ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Wednesday, February 15, 2006

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

The hearing convened, pursuant to notice, at 10:00 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN A. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
JOHN SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

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ALSO PRESENT:

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CONTENTS

International Antitrust Issues

Panelists:

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MICHAEL D. BLECHMAN, Kaye Scholer LLP
PROFESSOR ELEANOR M. FOX, New York University School of Law
GERALD F. MASOUDI, Department of Justice, Antitrust Division
RANDOLPH W. TRITELL, Federal Trade Commission Washington, D.C.

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his or her testimony.

PROCEEDINGS

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CHAIRPERSON GARZA: We would like to begin this morning's hearing for the Antitrust Modernization Commission. This morning, our hearing covers issues relating to international antitrust.

We would like to welcome our panel. Thank you for your statements and thank you for agreeing to participate.

Let me just briefly start by telling you how we plan to proceed. What we usually do is provide each of the panelists about five minutes to summarize his or her written testimony. The Commissioners all have copies of it, and we have read it. So, we ask you just to summarize it, if you could, for five minutes. Then we will have one Commissioner, in this case it will be Commissioner Delrahim, who will lead the questioning initially for the Commissioners, with 20 minutes of questioning to the panel. Following that, each of the remaining Commissioners will have ten minutes to ask any questions that they may want to ask of the panelists.

Of course, all of the proceedings today will be transcribed and eventually put up on the website.

All of your papers will also be available on the website.

I am going to start with Deputy Assistant Attorney General Masoudi and then I will go to Mr. Tritell and then to the rest of our panelists. So, Mr. Masoudi, would you like to begin?

MR. MASOUDI: Absolutely.

I'd first like to thank you all for inviting me to testify today on behalf of the Department of Justice.

In 1960, there were fewer than ten jurisdictions with antitrust laws. In 1990, still there were fewer than 30. Today, there are more than 100 jurisdictions with antitrust laws. In many ways, this is a very positive development. Prudent antitrust enforcement protects vigorous competition around the world and helps consumers to reap the benefits of free markets through low prices, quality products, and innovation.

The development is not without its potential concerns. Overly aggressive antitrust enforcement can hinder rather than help competition. Because companies are increasingly multi-national in scope,

many jurisdictions can be involved in examining a merger or a competitive practice.

With the proliferation of enforcement regimes around the world, it has fallen on the agencies in the United States, with their long tradition of antitrust enforcement and their unparalleled expertise in the economic and legal policy issues surrounding antitrust enforcement, to help guide other jurisdictions in the right direction.

The Antitrust Division has engaged antitrust enforcers around the world through various channels. We have been fully engaged in the OECD Competition Committee and the various committees of the International Competition Network. We have held bilateral meetings with other agencies to discuss criminal and civil enforcement. On particular enforcement matters, we have opened dialogue with other enforcers at the staff and the management levels. In general, we have spread our message of protecting competition rather than competitors, and of advancing consumer welfare, around the world.

Although there have been a few high-profile, well publicized cases in which the United States and other jurisdictions have differed in their enforcement approaches, there has been considerable

convergence in recent years. Over the past decade, many jurisdictions have come to realize the serious threat that cartels pose to competitive economies. An increasing number of countries, including the major economies of Canada, Japan, and the United Kingdom, have come to recognize, as we do, that criminal sanctions are a very important tool for deterring cartel behavior.

Many other governments have benefited from the lessons we have learned through our amnesty program, by devising programs of their own. Most notably, in February 2002, the European Commission issued a revised amnesty program, which improved transparency and predictability and created the opportunity for full immunity after an investigation has begun. This program has already proven to be successful.

There are also further success stories in the merger area. Through its guiding principles and recommended practices, the ICN's merger working group, which the Division chairs, has done important work to rationalize the multi-jurisdictional merger review process. By last count, more than 30 jurisdictions have proposed or are considering changes that would bring their merger regimes into

closer conformity with these ICN-recommended practices. We expect this pattern to continue.

On the substantive front, we have seen substantial convergence. The European Commission recently adopted horizontal merger guidelines that incorporate some concepts, such as the role of efficiencies, which are similar to principles used by the United States enforcement agencies. The Commission has also created a new chief economist position and continues to invigorate its use of economic analysis in its approach to antitrust enforcement.

We believe that one of the significant forces behind these developments has been the frank exchange of ideas that has occurred by virtue of cooperation and coordination between the U.S. and the EC on merger enforcement. We have done a great deal in the international arena, but more needs to be done and we are continually engaged in international efforts, both with regards to emerging regimes like China and developed ones like the European Union. This has been and will continue to be a top priority for the Antitrust Division.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Tritell?

MR. TRITELL: Thank you. Let me thank the Commission for the opportunity to participate in today's hearing.

Before I say anything further, let me make clear that the Federal Trade Commission has authorized the statement I have submitted, but the views expressed in that statement and any views I express at this hearing are my own and not necessarily those of the Federal Trade Commission or any individual Commissioner.

My statement replies to the three questions on which the AMC has sought public comment. I will try to summarize those here. I think you will see some common threads, which is that each of the issues raised are important and interesting ones and merit good discussion, but in none of these areas do we seek statutory changes or other formal changes at this time.

Regarding the FTAIA question, I think neither the statute nor the case law has ever been accused of being a model of clarity. The level of concern about the FTAIA rose dramatically after the Supreme Court's decision in the *Empagran* case left some open questions and created some ambiguity and possibly a wide berth for claims based on foreign harm. After the D.C. Circuit's decision in the

Empagran remand, establishing a proximate-cause test, and some follow-on lower court decisions, we are comfortable that the case law seems to be evolving in a consistent direction and a direction that is consistent as well with congressional intent and sound policy. So, I don't see a need to seek legislative clarification of the law at this time.

Turning to your question about whether there should be technical or procedural steps to facilitate further coordination with foreign antitrust authorities, I appreciate this question, because in a world of 100 enforcers, many of which may review the same transaction or conduct simultaneously, effective coordination is a necessity to avoid unnecessary costs and burdens to business, differing policies and analyses, or incompatible outcomes in cases.

That is why the twin goals of the FTC's international antitrust program are to promote cooperation with agencies around the world, and convergence, not just for its own sake, but convergence towards sound policy. Indeed, I think one can say that the U.S., having played a major role in facilitating the spread of antitrust regimes, bears some responsibility to see that the system now works in a coherent manner.

In my own, albeit biased, view the agency has done a pretty good job of promoting and achieving those goals. I think that is evident if you look at the cooperation agreements we have entered with major jurisdictions, and even more so in the day to day cooperation that goes on between our staffs. It's visible in the tangible products of multilateral competition fora, in which the U.S. agencies play a key role, such as the OECD and the International Competition Network.

In fact, if you will forgive a brief advertisement, six weeks from now, in this room, the FTC and the DOJ are going to co-host an ICN workshop for competition officials around the world on implementing the ICN recommended practices for merger notification and review procedures aimed at further streamlining the multi-jurisdictional merger review process.

Perhaps less visible but no less important are the incremental steps that agencies take toward international benchmarks of good practice based on their constant interactions with each other and the private sector in policy fora and actual cases. The proof mostly is in the scores of cases that undergo parallel review in the U.S. and the European Union and its member states, Canada, and, increasingly,

other jurisdictions in which our staffs work together to come to common understandings and, most important, to avoid conflicting outcomes and remedies.

Although differences in analysis and occasionally in outcome exist and are cause for legitimate concern and follow up, these rare exceptions should not be allowed to obscure the much larger and more realistic picture, which is one of successful cooperation and increasing policy convergence.

Now, regarding the questions posed by the Commission in this area, first, on the IAEAA, I don't think anyone would claim that the number of agreements that have been reached (i.e., one) fulfill the original hopes for this statute. Concluding additional agreements has proven challenging for a number of reasons, but those reasons lie largely in the lack of reciprocal statutes or in conditions in laws of other jurisdictions. So, while I appreciate the AMC's invitation to consider statutory changes, I don't see that there are amendments that would significantly enhance our ability to conclude additional mutual assistance agreements.

Turning to the area of technical assistance that you have raised, we are quite proud of the FTC-DOJ program, which has provided valuable assistance

to nascent agencies over the past 15 years. Last year, the FTC conducted 28 missions to 18 countries and maintained a resident advisor in one country. The program's funding, primarily from the Agency for International Development, has been reliable, and we don't think changes to the FTC's budgetary authority in this area are necessary.

Last, I will address the interesting questions the AMC has posed regarding whether steps should be taken to enhance the use of comity. Comity is, of course, a well-established part of U.S. case law, in antitrust cases and more broadly. It is reflected in the DOJ-FTC Guidelines for International Operations and in most of our bilateral antitrust agreements.

In addition to traditional or negative comity, most of the agreements provide for positive comity.

As many have pointed out, the multiplicity of antitrust laws raises at least the potential for duplicative, incompatible, and conflicting rules that can impose serious costs, not only on businesses but also that complicate antitrust enforcement. But is there now or is there likely to be a real problem meriting new policies?

Looking back, we see very few actual conflicts. Those rare cases are troublesome, but it is not clear that, weighed against the vast bulk of cases that have been resolved successfully, they should be the determining factor in shaping new policies. Predicting the future is obviously harder, but it is not clear whether conflicts will increase or whether continued progress in convergence will ensure that those conflicts remain rare exceptions.

Most of the proposals in the comity area basically encourage competition agencies to presumptively defer their own enforcement authority to that of jurisdictions with the greatest interest or center of gravity. Some countries—just recently, Canada—have explicitly deferred when another jurisdiction, in particular the United States, is taking steps that protect their interests. Many other jurisdictions no doubt also refrain, albeit more quietly. But articulating principles of deference is certain to raise difficult questions.

For example, how is the lead jurisdiction to be determined—based on where the parties are, the conduct, the evidence, or the most affected consumers? Does it mean that smaller jurisdictions, in which anticompetitive effects will almost always be slight relative to effects elsewhere,

presumptively defer to the action or inaction of larger jurisdictions? How should jurisdictions, including the United States, reconcile enhanced comity principles with domestic, statutory obligations to protect their consumers? Finally, in the few cases of actual enforcement conflict to date, would application of comity principles likely have produced a different result?

In short, the profusion of antitrust regimes raises important questions of potential conflicts and how to avoid or resolve them. While we welcome the discussion of those issues here and elsewhere, at least in my mind, the nature and extent of the problem as well as the merits of alternative solutions are not yet clear.

I'm sorry if I have exceeded my time. Let me reiterate my thanks, and I would be pleased to address any questions the Commissioners might have.

CHAIRPERSON GARZA: All right, thank you.

Professor Fox.

PROFESSOR FOX: Thank you very much. It's a pleasure to be here, and I thank the Commission very much for this opportunity.

To start out, I think it is very interesting to think where we are now compared with where we were about a half of a century ago. The conflicts that

existed half of a century ago were generally conflicts between the United States, which had a robust competition law and a strong market system, and countries that approved cartels. That was the nature of the conflict, and that was the time at which the comity issue or label arose, and the question was whether we should defer to another country that asserts a greater interest.

We have come a very long way. Compared with half of a century ago, the conflicts today are on a very small margin, and they are the results of great success in convincing the world that competition is the best economic basis for society.

I want to just say a word about cooperation, a word about convergence, a few more words about comity and other concepts that might replace it, and a word about the FTAIA.

First of all, on cooperation, as our agencies have said, cooperation is very, very strong, especially among our agencies. Our agencies, including people in this room, including at the table, but not only, our agencies have been real leaders in cooperating with other jurisdictions to try to enhance the competition system.

I don't think we need more legal instruments to cooperate. In almost all cases, one does not need

instruments to cooperate, although the IAEAA would have advanced our ability to share confidential information. That's important, but in general, we don't need more legal instruments.

On convergence, my view might be different from everybody else at the table. I think convergence is not a goal in itself. I think convergence is very good when it happens through enlightened self-awareness of one's interest in competition policy. I think that divergence is bound to happen, and it is very good and important to keep open the channels for diversity, for adjustment to change, and also for tailoring law to one's own context.

Comity. The word comity is an elusive word, and it means different things. As I said, for half a century, it was mostly about deferring to another country's industrial policy. Even today, it is often used that way; should one country defer to another nation's industrial policy?

In my view, we should try not to use the word. At least, we should unbundle it or think about what we mean when we use the word comity. Comity is about a process to defer to another country when that country has more important interests, without regard

to the results of the process. It is not instrumental. It is a process to defer.

I think what we need is not more comity, but we need more working together, as we're doing; further working together to advance our joint interests in competitive economies. This requires vision. It requires global vision. It requires a vision that is as broad as any given market, which is often global. It is a global concept. Think globally; implement locally. Comity implies think locally; implement locally.

I want to say a word about FTAIA and then a couple of words more about what we might do to enhance the joint effort to think globally in satisfying and advancing the world interest in competition and efficiency.

I think there is a case to be made for repeal of FTAIA, but I'm not making it.

I'm not going to make that case, because I think it would get us into a quagmire. 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. The FTAIA was never meant to indulge in

standing questions. It was a misconception of the Supreme Court in constraining the FTAIA to parse the issue as to what plaintiff is suing.

I did want to mention three items for possibly deeper work together with other nations to advance joint interests, taking a global perspective. One is from the ICPAC Report and relates to mergers.

The ICPAC Report in chapter two suggests that one think globally about merger problems and try to join together interests of all affected jurisdictions. When the merger affects many countries, perhaps the best-placed country should be the leader, and perhaps it should be the one to negotiate with the merging partners for a result. In that case, it is very important that all countries affected have voice and that there is a process whereby any country affected can come in and be heard and identify the relief that would be important for its jurisdiction. That would apply both to the review of the merger and to the relief.

My own proposals, very quickly. I think that we should move forward to thinking about mutual recognition of merger filings and perhaps a central clearinghouse for merger filings where interested countries accept the first filing in a jurisdiction that asks for sufficient information. Second, I

think we should think more seriously about a system or framework for how to resolve clashes when they happen, because clashes will happen, and, perhaps, think about applying the law of the country with the most contacts, but applying it to the whole market.

I will close there.

These issues could easily be raised within ICN and, perhaps, OECD. I think the discussions should be multinational first, so that solutions are not just devised unilaterally and exported to the world.

Thank you very much.

CHAIRPERSON GARZA: Thank you.

Mr. Blechman.

MR. BLECHMAN: Thank you and thank you for the opportunity to appear before the Commission this morning.

I'm going to focus in this opening statement on one of the issues that the Commission put forth, which is the one as to which actions might be taken to enhance international comity. As you know, my written statement on this subject was presented on behalf of the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD, which are two international business

organizations that have a long-standing interest in the subject of comity.

I think that globally there is generally a consensus, at least in principle, that comity has become increasingly important as the number of antitrust regimes has proliferated across the world. As noted in our paper, this view is one that has been embraced by top antitrust officials in the United States, the European Union, Canada and other jurisdictions. It is also a view that has been reflected in many existing international agreements, including and probably most notably the 1991 and the 1998 U.S.-E.U. agreements, which are discussed at length in our paper.

Nevertheless, conflicts do continue to arise between different antitrust regimes, as is shown, for example, by the differing remedies that were imposed and really different fundamental approaches that were taken by Korea and the European Union on one side and the United States on the other in the *Microsoft* case and the differences between the European Union and the United States in *G.E.-Honeywell* and other recent merger cases.

It may be that these examples that have been named are few in number, but the importance of these cases and the effect that they have had on the

international business community have been huge. An increased application of comity, in our view, would certainly be one helpful way of dealing with these kinds of conflicts.

In addition, the need for comity is probably going to be greater as private remedies play a greater role in Europe, as they promise to do, and as they presently do in the United States In the United States, perhaps the most significant recent development with respect to comity has been the Supreme Court's decision in the *Empagran* case, not so much the result that was reached, but the way the Court got there. The Court, in interpreting the FTAIA, adopted the principle of prescriptive comity and as a result of that Supreme Court decision, it is now an established canon of statutory construction in the United States that whenever a statute is ambiguous, as the FTAIA certainly was, it has to be construed, in the Court's words, "to avoid unreasonable interference with other nations' sovereign authority."

I think it is also significant that that principle was adopted by the Supreme Court at the urging of a number of our principle trading partners, including Germany, Japan, the U.K., and Canada. Therefore, you would think that that would provide an

impetus in other countries as well as in the United States for giving deference to both the substantive law of other countries as well as enforcement actions, in appropriate cases.

That now brings me to the specific proposals that the ICC and the BIAC would like to suggest. The first of these is that steps should be taken to develop internationally recognized standards for determining what the appropriate cases are for the exercise of deference, both with respect to substantive law and investigations, and enforcement actions and remedies.

The development of these standards can and should build on what has already been embodied in existing antitrust agreements, such as the 1991 and 1998 E.U.-U.S. agreements as well as in existing statutes like the FTAIA and in case law such as *Empagran*. Some of the specific factors that we suggest might be considered are, first, where did the conduct at issue primarily occur, where were its anticompetitive effects primarily felt, where would the possible remedies be implemented, and to what extent would the extraterritorial application of a country's laws conflict with the law, economic policies, or enforcement activities of the country in

which conduct did primarily occur or in which it had its primary anticompetitive impact?

These are all factors that are already embodied in the 1991 and 1998 U.S.-E.U. agreements as well as U.S. case law, but obviously the more definitive these standards are on which international consensus can be reached, the more predictable the outcome will be in specific cases in the future.

In addition, looking to a standard that is articulated in the American cases and codified in the FTAIA, we would suggest that there be a principle of presumptive deference whenever a transaction or conduct has no direct, substantial and reasonably foreseeable impact on a particular country. In other words, where not even the first of the requirements in the FTAIA would be satisfied.

In appropriate cases, this kind of deference could be conditional in the sense that, it might be rescinded if, upon further investigation, it turns out that the conduct does, in fact, have the requisite effects on competition in the country in question. These and other standards, to the extent they become internationally accepted for exercising comity, can and should be adopted and implemented through bilateral and multilateral agreements and treaties as well as incorporated into domestic

statutes, decisional law, and enforcement policy, and very importantly, in fashioning remedies.

Another effect or mechanism for promoting comity, which we saw in *Empagran* was the filing of briefs *amicus curiae*, which is something that can be done not only in the United States but, to the extent local procedural law permits, in other countries as well. In addition, the United States should continue to encourage international organizations, such as the OECD and the ICN, to promote comity through adopting guiding principles and best practices guidelines. Certainly, comity ought to be a best practice to be encouraged around the world.

We also think that more can be learned by looking at the experience so far with various comity mechanisms. For instance, with respect to positive comity, which was embraced in the 1991 and 1998 U.S.-E.U. agreements, while it was set out there, there seems to be very few cases, only one that we really know of, where it has been employed. It would be instructive to see why that is and whether anything can be done to make it more widely employed in the future.

Similarly, we think that a lot can be learned by looking at the application of comity in other regulatory contexts.

Finally, while comity is an important tool for reducing international friction, it is certainly not the only one. Convergence is also important in the long run, but as Professor Fox has indicated, 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.

Finally, we offer the pragmatic observation that, as a practical matter, efforts to promote comity are likely to be most successful when they are between antitrust regimes that have a history of cooperation and, therefore, the E.U.-U.S. and Canadian-U.S. relationships are certainly attractive candidates to serve as laboratories for implementing and testing increased comity mechanisms.

Finally, it is the view of the ICC and BIAC that greater application of comity, particularly through internationally recognized standards, will foster a more predictable, stable and efficient business environment that will encourage innovation and benefit consumers worldwide.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Atwood?

MR. ATWOOD: Thank you, Madam Chairperson, and I appreciate—to all members of the Commission—being invited to testify today.

Hearing the testimony of my fellow panelists, I think there is substantial convergence among us on the issues that are before the Commission, but there are some differences, although I would emphasize, I think they are at the margins. I think everyone at this table is essentially on the same page in terms of appreciating the progress that has been made internationally over recent decades, the effort the enforcement agencies have put into the convergence efforts, the comity efforts.

Basically, we are on a good track. I think the concern that we have is that, there is the possibility that we are going to move into a different scenario with greater conflicts, greater disputes in the antitrust area, given the two factors compelling the debate here. One is the increase in the number of enforcement agencies and the other is the increasing internationalization of business.

It might help clarify what I think of as comity. I distinguish between convergence and comity. Convergence, as I see it, is, as Mr. Blechman said, a long-run effort through all the mechanisms, the ICN and whatnot that have been

discussed, to bring enforcement policies in the different agencies into a coherent, reasonably unified body of knowledge. As Professor Fox said, convergence is not necessarily a goal in and of itself, but if convergence moves agencies across the globe toward sound economically oriented antitrust policies, that's all to the good. Obviously, that process needs to be encouraged and fostered.

What happens when, despite the growing convergence in a particular case, whether it is a merger or an investigation, there is prima facie a difference of opinion between two agencies, one in the United States and one abroad, for example?

That is a situation where you have to think about, can comity help bridge the gap? I think basically, if you have that initial potential disagreement, both agencies, U.S. and foreign, should consider, is it significant? Does it matter that there appears to be a disagreement? If you conclude, as an enforcement agency, it does matter that there is a disagreement, that a disagreement in remedies, a conflict in remedies, would be a bad thing in this particular case, what do you do about it? How much weight do you give to that potential harm from a disagreement?

Obviously, this is fairly subjective, but I think the point of my testimony is that the enforcement agencies have to give strong recognition to the fact that those disagreements are bad. They hurt; they hurt the international business community. They hurt the development of sound antitrust policies. When you have a disagreement, you have to work very hard to try to resolve it and deference may be, should be, in a number of cases, a method to resolve that disagreement.

I think the United States and the European Union have particular responsibility to set the model for the world in their comity agreement and in how they resolve differences that may arise between those two agencies, because they are the most mature, preeminent agencies in the world. And, as has happened, if they publicly disagree in important antitrust cases, it is sending, I fear, a message to a lot of other agencies that it is okay to disagree, that you can have a lot of different remedies and that you can require a company in one country to configure its product in another way, require them to configure it another way in another country, a third way in another country.

That is a very bad precedent to be setting out to the world, particularly to less mature

antitrust agencies. So, I think the United States and the European Union really need to work very hard to set a model for the rest of the world in saying, when we have a disagreement, we have to work it out in a manner that is consistent with sound economic policy and not, except in extreme cases, go our separate ways.

I think this is important also for the practical operation of the enforcement agencies, because in a major matter, a company is going to be—it is going to be much harder for DOJ or FTC to reach a settlement if the company does not feel comfortable that settlement will be pretty much a global settlement. The worst thing for a company, if they are in an important transaction, is to reach an agreement with the United States and then have that simply be the starting point for further negotiations abroad.

Assistant Attorney General Pate pointed out very effectively the problem of forum shopping, where an opponent of a transaction or an opponent of a practice will just simply go from one jurisdiction to another using the prior agency's determinations as a base, but then ask the next enforcement agency to add on something more. The dynamics of that are very

negative in terms of reaching prompt, sensible, global settlements on important transactions.

I endorse the kinds of principles Mr. Blechman identifies in his paper. My paper has similar principles on how we can try to improve the comity agreements. The one thing I would add is I think the U.S.-E.U. agreement would be the best place to start to identify explicitly as a standard for the comity discussions the desire to facilitate global trade, global investment, and consumer welfare.

If you read the comity agreements now, they can sometimes be viewed as simply an effort to make the law enforcement process more efficient, which is a desirable goal. But that is not the end all and be all. The ultimate goal of antitrust enforcement should be to make world markets more efficient, facilitate broad world trade, and cut down regulatory barriers. If that principle is adopted in comity agreements, when there is a dispute it gives the agencies a target, a reference point for their discussions, not simply what are my national interests, what are your national interests, but what is the long term interest of the antitrust goal and of the enforcement process. I think that would be a useful step in enhancing comity in the future.

Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Delrahim.

COMMISSIONER DELRAHIM: Thank you, all the panelists for the excellent presentations you gave to the Commission. We have read it and found it very useful.

Let me start first with Mr. Masoudi. We heard from Mr. Tritell that the Federal Trade Commission does not have a view with respect to any legislative clarifications of the FTAIA. We know that the D.C. Circuit has taken—has ruled the proximate cause standard after the Supreme Court's ruling for actions to be sustained.

Does the administration, which he represents, have any position with respect to any legislative changes to clarify that so we don't have disparate treatment of the *Empagran* case in the various circuits?

MR. MASOUDI: After the *Empagran* decision, there have been some circuit court decisions on point. The administration does not have a position at this time regarding any amendments that should be made. Right now, the statute is being batted about in the courts and will be decided in the courts. That is where we think is the appropriate place for it at this time.

COMMISSIONER DELRAHIM: Is the administration pleased with the D.C. Circuit's formulation?

MR. MASOUDI: I'm not going to comment on any particular decision, but I will say that, in general, we think that the courts are the right place for this statute to be considered right now.

COMMISSIONER VALENTINE: I think his testimony clearly says that.

COMMISSIONER DELRAHIM: Thank you.

We have heard—and let me just ask all the panelists to keep in mind. One of the things I think everybody agrees on, both on the panel and the Commission, is the issue of convergence. That is the general point.

One of the things that would be very useful to this Commission would be some practical recommendations. What can this Commission do, if anything? Are there legislative changes? Are there encouragements of the law going a certain way? Are there panel recommendations like the ICPAC?

Some of you have very important recommendations. Professor Fox, you mentioned some of your suggestions in your oral testimony. I think that is very useful. In your response, in your recommendations, if you could keep that in mind, what

are some specific things that we should be focusing on and recommending to the President and Congress in '07 and, again, if anything? There may be nothing there.

One of the considerations I think Mr. Atwood and others have raised in their concerns is, when you have divergence and you have—between different countries and it becomes a political issue. It is more a lack of trust or agreement in the approaches by the various jurisdictions? I tend to agree with you, Professor Fox, that I don't—I think just blind pursuit of convergence is not necessarily the most fruitful way. We don't have necessarily convergence in the domestic antitrust enforcement apparatus that we have.

The *Microsoft* case was a perfect example when the state agencies did not agree with the federal agencies on settlement, on approaches. You have circuit courts that disagree with each other. So, that divergence is less of a concern.

However, one thing we have here is some faith in a Supreme Court or in another court where whether we disagree with the outcome of *Empagran* or the Pfizer decision or *Illinois Brick*, we close the books, move on and then live at peace. That is the new law of the land.

When those types of divergence occur internationally, and we may or may not disagree on the different remedies imposed in *Microsoft* or *GE-Honeywell* and there is a lot of criticism about that. Is there an apparatus, is there an international organization where something like that should be appealed to, to address what we are talking about?

We talk about unilateral comity considerations between jurisdictions. Is there a way to address that and say, this person has taken a wrong approach, and give us a ruling, and then we could agree or disagree and move on?

I will start with you, Mr. Tritell.

MR. TRITELL: Thank you.

With regard to specific recommendations for the AMC to encourage convergence, tell us to keep up the good work. I am not advocating any—

COMMISSIONER JACOBSON: The great work.

[Laughter]

MR. TRITELL: I'm being only half facetious here.

This is not an area that, in my view, lends itself to improvement through legislation. That has been the strength of the convergence process. It hasn't happened because anybody has ruled or ordained that countries have to move together in their

antitrust policies. It has happened because there have been models that have been successful in the eyes of others that they have emulated.

Tim Muris gave a terrific speech about this a couple of years ago in Brussels, talking about how the convergence process has worked. One example he used is the U.C.C. in the United States Nobody told all the states they had to adopt it, but it was promulgated, it was adopted by some states, and it worked and others saw it as a good model.

I think that is what we are seeing in the international sphere. It takes some patience. It is incremental, but I think that is the way this process works, and it has been successful, and I think that is the way forward, rather than specific legislative or other steps that the AMC could recommend at this point.

Regarding an ultimate arbiter of differences internationally—of course, there isn't one today and I would submit, that is for the better. Who would anybody like to be that arbiter? To whom would we like to submit U.S. cases that another jurisdiction decides differently? I don't think we are at a stage in the world where that would be desirable.

As you are aware, the United States took a skeptical position about WTO disciplines in the

competition area. We felt the jurisdictions around the world were in different places as far as where they are coming from on antitrust, from nothing to very sophisticated; that you have countries with different legal cultures, histories, and economic development. One rule will not work well for everyone, and I think we have to accept some degree of disharmony as the price for not having uniform rules that may impose on the U.S. solutions that we don't think are optimal.

COMMISSIONER DELRAHIM: Mr. Masoudi, anything to add?

MR. MASOUDI: I generally agree with what Mr. Tritell said. We don't have any specific proposals for legislative action in this regard. We think we have been cooperating well on a general level through the OECD and the ICN: in a more targeted way through bilateral meetings; and on specific matters where we think the divergence might arise. In a great many cases, we have been successful in coming to satisfactory conclusions. In a few high profile cases, we have had exceptions.

We think things are moving in the right direction and we agree, at this time, that it would be inappropriate to have some sort of international body to which decisions would be appealed.

COMMISSIONER DELRAHIM: Professor Fox.

PROFESSOR FOX: Yes, I think, Commissioner Delrahim, you have put your finger on one really important point. Sometimes there is a direct clash, and where can one go to get a ruling? A direct clash would be the United States finds *Boeing-McDonnell Douglas* not anti-competitive, and the European Union finds it anti-competitive. Or *GE-Honeywell*.

I think that we do ultimately need some place to go. My idea relates to the problem that law is national and the United States applied its law in Boeing to simply close the investigation and not sue.

The former head of our Council of Economic Advisors said, this merger is good for the United States. Even if the price of airline seats goes up, that is still good for the United States. The Antitrust Division would never have said that. It instills the idea of national industrial policy on both sides.

So, one idea is to say—and this is in my testimony and in my separate statement in ICPAC—that where there is a direct clash and there is a question raised as to whether each of the nations has properly applied its own law, as there was in *Boeing* on both sides, perhaps there ought to be some procedure like NAFTA Article 19, which says, it is okay to apply

your anti-dumping law, but you have to apply it according to the terms of your law. A national decision may be appealed to a NAFTA to ascertain whether the national law was faithfully applied. That sounds like a small step, but it would give some legitimacy and take away the industrial policy overlay.

Microsoft is, to me, entirely different. In *Microsoft*, there was a U.S. judgment. The European Union, and then later Korea, examined practices after conduct that was at stake in the U.S. case. There was no direct clash, as threatened in *Boeing/McDonnell Douglas* and as in *GE-Honeywell*.

Several panel members and, I think, Commissioners have said they want sound economics, but I think both sides usually believe that they are applying sound economics. Economics is not a science, because models rest on presumptions.

COMMISSIONER DELRAHIM: Thank you.

Mr. Blechman?

MR. BLECHMAN: I think everyone agrees there is no global international court that is going to resolve international differences in terms of promoting convergence. However, while there may be differing views on particular aspects of antitrust doctrine between different jurisdictions, one thing

that I think all the jurisdictions agree on is that there ought to be some kind of principles of comity that are generally accepted, because no country knows on which side of the comity issue it is going to be. In one case, it may be seeking to enforce its law. In another case, it is worrying about the enforcement of someone else's law as it affects its citizens.

Therefore, it ought to be possible to develop, and it has been possible to develop, result-neutral rules in terms of who gives deference to whom. These so far have been between enforcement agencies, which have rules in terms of deference of one enforcement agency to the other, but to the extent these get adopted into treaties, for example, that become enforced both as a matter of national law and court decisions as well, that will not eliminate the diversity, but at least it will establish generally accepted principles as to who defers to whom, that will be acceptable on whichever side of a particular issue you happen to be.

COMMISSIONER DELRAHIM: Mr. Atwood.

MR. ATWOOD: On what recommendations this Commission can make to advance convergence, I guess, three areas have been identified. One, should you be recommending a supernational body? I would advise against that. I don't think it is going to happen.

It is simply, at this point, too far off the consensus of policymakers to be a viable proposal.

Proposing substantive changes of U.S. law to advance convergence: I agree that what I hear the others to be saying that the common law process is the better way to go in finding adjustments of substantive law. The Sherman Act is broadly written. The courts recognize the importance of sound economic policies. That process is more reliable, I think, to bring about sensible policies that are saleable internationally than would a legislative approach, which potentially could move us in the wrong direction, e.g., NOPEC.

One area though where I think legislation would help and is needed, because there isn't the same flexibility as there is in the substantive area, is in procedures and remedies under U.S. law. I would encourage the Commission—and I know you are doing this—to look at everything from Hart-Scott-Rodino to private treble damages to *Illinois Brick* rules, where, in many respects, the courts don't have the flexibility to make adjustments, and there are real clashes in approaches with foreign jurisdictions.

To my mind, the most obvious change that ought to be made is to eliminate automatic trebling

for antitrust violations. Make that, as in the patent law, a discretionary issue that the court would address, not the jury. It would require some additional element of willfulness or malice for a remedy to be multiplied. That should be a decision for the court to make, and it should be a separate decision as to whether or not there has been a violation of the antitrust laws.

I think that step would be tremendously welcomed by foreign jurisdictions. They would see that as a positive effort by the United States to align its law with the international consensus more closely.

COMMISSIONER DELRAHIM: A worthy goal; politically, almost impossible, I think, but not something that should be a concern of this Commission as far as recommending such a proposal.

MR. ATWOOD: I agree it is difficult, but the patent code is a good example. It works well. I think it is a better system.

COMMISSIONER DELRAHIM: Great.

Mr. Blechman, you mentioned some lessons in the areas of securities, taxation, and banking, and I think where we have had bilateral treaties in the taxation and securities area, they have worked well. We are talking domestic concerns that have

international spillovers not too dissimilar from some of the antitrust effects and concerns we have.

What specific lessons would you suggest we focus on that could be instructive for the antitrust laws?

MR. BLECHMAN: I thought the examples you just referred to were the ones that we had in mind. I didn't have any specific proposal base on the bankruptcy or tax laws. A number of the papers mentioned them—which ones would apply specifically to antitrust. Those kinds of statutory solutions were the ones that we were thinking of.

COMMISSIONER DELRAHIM: A lot of times, those provisions in the United States have worked, because there has been where—for example, on the taxation, where there has been a certain treatment. In a foreign body, there is consideration given under the U.S. tax code to the subject, a person or corporation.

Would you anticipate something along those lines, where you would have bilateral agreements with international trading partners on antitrust remedies and then the U.S. law would accommodate that?

MR. BLECHMAN: I think what we were thinking more in terms of specific treaties and agreements with other states as to which law would apply or

which agency would apply in specific kinds of cases. Then, when you have a *GE-Honeywell* type case in the future, which is a very difficult kind of case, if the impact of a remedy is going to have a huge effect on another country because it is that other country's two companies that are merging, and where it affects the whole merger and creates uncertainty as to whether the companies would merge, that you would have some internationally agreed to principle that deference would be paid and that you would not impose remedies that are going to interfere with a merger that might be critically important to another country. That was more of the kind of thing we were thinking of.

COMMISSIONER DELRAHIM: Thank you.

Mr. Tritell and Mr. Masoudi, if I could ask that you provide the Commission the information on the technical assistance that you jointly provide, which I think has been incredibly helpful towards the goal of convergence, that would be helpful for us, to take a look at what it is in the Commission, to determine if there are enhancements and if you have recommendations for whether it is budgetary authority, additional funds, other resources that cut through red tape, whether it is funds you get from other governmental agencies—that would be very

helpful for us, those recommendations from you guys who implement this.

Would you be able to provide that to us in the next month or two?

MR. TRITELL: I would be glad to get you that information.

MR. MASOUDI: What I would just say on that matter is that, we 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.

COMMISSIONER DELRAHIM: If you have any, given your experiences, that would be helpful. If not, that's just fine.

Let me switch gears to the area of cartel enforcement investigations, where, I think, the agencies have done a great job. We have had a lot of convergence towards that, as Mr. Masoudi reported. We have some concerns, though, because not every country has a similar level of fines or not all of them have the same investigative tools, whether it is the amnesty program or otherwise.

Given that there is almost universal agreement on the harm that cartels impose on the general consumers and economy, could that be a

possible area where there would be some—an effort that maybe they will never reach that point, but an effort to initiate—to have agreement among all countries imposing certain levels of fine so you have at least harmonization of fines so a cartel activity here is not more costly or less costly than one occurring in Vietnam or China or wherever it might be, and at the same time harmonize the amnesty process, because as we have seen, despite some efforts, there are some procedural mechanisms that make it difficult.

I think one of the most effective tools of detection has been the amnesty program. If you don't have the same procedures in Europe and risk possible treble action damages in other ways, you don't have one clearinghouse to go to and everybody agreeing on how to give that amnesty.

Is that a possible area? I'll start with you, Professor Fox and then go to the other panelists and the time is up for me.

PROFESSOR FOX: I am going to defer, because people here know much more about this issue than I do.

COMMISSIONER DELRAHIM: I will then refer that to Mr. Masoudi.

MR. MASOUDI: Cartel enforcement is the number one antitrust enforcement priority of the Antitrust Division. We have been making great strides in working with other countries, as I stated in my opening statement today, in convincing other countries that cartel enforcement is a very important priority.

Recently, at the OECD, we had a panel discussion on the use of evidence in cartel cases and we have had bilateral discussions with Japan and the E.C. We have had discussions on the leniency program. We have been working hard to make sure that there aren't conflicts between the leniency program in our jurisdiction from others, so that it can be used as an important tool for destabilizing cartels.

We think, at this point, that the best way for us to engage other enforcers is through the OECD, and through the ICN cartel working group. We think that has been very effective. There is more work to do, but we think that we have been effective in that regard.

COMMISSIONER DELRAHIM: Some of the difficulties, for example, in Japan and other places are they have domestic political problems of enacting increased fines. When they have an international agreement, they could take that back and implement

such an agreement just like trade agreements and intellectual property and other ways.

Do you think that could be something that would be useful?

MR. MASOUDI: That's something that we could certainly consider and look at to see if that would advance the ball. We have, even just through discussions, made progress.

CHAIRPERSON GARZA: I think we need to move on now.

Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Thank you, Madam Chairperson. Thanks to the panelists for helpful statements and good testimony, lively testimony.

Let me start with the FTAIA issue and see if we can put it to bed once and for all.

I take it, nobody at the table is recommending any statutory fix, anybody?

Okay.

Commissions of this kind can sometimes contribute, not simply by recommending statutory fixes, but by articulating the best rule of law that should apply in a certain situation. Could this Commission, assuming we ever could get our—get a consensus, contribute by stating what the preferable rule of law is with respect to FTAIA?

Mr. Atwood?

MR. ATWOOD: I think if you had to collect a short number of words to do it, I thought Professor Fox did it quite well in her testimony. The United States laws do not apply in the absence of an adverse effect in the United States' territory.

COMMISSIONER SHENEFIELD: Except that doesn't—does that deal with the situation where you have a worldwide cartel that affects different economies, not necessarily interdependently, but causes significant damage in the United States and also in Europe, but they are not interdependent?

MR. ATWOOD: From that principle, U.S. law is applicable only with respect to injuries in the United States. It doesn't otherwise comply. It leads you to conclude, as the Court in *Empagran* and D.C. Circuit have come pretty close to concluding, they are not quite all the way there—that a foreign market purchaser has no claim in the United States, because there has been no violation of the law that injured that party. So, I—

COMMISSIONER SHENEFIELD: You think that such a statement would be helpful if we could get this Commission to endorse that view?

MR. ATWOOD: Yes.

COMMISSIONER SHENEFIELD: Mr. Blechman?

MR. BLECHMAN: Yes, I have a slightly different suggestion in terms of a statement that might be helpful.

I think that the result that was reached by the D.C. Circuit in *Empagran* was a major step towards bringing certainty to this area of how those kinds of claims—when someone abroad can sue and when they can't sue for injuries that don't result proximately from a restraint of trade in the United States. That rule has been adopted now in the District of Minnesota, in a magistrate's decision in the Southern District of New York, and an unpublished decision in San Francisco. There is another case pending in San Francisco right now, all of them involving essentially the same facts, worldwide cartels of commodity type products with exactly the same kind of claims being made by the plaintiffs — price fixing in the United States somehow facilitating raising the prices abroad.

I think that a statement by this Commission that evolving consensus in the District Courts is a desirable rule and would give further impetus to resolving the issue so it won't have to be litigated and relitigated in district after district, which right now is what is happening.

COMMISSIONER SHENEFIELD: Professor Fox?

PROFESSOR FOX: I am going to disagree with one point.

I first want to say I think it would be wise to suggest repeal of Webb-Pomerene and the Export Trading Company Act. That is, I think it would be theoretically wise. It is politically difficult.

COMMISSIONER SHENEFIELD: We are going to come to that in a minute.

PROFESSOR FOX: Oh, okay.

Secondly, I don't like the FTAIA. It's a very badly drafted statute. I don't like the way it was interpreted. I'm convinced it is a statute about subject matter jurisdiction, not standing.

I think your questions were really going to the standing issue. I am not happy with the way in which most of the cases are going on the standing issues. They are going that way because of the language in the Supreme Court's opinion in *Empagran*. In *Empagran*, the Court interpreted the statute to say that a plaintiff who buys abroad—it's not just a foreign plaintiff—that would be a discrimination in violation of the GATT. A victim who happens to buy abroad cannot recover damages unless that person's claim derives directly, substantially, proximately from the U.S. effect. The plaintiff's claim never derives proximately from the U.S. effect. It derives

from the conduct that was within the U.S. subject matter jurisdiction.

My proposal would be for a standing rule better than what has evolved from *Empagran*. It would be to say that, there is a proximate cause rule, but that plaintiff's harm must be proximately related to the conduct within the jurisdiction of the United States and that the particular plaintiff's transaction must be significantly related to United States or to the U.S. market.

I'm afraid, however, that the language of the Supreme Court in *Empagran* runs against that.

COMMISSIONER SHENEFIELD: So, you think no such statement from this Commission would be helpful?

PROFESSOR FOX: Oh, I think it would be helpful—but the problem I am—

COMMISSIONER SHENEFIELD: Or would it be—In a simple, declarative English sentence, what would it be? How would you—

PROFESSOR FOX: Oh, okay.

I would refer to the example of the auction house conspiracy. Wildenstein sometimes bid and bought in London and, more often, in New York. Under *Empagran* it is precluded from getting damages when it placed the bid in the London market, even as to art

shipped to it in the United States so it could see it before bidding.

COMMISSIONER SHENEFIELD: What would the statement be—

PROFESSOR FOX: The statement would be: a plaintiff has standing—first of all, it must be the case that the court has subject matter jurisdiction. The plaintiff's antitrust harm must be proximately related to the conduct that causes the harm that relates to the jurisdiction, and the plaintiff's transaction must be significantly related to the U.S.—

COMMISSIONER SHENEFIELD: Okay, thanks, Professor Fox.

Mr. Masoudi?

MR. MASOUDI: We are satisfied with how the case law is proceeding and see no need for the Commission to make any statement in this regard.

COMMISSIONER SHENEFIELD: Okay.

Mr. Tritell?

MR. TRITELL: I suppose if the Commission wanted to make a statement that is consistent with or endorses the position taken by the DOJ-FTC brief in the Empagran case, that would be fine.

[Laughter]

COMMISSIONER SHENEFIELD: Okay, all right.

Let's turn our attention to export cartels, which Professor Fox mentioned on page 9 of her testimony in a sort of a hopeless statement that this is something for another day. First, Professor Fox, if we could come to a consensus, would it be helpful for the Commission to take a position on the Webb-Pomerene Act and the Export Trading Company Act?

PROFESSOR FOX: Yes, I think it would be helpful.

COMMISSIONER SHENEFIELD: What would the position you recommend be?

PROFESSOR FOX: Okay.

First, I would say, given the FTAIA, FTAIA really made both of those statutes superfluous, although it is somewhat difficult to say, because the Export Trading Company Act was adopted, I think, on the same day. That was because of a conflict among the congress people as to whether a more regulatory approach or a freer market approach was better and they decided to go with both, because they just were at loggerheads—

COMMISSIONER SHENEFIELD: It was a conflict between the Senate and the House, to be blunt.

PROFESSOR FOX: It was, I'm sorry; it was. It was a conflict between the Senate and the House and they decided to go down both paths, which was

really a wrong way to go, not a sensible way to go in a regulatory—

COMMISSIONER SHENEFIELD: But you would recommend that we come out in favor of a repeal or appeal?

PROFESSOR FOX: Right.

There were two different things. One is FTAIA has made those two acts superfluous. The second is something really different.

I think that there ought to be coverage of hardcore export cartels.

COMMISSIONER SHENEFIELD: For U.S. enforcement?

PROFESSOR FOX: For U.S. and for everybody.

COMMISSIONER SHENEFIELD: Okay.

PROFESSOR FOX: I also think the WTO leans in that direction in the Safeguards Agreement, paragraph 11, which seems to say that to me. That countries agree to not authorize or have export or import cartels.

COMMISSIONER SHENEFIELD: Okay, my time is—I'm on a very short leash here.

Mr. Atwood, what would you say to that?

MR. ATWOOD: I disagree. I think it is common ground now that the U.S. antitrust laws should not apply to conduct that does not—including U.S.

export conduct, that does not have a direct effect in the United States. Repealing Webb-Pomerene would put in doubt that principle. All the Export Trading Company Act does is it endorses that principle and gives exporters an opportunity to get pre-clearance for conduct which, in the judgment of the agencies, does not have that adverse U.S. effect. Therefore, it is a protective device to insure that there won't be misapplication of U.S. law to certified conduct.

I think it is a good program. It has worked well. It does not send the message that we endorse export cartels, because we do not purport to protect joint U.S. conduct from foreign antitrust laws. Every certificate that is issued explicitly says, you also have to honor the antitrust laws of foreign jurisdictions.

COMMISSIONER SHENEFIELD: Mr. Blechman.

MR. BLECHMAN: I think precisely because there are now more than a hundred antitrust laws around the world where other countries can take action virtually anywhere today, there is no need to get into what historically has been a very politically difficult issue of repealing Webb-Pomerene, and it is not something I would undertake.

COMMISSIONER SHENEFIELD: I am assuming, but I will ask anyway. Our government friends don't have a recommendation one way or the other on it?

MR. MASOUDI: That's correct.

COMMISSIONER SHENEFIELD: Mr. Tritell?

MR. TRITELL: Yes, that's fair except to the extent that my colleague who was here on the separate hearing on antitrust exemptions may have expressed a generally negative view towards antitrust exemptions. But I don't have anything to add to that.

COMMISSIONER SHENEFIELD: Thank you very much. My time is up.

CHAIRPERSON GARZA: Thank you.

Commissioner Valentine.

COMMISSIONER VALENTINE: Okay, thanks.

Let me also clear up quickly a little brush, all right. No proposals to change the FTAIA statutory language with respect towards two technical questions, technical amendments to the IAEAA and technical changes to the budget authority of the U.S. I did not hear either of the U.S. government agencies seeking any changes there; is that correct?

MR. MASOUDI: That's correct.

MR. TRITELL: Correct.

COMMISSIONER VALENTINE: Any opinions briefly from the other three?

MR. BLECHMAN: Yes, I think that there has been one problem with that statute in terms of the—

COMMISSIONER VALENTINE: The IAEAA?

MR. BLECHMAN: Yes.

COMMISSIONER VALENTINE: Okay.

MR. BLECHMAN: In terms of giving, sharing confidential information from one agency to the other that, in my estimation, has something to do with how few treaties have been actually—

COMMISSIONER VALENTINE: Do you have a specific recommendation?

MR. BLECHMAN: Yes.

The specific recommendation that I would make, and it is one that the ICC has voiced on a number of occasions, is that some due process element be introduced so that before a company's confidential information, trade secrets are shared with another agency, except in cases of cartel enforcement where it would interfere with the investigation, that there be some provision for notice—

COMMISSIONER VALENTINE: Okay, I hear you and we have that position on our books. I don't think that is why the other countries are not entering into the agreements.

Let's get to comity, which is the one place I do want to talk. I'm sorry, I just—again, we only have five minutes.

CHAIRPERSON GARZA: No, you have ten.

COMMISSIONER VALENTINE: We have ten? Oh, okay.

COMMISSIONER SHENEFIELD: So, go slowly.

[Laughter]

CHAIRPERSON GARZA: So, slow down, breathe.

COMMISSIONER VALENTINE: Okay.

We can easily get the ICC-BIAC submissions with respect to the due process matter, which I have seen several times.

Okay, with respect to comity—and here, I think it is going to be Professor Fox who may be the outlier, although the agencies don't seem to be exactly grabbing at this either.

What if we were to try to be extremely sensitive and to try to encourage adoption of certain principles, not in the—one question is should we be encouraging the U.S. government agencies to do this or should we be encouraging work through the ICN or the OECD?

I happen to like the way many of Mr. Atwood's statements are phrased. I have seen some draft ABA ones and I have seen, obviously,

Mr. Blechman's. I guess what I would propose is that, what if we were to recommend certain basic principles that went beyond the Blechman ones, simply, you know, if you don't have a direct, foreseeable and substantial effect, you should presumptively defer, because I think that is mom and apple pie and we can all agree to that.

Don't go as strong as something that says develop the principles, the jurisdiction with lesser interest and expertise should defer to actions by jurisdictions with greater interest in expertise, because I don't think we are going to get smaller jurisdictions saying, gee, I'm going to always defer, because I'm really lesser and small and I'm really dumb and inexpert.

Whereas, Mr. Atwood's which is, you know, where a presumptive deferral, where the deferring party's interest is relatively slight to that of the other party may be a step beyond the direct, foreseeable and substantial, but not as offensive to other countries as the—shall I say draft ABA proposal, which I shouldn't probably be—

Could we get there in a way that would be helpful and that would not be viewed as the U.S. mother, dictating to the rest of the world what they ought to be doing and why they should always be

deferring? We will just take them one at a time. Let's start with Jim and work on down.

MR. ATWOOD: I think so and one way where you can make progress again is in the U.S.-E.U. context. I think anything that is negotiated there will not be regarded as one jurisdiction's exercising dominance over another, because you're dealing with two very experienced, very substantial government agencies.

So, if agreement between them can be reached along the lines I have proposed, then it is easier to sell those principles to jurisdictions that might otherwise be sensitive to the political concerns you expressed that are arguably suggested by the ABA proposal.

MR. BLECHMAN: I think it is a good idea and the "relatively slight" formulation would be helpful. The problem is how you determine what is relatively slight. That's why I was looking for some kind of standards which are virtually self-executing and where it's automatic, but that there be deference where the interest is relatively slight in terms of where the conduct occurred, where the impact is felt, and those kinds of things would be wise to consider and should be something that you can reach agreement on, because it is not America dictating to the rest

of the world. The rest of the world wants America to defer when our interest is relatively slight. So, that should be an achievable result.

COMMISSIONER VALENTINE: Oh, okay.

PROFESSOR FOX: I am worried about going down this path. I wonder, for example, would people think that South Korea's interest in going after Microsoft is relatively slight. That's one point I have a quibble over, what is relatively slight. I might think something is not slight. Others might think it is, there will be a dispute on that point.

Another point is the one Randy Tritell had in his paper and the one you mentioned, Commissioner Valentine. We do have to be sensitive to developing countries that probably don't want to agree to defer. They probably will defer when it is in their interest to defer and they will never defer when it is not in their interest to defer. So, don't we achieve the desired result by just talking, lots of conversations, lots of fora for conversations?

A third point is that, if we go down this line, I would hope that the process is opened up so that countries whose interests are perceived as relatively slight have a voice and can still say, this is what is hurting me, and I need relief with respect to this.

Take, for example, the Kimberly-Clarke merger of some years ago. There was some impact to Mexico. There was a much greater contact in U.S. and European Union Would Mexico's interests be considered relatively slight? Shouldn't there have been a forum and it would have been useful if there was a forum where you could open it up and Mexico could go and say, these are my interests and this is the relief I want. Something like that actually may have happened. It ought to be encouraged. There might have to be some change in law to allow a jurisdiction to adopt remedies responsive to other countries.

MR. MASOUDI: I think that, in general, we work very, very well with other jurisdictions in coming to satisfactory results. The cases that seem to be driving this debate, I don't think are cases where we can say that the jurisdictions have slight interests or that they don't have some significant interest at stake.

That is where each country's sovereignty interests come into play. I think that we should continue to work well—

COMMISSIONER VALENTINE: The question is not whether you work well. The question is should we move toward articulation of some principles or is it

better not to articulate principles because of, let's say, what Eleanor said. People will then be forced to, in fact, act more aggressively because they don't want to say I have no interest.

MR. MASOUDI: We don't have a recommendation to articulate any principles.

COMMISSIONER VALENTINE: Okay.

Mr. Tritell?

MR. TRITELL: Yes, I think there is an urge, maybe especially among lawyers, to reduce things to writing, standards, codes, but I think this is an area where you have to be careful what you ask for and ask whether it is really an improvement. I think everybody's sense is this proposal would not get at the train wreck, the few train wrecks, if you will, that we have had.

I don't think there is any comity principle that would have prevented, for example, *GE-Honeywell*. Rather, what we do there is we formed a working group with our counterparts in the European Commission and said, let's look at our differences. Let's step back and look at our policies on conglomerate mergers and bundling issues and understand each other better and talk about the economic literature and see if there are ways to move towards each other in the future.

For the cases where the interests are slight, I submit that there is deference and comity every day on those cases. Think of all the global mergers. Why aren't there 50 cases being brought? Those jurisdictions are basically saying my interests are slight. They are being taken care of elsewhere.

So, do we really have a problem? If you put that in writing and say, from now on, all of you slight-interest countries should be deferring and so stating, I'm not sure you are going to get a better result.

COMMISSIONER VALENTINE: Okay.

One last quick question.

I liked Eleanor Fox's suggestion of a mutual recognition for a, shall we say, significant, substantial, well-documented, but merger filing. Is that achievable? I guess we need to hear from both the agencies and the private sector on that.

Within the next five or ten years, is that something worth recommending?

MR. TRITELL: This is some kind of joint filing form—

COMMISSIONER VALENTINE: It would be sort of like a clearinghouse master filing.

MR. TRITELL: This has been a long-time aspiration, and a lot of good thought and work has

been put into it. So far the results have not been so encouraging, as you probably know. The Germans, French, and British tried a joint filing form that's been almost never used, and for good reason—it really didn't serve anybody's interest. The OECD took a serious crack at developing a common form that was adaptable to the various pre-merger review systems and substantive standards around the world, and came up with something that's largely an amalgam of everything that exists.

I don't think we're there yet. I think we're better off, again, looking at incremental convergence in our procedures, and I think the ICN, which took that on as one of it's first major projects, has already made good strides. We've got dozens of countries that have made changes in the few years since the ICN recommended practices have been promulgated. Tangible changes to conform their procedures, that is things like eliminating market share and other subjective filing requirements, elimination of worldwide merger thresholds that lack a nexus to their jurisdiction, eliminating arbitrary timing deadlines for filing.

So, I think proceeding again along those incremental soft convergence lines is our best avenue

to achieve continued progress on multi-jurisdictional mergers.

MR. MASOUDI: I agree with Mr. Tritell.

COMMISSIONER VALENTINE: Can we hear one private sector side?

MR. ATWOOD: The ICN seems to me to be the best forum to try to achieve that goal. It's a very important goal.

MR. BLECHMAN: My impression was that substantial progress was made, in terms of best practices, in that framework to lessening the burdens of having multiple filings.

CHAIRPERSON GARZA: Thank you all for your really thoughtful comments. I tend to agree with a lot of what's been said, both in terms of recommendations for improvement, but also in terms of the difficulty, really, of dealing with those hard cases, for those kinds of improvements.

I particularly like the notion that I think Mr. Atwood raised about as we go forward with new bilateral agreements, inserting the notion that what we're trying to do is promote, sort of a global welfare, rather than putting the national interests first, but also recognize that that ultimately is, as Professor Fox says, that's what will come first, the national interest.

And it seems to me that, while people have said the clashes have been few and far between, maybe what we're seeing is the beginning of a culture clash in antitrust, and I think that, looking at the draft Article 82 guidelines and what they say about compulsory licensing and probability and abuse of dominance, and the possibility that the refusal to license could be an abuse of dominance.

And then when you look at codes like the new PRC Code that seems to modeled after the E.U. approach, I'm concerned that, for a truly global marketplace, we will have clashes that just can't be solved by traditional comity approaches. The shoulders of comity just aren't big enough to deal with a situation where it's hard to say one jurisdiction has a lesser concern than another, and where we really seem to have fundamental differences about what promotes global welfare best.

So, I'm wondering whether, in addition to some of the things that you all have mentioned, related more specifically to comity, we should potentially be thinking about other things to recommend that some commentators have suggested. For example, whether or not we should recommend things like the U.S. government intervening a little bit more in foreign competition proceedings, even if we

don't have our own parallel proceedings. For example, if it's allowable under foreign law, being an amicus in the E.U. Court of Justice, whether we should, in addition to behind the scenes activities, actually submit written comments. For example, on things like the Article 82 guidelines.

Other suggestions that have been made include that there should be some kind of executive branch interagency group that is maybe headed by the FTC and DOJ, but includes other components of the U.S. government, like the U.S. Trade Representative, like the State Department, like the Commerce Department, so that when issues come up, for example, with the PRC and abuse of dominance, that we have not only the antitrust authorities doing what they're doing, but have more of a concerted front. And more avenues exploited to deal with the issues that may be raised on behalf of the U.S. government.

And maybe other things that will help us, in terms of, what do you want to call it, policy convergence. It may not be convergence so much, but making sure that we don't run into a situation where—don't have vastly different approaches being taken in important areas where we happen to think, and we may be wrong, but we happen to think that global welfare would be better off taking the approach that we use.

So I know that's not a very sharply worded question, but I would like to get reactions from the panelists, if I could, starting with Mr. Tritell.

MR. TRITELL: That's what I get for being seated on the end here.

I have a few reactions, Madam Chairperson.

First of all, the concept of global welfare is appealing in some abstract sense, but not in any real sense. I don't see the U.S. having a mandate, or that it should, to enforce the law in a way beyond the interest of U.S. consumers.

I don't think there's a culture clash. I think we're building a culture of competition. There are still different strains and currents that we try to work out, but I don't see it as a clash.

Regarding the specific proposals you mentioned—by the way, I welcome all these very good ones from the other panelists and Commissioners, even if I don't embrace them fully—but, in terms of the U.S. government's intervening in foreign proceedings, we do engage very much with our foreign counterparts. Sometimes it's more visible, and sometimes it's less.

If you take the Article 82 paper, you can rest assured that we're studying that very carefully and we're in very close contact with our counterparts in Brussels. Whenever one of these types of

proposals comes out, we do that and we often call up our colleagues and say, what would be most helpful to you? Would it be best to put our comments on the record, and say this is the position of the United States agencies, or is it better if we have a conference call, a video conference, fly over and talk to one another about that? So this does happen. We are engaged in following these issues, even if you may not always see it.

In terms of the type of interagency group that you suggest, on matters like the proposed PRC law, this is high priority for us, and we paid a lot of attention, and will continue to. We talk all the time to our colleagues in the other U.S. agencies that you mentioned, but I'm not sure that conflating our voices would be beneficial. We have different roles. For example, the Commerce Department's mandate is to promote the interest of United States business. Our interest is to promote sound competition policy, and we're respected in the world for taking a view that advocates sound competition policy. If we became conflated with the mouthpiece for the commercial interests of the U.S., I believe the U.S. agency's position would lose the integrity of its message in the eyes of our foreign counterparts.

MR. MASOUDI: If I may, Madame Chairman.

There are some substantive differences, of course, in the Article 82 discussion paper, and the antimonopoly law that's developing in China. Those are high priorities for the Department. We are traveling to Europe and China. They are visiting us. We are discussing these matters with them with great interest.

As far as some of the other methods that you've stated, as far as intervention in court proceedings or amicus briefs, that's something that we would consider on a case-by-case basis. We wouldn't have a systematic policy, I don't think, in favor of or against such intervention, but that's something that we might consider.

As far as comments, we do comment, certainly informally at a staff and management level. As far as written comments, again, probably on a case-by-case basis, we would do whatever would be the most productive.

And as far as an Executive Branch group, we don't think that would be advisable at this time, or necessary, but we do have contact with other agencies in dealing with, for example, China.

PROFESSOR FOX: I agree with Mr. Tritell and Mr. Masoudi.

My first reaction to your remarks was: Be careful, because there could be a backlash against a concerted U.S. position that seems to be trying to move the E.U. law to be just like U.S. law. Regarding the discussion paper on Article 82, one thing that may not be appreciated is the extent to which that represents a very good deal of convergence. People pick out the last three pages on refusal to deal as exemplary of divergence.

This section represents what the European Court of Justice has said. The Commission, especially the staff, have no right to reverse the European Court of Justice.

A final point is, what is that concerted front that the United States wants? Is there really a common view that the United States wants and thinks is right law? I really don't think so.

MR. BLECHMAN: My impression is that the European governments and agencies have been increasingly and effectively using the amicus brief route as a way of influencing U.S. decisional law in areas where these countries have interest, and that would be something that I would welcome seeing our government do as well.

The kinds of things that the government panelists have been talking about have influence at

the enforcement agency level, but the court level is also going to be increasingly important, as private remedies play more of a role in Europe. And where U.S. interests are at issue, I think that our government should do as foreign governments do and file briefs amicus curiae.

And I think that there are also other areas that may go beyond just antitrust concerns, basic procedural due process concerns, like, for instance, the issue with privilege, where basic American interests, or at least their rights, are involved, and where it would be much more effective for our government to speak than for the private sector to try and do this on their own.

MR. ATWOOD: I endorse Mr. Blechman's comments completely.

The other point I'd make is, it seems to me irrefutable that on important issues of competition policy such as the China legislation or the E.U. Article 82 initiatives, there must be, ought to be, a coherent unified United States government position. Now, how that position is presented to the Europeans or the Chinese presents a very subtle question. The State Department certainly has some role, USTR has a role to play, the Justice Department has a role to play, the FTC has a role to play, and so you might

play out that U.S. policy in a multifaceted way, with different people emphasizing different points. But I don't see how one could argue, and I hope nobody here is arguing, that we shouldn't have a coherent government position. That's what the White House is for. That's what The NSC is for.

COMMISSIONER JACOBSON: Including the State Department?

MR. ATWOOD: Including the State Department. Including the Justice Department.

CHAIRPERSON GARZA: Thank you.

Commissioner Warden?

COMMISSIONER WARDEN: Thank you.

Thank you and thank all of you.

I'm afraid that I listen to what you're saying, all of you, from the standpoint of being concerned that in this area, as in so many other areas, the perfect is the enemy of the good. The good that, it seems to me, should be achieved is effective enforcement at the least cost to the public and to businesses, and I don't think the current regime achieves that.

I agree with Professor Fox that substantive convergence may never occur and may not even necessarily be the greatest thing in the world, because nobody has a monopoly on the truth in this

area, whatever one's views of his own country's ant-trust policy might be from time to time. But it does seem to me that I would at least, as an American citizen, be willing to give up some of what you might call sovereignty in return for getting rid of the burden.

And why shouldn't we have a regime, through treaty, if necessary, by which the country that would be viewed as the center of gravity under, let's say, private conflicts of laws principles, have virtually exclusive jurisdiction over mergers and over the *Microsoft*-type Section 2 cases? At least so long as that country is recognized as having an effectively enforced competition law.

I think, Professor Fox, I have to disagree with you: I think South Korea's interest is relatively trivial in the Microsoft situation, if those words have their ordinary meaning, compared to the interest of the United States. And then when you add to that the interest of the EC, which jumped in second, I think you've reached the point of triviality.

Maybe these hard cases are not the ones that ought to dictate public policy, but the *GE-Honeywell* case and the *Microsoft* case are both good examples of where the center of gravity of these matters was

clearly in the United States. If two European steel makers merged, unless all of their sales consisted of exports to The United States, I would say the center of gravity was in the European Union. If they want to permit the merger, why should we care? The same with *GE-Honeywell*, now that Europe is not a cartel-sponsoring jurisdiction, but has an effective competition policy, though it may be differ from ours.

May I have reactions as to why we shouldn't go down that path?

I'll start with you, Professor Fox.

PROFESSOR FOX: Yes, thank you for those comments.

I do think that we should not go down that path. For one thing, it would not be perceived as legitimate in the world. For example, as in my example on *Boeing-McDonnell Douglas*, a country that is the center of gravity often also has the highest national industry policy interest that plays out through the State Department and Commerce Department.

Our decision in *Boeing-McDonnell Douglas* was considered industrial policy in Europe and vice versa; their decision was considered industrial policy in the United States. Just because the country that is the center of gravity has these

various interests in addition to consumers interests would give some basis for skepticism.

I also think that in a lot of these cases the markets, like *GE-Honeywell*, the markets for avionics as well as engines was all over the world. It wasn't centered in the United States. It has to be legitimate for another country to take action on it. But then, as I also said, for cases in which there is a direct clash, I think it's a very a good idea to think globally about all the harms and benefits and choose one country's law that ought to be applied neutrally to that whole transaction.

Thank you.

COMMISSIONER WARDEN: No, I agree with you, that one country's law should be applied neutrally, and I don't think there are too many instances in which the U.S. can be accused of following a national industrial policy, other than the Sherman Act, or the Clayton Act.

Mr. Blechman?

MR. BLECHMAN: Yes. I would just add one thing to it, because the approach you suggest is basically wise.

If, in addition to the center of gravity of the conduct or a transaction clearly being in another jurisdiction, if the jurisdiction that's less

affected, if applying it's laws is going to conflict with the laws or policies of the country that's more centrally affected, then I think you have the classic situation where comity ought to apply and there ought to be deference. And the challenge is simply creating rules that are clear enough so that will happen on a consistent basis in future cases.

COMMISSIONER WARDEN: I thought your testimony on that point was very effective.

MR. ATWOOD: I don't see how it would be possible, practically, to deliver the proposal that you've outlined, wise as it may be.

Therefore, I think what you need to try to achieve is practical consequences in particular cases that would approach that result, which is that you have consistent rules, you have unified remedies, avoid conflicting remedies, and have sensible rules apply to major transactions. And I think given the current mechanisms that exist, one area now where we can practically make progress is try to enhance the concept of comity.

COMMISSIONER WARDEN: Does either of the government representatives want to comment?

MR. MASOUDI: Although we certainly share the goal of having effective enforcement and low transaction costs for mergers, your proposal raises a

number of issues, among them, who would be the arbiter of who is the center of gravity. What if one jurisdiction may be deemed the center of gravity, but other jurisdictions have very significant interests? What happens when there are very different competitive effects in different jurisdictions?

We believe that our current approach to working with other jurisdictions is effective and don't have a position on supporting your approach at this time.

MR. TRITELL: Three quick observations.

First of all, we shouldn't overstate the extent to which there are cases to which this would apply. In our experience only a small minority of mergers are truly global, in the sense that you have a worldwide relevant geographic market, even when you're looking at global companies and global products.

We recently looked at the Procter & Gamble-Gillette merger and you could say, well, where's the center of gravity, but it turns out that the competitive issues come up in things like deodorants and toothpastes and there isn't a global market for those kinds of things.

You can find the same thing in energy mergers, where it boils down to retail gas station,

and pharmaceutical mergers where it turns out markets are totally different because of domestic regulatory requirements. And I don't think we'd be advocating a system of deference in cases where the effects vary, and that's really the norm.

Where it's not the norm, where you get into truly global markets, you've posited where both companies are in jurisdiction A, but that's not necessarily where most of the effects are going to be, or where most of the harm or evidence is. So it may be not so simple to figure out what's the so-called lead jurisdiction.

And finally, even if you did, in my personal view the tradeoff just isn't worth it—

COMMISSIONER WARDEN: Excuse me. I have limited time, and I'd like to put one other question to you two gentlemen.

Both of you endorsed efficiency in merger enforcement. We received a comment from the Merger Streamlining Group, which makes the following statement, and I quote:

"The U.S. Second Request process does not comply with the [Recommended Practices of the ICN] on Conduct of Investigations, nor with the efficiency-oriented spirit of the Recommended Practices and the Guiding Principles. We know of no

other merger review system in the world that comes close to the scale of the Second Request process…"

In pursuit of your avowed loyalty to the principle of efficiency, would both your agencies support radical curtailment of the second request process, by legislation if necessary?

MR. MASOUDI: Let me first say that I am no radical, but I would say that there has been progress in the second request process. I think we all agree that things can be made better. It's something that we have looked at in the past, and that we continue to look at, for ways to streamline the process and make sure that we get the information that we need without putting undue burden.

And it's really not in our interest to gather up too much information, either. So it is something that we continue to look at.

COMMISSIONER WARDEN: Why are we out of step with the rest of the world on this?

Because these people say other jurisdictions enforce against mergers without this.

MR. MASOUDI: Well, different jurisdictions are different.

I don't know that you can say that we're out of step with the rest of the world. We need to gather the information to do our investigations, and

we intend to keep looking at these issues to try and make them better.

COMMISSIONER WARDEN: Thank you.

CHAIRPERSON GARZA: Commissioner Kempf?

COMMISSIONER KEMPF: Three things. First is a technical one. There have been a lot of references to the ICN, and in fact that was the last question by Commissioner Warden. And, Mr. Masoudi, I think it's page four of your submitted testimony, we have a couple of think pieces that the staff has provided us. Maybe my question is as much to the staff as the panelists.

But what is the best thing to look at for a comprehensive discussion of the eight Guiding Principles and 13 Recommended Practices. The papers are sort of what I'll call next generation. They talk about implementing them or reducing costs through them, and things like that. But what are your fundamental building blocks, and how do I get that?

MR. MASOUDI: The ICN website has a lot of that information on it. And I believe that in some of the footnotes to Mr. Tritell's testimony there are some references.

MR. TRITELL: We'd be happy to supplement those with other papers that you might find useful on the ICN—

COMMISSIONER KEMPF: I would appreciate that. If you could get those to the staff, so that the could make them available to me and to other Commissioners.

Second, on comity and convergence, I sort of draw a distinction between what I'll call easy stuff and hard stuff. Easy stuff I think of as joint global attacks on cartels that fix prices and no wacko suits by plaintiffs from Bolivia and Bulgaria and South America—the *Empagran*-type situation. And I'd say those are probably 90 percent of the things where we cooperate on and we do a good job on them and convergence and comity are probably a swell thing. And I would draw a distinction from that to what I would call the hard stuff. And I don't know whether any of you have taken a look at it, the ACT submission, The Association of Competitive Technology. The front part of their paper goes through and says, whoa, there're all kind of real problems going on, and they touch on a lot of things that have been mentioned today. The *Boeing* acquisition, the *General Electric* acquisition, the relief in the *Microsoft* case in Europe and Korea

particularly, the total-removal remedies. The emergence of abuse of dominance and new laws, like in China, as hard stuff.

In fact, Professor Fox and I last week were in a meeting where someone was regaling us how, in the convergence area, a bunch of legislators from India proudly announced to their American counterparts that they had decided to converge more closely with us and had enacted a comprehensive Robinson-Patman Act.

[Laughter]

And wasn't that great progress in convergence.

But the ACT paper submission goes through those, and focuses on those as the hard thing, and they may be decidedly less than 10 percent of the activities, but they account for well over 90 percent of the angst, I'll say.

And I'd be interested in what the panelists had to say about what can be done to achieve better convergence and comity, not on the easy side of the table, but on the harder stuff. Especially, Mr. Atwood, some of your things. I'd be interested to put them in the narrower context of those kind of hard case problems.

Why don't we start with you.

MR. ATWOOD: I agree that there are hard cases. They are not all going to be solved. One point I would simply emphasize, though, that in trying to see whether a resolution can be achieved in a hard case—this comes back to one of my original points—one of the things that the agencies ought to be considering is the fact that disagreement has negative consequences outside the context of that particular case.

Because, as I mentioned, it gives another example where less responsible, less mature antitrust regimes might take more comfort in going a separate way. So, every case of disagreement has negative consequences of a broader nature, and that has to be taken into account.

As to how you solve any particular case, obviously, is going to depend very much on the details and on the specifics, and people have to really roll up their sleeves and work as hard as they can.

Let me give one example, which may or may not be a real one, but it occurred to me in reading the decision of the Court of First Instance in the *GE-Honeywell* case. There was one product market there where the defendants were saying, you shouldn't worry about our ability to merge, because there are

other suppliers available in the United States that can compete against us in Europe. But the European Union was concerned about whether those other suppliers, under our export control regulations, would in fact have been able to supply competitive products in Europe.

Now, I don't know how carefully that was explored at that time, but maybe the Europeans could have been satisfied by the United States that those products can in fact be made available in Europe. And that might have helped narrow the dispute. That's the kind of very specific effort that has to be made in the hard cases to minimize conflict.

COMMISSIONER KEMPF: The principle prospective supplier was actually spending more time than GE and Honeywell over in Europe lobbying against approval of that in Europe, having failed to block that in the United States.

MR. ATWOOD: I understand, and that's the problem of forum shopping that I referred to.

COMMISSIONER KEMPF: Anybody else want to comment?

Mike?

MR. BLECHMAN: I haven't read the ACT submission, but I understand that hard cases are ones where there's a fundamental difference of approach

between the two jurisdictions, basically. That's what the hard cases are.

In a sense, those are the easy cases, or easier cases, when it comes to comity, because that's particularly the situation in which extraterritorial application of your own law, for example, to another country, which has a clearly more dominant interest, if you can find that kind of situation, is going to have the biggest conflict. And conflict is what's supposed to trigger comity.

So, I would think that the way you'd deal with those cases is through some kind of regime where you can establish standards for deference, because the greater the conflict, the more you should defer, if someone else has a predominant interest.

COMMISSIONER KEMPF: Many people would say that the conflict there was not over where the center of gravity was, but a different fundamental approach to antitrust, whether it was protectionist- or competitive-oriented.

MR. BLECHMAN: Right. Exactly.

So if you have two fundamentally different approaches to antitrust, for example, the perceived difference in *GE-Honeywell*, do you protect competitors or do you protect competition? That's the way that we would phrase it. That where your

basic approach is very different from that of another jurisdiction. You would think that you should be particularly reticent in applying your approach where the people involved are in another country. You're talking about two merging companies in another country, and where the center of gravity is in another country.

Now, whether the center of gravity is in another country—I can see that could be an issue that may be difficult in individual cases—where it clearly is, and where the approach is fundamentally different, I think the teaching of *Empagran*, for example, is we shouldn't be exporting, or no country should be exporting it's different philosophy to a country that has different approach, where the context and the center of gravity is clearly in the other country.

COMMISSIONER KEMPF: I view both the *GE* and *Boeing* situations where there was a significant interest in both jurisdictions.

COMMISSIONER VALENTINE: Yes. Yes.

COMMISSIONER KEMPF: Anybody else want to comment?

PROFESSOR FOX: Yes, I would like to.

First, I would like to say that the United States has sometimes reached out to proscribe mergers

or require relief when the center of gravity is abroad, like Institut Merieux, and like Ciba-Geigy-Novartis, where we have applied cutting edge law to transactions that cleared abroad, so it cuts both ways.

Secondly, I think that the best remedy is lots of discussion, which we're doing. I think we're on the right track, lots of reasoned discussions, reasoned opinions, joining issue, identifying precisely where the conflict is, and then arguing on both sides to see if the conflict goes away. I think we've had good fallout from the aftermath of *Boeing*, the aftermath of *GE*: more economics on the European side, and the working groups to pinpoint differences.

Oracle-PeopleSoft is a positive example, not only of Europe's respecting what the U.S. court did, after starting out at a different track, but incorporating the testimony that was in the U.S. trial.

MR. TRITELL: Just, on the same song sheet, I think we need to plug away through soft incremental convergence, and we do take on the hard issues. I mentioned in the merger context, our sitting down with the European Commission after *GE-Honeywell*.

In the intellectual property context, which the ACT paper mentions, we formed working groups to

take on compulsory licensing and other such issues with the EC, Japan, Korea, and Taiwan. ACT also recommends that the ICN deal with the thorny issues of dominance, and we're likely to establish a working group to do just that at the ICN conference this year.

And the good thing about the ICN is that the discussion is not only among us enforcers, but it's very importantly with representatives from the private sector, who've been helping foster convergence.

CHAIRPERSON GARZA: Thank you.

Commissioner Jacobson?

COMMISSIONER JACOBSON: Thank you.

And thank you all for very helpful presentations.

On the larger foreign relations issues, I don't know enough to disagree with Mr. Tritell's suggestion that we pat the agencies on the back and do no more. The agencies are keenly aware of the issues, and there's no evidence that I've seen that they're not doing an excellent job in these issues.

Where I have a hard time with the general positions of the panel is on the Foreign Trade Antitrust Improvements Act. And let me preface it by saying that there's no more ardent advocate on this

Commission of letting the common law process work its way through troublesome issues of substantive law.

I've expressed that point on a number of occasions. And my basic view is that should be true except where it's shown beyond a reasonable doubt that there's a problem with the statute, or that the common law process is not working. And one of the few areas where I think it's absolutely clear that, beyond any reasonable doubt that the process is not working, is the Foreign Trade Antitrust Improvements Act.

And so I was astonished, really, to see unanimity among the panel that we should do nothing about this unintelligible statute that is being interpreted in completely different ways by various courts, including the courts of appeals. And in particular, we have a decision by the D.C. Circuit that is commended by four of the five panelists, that basically makes the standing or jurisdiction issue, depending on your perspective, turn on the difference between proximate cause and but-for cause, and the last time I read a dictionary they were the same thing.

Now, they're not the same thing under the D.C. Circuit's decision, but for goodness' sake, why

should such an important issue turn on such a trivial distinction?

So, I want to start with Mr. Masoudi and ask, would the Justice Department really have a problem if we proposed either judicial interpretation or a statute that simply parroted the position taken by The Justice Department and the FTC in the Supreme Court amicus brief in the *Empagran* case? What would be wrong with that?

MR. MASOUDI: I don't know if I have anything, really, to add to the statement that I made that we think that it ought to continue to be played out in the courts. We've made the statements that we've made in the amicus brief, and we don't have a recommendation for any changes to the statute.

COMMISSIONER JACOBSON: Would the Federal Trade Commission have a problem with our endorsement of the Federal Trade Commission's official position.

MR. TRITELL: No problem if you can guarantee that would be the Congressional result.

[Laughter]

COMMISSIONER JACOBSON: I've said this before, I think the assumption that this Commission should assume that the legislative process is broken and won't work is out of bounds, given our function

and given our history. I just don't think we can take that point of view.

MR. TRITELL: I'm only suggesting that we need to consider the risks of the outcomes that are likely from the different options of going the legislative route, and the judicial route, and we're comfortable with the way the judicial route is going.

COMMISSIONER JACOBSON: And Mr. Blechman, would you oppose a statute that said that a foreign located purchaser purchasing from a foreign located seller could not sue under the U.S. antitrust laws, as urged by the governments of Germany and the United Kingdom, et cetera?

MR. BLECHMAN: I don't think I would oppose a statute like that, but the question is, is it necessary at this point? You made the point that the D.C. Circuit formulation, in terms of the difference between proximate cause and but-for cause may be difficult and confusing, given dictionary definitions. I'm not sure that's true, but what's clear, based on the facts of that case, and on all the cases that have come down since, is that the result is, for all practical purposes what you said.

If you buy abroad a price-fixed product from a worldwide cartel, and the only connection with the U.S. is that the price fixing is global and also

affects the U.S., I think the law has now made clear that you can't sue.

COMMISSIONER JACOBSON: But if you're paying an elevated price because a competitor was excluded by a tying agreement, as opposed to a per se price-fixing offense, then, under the D.C. Circuit's opinion, you could sue.

How does that make any sense?

MR. BLECHMAN: It may be because they're citing the *Industria Siciliana* case—

COMMISSIONER JACOBSON: And endorsing it.

MR. BLECHMAN: Yes.

I agree that the references to those cases are confusing, because that was not even tying, but reciprocity, and it's probably a case where there would be no subject matter jurisdiction, because only American exports were involved, and it didn't involve another American exporter.

So, I think in those kinds of cases there is potential for confusion. But those cases that have arisen in the cartel area, which are the ones that keep coming up again and again, there I think the law is now pretty much clear, and therefore my reluctance is to fix something that may not be broke.

If you were starting from scratch and looking at the statute, yes, I mean, the statute, I

agree, is something that could have been done much better. But the result, after all the interpretation, I think is finally on the right track.

COMMISSIONER JACOBSON: Except in the District of Minnesota, if you're dealing with additives to Chinese food.

MR. BLECHMAN: No. The Minnesota court reversed itself. The Minnesota court first came out the other way, then on reconsideration, said we are persuaded by *Empagran* and the D.C. Circuit, and we reverse on reconsideration.

So, every court thus far has reached a conclusion that the person who is injured abroad can't sue.

MR. ATWOOD: I agree with Mr. Blechman, and I did not mean to suggest that I think the D.C. Circuit decision in *Empagran* is the final right answer. But I think it is on track. I think as a practical matter it's now going to be workable.

My concern about legislation is the one that Mr. Tritell mentioned, that perhaps is not within the authority of this Commission to consider, but I would just be worried about starting a legislative process that could spin in the wrong direction.

If we could write the legislation, that's one thing.

COMMISSIONER JACOBSON: Professor Fox, would you like a last word on it?

PROFESSOR FOX: Yes. Thank you.

My reluctance to amend was based on a risk of outcome. If I put that to one side, I would say definitely amend. Repeal it and put in statute limits that are only subject matter jurisdiction, which is what was intended.

Then the problem on which I'm holding some hope is the standing issue. I think that anyone who suffers with antitrust injury—directly, substantially, or foreseeably—from conduct within the U.S. jurisdiction that proximately causes the harm should have a right to sue as long as that person is sufficiently related to the United States. This is not the way the cases are running. The cases are saying that plaintiffs who buy abroad must be injured by the U.S. effect as if that U.S. effect could directly injure them. I think that is wrong.

COMMISSIONER JACOBSON: Thank you very much.

CHAIRPERSON GARZA: Okay.

Commissioner Carlton?

COMMISSIONER CARLTON: Okay, Thank you.

I wanted to follow up on the *Empagran* decision. As I understand it, most of the panelists seem to like the outcome because, and the DOJ and FTC briefs argued that—otherwise, there would be this jurisdictional problem. So they're focusing on the jurisdictional problem. I want to distinguish the standing issue from the damage issue.

One of the functions of damages in a cartel case is to deter. We have treble damages, supposedly, one justification is, because—just thinking about domestic cartels—we don't detect them all the time. If we detected them, roughly, one out of three times, then treble damages is probably a good number to deter. Actually, there is a large amount of literature on efficient deterrence. One of the concerns that the *Empagran* decision raises is deterrence.

And the question is, if the standing issue is resolved, the jurisdictional issues are resolved in a way that everyone on the panel thinks is favorable, that we don't have foreign purchasers coming over and suing in the United States, that leaves the deterrence problem and that there will be under-deterrence of cartels.

There is a way around that problem, to adjust—following up on what Mr. Atwood said—that we

should adjust treble damages. So, for example, in order to have deterrence, we should give judges discretion that in an antitrust case, where there's a large fraction of overcharged consumers abroad, we should allow quadruple damages, or five times damages. That is, give them some discretion. And if you're worried that plaintiffs will make to much money, we can let that difference between treble and five times damages go to the government. It doesn't matter from a deterrence point of view.

So, I'm interested in the distinction between standing damages and whether you would be in favor of altering treble damages.

MR. ATWOOD: If I could start, I think a lot of that makes sense.

In thinking about deterrence, though, of course you've also got to keep in mind the point that the Justice Department and FTC were making in *Empagran*: that if the private remedies are so extreme it's going to impact adversely the amnesty program. And that was one of the reasons to cut back on the scope on the private remedy, in the case of an international cartel.

But if you had a regime where treble damages were within the discretion of the court, I think it would be relevant factor that the U.S. conduct was

part of a worldwide international cartel. That would be an aggravating factor, just as, I believe it is the case in sentencing under the criminal laws, in an international cartel case, the government will take into account the fact that there was an international cartel, and that it had a broader scope than just the U.S. market.

So, I endorse that basic principle.

COMMISSIONER CARLTON: Anyone else?

MR. BLECHMAN: My understanding, in terms of deterrence, the first issue is discovery of the violation. What leads to the discovery of cartels? And what seems to have led overwhelmingly to the discovery of cartels in recent years has been the amnesty program.

The treble-damage follow-on suits generally involve a cartel that's already been discovered. And the foreign suits, the suits on behalf of foreign purchasers, come in the last wave as part of a pile on.

So they don't lead to the discovery of anything new. On the other hand, they discourage amnesty seekers because of the danger that you're going to get amnesty, but you're going to be swamped with treble damage suits from all over the world. Now, the statute that allows for de-trebling, or no

treble damages if you have the amnesty, helps to some extent, but I think there's a lot of benefit in being able to have the government cut deals with defendants who are second and third in, and encourage people to come in, cooperate, and give further information, which leads to deterrence as well.

The problem with multiple damages, particularly if you're going above trebling, to four times, five times, is, again, it's another loose cannon, it's another wild card, so that someone seeking amnesty doesn't know whether—great, I'm going to get amnesty, but I am then going to be hit with ten times damages by some particularly activist judge someplace who thinks I ought to be punished.

So, I think that deterrence, in terms of both discovery and encouraging behavior that leads to discovery, is promoted by keeping control of the punishment in the hands of The Justice Department under the oversight of the courts, subject to rules that are relatively predictable.

PROFESSOR FOX: This is a very important question, and I think that it would really be good if your Commission addresses and at least outlines empirical work that ought to be done on what remedies constitute sufficient cartel deterrence; what happens when we eliminate the damages attributable to so many

victims. The Supreme Court in *Empagran* said, as I'm sure you know, that there was no empirical backup for the government's position, or the other position, whether cartels would be better deterred by more damage liability or less damage liability and more amnesty.

The new statute, which allows forgiveness of treble damages for the amnesty recipient should weaken the argument that you get better deterrence by disallowing the foreign actions.

A related factor is the extent to which damage actions are brought abroad. Although it's very hopeful to say that there will be lots of damage actions abroad for victims of cartels, the jury is still out.

I would love to see you recommend empirical work on that issue.

MR. MASOUDI: I would agree that any changes to the treble damages statute would raise important issues, including the interplay with the amnesty program.

At this time, we're not making any recommendations to make any changes to treble damages.

COMMISSIONER CARLTON: Okay.

Let me turn to the interaction between international competition and international trade, because they seem quite closely related, and it was just really briefly touched on by Professor Fox.

It seems to me—again, I want to distinguish between—in the discussions of comity, people said it's good to cooperate and trade off interest; that I understand. But then there was a discussion about convergence. And convergence really means convergence in objectives, and the idea is that if your objectives converge, then it will be easier to reach an agreement. It seems comity is hard to achieve when you don't have convergence. Those are the hard cases.

Comity is deferring, it seems to me. Convergence is reaching the same objectives.

When you think of the area of international competition and trade, the convergence is to something—I think Jim articulated quite well, he said that it's the notion that world trade can become more efficient if competition prevails and there aren't trade barriers and regulatory barriers. That seems exactly right.

That is a convergence to a view that is different from having a national interest of one country versus the national interest of another

country. The whole notion between the free trade movement has been that free trade will benefit the world. What I worry about is that what we might be accomplishing in lowering barriers to trade can be undone by competition, especially in new competition regimes.

International trade that lowers tariffs or taxes on exports can be completely undone by an aggressive domestic antitrust policy that allows a cartel. Because a cartel is just another way to tax purchases that go to consumers.

So my first question is, if we're looking for convergence, to the idea that I think America likes, competition, free trade. Doesn't that compel us, as a Commission here to say that we really do want to be an export cartel in the United States. We really do want to come out strongly and say that anti-dumping laws are precisely the wrong thing for the United States, in terms of adhering to what we hope is the policy that everyone's going to converge to—the objective everybody's going to converge to.

Actually, if I could start with Jim and then go to Eleanor, because you touched on it in your testimony. Jim, you seemed to, I thought, articulate the right objective function, but come to a very different outcome.

CHAIRPERSON GARZA: Can we try—I hate to do this, but if we could try to be very succinct, because we have to be out of here in two minutes. Chairman Majoras wants the room back.

It's a good question, and we'll follow up, but don't—

MR. ATWOOD: I'm not endorsing export cartels. I think that an export cartel that violates the laws of France should be prosecuted under French law and stopped.

My point is I don't think it makes sense for The United States to apply its antitrust laws to export conduct that doesn't adversely affect the United States.

PROFESSOR FOX: I agree that those issues are inter-related, and should be taken up. I would love to see you recommend the repeal of anti-dumping laws and that nations should adopt cartel laws and nations should not be able to permit cartels that stand in the way of free trade.

We have to reconsider the notion that this is not our problem; that France or Indonesia or India or China should just step in and prohibit our export cartels. They don't have the wherewithal to do so. They need enforceable remedies and resources to police cartels. It is in the interests of the global

community to prevent cartels. We should think of it just like in the E.U. internal market. France can't have a cartel into Germany, and it's France's problem if it does.

CHAIRPERSON GARZA: Any other panelists who want to make a quick response?

Okay.

Thank you very much to all of the panelists for your papers, your testimony today, it was very helpful to the Commission.

[Whereupon, at 12:16 p.m., the hearing was adjourned.]