).

¹⁶ *Supra* note 11.

reach its conclusion, the Supreme Court made a strange and strained construction of the FTAIA. It held that plaintiffs who buy abroad have no cause of action unless the challenged conduct's *domestic effect* "gives rise" to their claim.¹⁷

This language, if taken literally, is a handicap going forward and would lead to under-deterrence as well as unfairness. Plaintiffs who are directly, substantially, and foreseeably hurt by anticompetitive conduct centered in the United States should not have to show that their harm derived from the U.S. *effect*. Rather, they should be required to show that their harm derived from the illegal *conduct*, and proximately so, and perhaps that their purchases were sufficiently linked to the United States. Thus, Wildenstein, a New York art gallery and victim of the auction house price-fixing conspiracy, should not have to forego the overcharge on paintings for which it bid at Christie's London auction house; while the *Empagran* plaintiffs' much-less-connected lawsuit could be screened out, as it was. (See below.)

The Antitrust Modernization Commission has asked whether the FTAIA should be revised. There is a case for repeal of the FTAIA. A substitute provision could be: "The Sherman and FTC Acts shall not apply to harms not within the United States and not on U.S. territory."¹⁸ This could usefully be accompanied by repeal of the Webb-Pomerene Act and of the Export Trading Certificate of Review Act, both of which are superfluous. Formulating the required connection for standing should be, as intended, left to the case law.

¹⁷ Paragraph (2) of the FTAIA states that the relevant effect on U.S. domestic or export commerce must "give[] rise to a claim under the provisions of sections 1 to 7 of this title [the Sherman Act], other than this section." Congress inserted paragraph (2) to make it clear that the FTAIA did not create a cause of action; the substantive cause of action must be found elsewhere. See E. Fox, *Empagran*, supra note 11.

¹⁸ But see my suggestion at *V. infra*. Hard core cartels should be prohibited wherever their effects are targeted. Eventually, Congress should amend the Sherman Act to state: "Notwithstanding [the FTAIA], all hard core cartels are prohibited."

In the aftermath of *Empagran*, case law on standing (which the Supreme Court has elevated to a matter of jurisdiction) is developing. The developments are not satisfactory. On remand, the circuit court in *Empagran* ruled that but-for harm is not sufficient (a correct conclusion), and suggested, although with a reservation, that plaintiffs' harm must be proximately caused *by the U.S. domestic effect*.¹⁹ The problem is: This latter limitation screens out everything in cases in which purchases are not made in the United States. Harm is never caused proximately from the U.S. *effect*. Even the most foreseeable antitrust injury tightly linked with the U.S. harm would not be caused proximately by the *effect*, domestic or otherwise. It would be proximately caused by the *conduct* that the Sherman Act proscribes. Proximate cause is a good test; the illegal conduct must proximately cause the harm. This means that plaintiffs must suffer by reason of that which made the conduct illegal (thus, they must suffer antitrust injury), and their harm must be sufficiently directly related to the acts that trigger the causal chain – the *illegal acts*.²⁰ Another screen could be added where the U.S. market is only a piece of a global conspiracy; e.g., that plaintiffs' harm is sufficiently linked with the United States. But the requirement that the harm must be proximately *caused* by the U.S. *effects* (i.e., directly caused by the price rise in the United States) is simply a way of slamming a steel door – to the detriment not only of compensatory justice but also to deterrence of cartels that hurt Americans,

¹⁹ *Empagran S.A. v. Hoffmann-La Roche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, — U.S. — (Jan. 9, 2006).

²⁰ See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (NY 1928).

The opinions in *Palsgraf*, including the dissenting opinion of Judge Andrews, are credited with pioneering the doctrine of proximate cause. The doctrine is intended to test whether defendant's *wrongful acts* are tightly enough connected with plaintiff's harm that it is just and legitimate to conclude that defendant's wrongful acts legally caused the harm and therefore that defendant bears legal responsibility. (It must also be the case that defendant's wrongful acts caused plaintiff's harm in fact; a conclusion typically tested by the "but-for" test.)

The line of proximate causation always runs from the offending acts to plaintiff's harm. It would not make any sense to require that the line run from harm to a target group to harm to a plaintiff; yet this is what the *Empagran* circuit court did, and other courts are following its lead in this pseudo-proximate cause analysis.

since other nations' private action remedies are exceedingly weak, and global cartels' profits from sales outside of America may overwhelm losses from damages on sales within.²¹

The case law is still in the process of development. Language in *Empagran* of both the Supreme Court and the Court of Appeals of the D.C. Circuit gives some hope for a less rigid jurisdictional rule on standing. In *Empagran*, the U.S. Supreme Court distinguished a case involving U.S. commerce with Italy in which jurisdiction was found on grounds that “the foreign injury was ‘*inextricably bound up with . . . domestic restraints of trade*’”²² On remand in *Empagran*, the Court of Appeals dismissed the complaint after finding that the plaintiffs had preserved their claim that the foreign situs of purchase of the price-fixed vitamins was linked to the U.S. market but that the plaintiffs' harm was not proximately caused by the U.S. effect of the price fixing. It added: “Nor do the appellants otherwise identify the kind of *direct tie to U.S. commerce* found in the cited cases.”²³ If the Supreme Court dictum and the last quoted circuit court language suggest an alternative, it is still possible that courts will gravitate towards a sound test. A sound test would be: “Plaintiffs must show that their harm has been proximately caused by the illegal acts that harm the U.S. market and is inextricably bound up with the affected U.S. commerce.” If courts continue to require that the U.S. *effect* proximately causes plaintiffs' harm, legislative amendment may be necessary.

²¹ In their amicus brief in *Empagran*, the U.S. Justice Department and FTC expressed the fear that a higher treble damage burden would deter would-be leniency applicants from coming forward with information about cartels. They speculated that the gains in deterrence from lower damages (more leniency applications) were greater than the gains from greater damages.

This raises a much debated and apparently little researched empirical question. In any event, the United States has since enacted a law that forgives treble damages to a successful and fully cooperating leniency applicant. Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The AMC could helpfully support empirical research on this issue, taking into account the 2004 Act as well as penalties and damages likely to be imposed or awarded by other jurisdictions.

²² 542 U.S. at 171-72, citing and quoting from *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*, 1977 WL 1353 (S.D.N.Y. 1977) (emphasis added; other emphasis deleted).

²³ 417 F.3d at 1271 (emphasis added).

V. Big issues not to be forgotten

Antitrust has many carve-outs. When we advise emerging antitrust jurisdictions on their legislation, we always call attention to coverage of the law. We often suggest minimizing exemptions, and sometimes suggest that the antitrust agency should have a role to play in identifying or even checking undue and unnecessary government restraints on trade and competition.

There are at least three big problem-categories in the areas of government restraints and limits to jurisdiction. If the problems are solved, the gains would overwhelm any gains from the important subject of improved inter-jurisdictional cooperation. These are: antidumping and subsidies, OPEC and other state-sponsored cartels, and export cartels.

These problems are not solvable tomorrow.²⁴ The politics are daunting. In the case of export cartels, for example, it is often said in developed countries: This is not our problem. Let the importing country sue. But, especially if the importing country is a developing country or has an immature or politically unsupported antitrust agency, it cannot.

Despite the uphill road, progress on quite similar problems has been made in other fields. I would cite the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.²⁵ The Basel Convention provides that any state that is party to the convention may prohibit import of hazardous wastes. The other parties to the agreement are then required to prohibit the export of hazardous wastes to the prohibiting country.

²⁴ In the sector of telecommunications, in the case of state-sponsored cartels and neglect of a state to take measures against private anticompetitive restraints that block trade, WTO nations have adopted a discipline. See E. Fox, *The WTO's First Antitrust Case – Mexican Telecoms: A Sleeping Victory for Trade and Competition*, J. Int'l Econ. L. (forthcoming).

²⁵ March 22, 1989, 1673 U.N.T.S. 125.

Export cartels are the hazardous wastes of exporting countries. Many countries prohibit their “import.” Cartels do not kill, but they rob; they milk. Cartels are identified around the world as the most noxious of antitrust crimes. Together with anti-dumping duties and subsidies, export cartels stunt the development of countries that are trying so hard to develop. If world competition is our problem (which is the whole thrust of our efforts at cooperation and coordination), export cartels are our problem; they are the underbelly of global competition. Can we legitimately embrace jurisdiction when our ox is gored but disclaim jurisdiction when our ox is goring?

Export cartel exceptions, state-sponsored cartels, anti-dumping duties, and subsidies will not be abolished tomorrow; but they should not be forgotten. They should appear on every progressive antitrust agenda as serious problems that undermine the effort to achieve a more competitive world. With these challenges in our sights,²⁶ incremental progress can be made. In the absence of a prohibition of export cartels, at least we should adopt law to enable us to aid developing and other countries in the detection of and discovery regarding export cartels that emanate from our shores.

VI. A few suggestions on deepened cooperation

The ICPAC Report makes many recommendations on methodologies to enhance cooperation and eliminate unnecessary conflict in the case of international mergers and international cartels. I refer the Commission in particular to Chapter 2 (Mergers: Facilitating substantive convergence and minimizing conflict), Chapter 4 (Cartels: Interagency cooperation), and Chapter 5, third subsection (Positive comity).

²⁶ See note 18 *supra*.

ICPAC took a cosmopolitan approach. It recommended, among other things, expanding bilateral cooperation, including cooperation with newer competition systems,²⁷ and it recommended including on a discussion agenda multilateralization of inter-jurisdictional cooperation.²⁸

ICPAC emphasized multi-jurisdictional work-sharing in merger review:

“The Advisory Committee views the creation of a nearly seamless multijurisdictional merger review system as the ultimate goal of all of these efforts toward expanded cooperation and coordination.”²⁹

Cooperation at the merger remedy stage was singled out for its importance. ICPAC suggested:

In some cases it may be feasible to have only *one jurisdiction negotiate remedies with the merging parties that will address the concerns of both that jurisdiction and other interested jurisdictions*. In other words, the reviewing jurisdictions would identify the remedies necessary to address their competitive concerns, and the jurisdiction best positioned to negotiate and obtain the desired remedies would do so. An approach of this kind, for example, was successfully employed by the United States and the EU in the Halliburton/Dresser transaction. There, rather than negotiating separate undertakings

with the merging parties, the EC relied on the provisions of a U.S. consent decree to satisfy its concerns regarding a perceived global problem in drilling fluids.³⁰

ICPAC also underlined the importance of work-sharing at the review state. It said:

In appropriate cases, it may be beneficial to limit the number of jurisdictions conducting independent second-stage reviews of a proposed transaction. Where the concerns of one country are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for the first company to refrain from independent investigation.

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²⁷ ICPAC Report, p. 200.

²⁸ *Id.*, p. 284.

²⁹ *Id.*, p. 76.

³⁰ *Id.*, p. 77, noting use of this approach also in Federal Mogul/T&N.

One way to safeguard against the possibility that the proceeding agency may reach a different result on the merits or a remedy different from the one the other jurisdictions might have reached, while at the same time gaining efficiency in the process and other potential benefits is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction could coordinate the investigation of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions.³¹

ICPAC considered yet more advanced work-sharing as a vision for the future. It described this as follows:

The Advisory Committee also considered whether an even higher level of work sharing might be possible after more procedural and substantive convergence among merger review regimes has occurred. At this advanced level of work sharing, the coordinating agency would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would endeavor to evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger's costs and benefits to competition, not only the net effects within its borders. This approach arguably is superior to an approach in which each jurisdiction analyzes the effects of a proposed transaction within its own borders and ignores the harms or the benefits that the transaction may generate elsewhere. Multimarket assessment would position the coordinating jurisdiction to account for what had previously been viewed as externalities, thereby enabling it to assess the net effects of the proposed transaction (under a neutral welfare standard) on a global scale. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.³²

For my own part, as a member of ICPAC, I suggested two further initiatives; one to put a check on overregulation, and one to provide a path to resolve system clashes. I quote below from the relevant portion of my Separate Statement.³³

³¹ *Id.*, pp. 78, 80 (footnote omitted). The Report continues:

Under this advanced work-sharing arrangement, the coordinating agency would perform a centralized information gathering function following initial notification by the merging parties to all reviewing agencies. The coordinating agency would then assess the competitive effects of the proposed transaction in all relevant product and geographic markets. Each interested jurisdiction would be invited to submit comments to the coordinating jurisdiction regarding its particular concerns. The assessment of the coordinating agency would be binding on the coordinating agency but could either serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the recommendation) or be binding on those jurisdictions as well.

³² *Id.*, p. 81.

Overregulation: Globalization has put pressure on our system in which the laws of numerous nations apply to the same conduct or transaction. The pressure comes especially at the point at which competition law is regulatory rather than liberalizing; paradigmatically, premerger notification filing-and-waiting regimes. In this area, sound regulation requires coordination, and modes adopted by the European Union for its internal market are often instructive. I would go further than the Advisory Committee to propose an opportunity for mutual recognition of premerger notification filings when the market of a would-be regulating nation is subsumed by the broader global market.³⁴

System clashes: We must find international solutions for systems clashes, probably with international dispute resolution. Actual cases provide helpful laboratories. Boeing's acquisition of McDonnell Douglas — which the U.S. cleared and the EU threatened to enjoin [and which nearly accelerated into a trade war] — is such a case. . . .

There are various possible agreements that nations might consider that would keep an international merger on track as a competition case and prevent diversion into a trade war. The Advisory Committee has proposed several progressive measures, on the order of transparency.

I believe that we must move further, in view of the need for a world view and in view of the fact that conflict will otherwise always be resolved in favor of the nation that imposes the most aggressive remedies. In the absence of international rules and dispute resolution, we may eventually find it necessary to give the nation at the center of gravity a trumping right to enjoin or allow the merger (while other interested nations might retain the right to implement more modest, tightly tailored relief). But if any nation is, legitimately, to wear the mantle of *parens patriae* for the world, it would be obliged to count all costs of the merger, even those outside of its borders, as if they fell within its borders.³⁵ Indeed, we may reach the point — not just in merger law — at which counting all costs is an important obligation of all competition authorities vetting international transactions.

³³ Separate Statement of Eleanor M. Fox, ICPAC Report, Annex 1-A.

³⁴ I spelled out my proposal for an opt-in clearing house system as follows at ICPAC Report, p. 97, Chap. 3, footnote 24:

Advisory Committee Member Eleanor M. Fox suggests another approach to facilitate efficient coordination of filings and reduce the burden on parties of multiple notifications. She proposes a common clearinghouse for premerger notification by firms that elect to opt into such a system. One way to achieve this would be to permit the merging parties to file with a disinterested clearinghouse center on the day of the first filing. Alternatively, if the first filing is in a mature antitrust jurisdiction and covers international markets where all or most of the impacts would occur, all interested nations would be bound to accept the first filing as their first and basic information about the merger. The notified center or jurisdiction would announce the filing to member nations (or to interested or potentially interested nations). The recipient agencies would be bound to use the information only for merger review. Any country receiving the announcement that believes its system requires notification of the transaction could request a copy of the notification. A copy of this request would go to the merging parties who could contest the jurisdiction of a requesting country before the filing is sent to that country.

³⁵ My Separate Statement cross-references to the ICPAC Report, p. 64, Chap. 2, footnote 72, which reads as follows:

If national authorities do not broaden their perspectives to count all costs of conduct or transactions by their firms, we will probably move to international antitrust sooner rather than later, for these problems are world problems.^[36]

Finally, as reflected above, many potential clashes can be diffused. The best way to diffuse them is not to decree comity or convergence but to solidify norms of talking, listening, reasoning and engaging. When authorities appear to be reaching different evaluations, e.g., of whether a multinational merger is anticompetitive, the authorities should explore and then pinpoint for one another exactly where their differences lie, identifying inferences, presumptions, premises, and critical evidence. By that means, they may be able to resolve differences. If not, they should be able to understand the basis of divergence.

I propose that the AMC consider recommending that the following three norms be adopted by competition authorities and, where appropriate, commissions and courts. The norms could be adopted in the context of ICN.

- (1) In matters involving cross-border spill-overs, competition authorities and courts should be sensitive to the perspectives of other enforcing nations that have ruled on or are addressing substantially the same problem. Where consistent with their law and goals, they should sympathetically consider integrating other nations' perspectives or relevant acts into their own thinking and analysis.
- (2) They should recognize existing relief decreed by another jurisdiction as contextual background, and strive to avoid unnecessary regulation.

Advisory Committee Member Eleanor M. Fox calls attention to the problem of clashes where one nation decides that a merger is anticompetitive and should be enjoined and another nation decides that a merger is procompetitive and should be allowed. In the absence of formal protocols for resolving the clash, the more restrictive nation always prevails. This member suggests that development of rules of priority in deciding to enjoin or not to enjoin and international merger may be needed. To be entitled to exercise such right of priority, however, the privileged jurisdiction would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would be obliged to count not only the net benefits within its borders, but all of the merger's costs and benefits to competition (under whatever neutral framework for analysis it applies). See Eleanor M. Fox, Extraterritoriality and Merger Law: Can All Nations Rule the World? Antitrust Report 2, Dec. 1999.

³⁶ [Footnote 7 in Separate Statement of Eleanor M. Fox:] One appropriate "higher" solution would provide for international dispute resolution. The panel would begin to resolve the dispute by choice of law based on center of gravity. Thus, in Boeing/McDonnell Douglas, the panel would apply the U.S. rule to the true market.

- (3) In the event that a second nation takes jurisdiction over conduct or structure roughly within pronouncements of a jurisdiction that proceeds first, the decision-maker should write a reasoned opinion that engages with the first nation's perspective. By attentive and engaged process, some divergent outcomes may be avoided, and others legitimized.³⁷

I respectfully recommend to the Antitrust Modernization Commission all of the above proposals.

as revised
March 2, 2006

³⁷ These recommendations are adapted from E. Fox, *Empagran*, *supra* note 11, at p. 24.