



## MEMORANDUM

From: AMC Staff<sup>†</sup>  
To: Commissioners  
Date: June 5, 2006  
Re: International Antitrust Discussion Memorandum

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The Antitrust Modernization Commission adopted for study several related issues regarding U.S. and international antitrust enforcement: The Foreign Trade Antitrust Improvement Act (“FTAIA”), the International Antitrust Enforcement Assistance Act (“IAEAA”), budget authority for foreign antitrust assistance, and comity and convergence.<sup>1</sup>

The AMC requested public comments on the following questions.

1. Should the FTAIA be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?
2. Are there technical or procedural steps the United States could take to facilitate further coordination with foreign enforcement authorities?
  - a. Are there technical amendments to the IAEAA that could enhance coordination between the United States and foreign antitrust enforcement authorities?
  - b. Are there technical changes to the budget authority granted U.S. antitrust agencies that could further facilitate the provision of international antitrust technical assistance to foreign antitrust authorities?
3. The adoption of competition or antitrust laws by over 100 jurisdictions around the world, as well as the globalization of commerce and markets, has given rise to the

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<sup>†</sup> This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

<sup>1</sup> See Jan. 13, 2005, Meeting Trans. at 12-19; International Study Plan, at 1 (May 4, 2005).

potential for conflict between the United States and foreign jurisdictions with respect to enforcement actions taken and remedies sought. Are there multilateral procedures that should be implemented, or other actions taken, to enhance international antitrust comity? In commenting, please address the significance of the issue, what solutions might reduce that problem, and how such solutions could be implemented by the United States.<sup>2</sup>

The Commission held a hearing on these issues on February 15, 2006. The panel consisted of: Gerald F. Masoudi, Deputy Assistant Attorney General for International, Policy, and Appellate Matters for the Antitrust Division of the Department of Justice; Randolph W. Tritell, Assistant Director for International Antitrust, Federal Trade Commission; James R. Atwood, partner at Covington & Burling; Michael D. Blechman, partner at Kaye Scholer, on behalf of the International Chamber of Commerce (“ICC”) and the Business and Industry Advisory Committee to the OECD (“BIAC”)<sup>3</sup>; and Eleanor M. Fox, Professor of Trade Regulation at New York University School of Law.<sup>4</sup>

The Commission also received comments from 18 members of the public on these issues, including: the Antitrust Section of the American Bar Association (“ABA”); the International Section of the ABA; the American Antitrust Institute (“AAI”); and the International Bar Association (“IBA”).<sup>5</sup>

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<sup>2</sup> 70 Fed. Reg. 28,902, 28,906 (May 19, 2005); 70 Fed. Reg. 69,510, 69,511 (Nov. 16, 2005).

<sup>3</sup> Mr. Blechman is the Vice-Chair of the ICC Commission on Competition.

<sup>4</sup> Unless otherwise noted, all references to “Trans.” are to the transcript of the hearing on February 15, 2006.

<sup>5</sup> ABA Section of Antitrust Law, Comments Regarding the Foreign Trade Antitrust Improvements Act (Feb. 8, 2006) (“ABA FTAIA Comments”); ABA Section of Antitrust Law, Comments Regarding the Technical or Procedural Changes that the United States Could Implement to Facilitate Further Coordination with Foreign Antitrust Authorities (Feb. 8, 2006) (“ABA Coordination Comments”); ABA Section of Antitrust Law, Comments on Comity (Apr. 10, 2006) (“ABA Comity Comments”); ABA Section of International Law, Comments in Response to Antitrust Modernization Commission Request for Public Comment Regarding International Issues (Sept. 1, 2005) (“ABA Int’l Section Comments”); Antitrust and International Sections of the ABA, Comments in Response to the Antitrust Modernization Commission’s

## I. Foreign Trade Antitrust Improvements Act

### A. Background

Congress enacted the Foreign Trade Antitrust Improvements Act (“FTAIA”) in 1982.<sup>6</sup>

The Act provides that:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
  - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
  - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.<sup>7</sup>

Congress enacted the FTAIA to clarify and make explicit that only anticompetitive conduct having a direct, substantial, and reasonably foreseeable effect on U.S. commerce is actionable under the Sherman Act.<sup>8</sup> Congress sought to implement a “simple and straightforward clarification of existing American law,” because the courts’ treatment of the

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Request for Comments Regarding the Role of Comity in International Competition Law Enforcement (Feb. 8, 2006) (“ABA Joint Sections Comments”); Comments of the American Antitrust Institute, Working Group on International Issues (July 15, 2005) (“AAI Comments”); International Bar Association, Comments Regarding International Issues (Jan. 27, 2006) (“IBA Comments”).

<sup>6</sup> 15 U.S.C. § 6a. (2006)

<sup>7</sup> *Id.*

<sup>8</sup> H.R. Rep. No. 97-686, at 2 (1982).

scope of the Sherman Act had been inconsistent in the past.<sup>9</sup> More generally, Congress sought to limit the exposure of U.S. businesses to antitrust suits for global conduct.<sup>10</sup> At the time, businesses believed that U.S. antitrust laws inhibited “efficiency-enhancing” ventures, placing them at a competitive disadvantage against business operating outside the United States who were not subject to the same legal restrictions.<sup>11</sup> Congress accordingly enacted the FTAIA, along with the Export Trading Company Act of 1982, to “leave[] no doubt that [it] sought to limit the potential antitrust exposure of domestic exporters.”<sup>12</sup> This legislation thus would “encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services.”<sup>13</sup>

Courts have interpreted the FTAIA as creating a “general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act’s reach.”<sup>14</sup> Such activity may come back within the Sherman Act if it: (1) has a direct, substantial, and reasonably foreseeable effect on U.S. domestic (or import) commerce; and (2) this domestic effect is of the sort condemned under the Sherman Act.<sup>15</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. Rev. 2151, 2158 (Fall 2003) (“Cavanagh, *FTAIA*”).

<sup>11</sup> *Id.* at 2158.

<sup>12</sup> *Id.*; see also *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155, 166 (2004) (explaining that “Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm.”) (emphasis omitted) (“*Empagran*”).

<sup>13</sup> H.R. Rep. No. 97-686, at 2; Cavanagh, *FTAIA*, at 2158.

<sup>14</sup> *Empagran*, 542 U.S. at 162 (emphasis omitted).

<sup>15</sup> See Cavanagh, *FTAIA*, at 2158 (stating that the FTAIA “carves out” then “carves back in” conduct involving foreign trade if that conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and that domestic effect is anticompetitive); ABA FTAIA Comments, at 2 (“The FTAIA removes from the Sherman Act’s jurisdictional reach all non-import activity . . . but allows an injured plaintiff to bring the conduct back within the

The Supreme Court most recently addressed the FTAIA in *F. Hoffman-LaRoche Ltd. v. Empagran* (“*Empagran*”). The Court granted *certiorari* for the express purpose of resolving a split between the circuits.<sup>16</sup> The basic split in authority was over whether the FTAIA allowed a foreign plaintiff suffering injury outside the United States to sustain a claim under the Sherman Act when the anticompetitive effect of the defendant’s conduct gave rise to “a” claim, but not necessarily to “the” claim being asserted by the plaintiff.<sup>17</sup>

*Empagran* involved follow-on civil suits to criminal prosecution of the international vitamins price-fixing conspiracy.<sup>18</sup> The plaintiffs, who resided in the Ukraine, Australia, Ecuador, and Panama, conceded that all their vitamins purchases took place outside of the United States.<sup>19</sup> They argued that because the defendants’ conduct gave rise to “a” claim under the U.S. antitrust laws, the fact that their harm was not suffered in the United States did not bar their claims.<sup>20</sup>

The Supreme Court rejected plaintiffs’ argument. Writing for the majority, Justice Breyer explained that Congress did not intend for the FTAIA to “expand in any significant way, the Sherman Act’s scope as applied to foreign commerce.”<sup>21</sup> Rather, “Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct

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Sherman Act’s purview if the plaintiff can show both that: (a) the foreign conduct had ‘a direct, substantial, and reasonably foreseeable effect’ on domestic, import or export commerce; and (b) such domestic effect . . . ‘gives rise to a claim’ under the Sherman Act.”).

<sup>16</sup> *Empagran*, 542 U.S. at 160-61.

<sup>17</sup> Compare *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (5th Cir. 2001) (holding that the domestic effect had to give rise to *the* claim being asserted), with *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 399-400 (2d Cir. 2002) (“*Kruman*”) (holding that the defendant’s conduct only had to give rise to *a* claim under the Sherman Act, and not necessarily the plaintiff’s claim).

<sup>18</sup> Cavanagh, *FTAIA*, at 2177.

<sup>19</sup> *Empagran*, 542 U.S. at 159-60.

<sup>20</sup> *Id.* at 173-74.

causes foreign harm.”<sup>22</sup> The Court could find no basis for extending the reach of U.S. antitrust laws to conduct that “causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim.”<sup>23</sup> Indeed, the Court explained that “Congress would not have intended the FTAIA . . . to bring independently caused foreign injury within the Sherman Act’s reach.”<sup>24</sup> Furthermore, the Court reasoned that comity cautioned against an interpretation of the Sherman Act that allowed U.S. courts to “interfere with a foreign nation’s ability independently to regulate its own commercial affairs.”<sup>25</sup> As a result, only if the plaintiffs’ claim itself arises from the domestic effect of the antitrust harm will a plaintiff have a claim under the Sherman Act; foreign injury that arises independently is not within the Sherman Act’s reach.<sup>26</sup>

The case was remanded to the D.C. Circuit for consideration of the plaintiffs’ alternate theory, that their harm was not independent of the cartels’ domestic effects.<sup>27</sup> The plaintiffs argued that the defendants’ ability to maintain supracompetitive prices abroad was dependent on supracompetitive pricing in the United States as well, or foreign prices would have been eroded through arbitrage.<sup>28</sup> Accordingly, “but-for” the higher U.S. domestic prices that resulted from the collusion, the conspiracy would not have caused the plaintiffs’ harm.<sup>29</sup>

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<sup>21</sup> *Id.* at 170 (emphasis omitted). Justices Scalia and Thomas concurred in the judgment.

<sup>22</sup> *Id.* at 166 (emphasis omitted).

<sup>23</sup> *Id.* at 165 (emphasis omitted).

<sup>24</sup> *Id.* at 173; *see also id.* at 169 (noting that even the Solicitor General stated that it knew of no case where “any court applied the Sherman Act to redress foreign injury in such circumstances”).

<sup>25</sup> *Id.* at 165.

<sup>26</sup> *Id.* at 173-74 (holding that notwithstanding the FTAIA’s reference to “a” claim, it should be read as meaning “the plaintiff’s claim” “the claim at issue”).

<sup>27</sup> *Id.* at 175.

<sup>28</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1270 (D.C. Cir. 2005) (“*Empagran Remand*”).

<sup>29</sup> *Id.* at 1270-71.

The D.C. Circuit ruled that this argument of but-for causation “establishe[d] only an indirect connection between the U.S. prices and the prices [the plaintiffs] paid when they purchased vitamins abroad.”<sup>30</sup> The term “give rise to” in the FTAIA, the court held, demanded “a direct causal relationship, that is, proximate causation.”<sup>31</sup> As such, “but-for causation between the domestic effects and the foreign injury claim [was] simply not sufficient to bring anti-competitive conduct within the FTAIA exception.”<sup>32</sup>

Subsequent cases interpreting the FTAIA under *Empagran* have followed the reasoning of the D.C. Circuit.<sup>33</sup> For example, in *In re Monosodium Glutamate Antitrust Litigation*,<sup>34</sup> the district court cited the D.C. Circuit in holding that the plaintiffs in that case had not alleged a sufficient causal connection between the domestic effects and the plaintiffs’ foreign injury.<sup>35</sup> Similarly, in *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*,<sup>36</sup> the district court held that the plaintiffs’ claim that “adverse effects in the U.S. and in other nations” caused their antitrust injury was “patently inadequate,” as the plaintiffs did “not even plead that it was the effect on U.S. commerce, rather than an effect on foreign commerce, that gave rise to [their] claim.”<sup>37</sup> To date, no case has rejected the D.C. Circuit’s reasoning in *Empagran*.<sup>38</sup>

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<sup>30</sup> *Id.* at 1271.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1270-71 (internal quotations omitted).

<sup>33</sup> Trans. at 51-52 (Blechman) (referring to various cases following the D.C. Circuit’s ruling in *Empagran*); Statement of Randolph W. Tritell, Assistant Director for International Antitrust, Federal Trade Commission, Antitrust Modernization Commission Hearing on International Antitrust Issues, at 3 (Feb. 15, 2006) (“Tritell Statement”) (stating that FTAIA case law is “evolving in a coherent and sound direction”).

<sup>34</sup> 2005 WL 2810682 (D. Minn. Oct. 26, 2005) (“*Monosodium*”).

<sup>35</sup> *Monosodium*, at \*3; *see also* Trans. at 100 (Blechman) (noting that the Minnesota court was “persuaded by *Empagran* and the D.C. Circuit” and as such reversed itself).

<sup>36</sup> 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005).

<sup>37</sup> *Id.* at \*9 (emphasis omitted); *accord CSR Ltd. v. CIGNA Corp.*, 405 F. Supp. 2d 526, 549 (D.N.J. 2005).

B. Discussion

*Should the FTAIA be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?*

Despite Congress' desire to enact a simple and straightforward test, the FTAIA has been "widely criticized by courts, practitioners, and academics as being poorly drafted and confusing."<sup>39</sup> Some have characterized it "as a drafting disaster, the worst nightmare of every legislation professor."<sup>40</sup> Others have described it as "cumbersome and inelegant," and "very difficult to read."<sup>41</sup>

Several commentators identified potential harm to international relations that would result from an expansive interpretation of the FTAIA as a reason for limiting the instances in which the FTAIA permits applicability of the Sherman Act to foreign commerce. For example, the Canadian Bar Association submitted that an expansive reading of the FTAIA could interfere with Canada's criminal antitrust immunity program.<sup>42</sup> Similarly, it could lead to Canadian plaintiffs suing Canadian defendants in U.S. courts.<sup>43</sup>

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<sup>38</sup> In *Sniado v. Bank of Austria*, the Second Circuit overruled its decision in *Kruman* based on the Supreme Court's decision in *Empagran*. It held that the plaintiffs had not adequately pleaded an alternative claim that the foreign harm would not have been suffered but for the effects in the United States, and therefore upheld dismissal of the complaint. *See Sniado v. Bank of Austria*, 378 F.3d 210, 213 (2d Cir. 2004).

<sup>39</sup> ABA FTAIA Comments, at 4; Cavanagh, *FTAIA*, at 2157.

<sup>40</sup> Cavanagh, *FTAIA*, at 2157.

<sup>41</sup> *Id.* (internal quotations and citations omitted).

<sup>42</sup> Canadian Bar Association, Comments to the Antitrust Modernization Commission—Extraterritorial Anticompetitive Conduct, at 3 (Jan. 16, 2006) ("Canadian Bar Comments").

<sup>43</sup> *Id.*; *see also* IBA Comments, at 16-18 (identifying risk to comity and potential forum shopping as harms of expanded reading of FTAIA).

Most commenters and all of the panelists argued that the AMC should not recommend statutory change, but rather should allow the courts to continue to develop their interpretation of the FTAIA.<sup>44</sup>

- Case law is evolving in a sound direction.<sup>45</sup> Increased agency *amicus* participation in lower and appellate court proceedings would help to facilitate this process.<sup>46</sup>
- AMC could endorse or recommend the position taken by today’s courts that “[t]he United States laws do not apply in the absence of an adverse effect in the United States’ territory.”<sup>47</sup>

Some commentators called for statutory change to clarify that all, or nearly all, foreign harm is outside the Sherman Act.<sup>48</sup> To the extent the Commission decided to recommend legislative change, Professor Fox proposed repealing the FTAIA and replacing it with a statute that simply states:

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<sup>44</sup> Trans. at 50 (where none of the panelists believed the Commission should recommend an amendment to the FTAIA); Trans. at 18-19 (Fox) (stating that “I think there is a case to be made for repeal of FTAIA, but I’m not making it”); Tritell Statement, at 3; Statement of Gerald F. Masoudi on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearing on International Antitrust Issues, at 8 (Feb. 15, 2006) (“Masoudi Statement”); Testimony of James R. Atwood, Partner, Covington & Burling, Before the Antitrust Modernization Commission Hearings on International Issues, at 16 (Feb. 15, 2006) (“Atwood Statement”); ABA FTAIA Comments, at 1, 7; AAI Comments, at 1-2; *see also* Trans. at 101 (Fox) (“My reluctance to amend was based on a risk of outcome. If I put that to one side, I would say definitely amend.”).

<sup>45</sup> Tritell Statement, at 3; Masoudi Statement, at 8; Atwood Statement, at 16; Trans. at 9-10 (Tritell); Trans. at 55 (Masoudi); AAI Comments, at 2 (stating that “we believe it makes sense to allow the law to continue to evolve”); ABA FTAIA Comments, at 1, 7.

<sup>46</sup> ABA FTAIA Comments, at 1, 8.

<sup>47</sup> Trans. at 51 (Atwood); Trans. at 55 (Tritell); Trans. at 51-52 (Blechman).

<sup>48</sup> *See* IBA Comments, at 13 (legislative action would provide clarity); ABA Int’l Section Comments, at 4, 11-15 (calling for legislation to clarify scope of Sherman Act, and providing two alternative approaches, one barring all claims in U.S. courts for foreign injury, even when the foreign injury is inextricably linked to domestic effects, and the other allowing claims for foreign injury that is inextricably linked to domestic anticompetitive conduct); Canadian Bar Comments, at 3-4 (calling for legislative clarification that would limit Sherman Act to domestic harm).

The Sherman and FTC Acts shall not apply to harms not within the United States and not on U.S. territory.<sup>49</sup>

Prof. Fox argued that a revised statute would correct the courts' current (in her view) improper focus on whether the harm was caused by domestic effects within the United States.<sup>50</sup>

As an alternative to legislative change, Prof. Fox recommended that the AMC endorse a rule stating that “plaintiff’s harm must be proximately related to the conduct within the jurisdiction of the U.S. and that the particular plaintiff’s transaction must be significantly related to U.S. or to the U.S. market.”<sup>51</sup>

## II. International Antitrust Enforcement Assistance Act

### A. Background

Since the early 1990s, the United States has entered into antitrust cooperation agreements with the European Union, Canada, Brazil, Israel, Japan, and Mexico.<sup>52</sup> These agreements facilitate cooperation in both criminal enforcement and merger reviews.<sup>53</sup> The benefits of these agreements are limited, however, by provisions in U.S. and foreign law prohibiting the disclosure of confidential information.<sup>54</sup>

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<sup>49</sup> Testimony of Eleanor M. Fox Before the Antitrust Modernization Commission, as Revised March 2, 2006, at 9 (Feb. 15, 2006) (“Fox Statement”) (Prof. Fox notes that such a revision would make the Webb-Pomerene Act and Export Trading Company Act surplusage); *see also* Trans. at 55-57 (Fox).

<sup>50</sup> Fox Statement, at 9-10.

<sup>51</sup> Trans. at 53-55 (Fox); *id.* at 19 (Fox) (stating “I think that the FTAIA could wisely be repealed. It could be replaced by a short statute that says when there is no significant or substantial or foreseeable antitrust harm in the United States, there is no antitrust jurisdiction, and we could leave standing to courts”).

<sup>52</sup> ABA Coordination Comments, at 2.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 3; Tritell Statement, at 5; *see also* IBA Comments, at 19 (agreements that allow sharing of commercially sensitive information require parties to “have a high degree of confidence in the integrity of the competition authorities of the other nation”).

Congress enacted the International Antitrust Enforcement Assistance Act (“IAEEA”) in 1994 to allow the United States to enter into Antitrust Mutual Assistance Agreements (“AMAAs”) that permit U.S. antitrust agencies to share confidential information in both civil and criminal antitrust enforcement with foreign antitrust enforcers, subject to safeguards.<sup>55</sup> The IAEEA provides that an AMAA must include a provision requiring the foreign jurisdiction counterparty to allow the use of exchanged evidence on a “reciprocal basis.”<sup>56</sup>

Although the IAEEA is antitrust-specific, Section 6211(2)(E)(ii) of the IAEEA provides that any AMAA entered into pursuant to the IAEEA must include a provision allowing a foreign jurisdiction to use antitrust evidence in non-antitrust cases when (1) that use is “essential to a significant law enforcement objective,” and (2) the Attorney General or the FTC provides prior written consent to its use.<sup>57</sup> Under the reciprocity requirement, it appears that foreign countries must also agree to allow the United States to use antitrust evidence provided by a foreign jurisdiction in non-antitrust cases.

To date, the United States has entered into only one AMAA pursuant to the IAEEA, with Australia.<sup>58</sup> It appears that this agreement has been used infrequently.<sup>59</sup> Notably, the United States currently has no formal mechanism for exchanging cartel evidence with either Canada or

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<sup>55</sup> 15 U.S.C. §§ 6201-12 (2006); *see* IBA Comments, at 19-20; Tritell Statement, at 5 (stating that Congress enacted the IAEEA to overcome the limitation in prior cooperative agreements which prevented parties from exchanging confidential information); ABA Coordination Comments, at 3.

<sup>56</sup> 15 U.S.C. § 6211(2); ABA Int’l Section Comments, at 8; *see also id.* (“IAEEA provides that the United States may enter into AMAAs with foreign jurisdictions . . . on a reciprocal basis.”) (internal quotes omitted).

<sup>57</sup> 15 U.S.C. § 6211(2)(E)(ii).

<sup>58</sup> ABA Coordination Comments, at 3; Trans. at 12 (Tritell).

<sup>59</sup> ABA Coordination Comments, at 4.

the European Union.<sup>60</sup> As discussed further below, some observers believe that the failure to enter into other AMAAs is attributable to a reluctance on the part of foreign jurisdictions to agree to allow confidential information to be used for purposes other than antitrust enforcement, notwithstanding that some form of written consent from the foreign jurisdiction would be needed before any particular information could be so used.

B. Discussion

*Are there technical amendments to the IAEAA that could enhance coordination between the United States and foreign antitrust enforcement authorities?*

One AMC commenter suggested that Section 6211(2)(E)(ii) of the IAEAA, in combination with the Act's reciprocity requirement, is the reason why more jurisdictions have not entered into AMAAs pursuant to the IAEAA.<sup>61</sup> For instance, Canada's Competition Act expressly prevents the Competition Bureau from entering into an agreement where the information provided would be used for purposes other than "the purpose for which it was requested."<sup>62</sup> Such a statutory provision arguably precludes a foreign jurisdiction from entering into an AMAA with the United States notwithstanding the requirement of consent. In addition, even without such a statutory prohibition, a foreign jurisdiction may be reluctant generally to agree to the extraneous use of confidential information provided to further common competition enforcement goals, even with a consent proviso.

Most AMC witnesses and commentators, however, submitted that the provisions of

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<sup>60</sup> *Id.* at 5.

<sup>61</sup> ABA Int'l Section Comments, at 8.

<sup>62</sup> *Id.* at 9 (citing to R.S.C. 1985, c. C-34, section 30.01(d)(ii), which provides that "[b]efore Canada enters into an agreement, the Minister of Justice must be satisfied that . . . the agreement contains the following undertakings by the foreign state, namely, . . . that any record or thing provided by Canada will be used only for the purpose for which it was requested").

the IAEAA are not to blame for the lack of AMAAs. They explained that “the obstacles that have prevented the conclusion of further [IAEAA] agreements are largely not attributable to the wording of the statute.”<sup>63</sup> Rather, some foreign jurisdictions have laws that prevent them from entering into information-sharing agreements such as those contemplated by the IAEAA (irrespective of the issue raised by Section 6211(2)(E)(ii) of the IAEAA).<sup>64</sup> Other foreign jurisdictions that have not criminalized antitrust violations might be concerned about the possible use of AMAA-obtained information in a U.S. criminal proceeding.<sup>65</sup> And other jurisdictions may simply find the use of existing MLATs sufficient.<sup>66</sup>

Furthermore, commentators suggested that the lack of AMAAs should not be of particular concern.

- Because the parties themselves often waive confidentiality (especially in the context of mergers), the antitrust agencies have no need to enter into a formal AMAA in order to share confidential information.<sup>67</sup>
- The agencies’ “extensive and successful use of other instruments, including MLATs, extradition treaties, and informal law enforcement assistance

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<sup>63</sup> Tritell Statement, at 5; *see also* Masoudi Statement, at 9 (stating that notice must be given to the jurisdiction furnishing the information that the jurisdiction receiving the information seeks to use it for a non-antitrust matter and that the jurisdiction furnishing the confidential information must consent to have it used for the non-antitrust matter described).

<sup>64</sup> ABA Coordination Comments, at 6.

<sup>65</sup> IBA Comments, at 22 (noting that there are jurisdictions “where, currently, there is no criminal enforcement of antitrust laws (such as the EU),” which may therefore be less willing to share confidential information that could be used for antitrust criminal enforcement); ABA Coordination Comments, at 6 (stating that jurisdictions might be reluctant or unable “to provide information that could be used in U.S. criminal prosecutions”).

<sup>66</sup> IBA Comments, at 22 (identifying Canada as one jurisdiction that prefers the use of MLATs over AMAAs). By comparison, Australia, which does not have criminal antitrust enforcement, likely entered into an AMAA because an MLAT (used only for criminal investigations) would provide it with no benefits. *Id.* at 20.

<sup>67</sup> Tritell Statement, at 5 (stating that “in merger investigations, . . . parties routinely waive confidentiality protections to enable the agencies to share information.”); ABA Coordination Comments, at 3; *see also id.* (“The agencies have a track record of extensive cooperation and coordination with foreign antitrust authorities. In merger investigations, the U.S. has cooperated extensively with the EU, its Member States, Canada, and others.”).

mechanisms, combined with its effective leniency program, may largely have obviated the need for IAEAA agreements.”<sup>68</sup>

- Civil non-merger enforcement appears not to have been significantly hampered by the lack of AMAAs, because few such matters involve more than one jurisdiction.<sup>69</sup>

Two commentators suggested that Congress should modify Section 6211(2)(E)(ii) to clarify that a provision for non-antitrust uses is not a mandatory component of an AMAA.<sup>70</sup> By making clear that the United States could enter into an AMAA without a provision for non-antitrust use of exchanged information, which by reciprocity other jurisdictions could also omit, other countries might be more willing to enter into AMAAs.<sup>71</sup>

Both the FTC and DOJ specifically informed the Commission that statutory change would not assist them in entering into more AMAAs.<sup>72</sup>

### **III. Budget Authority for International Antitrust Technical Assistance**

The FTC and DOJ engage in extensive international antitrust training.<sup>73</sup> Neither agency, however, has authority to fund such training itself. Rather, the U.S. Agency for International

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<sup>68</sup> ABA Coordination Comments, at 4-5.

<sup>69</sup> *Id.* at 5.

<sup>70</sup> ABA Int’l Section Comments, at 2; IBA Comments, at 4 (stating that it would be “advisable that Congress amend this provision to clarify that this provision to disclose antitrust evidence for non-antitrust purposes is not mandatory”); *see also* IBA Comments, at 22 (Congress could amend section to limit information sharing to antitrust matters only).

<sup>71</sup> ABA Int’l Section Comments, at 9.

<sup>72</sup> Tritell Statement, at 5; Trans. at 12 (Tritell) (“I don’t see that there are amendments that would significantly enhance our ability to conclude additional mutual assistance agreements.”); Trans. at 59 (Masoudi) (stating that the Division is not seeking changes to the IAEAA); ABA Coordination Comments, at 6 (“We do not recommend seeking any change in the IAEAA at present.”); *see also* ABA Int’l Section Comments, at 9 (recommending that AMC determine whether FTC or DOJ seek statutory modification).

<sup>73</sup> Tritell Statement, at 5-6.

Development (“USAID”) provides funding for this training pursuant to requests from FTC and/or DOJ.<sup>74</sup>

No commentators or witnesses, in particular DOJ and FTC, recommended any change to this arrangement.<sup>75</sup> Indeed, both FTC and DOJ testified that they are satisfied with the current arrangement.

- The agencies’ funding by USAID to carry-out technical training “has been reliable, and we don’t think changes to the FTC’s budgetary authority in this area is necessary.”<sup>76</sup>
- “[W]e have provided technical assistance to a number of emerging economies and we think the USAID process is working well. We don’t have, at this time, any specific proposals for any legislative changes.”<sup>77</sup>

#### **IV. Comity and Convergence**

##### **A. Background**

Globalization and the increased proliferation of competition regimes around the world have given rise to the potential for conflicts between the United States and other antitrust enforcement agencies.<sup>78</sup> Over 100 jurisdictions now have antitrust laws.<sup>79</sup> Over 70 countries

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<sup>74</sup> ABA Int’l Section Comments, at 10.

<sup>75</sup> One commenter noted that the antitrust agencies might improve their coordination with USAID to direct funding where it is most beneficial. IBA Comments, at 24. Neither DOJ nor FTC testified that misdirected funding was currently a problem.

<sup>76</sup> Trans. at 13 (Tritell); *see also* Tritell Statement, at 6.

<sup>77</sup> Trans. at 46 (Masoudi).

<sup>78</sup> Atwood Statement, at 2; Comments of the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Antitrust Modernization Commission’s Request for Public Comment “International,” at 1 (Feb. 15, 2006) (“Blechman Statement”).

<sup>79</sup> Comments of Bertelsmann AG, General Electric Company, Microsoft Corporation, Pfizer Inc., Royal Phillips Electronics, and TimeWarner Inc., at 2 (Aug. 12, 2005) (“Bertelsmann Comments”); Comments of the Association for Competitive Technology on International Antitrust Convergence, at 3 (Feb. 7, 2006) (“ACT Comments”); ABA Comity Comments, at 4.

have adopted merger control laws requiring pre-notification or merger review.<sup>80</sup> The ever-increasing number of enforcers creates two principle problems. First, companies must comply with the laws of multiple jurisdictions, potentially increasing their costs significantly. Second, companies may be subject to conflicting and inconsistent laws or obligations imposed by various enforcers. Witnesses and commenters identified the following costs, which are part of the estimated one to three percent of U.S. gross domestic product that regulatory differences between the U.S. and European Union (“E.U.”) cost each year.<sup>81</sup>

- Uncertainty over the legal consequences of transactions in multiple countries.<sup>82</sup> This can increase transaction costs both through higher legal fees and other administrative burdens.<sup>83</sup> In particular, merger filing costs, as well as determining where filings are required, are particularly expensive.<sup>84</sup>
- Remedies imposed by a single country may affect operations worldwide.<sup>85</sup>
- A risk of inconsistent outcomes resulting from decisions by different enforcers.<sup>86</sup> The problem is exacerbated by the possibility of “forum shopping” by complainants to find the jurisdiction that will impose the most stringent remedy.<sup>87</sup>
- Reduced economic efficiency because companies will either forgo procompetitive conduct about which they have legal uncertainty or will be forced to operate

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<sup>80</sup> Bertelsmann Comments, at 3; ACT Comments, at 3.

<sup>81</sup> Atwood Statement, at 2 (relying on Gary Litman, V.P., Europe and Eurasia, U.S. Chambers of Commerce, Statement on the U.S.-E.U. Economic Relationship Before the U.S. House of Representatives Committee on Financial Services, Subcommittee on Domestic and International Monetary Policy, Trade and Technology, for the U.S. Chamber of Commerce (June 16, 2005)).

<sup>82</sup> Bertelsmann Comments, at 3; Blechman Statement, at 2; Atwood Statement, at 4.

<sup>83</sup> Bertelsmann Comments, at 3; Blechman Statement, at 2; Atwood Statement, at 4.

<sup>84</sup> ACT Comments, at 10; Blechman Statement, at 2; ABA Comity Comments, at 4.

<sup>85</sup> Bertelsmann Comments, at 3; *see also* ACT Comments, at 8-9 (citing Microsoft remedies in EU and South Korea, as well as EU’s order of compulsory licensing of intellectual property held by IMS Health); Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission, at 26 (Nov. 4, 2005) (“Business Roundtable Comments”) (stating that Roundtable members are concerned they will face conflicting antitrust remedies).

<sup>86</sup> Bertelsmann Comments, at 3; Blechman Statement, at 2; ABA Comity Comments, at 4.

<sup>87</sup> Bertelsmann Comments, at 3; Blechman Statement, at 2; ABA Comity Comments, at 4.

different marketing, distribution, and manufacturing schemes to comply with different requirements in competing jurisdictions.<sup>88</sup>

- Reduced cooperation with antitrust enforcers because of potentially conflicting remedies or results.<sup>89</sup>

One witness testified that these costs likely disproportionately affect U.S. businesses because “the United States is the world’s largest source of foreign direct investment,” and “[m]any of the world’s leading multinational corporations . . . are American.”<sup>90</sup> The United States accordingly “has more to lose than most other countries.”<sup>91</sup>

## B. Discussion of Issues

AMC witnesses and commenters identified several different, and not necessarily mutually exclusive, ways to improve international antitrust comity and promote antitrust convergence, all with the goal of reducing the current costs that arise from multiple national antitrust enforcers. First, witnesses and commenters proposed enhancing existing comity agreements between countries. Second, they proposed other procedural mechanisms to resolve or reduce costs and conflicting results. Finally, they proposed continued (or increased) reliance on existing efforts towards convergence.

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<sup>88</sup> Bertelsmann Comments, at 3; *see also* ACT Comments, at 9-10 (noting problem is particularly acute for computer software companies, whose assets are primarily intellectual not physical, and who thus easily do business globally); Blechman Statement, at 2; International Chamber of Commerce, Comments on Selected Issues for Study by the US Antitrust Modernization Commission, at 11 (Sept. 1, 2005) (“ICC Comments”); Atwood Statement, at 4; Tritell Statement, at 7 (referring to potential for duplicative or incompatible antitrust rules due to the existence of over 100 antitrust regimes); ABA Joint Sections Comments, at 2.

<sup>89</sup> Bertelsmann Comments, at 3.

<sup>90</sup> Atwood Statement, at 4.

<sup>91</sup> *Id.* at 5.

Witnesses and commenters testified generally that until there is complete convergence, countries must improve comity or other procedural mechanisms to avoid the costs imposed by inconsistent approaches, both substantive and procedural.<sup>92</sup>

Mr. Tritell testified that instances of genuine conflict and inconsistency are “rare,” and that the vast majority of global transactions are processed without incident.<sup>93</sup> He argued that most cross-border antitrust enforcement has resulted in parallel and compatible reviews.<sup>94</sup> (Commenters and witnesses routinely cited three principal instances where different jurisdictions reached substantially different results: *Microsoft* in the U.S., E.U., and Korea; *G.E./Honeywell* in the U.S. and E.U., and *Boeing/McDonnell-Douglas* in the U.S. and E.U.<sup>95</sup>) He questioned the wisdom of implementing policy changes based on what he characterized as exceptional circumstances, as opposed to the typical case.<sup>96</sup>

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<sup>92</sup> Blechman Statement, at 1-2; Trans. at 13 (Tritell); ABA Joint Sections Comments, at 4-5; IBA Comments, at 25; *see also* Atwood Statement, at 9 (stating that Microsoft was “subjected to three different sets of remedies for essentially the same allegedly anticompetitive conduct in the United States, EU and Korea”); ABA Joint Sections Comment, at 9 (“Comity principles can be useful, however, where complete harmonization of enforcement . . . is not possible.”). Some witnesses testified that complete convergence may not be desirable. *See* Fox Statement, at 4-5 (stating that some diversity is a good thing); ABA Joint Sections Comments, at 2 (stating that “some divergence may provide a healthy dialectic”).

<sup>93</sup> Tritell Statement, at 8; Trans. at 14 (Tritell).

<sup>94</sup> Trans. at 12 (Tritell) (referring to the “scores of cases” that have undergone parallel review in the U.S. and the EU with little to no incident).

<sup>95</sup> *See* Blechman Statement, at 6-7 (*Microsoft*); Atwood Statement, at 9 (*G.E./Honeywell*; *Boeing/McDonnell-Douglas*); Tritell Statement, at 8 n.17 (calling these the “best known, and perhaps only, examples”); *see also* Press Release, Department of Justice, Statement of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission’s Decision in its Microsoft Case (Dec. 7, 2005), *available at* [http://www.usdoj.gov/opa/pr/2005/December/05\\_at\\_648.html](http://www.usdoj.gov/opa/pr/2005/December/05_at_648.html) (objecting to Korea’s implementation of remedy against Microsoft regarding Windows Media Player).

<sup>96</sup> Trans. at 12, 14 (Tritell).

1. *Enhancing Comity Through Bilateral Agreements*

Comity has long been recognized as “a well-established part of U.S. case law in antitrust cases.”<sup>97</sup> It has been described as “a concept of reciprocal deference . . . [that] holds that one nation should defer to the law and rules . . . of another because . . . the other has a greater interest.”<sup>98</sup> It encourages “competition agencies to presumptively defer their own enforcement authority to that of jurisdictions with the greatest interest or center of gravity.”<sup>99</sup>

Traditional or “negative” comity is where one country restrains itself so as not to allow its laws and law enforcement actions to harm and/or impede another country’s important interests.<sup>100</sup> This type of comity is an exercise of restraint. “Positive” comity, by comparison, is where one country asks another to “take appropriate actions regarding anticompetitive behavior occurring in its territory that affects the important interests of the requesting party [and] where that behavior [also] violates the competition laws and regulations of the host [country].”<sup>101</sup> Positive comity places primary responsibility “in the hands of the jurisdiction most closely associated with the alleged anticompetitive conduct.”<sup>102</sup>

The United States has entered into agreements with several countries and the European Union.<sup>103</sup> The agreement with the E.U., which was adopted in 1991 and revised in 1998, sets out certain principles of comity, both negative and positive.<sup>104</sup>

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<sup>97</sup> Trans. at 13 (Tritell).

<sup>98</sup> Fox Statement, at 6.

<sup>99</sup> Trans. at 14 (Tritell).

<sup>100</sup> Blechman Statement, at 2.

<sup>101</sup> Atwood Statement, at 8; Blechman Statement, at 3.

<sup>102</sup> Blechman Statement, at 3. Worth noting, however, is that positive comity is very seldom invoked by jurisdictions. Blechman Statement, at 8.

<sup>103</sup> See ABA Comity Comments, at 8 (citing [http://www.usdoj.gov/atr/public/international/int\\_arrangements.htm](http://www.usdoj.gov/atr/public/international/int_arrangements.htm)).

The 1991 Agreement contains principals relating to negative comity, in addition to providing for cooperation and coordination and information exchanges. The negative comity provisions call for the U.S. or E.U. to consider certain factors in conducting investigations of anticompetitive conduct that may have effects in the other party's territory. Accordingly, when "it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests."<sup>105</sup>

- (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
- (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
- (c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;
- (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- (e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and

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<sup>104</sup> See ABA Comity Comments, at 8; Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C. (Mar. 6-June 4, 1998) ("1998 US-EC Agreement"); Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding The Application of Their Competition Laws (Sept. 1991) ("1991 US-EC Agreement").

<sup>105</sup> 1991 US-EC Agreement, art. V.

(f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.<sup>106</sup>

The 1998 Agreement supplements the 1991 Agreement to add provisions more specifically directed to positive comity. It applies when “anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interests of the other Party.”<sup>107</sup> It sets out a principle of positive comity that allows the “competition authorities of a Requesting Party [to] request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party’s competition laws.”<sup>108</sup> The agreement also allows a requesting party to “defer or suspend pending or contemplated enforcement activities during the pendency of enforcement activities of the Requested Party.”<sup>109</sup> Such suspension of enforcement activities should occur when:

(1) the anticompetitive activity does “not have a direct, substantial and reasonably foreseeable impact on consumers” in the requesting party’s territory or, when there is such impact, the activities “occur principally in and are directed principally towards” the other party’s territory.”<sup>110</sup>

(2) the adverse effects on the interests of the requesting party are likely “to be fully and adequately investigated and . . . eliminated or adequately remedied” by the requested party.<sup>111</sup>

(3) the requested party agrees to devote adequate resources to the investigation, and to use its best efforts to complete the investigation.<sup>112</sup>

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<sup>106</sup> *Id.* at art. VI.

<sup>107</sup> 1998 US-EC Agreement, at art. I, § 1(a).

<sup>108</sup> *Id.* at art. III; *see also id.* at art. II, §§ 2-3 (defining “Requested Party” and “Requesting Party”).

<sup>109</sup> *Id.* at art. IV, § 1.

<sup>110</sup> *Id.* at art. IV, § 2(a).

<sup>111</sup> *Id.* at art. IV, § 2(b).

Both agreements, which have been used as models for agreements with other countries, have been credited with “facilitat[ing] substantial strides in cooperation among enforcement authorities.”<sup>113</sup> The ABA notes, however, that the potential of the agreements have not been fully realized because the parties have not regularly invoked its comity principles.<sup>114</sup>

Several commenters and witnesses suggested that existing comity agreements could be improved. In general, they call for the further development of internationally recognized standards for determining when deference is appropriate.<sup>115</sup> More particularly, witnesses identified the following possible improvements and approaches.

- Amend existing bilateral agreements to explicitly recognize that divergent government competition policies and inconsistent antitrust remedies impede trade, investment, and welfare.<sup>116</sup>
- Give the jurisdiction that is the “center of gravity” virtually exclusive jurisdiction over the matter, but still allow non-center of gravity jurisdictions to have a voice in the process so that their interests also can be considered.<sup>117</sup> The antitrust remedy should be fashioned together.<sup>118</sup>
- Jurisdictions should presumptively defer when there is no direct, substantial, and foreseeable impact on their interests by a given transactions. This deference can be later rescinded if upon further investigation it becomes apparent that there are direct and substantial effects on their interests.<sup>119</sup>
- Companies that make a *prima facie* showing that they will be subject to antitrust enforcement in multiple jurisdictions should be able to insist that these agencies cooperate and consult with each other.<sup>120</sup>

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<sup>112</sup> *Id.* at art. IV, § 2(c).

<sup>113</sup> Blechman Statement, at 5; ABA Comity Comments, at 8.

<sup>114</sup> ABA Comity Comments, at 8.

<sup>115</sup> Blechman Statement, at 8.

<sup>116</sup> Atwood Statement, at 13; ABA Joint Sections Comment, at 14.

<sup>117</sup> Trans. at 19-20, 81 (Fox).

<sup>118</sup> Atwood Statement, at 14.

<sup>119</sup> Trans. at 24-25 (Blechman).

<sup>120</sup> Atwood Statement, at 14; ABA Joint Sections Comment, at 14.

- Develop principles further based on procedural mechanisms implemented in other regulatory practices to advance comity,<sup>121</sup> including
  - In bankruptcy law, the Bankruptcy Abuse Prevention Act calls for U.S. courts to defer implementing their own relief, and to instead “grant relief consistent with the recognized proceedings occurring in the country where the debtor’s center of interest is located.”<sup>122</sup>
  - In the airlines industry, the model Open Skies Agreement provides that while jurisdictions are allowed to object to another jurisdiction’s pricing practices on the basis of consumer welfare, they cannot take individual action. The parties must agree and reach consensus.<sup>123</sup>
  - In the pharmaceutical industry, the US FDA and EU EMEA have implemented an information exchange program that allows “a drug sponsor to request parallel advice meetings.”<sup>124</sup>
  - Under the Agreement of Mutual Recognition, the U.S. and E.U. agree to accept each other’s test results on such items as medical devices, pharmaceuticals, telecommunications equipment, and recreational crafts.<sup>125</sup>

Others expressed concern about certain aspects of these proposals.

- Comity agreements that call for the jurisdiction that is the “center of gravity” to conduct the investigation do not address other jurisdictions that may have significant interests.<sup>126</sup> Comity would be undermined if the interests of smaller jurisdictions were continually left unaddressed. The problem is exacerbated if there are different competitive effects in each jurisdiction.<sup>127</sup>

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<sup>121</sup> Atwood Statement, at 3 (“U.S. antitrust authorities should explore the scope for enhanced comity mechanisms, drawing . . . [on] the cooperative approaches applied in other regulatory fields.”); *see also* Blechman Statement, at 8.

<sup>122</sup> Atwood Statement, at 11; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

<sup>123</sup> Atwood Statement, at 11-12; ABA Joint Sections Comment, at 12; *see, e.g.*, Open Skies Agreement, U.S. Dep’t of State, at <http://www.state.gov/e/eb/rls/fs/208.htm>.

<sup>124</sup> Atwood Statement, at 12.

<sup>125</sup> *Id.*; *see, e.g.*, Mutual Recognition Agreements for Conformity Assessment (Jun. 20, 1997) (“US-EU MRA”), at <http://www.fda.gov/cdrh/mra/introduction.html> (last visited June 5, 2006).

<sup>126</sup> Trans. at 83 (Masoudi).

<sup>127</sup> *Id.*

- Smaller jurisdictions cannot always be expected to “presumptively defer,” simply because their interests are typically slight in comparison to the larger jurisdictions.<sup>128</sup>
- The United States has only has a mandate to enforce its antitrust laws in the interests of U.S. consumers. A comity agreement that required the U.S. to act on behalf of consumers in other countries (at least in part) would improperly expand that mandate.<sup>129</sup>

## 2. *Other Procedural Mechanisms*

Witnesses and commenters also addressed specific procedural mechanisms that could avoid (or resolve) disputes between enforcers or reduce the costs of multiple international enforcers.

### *World Antitrust Court*

The World Trade Organization has in the past considered some form of world antitrust court or arbiter.<sup>130</sup> Such an institution would be available to resolve conflicts between countries regarding the application of their competition laws to multinational transactions.

No witnesses or commenters advocated the creation of such a final arbiter.<sup>131</sup>

### *Central merger clearinghouse*

Witnesses and commenters also suggested establishment of a “central clearinghouse” for mergers filings.<sup>132</sup> Under such an approach, merging parties would submit notifications to a

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<sup>128</sup> Tritell Statement, at 9; Trans. at 15 (Tritell).

<sup>129</sup> Trans. at 73 (Tritell); Tritell Statement, at 9.

<sup>130</sup> Trans. at 35 (discussing domestic judicial process that allows the U.S. Supreme Court to be the final arbiter over court splits); *see also* Trans. at 37 (Tritell) (referring to past WTO attempts to establish an international competition tribunal).

<sup>131</sup> One witness specifically rejected such an approach. *See* Trans. at 37 (Tritell) (“To whom would we like to submit U.S. cases that another jurisdiction decides differently?”).

<sup>132</sup> Daniel Cooperman, Senior Vice President, General Counsel and Secretary, Oracle Corporation: Testimony Before the Antitrust Modernization Commission, at 7 (Nov. 8, 2005) (calling for standard form with single filing to which all jurisdictions have access, with a common schedule for initial and follow-up submissions); Trans. at 20 (Fox).

single jurisdiction or small number of jurisdictions, which would make the filing available to other countries upon whose consumers the merger might have effects. Witnesses testified that such an approach, with a common form, has been an aspiration of some antitrust enforcers but that it appears currently not to be obtainable. For example, Mr. Tritell noted that Germany, France, and Britain attempted to implement such a mechanism, but they have found that it is not frequently used and generally does not serve their interests.<sup>133</sup> Instead, he proposed continued work towards “soft convergence” among countries to align timetables and filing standards.<sup>134</sup>

### 3. *Continued Multinational Convergence Discussions*

In recent years, several international bodies, including the International Competition Network (“ICN”), and the Organization for Economic Cooperation and Development (“OECD”), have worked to promote international antitrust convergence.<sup>135</sup> Ninety-seven members from 85 jurisdictions participate in the ICN,<sup>136</sup> and 30 member governments participate in the OECD.<sup>137</sup> Both international bodies have promulgated “best practices” on merger reviews and cartel investigations.<sup>138</sup> More recently, the ICN announced its establishment of a Unilateral Conduct working group.<sup>139</sup> These institutions have had a significant influence in “promoting convergence

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<sup>133</sup> Trans. at 68 (Tritell).

<sup>134</sup> *Id.* at 69 (Tritell); *accord id.* (Masoudi) (agreeing).

<sup>135</sup> Masoudi Statement, at 3-4; Trans. at 7 (Masoudi).

<sup>136</sup> See International Competition Network, *A Statement of Mission and Achievements up until May 2006*, at 2 (May 2006), at <http://www.internationalcompetitionnetwork.org/capetown2006/ICNMission&AchievementsStatement.pdf> (last visited June 5, 2006).

<sup>137</sup> Masoudi Statement, at 5.

<sup>138</sup> *Id.* at 4-5.

<sup>139</sup> Press Release, Department of Justice: International Competition Network Conference Finalizes Merger Guidelines Workbook to Improve Merger Review Analyses, Establishes Unilateral Conduct Working Group (May 5, 2006), at [http://www.usdoj.gov/atr/public/press\\_releases/2006/215982.htm](http://www.usdoj.gov/atr/public/press_releases/2006/215982.htm) (last visited Jun. 5, 2006).

in antitrust enforcement.”<sup>140</sup> Generally, convergence contemplates reaching unity in objectives, practices, and outcomes among antitrust regimes throughout the world.<sup>141</sup>

Both U.S. antitrust agencies profess to “enjoy [a] strong cooperative relationship[] with a large and increasing number of foreign enforcement agencies, enabling close cooperation on cases, coordination in international antitrust policy, and provision of technical assistance to new agencies around the world.”<sup>142</sup> Comity and convergence, they argue, has improved because successful models have been shared and emulated through organizations such as the OECD and the ICN.<sup>143</sup> It is these efforts, and not necessarily new legislation that are responsible for the coordination and cooperation that exist today in global antitrust enforcement.<sup>144</sup> The success of these efforts can be measured by the fact that the vast majority of international cases are processed seamlessly and without incident.<sup>145</sup> Actual conflicts and inconsistencies are in fact “rare.”<sup>146</sup> As such, fashioning changes to current practices based on these rare occurrences seems unwise.<sup>147</sup>

Witnesses and commenters noted the following additional pros and cons regarding convergence efforts of these types.

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<sup>140</sup> Masoudi Statement, at 3.

<sup>141</sup> Trans. at 7-8 (Masoudi); *id.* at 107 (discussing convergence in objectives).

<sup>142</sup> Tritell Statement, at 3; *see also* Trans. at 36-38 (Tritell and Masoudi).

<sup>143</sup> Trans. at 36-38 (Tritell and Masoudi).

<sup>144</sup> *Id.* at 36 (Tritell).

<sup>145</sup> *Id.* at 11-12, 14 (Tritell).

<sup>146</sup> *Id.*

<sup>147</sup> Trans. at 14 (Tritell); Tritell Statement, at 8 (“Although the rare cases that result in conflict are troublesome, it is not clear whether, weighed against the countless matters in which authorities reach compatible conclusions, they should be the determining factor in shaping future policy.”).

## Pros

- Encourage OECD and ICN roundtables and peer reviews on developing additionally mechanisms for enhanced comity<sup>148</sup> and possibly develop international “best practices” for effective comity.<sup>149</sup> Both the U.S. and foreign agencies should conduct benchmark reviews of past divergent decisions.<sup>150</sup>
- Endorse the agencies’ work and efforts by simply telling them to “keep up the good work.”<sup>151</sup>

## Cons

- It is unrealistic to rely exclusively on achieving ultimate convergence—especially since complete convergence will take a long time, if it happens at all.<sup>152</sup>
- Practicing and promoting comity until such time there is sufficient, if not absolute, substantive convergence in the international antitrust community, is the more responsible approach.<sup>153</sup>

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<sup>148</sup> Blechman Statement, at 8.

<sup>149</sup> Atwood Statement, at 13.

<sup>150</sup> *Id.* at 14.

<sup>151</sup> Trans. at 36 (Tritell).

<sup>152</sup> Trans. at 26 (Blechman) (“Convergence is also important in the long run, but . . . some diversity is inevitable, and, therefore, in the here and now, the most immediate thing that probably can be done effectively is to encourage an increase in comity.”); *see also* Trans. at 28 (Atwood) (agreeing that convergence is “a long-run effort”).

<sup>153</sup> Trans. at 26 (Blechman).