CHAPTER 10

AN INTERNATIONAL PERSPECTIVE

I. Introduction

Over one hundred nations now have antitrust laws, most of which include provisions condemning monopolization or, more commonly, abuse of dominance.[1] Many regard this blossoming of competition regimes as good news, because it shows recognition that markets generally are the best means for economies to allocate their scarce resources. However, the proliferation of antitrust regimes throughout the world—each with its own substantive laws, enforcement priorities, and policy objectives—has raised concerns about procedural and substantive conflicts among jurisdictions and the impact of those conflicts on firms doing business internationally. As one panelist observed,

> [T]he growing proliferation of antitrust enforcement around the world, together with the globalization of business[,] creates increasing risk of conflict in the application of antitrust rules to single-firm conduct. These conflicts impose costs on firms and harm consumers and are becoming potential barriers to international trade.[2]

In opening remarks at the hearings, Assistant Attorney General Thomas O. Barnett observed that single-firm business conduct is "at the forefront of people's minds as we talk to officials on every continent."[3] Then-FTC Chairman Deborah Platt Majoras emphasized that it is "the most heavily discussed and debated area of competition policy in the international arena."[4]

The proliferation of antitrust regimes throughout the world—each with its own substantive laws, enforcement priorities, and policy objectives—has raised concerns about procedural and substantive conflicts among jurisdictions and the impact of those conflicts on firms doing business internationally, particularly with regard to single-firm conduct.

This chapter addresses policy issues arising from the proliferation of diverse antitrust regimes around the world with respect to monopolization and abusive conduct by dominant firms. Part II considers various policy concerns that have arisen as a result of the diversity in approaches to single-firm conduct. Part III describes efforts to promote international convergence and cooperation, including the adoption of recommended practices for the assessment of substantial market power and dominance at the 2008 meeting of the International Competition Network (ICN) in Kyoto, Japan. Part IV describes a number of initiatives the Department will explore to address the policy concerns identified at the hearings.

II. Concerns Raised by the Diversity in Approaches to Single-Firm Conduct

Virtually all antitrust laws contain provisions that address unilateral conduct by firms holding substantial market power. Although

[1] *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 53, 235 (2007).

[2] Sherman Act Section 2 Joint Hearing: Business Testimony Hr'g Tr. 127–28, Feb. 13, 2007 [hereinafter Feb. 13 Hr'g Tr.] (Heather); *see also* Sherman Act Section 2 Joint Hearing: Business Testimony Hr'g Tr. 26, Jan. 30, 2007 [hereinafter Jan. 30 Hr'g Tr.] (Heiner) ("Increasingly we see foreign agencies stepping up their antitrust enforcement . . . . And while that's of course a useful thing, we may find that some of these agencies have differing interests, differing views as to how the antitrust laws should be applied.").

[3] Sherman Act Section 2 Joint Hearing: Welcome and Overview Hr'g Tr. 24, June 20, 2006 [hereinafter June 20 Hr'g Tr.] (Barnett).

[4] *Id*. at 10 (Majoras).

the terminology differs, the general requirements in most cases are similar: (1) the firm must have sufficient market power, and (2) the firm must have engaged in conduct that is "abusive," "anticompetitive," or "exclusionary."[5] Like the United States, most jurisdictions do not regard monopoly in and of itself to be unlawful; rather, there must also be some anticompetitive conduct.[6] Significant differences exist between the United States and other jurisdictions, however, as to how much market power is required,[7] what types of conduct are considered anticompetitive, the analytical frameworks used to determine if there is a violation, and enforcement policies.[8] Jurisdictions also have different institutional frameworks for enforcing their antitrust laws.

The diversity of substantive laws and enforcement objectives pursued by competition regimes in different jurisdictions raises important policy concerns regarding single-firm conduct. Individual jurisdictions, of course, should strive to make their own laws and enforcement policies clear and transparent. Beyond this, there is a recognized need both to reduce conflicts in the way laws governing single-firm conduct are applied globally and to ensure that one jurisdiction's remedies do not have undue, adverse spillover repercussions elsewhere.

The basic problem is that antitrust laws are national (or regional) but markets are increasingly global. As one panelist observed,

> We live and work in an era characterized by increasingly globalized markets and increasing concentration levels [in] many sectors. Ensuring the "right" approach to assessing allegations of abuse [of] dominance in this context is critical. . . . [I]t also poses a challenge to competition agencies attempting to apply domestic antitrust laws to business markets that are global and business practices which are globalizing.[9]

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While there has been notable success in achieving international convergence in cartel and merger-enforcement policies,[10] the same is less true of single-firm conduct policies. Panelists voiced a number of interrelated concerns, which are discussed below.

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[5] ELHAUGE & GERADIN, *supra* note 1, at 235.

[6] UNILATERAL CONDUCT WORKING GROUP, INT'L COMPETITION NETWORK, DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS 1 (2007), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf [hereinafter 2007 ICN REPORT] ("All jurisdictions agree that unilateral conduct laws address specific conduct and its anticompetitive effects, rather than the mere possession of dominance/substantial market power or its creation through competition on the merits.").

[7] *See* Feb. 13 Hr'g Tr., *supra* note 2, at 57–58 (Stern) (noting that foreign competition authorities generally have set the presumption of dominance at thirty-three to fifty percent, below "essentially the U.S. safe harbor"). *See generally* James F. Rill, Prepared Remarks of James F. Rill 7–11 (Sept. 12, 2006) (hearing submission) (discussing different national standards for defining dominance and the variance in the market-share thresholds that suggest dominance and noting the differences in the evidentiary weight accorded to market-share data in different jurisdictions).

[8] *See* Brian A. Facey & Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, 70 ANTITRUST L.J. 513, 523–29 (2002).

[9] George N. Addy, Speaking Notes 1–2 (Sept. 12, 2006) (hearing submission); *see also* Sherman Act Section 2 Joint Hearing: International Issues Hr'g Tr. 119, Sept. 12, 2006 [hereinafter Sept. 12 Hr'g Tr.] (Lugard) (stating that "the need for convergence in this specific area [unilateral conduct] is most pressing, because different and inaccurate standards for exclusionary conduct involving firms with significant market power . . . are most likely to defeat procompetitive conduct . . . that ultimately benefits consumers").

[10] *See* Sherman Act Section 2 Joint Hearing: Conduct as Related to Competition Hr'g Tr. 138, May 8, 2007 [hereinafter May 8 Hr'g Tr.] (Rill); R. Hewitt Pate, Assistant Attorney Gen., U.S. Dep't of Justice, Antitrust in a Transatlantic Context—From the Cicada's Perspective (June 7, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/203973.pdf.

A. Concerns About Uncertainty, Chilling Procompetitive Conduct, and Forum Shopping

As discussed in chapter 1, single-firm conduct presents especially challenging analytical issues because it is often difficult to distinguish between aggressive competition that should be encouraged and competitively harmful conduct that should be condemned. Thus, even within any given jurisdiction, it may be difficult for firms to determine what conduct is forbidden, and to fashion their conduct accordingly. At the same time, in light of the potentially significant remedies, when a firm "gets it wrong," the consequences may be severe.

This uncertainty is multiplied when a firm does business throughout the world and must take into account the laws and enforcement policies of numerous jurisdictions. As one panelist observed, "[T]he different approaches of the different antitrust agencies across the world provide a daunting task to the ability of multinational firms, firms practicing and doing business, operating in more than one jurisdiction, to plan business strategies with any confidence that they will avoid antitrust challenge."[11] He further observed that "[t]here has not been nearly the progress towards certainty, transparency, much less convergence, in the area of single-firm conduct as in, for example . . . the case of horizontal mergers."[12] In his view, there is a "crying need . . . for transparency, at a minimum certainty, and at least some mechanisms for the ability of agencies to achieve, in time, convergence in single-firm . . . conduct across borders."[13] Another panelist similarly emphasized the high costs of attempting to comply with rules that are often unclear and vary significantly from jurisdiction to jurisdiction.[14]

A number of panelists emphasized that the problem of uncertainty is far more serious in many other jurisdictions than it is in the United States.[15] It is critical that enforcement agencies from all jurisdictions ensure that their own laws and enforcement policies with regard to single-firm conduct are as clear and transparent as possible.[16]

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[11] Sept. 12 Hr'g Tr., *supra* note 9, at 126–27 (Rill); *see also* Jan. 30 Hr'g Tr., *supra* note 2, at 25–27 (Heiner) (describing difficulties in making product-design decisions, taking into account views of different enforcers applying different legal standards); *id.* at 95 (Hartogs) (noting, in particular, uncertainties in connection with bundled and loyalty discounts, where "you lack clarity here, you lack clarity in Europe"); Sept. 12 Hr'g Tr., *supra* note 9, at 10 (Lowe) ("The application of Article 82 was . . . widely criticized as being fragmented without guiding principles and for applying in some instances general form-based criteria whose meaning was not always clear . . . .").

[12] Sept. 12 Hr'g Tr., *supra* note 9, at 128 (Rill).

[13] *Id.* at 127–28 (Rill).

[14] *See* Feb. 13 Hr'g Tr., *supra* note 2, at 209–10 (Sewell) ("Intel expends an enormous amount of resources, legal resources, trying to figure out where these lines are and trying to make sure that we . . . can defend everything that we do if challenged."); *id.* at 215 ("[T]he disharmony and the lack of convergence represent[] a substantial and significant cost for us, and that cost could be alleviated or at least substantially reduced if we had greater consistency among the various laws.").

[15] *See, e.g.*, Sherman Act Section 2 Joint Hearing: Section 2 Policy Issues Hr'g Tr. 24–25, May 1, 2007 [hereinafter May 1 Hr'g Tr.] (Calkins) (contrasting United States with "the very, very different standards in other parts of the world, where agencies care about firms that have market shares that are somewhere below 50 percent"); Feb. 13 Hr'g Tr., *supra* note 2, at 52–53 (Stern) (counseling in United States is relatively easy compared to some other jurisdictions with lower dominance thresholds and the concept of collective dominance); *id.* at 57–60; *id.* at 83 (Sheller) ("[W]e don't seem to have too much difficulty identifying the market monopoly power threshold, in the U.S. anyways. That becomes more of a challenge when we counsel clients outside the U.S."); Jan. 30 Hr'g Tr., *supra* note 2, at 38 (Heiner) ("[F]or everything I've said about predictability, U.S. law is more predictable than European law and the law of other countries with their emerging antitrust regimes.").

[16] *See, e.g.*, Feb. 13 Hr'g Tr., *supra* note 2, at 47 (Stern) ("Now increasingly, as the economy globalizes, it's not sufficient that the U.S. rules are clear. The rules adopted by other jurisdictions will of course affect U.S. commerce."); Sept. 12 Hr'g Tr., *supra* note 9, at 120 (Lugard) ("[T]here is an urgent need for the two key jurisdictions, the EC and U.S., to align their approach towards unilateral firm behavior. But I believe that there is an even clearer and more urgent need to first develop a coherent and clear framework [for] analysis in both of the home jurisdictions.").

It is critical that enforcement agencies from all jurisdictions ensure that their own laws and enforcement policies with regard to single-firm conduct are as clear and transparent as possible.

Panelists expressed concern about how multiple layers of enforcement may chill procompetitive conduct. As one panelist from Canada observed, "The risk of chill is real and the economic costs associated with the inappropriate or inadvertent chilling of legitimately competitive conduct is, in my view, significant although I acknowledge it's very, very difficult to measure."[17] He continued:

> The unwanted chill not only affects parties who may be the target of some proceedings, but extends far beyond those individual firms to other observers of market behaviour, including other market participants or participants in different markets. They not only see the outcome of the proceeding at issue but they also observe the costs, uncertainty and disruption associated with lengthy and protracted litigation dealing with those issues.[18]

At the same time, concern about differing international antitrust standards chilling procompetitive behavior must be balanced by potential gains for consumers that would come from the interaction among different enforcers with different standards. One of the business panelists expressed the view that "in a world that is changing rapidly and globalizing, it's very . . . appropriate to step back and take . . . a fresh look at the policy objectives that underlie antitrust law and policy and enforcement," and "it is likewise appropriate that that be a global debate."[19] Thus, in his view, while "the issue of harmonization across . . . borders . . . [is] very important,"[20] "intellectual competition" among competition agencies is healthy rather than cause for serious concern.[21]

Nevertheless, an oft-repeated particular concern is that legal advisors to firms doing business globally may base their advice on the "lowest common denominator," that is, the rules of the most restrictive jurisdiction. Several panelists suggested that this may be so. One panelist explained, "We find ourselves trying to determine what is the most restrictive set of rules under which we should do our analysis and guide our conduct."[22] Another panelist concurred: "It's very much a global business. . . . And so we do find ourselves kind of looking to what's the most restrictive set of rules. And that's what we have to adhere to."[23] Yet another observed, "[T]here's a definite threat of a chill, the least common denominator approach in business counseling that can discourage procompetitive business activity and adversely affect consumer welfare."[24]

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[17] Addy, *supra* note 9, at 5; *see also* Sept. 12 Hr'g Tr., *supra* note 9, at 111 (Bloom) ("[T]he U.S. is right to be duly nervous about false positives. I think in Europe we're a bit too ready to intervene too often.").

[18] Addy, *supra* note 9, at 6.

[19] Jan. 30 Hr'g Tr., *supra* note 2, at 179 (McCoy).

[20] *Id.* at 193.

[21] *Id.* at 194.

[22] *Id.* at 93 (Hartogs).

[23] *Id.* at 94–95 (Heiner); *see also* Feb. 13 Hr'g Tr., *supra* note 2, at 85–86 (Sheller) (describing mix of decentralized and centralized advice at Kodak depending on the localized or global nature of the business); *id.* at 86–90 (Stern) (noting that at GE "[t]here are a number of businesses we're in that are truly global businesses where you really need to counsel on a global basis rather than individualize"); *id.* at 90–91 (Sheller) (noting that "assuming that we can give the green light from a U.S. antitrust perspective, then the next step would . . . be to look at whether there are nuances under European law that might create a problem"); *id.* at 129 (Heather) (noting that "the impact of competition decisions by any given enforcement agency . . . [is] forcing firms to conform their behavior to the most restrictive enforcement policies"); *id.* at 213 (Sewell) (describing how Intel approaches antitrust compliance taking into account different laws of multiple jurisdictions); Sept. 12 Hr'g Tr., *supra* note 9, at 148–49 (Lugard) (stating that decentralization, while possible in many cases, is likely to be costly and sub-optimal).

[24] Sept. 12 Hr'g Tr., *supra* note 9, at 127 (Rill). *But cf. id.* at 149 (Addy) ("[T]he notion that there's a huge impediment to business there, I'm not convinced yet," except for intellectual property.).

One concern is that legal advisors to firms doing business globally may base their advice on the "lowest common denominator," that is, the rules of the most restrictive jurisdiction.

The problem may be most acute in high-technology areas involving product design and intellectual property.[25] Product-design decisions, for example, may be based not on optimal functionality, but rather on antitrust advice keyed to the requirements of the most restrictive antitrust regimes. This can impede innovation, lead to substantially higher research and development costs, and risk chilling procompetitive, pro-consumer conduct.[26]

Panelists also expressed concern about forum shopping. One panelist observed, "[T]here's a real tendency . . . for competitors who are hurt by efficiency and procompetitive conduct to engage in forum shopping"[27]—"trying to game the system, to do forum shopping, to take a number of whacks at the piñata, to try and play on divergence to find an agency somewhere that will accept their complaint."[28] Another panelist echoed this concern, observing that "[i]ncreasingly we see foreign agencies stepping up their antitrust enforcement . . . . [S]ome of these agencies have differing interests, differing views as to how the antitrust laws ought to be applied. . . . With the stepped up enforcement, we have the prospect of forum shopping. And that clearly is going on."[29] Another noted that "the proliferation of competition regimes around the world has also driven an increase not only in knowledge of the law but also an increased understanding of possible strategic use of those laws. Parties threaten to initiate antitrust complaint mechanisms to extract commercial concessions."[30]

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Another panelist observed that the problem is not so much one of forum shopping for the jurisdiction with the lowest enforcement standard but rather the potential for multiple reviews by different agencies: "Multiple reviews ensure that we are going to have a bias in the system in favor of false positives because the second review can cure a false negative but there is nothing that can cure a false positive."[31]

B. Concern About Conflicting Remedies and Spillover Effects

Other panelists expressed concern about the prospect of inconsistent remedies being imposed upon firms doing business globally.[32]

[25] *See, e.g.*, Feb. 13 Hr'g Tr., *supra* note 2, at 126 (Heather) ("It is important to remember that new products and new business practices are developed well ahead of their actual introduction and ahead of any scrutiny by antitrust regulators. Firms do want to obey the rules of the road, but discerning and applying those rules is becoming increasingly difficult."); Jan. 30 Hr'g Tr., *supra* note 2, at 30–31 (Heiner) ("[I]t's often quite difficult to undo a design decision."); Sept. 12 Hr'g Tr., *supra* note 9, at 139 (Lugard) ("There is a real chill factor in particular in high technology markets."); *id.* at 150–51 (Bloom) ("[I]f you are talking about discounts, then it would be possible to have a different discount structure in different jurisdictions. . . . But for IP or the criteria of products, it may well not be possible to differentiate between jurisdictions."); *id.* at 160 (Addy) (noting problem of enforcement agencies second-guessing business decisions made years earlier).

[26] *See, e.g.*, May 1 Hr'g Tr., *supra* note 15, at 152 (Elhauge) (discussing why there is more reason to be worried about false positives in global markets); Feb. 13 Hr'g Tr., *supra* note 2, at 90 (Stern) ("[T]he concern that I was trying to express about the need to address this globally is that U.S. legal clarity at least in a number of areas, could be overridden by a lack of clarity or by overly restrictive rules outside the U.S. and the harm could come to U.S. consumers as well as those in other areas."); Jan. 30 Hr'g Tr., *supra* note 2, at 35–36 (Heiner).

[27] Sept. 12 Hr'g Tr., *supra* note 9, at 127 (Rill).

[28] *Id.* at 145.

[29] Jan. 30 Hr'g Tr., *supra* note 2, at 26–27 (Heiner).

[30] Addy, *supra* note 9, at 5.

[31] May 8 Hr'g Tr., *supra* note 10, at 143 (Melamed).

[32] *See, e.g.*, *id.* at 144 (Muris) (contrasting mergers, where "you can have multiple reviews and it is basically okay because you can sell off parts," with "the dominance area, [where] the most aggressive remedy tends to dominate"); Feb. 13 Hr'g Tr., *supra* note 2, at 130 (Heather) (noting "the growing potential for conflict and the costs and burdens associated with it"

Even when remedies are not actually in conflict, there can be spillover effects to consider. Although some remedies, such as most fines, may have less direct impact outside the jurisdiction in which they are imposed, other remedies, such as mandatory sharing or licensing of intellectual property, may have global repercussions.[33]

Although some remedies, such as most fines, may have relatively little impact outside the jurisdiction in which they are imposed, other remedies, such as mandatory sharing or licensing of intellectual property, may have global repercussions.

One panelist cautioned, "I think we need to pay close attention to the whole issue of compulsory access to intellectual property, because that is the area in which decision-making by one competition authority can have the greatest spillover effects on other economies."[34] Another observed,

> When you think about intellectual property, if you have as enforcement and remedy a disclosure of intellectual property, you can't contain that [disclosure] within a geographical jurisdiction of France or the EU. Once . . . the proverbial cat's out of the bag, it spreads quickly across the rest of the known world.[35]

III. The Way Forward: Efforts to Encourage Convergence and Cooperation in the Area of Single-Firm Conduct

Multi-jurisdictional enforcement of antitrust laws poses considerable challenges. Today's challenges are an outgrowth of several factors. First, many firms increasingly do business globally. Second, the world has largely adopted the long-held U.S. position basing jurisdiction on effects rather than on the situs of the conduct, which means that conduct with effects in multiple jurisdictions can be challenged in multiple jurisdictions. Third, there has been a proliferation of antitrust regimes throughout the world, which, as they become more established and more fully staffed, are better able to challenge conduct they find objectionable.

These forces will endure, and the Department recognizes that there are no easy solutions for the challenges they present. Yet, steps can be taken to manage these challenges effectively. In recent years, there have been a variety of policy proposals to encourage more consistency in antitrust laws and enforcement across jurisdictions.

Probably the most radical solution, recommended by a limited number of commentators, is an international competition regime with authority to enforce uniform competition rules.[36] Some have suggested that an international organization, such as the World Trade Organization, could assume this role.[37] However, others view any kind of

and observing that "Microsoft has been subject to three different sets of remedies in three different jurisdictions for what is essentially similar conduct"); Jan. 30 Hr'g Tr., *supra* note 2, at 35 (Heiner) (stating that European Union (EU) relief "will prevail" over U.S. relief in Microsoft because EU relief is "more restrictive"); Sept. 12 Hr'g Tr., *supra* note 9, at 166 (Bloom) (noting that there may be situations where "one jurisdiction requires something of a company which then conflicts with a remedy that's required in another jurisdiction").

[33] *See, e.g.*, Feb. 13 Hr'g Tr., *supra* note 2, at 38 (Sheller) (observing that "obstacles to [Kodak's] ability to monetize our intellectual property investments exists in the form of cases . . . where the [European] Commission required compulsory licensing by intellectual property owners"); Jan. 30 Hr'g Tr., *supra* note 2, at 35 (Heiner) (compulsory licensing creates "a greater uncertainty as to whether the IP can be properly monetized"); Sept. 12 Hr'g Tr., *supra* note 9, at 136–37 (Addy) (noting that intellectual property represents a "big, big problem").

[34] May 1 Hr'g Tr., *supra* note 15, at 18 (Kolasky).

[35] Feb. 13 Hr'g Tr., *supra* note 2, at 194 (Heather).

[36] *See, e.g.*, Andrew T. Guzman, *Antitrust and International Regulatory Federalism,* 76 N.Y.U. L. REV. 1142, 1142–43 (2001).

[37] *See generally* Frederic Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, *in* INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES 31, 56–67 (Yang-Ching Chao et al. eds., 2001) (discussing the pros and cons of establishing a multilateral framework for competition consistent with WTO principles of transparency and

international regime as unrealistic and undesirable and instead urge "soft harmonization" policies, seeking voluntary convergence in substantive laws and cooperation between enforcement agencies to reduce the costs and burdens of enforcement both to businesses and competition agencies.[38]

In accordance with the recommendations contained in the 2000 International Competition Policy Advocacy Commission Report, the Department has supported the latter policy.[39] The Department's primary initiatives are focused on (1) bilateral cooperation with competition agencies abroad, (2) active participation in multilateral fora, and (3) provision of technical assistance to new competition regimes.

A. Bilateral Cooperation

The federal antitrust enforcement agencies and foreign competition agencies have developed an extensive network of cooperative relationships, some of which are based on bilateral cooperation agreements. The United States currently has formal bilateral cooperation agreements with eight jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); and Mexico (2000).[40] Although these agreements are not identical, they generally require the signatories to notify one another about antitrust enforcement activities that affect the other's interests, to cooperate and coordinate with one another in investigations, and to consult with one another about matters that arise under the agreements. All the agreements contain traditional comity provisions, and most, including those with the EU, contain positive-comity provisions as well.[41] The federal antitrust enforcement agencies also cooperate extensively with other competition agencies under the Organisation for Economic Co-Operation and Development (OECD) recommendation on antitrust cooperation[42] and

non-discrimination).

[38] *See, e.g.*, Kerrin M. Vautier, *International Approaches to Competition Laws: Government Cooperation for Business Competition*, *in* INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES 187, 188 (Yang-Ching Chao et al. eds., 2001) (concluding that "there is little, if any, prospect of a single workable approach to transnational competition issues, let alone prospect of multilateral competition rules and supra-national enforcement"); Diane P. Wood, *Cooperation and Convergence in International Antitrust: Why the Light Is Still Yellow*, *in* COMPETITION LAWS IN CONFLICT 177, 179 (Richard A. Epstein & Michael S. Greve eds., 2004) (suggesting a "need to exercise caution before we take the leap into a formal international antitrust regime" and asserting that "there's a better way forward, which involves education, consensus building in a voluntary environment, and targeted cooperation with like-minded countries"); *id.* at 186.

[39] *See* INT'L COMPETITION POLICY ADVISORY COMM'N, FINAL REPORT 26 (2000), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm (concluding that "efforts at developing a harmonized and comprehensive multilateral antitrust code administered by a new supranational competition authority or the WTO [are] both unrealistic and unwise" and recommending instead efforts to promote soft convergence); *id.* at 35 (recommending that the Department work toward increased transparency and accountability of government actions; expanded and deeper cooperation between U.S. and foreign competition enforcement agencies; and greater soft harmonization and convergence of systems); *see also* Vautier, *supra* note 38, at 199 (noting that "the U.S. . . . resists a multilateral approach to competition law" and instead "favors bilateral cooperation agreements, these being an integral feature of U.S. strategy for internationalizing antitrust").

[40] *See generally* 2 SECTION OF ANTITRUST LAW, AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 1261–63 (6th ed. 2007) (discussing bilateral cooperation agreements); U.S. Dep't of Justice, Antitrust Cooperation Agreements, http://www.usdoj.gov/atr/public/international/int_arrangements.htm (compiling these agreements).

[41] Traditional (or negative) comity requires an enforcement agency in country A, when enforcing its law, also to take into account important interests of country B. Positive comity allows one country's enforcement agency to request another country's agency to initiate an enforcement action within its jurisdiction when the conduct at issue harms the requesting country and would be illegal in the requested jurisdiction.

[42] ORGANISATION FOR ECON. CO-OPERATION & DEV., REVISED RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE (1995), *available at*

with still other agencies through informal arrangements.

Pursuant to these agreements, and even without an agreement, antitrust agencies cooperate both on individual cases and on general competition policy issues. This cooperation may include sharing appropriate information to facilitate investigations. In some enforcement areas, such as mergers, the parties also routinely waive restrictions on the sharing of their confidential information to facilitate cross-agency cooperation.[43] Waivers have been valuable to the Department and also can benefit the parties by reducing document production burdens and helping to reduce inconsistent outcomes and incompatible remedies. Such waivers, however, are not as common in cases involving single-firm conduct.[44]

Additionally, the Department works with its counterparts abroad to promote policy convergence on broader competition issues. For example, Department officials attended the European Commission's hearings on the Directorate General for Competition (DG-Comp) Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses,[45] in addition to engaging in informal discussions with the EC about the Discussion Paper. Similarly, the Director-General of DG-Comp, Philip Lowe, testified at the hearing on international issues, along with Hideo Nakajima, then-Deputy Secretary General of the Japan Fair Trade Commission, Eduardo Pérez Motta, Chairman of Mexico's Federal Commission on Competition, and Sheridan Scott, Commissioner of Competition from Canada's Competition Bureau.[46] Additionally, the U.S., Mexican, and Canadian agencies have formed informal working groups to discuss issues involving intellectual property and single-firm conduct. Although such initiatives cannot guarantee that competition agencies in different jurisdictions will reach consistent decisions in individual cases,[47] they have been important in fostering increased understanding of the issues and in facilitating constructive dialogue among regimes with somewhat different approaches.

The Department and the FTC also have devoted substantial resources to working with China on its Antimonopoly Law, which became effective on August 1, 2008. Officials of both agencies frequently have shared their experience with officials in China involved in developing the law, with the objective of creating a legal framework consistent with sound competition principles, and have conducted training workshops. The Department expects to continue consulting with the Chinese authorities and to provide additional technical assistance as China implements its new law.

B. Participation in International Organizations

The Department and the FTC also actively participate in international organizations that have facilitated dialogue and sponsored programs on competition issues. Two international organizations—the ICN[48] and the

http:/www.oecd.org/dataoecd/60/42/21570317.pdf. The OECD's Competition Committee has long served as an important consultative body for countries with competition regimes as well as a source of technical assistance to jurisdictions enacting new antitrust laws.

[43] *See* INT'L COMPETITION NETWORK, WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS (n.d.), *available at* http://www.international competition network.org/media/archive0611/NPWaiversFinal.pdf.

[44] *See infra* Part IV.

[45] *See* June 20 Hr'g Tr., *supra* note 3, at 10–11 (Majoras).

[46] *See* Sept. 12 Hr'g Tr., *supra* note 9, at 8–23 (Lowe); *id.* at 24–38 (Nakajima); *id.* at 39–49 (Pérez Motta); *id.* at 50–66 (Scott).

[47] *See* Feb. 13 Hr'g Tr., *supra* note 2, at 139 (Heather) ("While existing bilateral agreements and the existing application of comity principles have certainly been useful, they have limitations, as illustrated by the inconsistent remedies imposed by the U.S., E.U., and enforcement authorities in the Microsoft matter.").

[48] The ICN was launched in 2001 by the Department, the FTC, and fourteen other antitrust enforcement agencies. Its membership now includes virtually all competition enforcement agencies around the world. Open only to competition agencies, the ICN exists as a virtual network of enforcers; it has no permanent staff and operates through working groups comprising government enforcement officials as well as advisors from academia, the legal community, and business groups. The ICN seeks to promote greater substantive and procedural convergence among

OECD[49]—have played an especially pivotal role in fostering cross-border understanding and cooperation among competition regimes throughout the world in the area of single-firm conduct. The Department and the FTC have actively supported, and taken lead roles in, both of these organizations.[50]

The Department and the FTC have actively supported, and taken a leading role in, multilateral organizations, such as the ICN and the OECD.

In 2006, the ICN established a Unilateral Conduct Working Group (UCWG) to promote convergence and sound enforcement of laws governing single-firm conduct. In its first two years, the working group has tackled difficult issues and made significant progress. The group's work on a set of recommended practices for the assessment of substantial market power and dominance under unilateral-conduct laws particularly stands out. These recommended practices, which were adopted by all ICN members at the ICN's annual conference in Kyoto, Japan, in April 2008, represent significant convergence on important points regarding the assessment of substantial market power and dominance and also will serve as a helpful guide to new competition agencies as they formulate their policies in this area. Specifically, the recommended practices are:

1. Agencies should use a sound analytical framework firmly grounded in economic principles in determining whether dominance/substantial market power exists.
2. A firm should not be found to possess dominance or substantial market power without a comprehensive consideration of factors affecting competitive conditions in the market under investigation.
3. Market shares of the firm under investigation and its existing competitors, including their development during the past years, should be used as an indication or starting point for the dominance/substantial market power analysis.
4. Agencies should give careful consideration to the calculation of market shares.
5. It can be beneficial to use market-share based thresholds as a safe harbor.
6. It can be beneficial to use market-share based thresholds as an indicator of dominance/substantial market power.
7. The assessment of durability of market power, with a focus on barriers to entry or expansion, should be an integral part of the analysis of dominance/substantial market power.
8. As appropriate in the specific circumstances of a particular case, agencies should use further criteria to analyze dominance/substantial market power.
9. The analytical framework used to assess market power is the same in small and/or isolated economies, but market factors may result in more limited

antitrust authorities around the world toward sound competition policies and to provide support for new antitrust agencies both in enforcing their laws and in building strong competition cultures. The ICN has had considerable success in fostering multi-jurisdictional cooperation and convergence on both substance and procedure.

[49] The OECD has promoted convergence both in substantive analysis and competition policy by issuing reports, sponsoring roundtable discussions, and providing a forum where enforcers can meet and discuss competition issues. It has also published non-binding recommendations, including one that provided a basis for the bilateral cooperation agreements. *See supra* Part III(A).

[50] The Department co-chairs the ICN's Merger Working Group and co-chairs a sub-group of the Cartel Working Group; the FTC co-chairs the ICN's working group on unilateral conduct and chairs the Merger Working Group's subgroup on notification and procedures. Over the years, Assistant Attorneys General have often been elected by OECD members to chair the OECD Competition Committee's Working Party No. 3 on Enforcement and Cooperation; Assistant Attorney General Thomas O. Barnett currently chairs the Working Party. Senior officials of both agencies participate actively in these organizations and in their activities devoted to single-firm conduct issues. *See, e.g.*, June 20 Hr'g Tr., *supra* note 3, at 11 (Majoras).

competition.

10. Agencies should seek to make their dominance/substantial market power assessments transparent, subject to the appropriate protection of confidential information.[51]

In addition to the recommended practices on dominance or substantial market power, the UCWG issued recommended practices on the application of unilateral-conduct rules to state-created monopolies[52] and has released a series of reports on member agencies' laws, policies, and enforcement practices in various areas of single-firm conduct.[53] These reports, which are based on questionnaire responses submitted by members and non-governmental advisors, address the following topics: (1) the objectives of unilateral-conduct laws,[54] (2) the assessment of dominance and substantial market power, (3) state-created monopolies, (4) predatory pricing, and (5) exclusive dealing.[55]

The UCWG plans to study members' approaches to tying, bundling, and single-product loyalty rebates during the upcoming year, and it will host a unilateral-conduct workshop in Washington, DC, on March 23–24, 2009.

The OECD Competition Committee also has focused on issues relating to single-firm conduct. It has sponsored a series of roundtables on abuse of dominance. Its efforts have culminated in reports on predatory foreclosure, competition on the merits, barriers to entry, remedies and sanctions, unilateral refusals to deal, and bundled and loyalty discounts.[56] These reports have played an

[51] 2007 ICN REPORT, *supra* note 6, at 2–7.

[52] UNILATERAL CONDUCT WORKING GROUP, INT'L COMPETITION NETWORK, STATE-CREATED MONOPOLIES ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS: RECOMMENDED PRACTICES (n.d.), *available at* http://www.internationalcompetitionnetwork.org/media/library/ unilateral_conduct/ Unilateral_WG_2.pdf.

[53] UNILATERAL CONDUCT WORKING GROUP, INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE CREATED MONOPOLIES (2007), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf [hereinafter ICN REPORT ON MARKET POWER AND STATE-CREATED MONOPOLIES]; UNILATERAL CONDUCT WORKING GROUP, INT'L COMPETITION NETWORK, REPORT ON PREDATORY PRICING (2008), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf [hereinafter ICN REPORT ON PREDATORY PRICING]; UNILATERAL CONDUCT WORKING GROUP, INT'L COMPETITION NETWORK, REPORT ON SINGLE BRANDING/EXCLUSIVE DEALING (2008), *available at* http://www.internationalcompetition network.org/media/library/unilateral_conduct/ Unilateral_WG_4.pdf [hereinafter ICN REPORT ON SINGLE BRANDING/EXCLUSIVE DEALING].

[54] An ICN report noted that the majority of respondents identified consumer welfare, efficiency, and ensuring an effective competitive process as objectives of unilateral-conduct rules. *See* ICN REPORT ON MARKET POWER AND STATE-CREATED MONOPOLIES, *supra* note 53, at 38. However, unlike the United States, where these are the only goals, certain respondents identified additional goals, including, for example, promoting fairness and equality within markets and ensuring a level playing field for small and medium-sized enterprises. *See id.* at 17–18. Interestingly, there appeared to be no support for the proposition that promoting industrial-policy goals is an appropriate objective. *See id.* at 31.

[55] The information on substantial market power and dominance assessment and state-created monopolies in an ICN report formed the basis for the 2008 recommended practices. The report on predatory pricing confirmed that, when analyzing possible predatory-pricing conduct, virtually all agencies require that prices be below cost for there to be a violation. The report also showed that agencies take into account some or all of the following factors: (1) recoupment of losses, (2) competitive effects such as foreclosure or consumer harm, (3) predatory intent, and (4) justifications or defenses that offer pro-competitive rationales for the conduct. *See* ICN REPORT ON PREDATORY PRICING, *supra* note 53, at 3. The exclusive-dealing report identified four factors that agencies generally consider in evaluating exclusive dealing under single-firm conduct rules: (1) the existence of an exclusive-dealing arrangement, (2) the existence of substantial market power or dominance, (3) competitive effects, and (4) procompetitive justifications or defenses. *See* ICN REPORT ON SINGLE BRANDING/EXCLUSIVE DEALING, *supra* note 53, at 3.

[56] *See* Organisation for Economic Co-Operation & Dev., Best Practice Roundtables on Competition Policy, http://www.oecd.org/document/38/0,3343,en_2649_37463_2474918_1_1_1_37463,00.html (last visited Aug.

important role in furthering cross-border understanding of policy issues in these areas.

C. Provision of Technical Assistance

The Department and the FTC provide technical assistance to countries establishing new competition regimes, largely through funding by the U.S. Agency for International Development. The programs, which began in the early 1990s in Central and Eastern Europe, are active in many areas of the world, including Southeast Asia, Russia, India, Egypt, South Africa, and Central America. Since 1991, the Department and the FTC have conducted approximately four hundred technical-assistance missions, some short-term and others longer-term, in scores of countries. In numerous countries, the agencies have also maintained resident advisors to assist in developing antitrust laws.[57]

In its recent report, the Antitrust Modernization Commission (AMC) reported that technical-assistance programs have been effective and recommended that they receive direct funding in the future.[58] Congress considered this recommendation, and, in fiscal year 2008, the FTC was granted supplemental funds to be distributed to a number of activities, including technical assistance for both competition and consumer protection.[59]

IV. Additional Steps: What Should Be Done?

Over the past decade, the U.S. antitrust enforcement agencies and other organizations have devoted significant resources to improving communication, cooperation, and coordination with other competition agencies throughout the world and in working towards greater convergence in standards and procedures based on sound economic principles. These efforts have been successful in part. As the AMC Report observed, both the Department and the FTC "'enjoy [a] strong cooperative relationship[] with a large and increasing number of foreign enforcement agencies, enabling close cooperation on cases, coordination on international antitrust policy, and provision of technical assistance to new agencies throughout the world.'"[60]

On the other hand, there has been less convergence on single-firm conduct issues than in other areas.[61] This may be attributable to several factors.

First, for all the reasons discussed above, it has proven particularly difficult to develop substantive consensus on the appropriate standards for evaluating single-firm conduct. As one panelist observed, "The complexity inherent in the analysis of single-firm conduct simultaneously endorses the need for caution and challenges the steady approach to convergence that has been in large measure achieved, for example, in the area of horizontal mergers."[62]

Second, opportunities for cooperation in the area of single-firm conduct historically have

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6, 2008).

[57] *See generally* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, U.S. FEDERAL TRADE COMMISSION'S AND DEPARTMENT OF JUSTICE'S EXPERIENCE WITH TECHNICAL ASSISTANCE FOR THE EFFECTIVE APPLICATION OF COMPETITION LAWS (2008), *available at* http://ftc.gov/oia/wkshp/docs/exp.pdf; Federal Trade Commission, International Technical Assistance, http://ftc.gov/oia/assistance.shtm.

[58] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 219 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[59] *See generally* 153 CONG. REC. H15741, H16054 (daily ed. Dec. 17, 2007) (explanatory statement regarding the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1884) ("The Appropriations Committees recognize and support the FTC's international programs. The FTC should continue competition policy and consumer protection efforts, including training and technical assistance, in developing countries.").

[60] ANTITRUST MODERNIZATION COMM'N, *supra* note 58, at 216 (alteration in original) (quoting Randolph W. Tritell, Assistant Dir. for Int'l Antitrust, Fed. Trade Comm'n, International Antitrust Issues (Feb. 15, 2006), *available at* govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Tritell.pdf).

[61] *See* Feb. 13 Hr'g Tr., *supra* note 2, at 137 (Heather) ("[S]uccess has been realized largely in the cartel and merger enforcement areas. Greater priority must be given to the area of unilateral conduct.").

[62] Rill, *supra* note 7, at 1.

been far fewer than, for example, in the area of horizontal mergers. Despite the attention devoted to single-firm conduct issues internationally, only a handful of single-firm conduct cases have had cross-border ramifications; in contrast, staffs now routinely work cooperatively on horizontal mergers and cartel investigations.

Finally, in merger investigations, the incentives of both the parties and the reviewing agencies are often aligned, and firms routinely provide waivers that enable the agencies in different jurisdictions to cooperate effectively, thereby speeding the review process and enabling the transaction to move forward. This, however, may not always be the case in investigations involving single-firm conduct, where the firm under investigation does not have the same incentive to cooperate with competition agencies and, therefore, may not be willing to provide waivers that could facilitate better cross-border cooperation.

These factors have posed obstacles to cooperation and convergence with regard to single-firm conduct. Hearing testimony stressed the need to continue striving for progress. Panelists supported efforts to encourage voluntary convergence on substantive standards.[63] At the same time, however, several panelists cautioned that convergence was not a transcendent goal in and of itself,[64] and that convergence must be forged around appropriate legal and economic principles.[65] Other panelists urged a focus on comity and ways of reducing overlapping enforcement by different agencies.[66]

This part of the chapter discusses a number of proposals for future steps to address the policy concerns identified above.

Participation in Multilateral Organizations. Organizations such as the ICN and the OECD have made major strides in promoting convergence, and the Department will continue to participate actively in both organizations. In particular, the Department will work toward greater convergence on issues of single-firm conduct in the UCWG. Several panelists stressed the importance of this undertaking,[67] and the Department agrees. The UCWG affords an important forum for dialogue and presents an opportunity for the various jurisdictions to learn from one another, benchmark their approaches, and generally foster convergence.

Organizations such as the ICN and the OECD have made major strides in promoting convergence, and the Department will continue to participate actively in both organizations.

Evaluation and Expansion of Technical-Assistance Programs. Commentators have found that the technical-assistance programs that the Department and the FTC have sponsored to help nascent competition regimes "will foster greater cooperation and

[63] *See, e.g.*, May 8 Hr'g Tr., *supra* note 10, at 137–38 (Rill) ("I think we should not be too pessimistic and certainly not too humble about the opportunities for convergence and the role the U.S. should play."); Sept. 12 Hr'g Tr., *supra* note 9, at 144 (Bloom) ("I think there should be as much convergence as will achieve maximum consumer welfare.").

[64] *See* Sept. 12 Hr'g Tr., *supra* note 9, at 136–37 (Addy) (expressing the view that there should be room for countries to reasonably disagree on what they consider the primary factors in challenging single-firm conduct; that firms can operate in conformity with local laws without any major impediment to doing business; and that the most critical need is for individual jurisdictions to make their rules clear and understandable).

[65] *See* May 8 Hr'g Tr., *supra* note 10, at 139 (Rule) ("The only thing I would say is if given the choice between convergence and advocating what you believe is the right principle, I would frankly urge you always to adopt the second."); May 1 Hr'g Tr., *supra* note 15, at 151 (Calkins); Feb. 13 Hr'g Tr., *supra* note 2, at 182 (Wark); *id.* at 183–84 (Sewell); *id.* at 184 (Heather).

[66] *See* May 8 Hr'g Tr., *supra* note 10, at 144–45 (Pitofsky) ("My view . . . is that convergence is a long way off. . . . But I think there is something that is in the cards, and that is comity."). *But cf. id.* at 142 (Melamed) ("I think there will be increasing convergence.").

[67] *See, e.g.*, Sept. 12 Hr'g Tr., *supra* note 9, at 142 (Rill) ("[T]hrough the ICN and the OECD . . . the agencies can, are and should do more work in the area of bringing about cross-border transparency, and . . . ultimately convergence.").

convergence on sound antitrust law principles."[68] A panelist representing the U.S. Chamber of Commerce recommended review of the adequacy of these programs and "implement[ing] any changes that may be necessary to make them more effective."[69] The Department is continually in the process of such an evaluation. As one part of that effort, the Department and the FTC conducted a Technical Assistance Workshop in February 2008, at which they obtained the perspectives of other aid providers, academics, and private practitioners on possible improvements to the assistance programs and ways to maximize their effectiveness. The Department plans to continue providing training on single-firm conduct as part of its technical-assistance efforts.

Enhanced Bilateral Cooperation. Bilateral cooperation among competition agencies has multiplied over the years, and the Department and the FTC have established strong working relationships with many competition agencies throughout the world. In this regard, the Department continues to explore additional measures to improve cooperation and coordination with regard to single-firm conduct.

One avenue the Department intends to explore is whether more can be done to facilitate the sharing of confidential business information between the Department and counterpart foreign competition agencies. The International Antitrust Enforcement Assistance Act (IAEAA) authorizes the United States to enter into antitrust mutual assistance agreements with other countries that allow the exchange of confidential business information.[70] Although such agreements enable closer working relationships among agencies in different jurisdictions on cases of common interest, the United States to date has entered into only one antitrust mutual assistance agreement, with Australia.[71] Accordingly, in most jurisdictions, in-depth cooperation and coordination is feasible only with the parties' consent to the sharing of confidential information. When such consent is given, extensive cooperation and coordination may be beneficial to both the parties and the enforcement agencies involved.[72]

While confidentiality waivers are entirely within the discretion of parties, this is one area in which businesses concerned with the challenges posed by multi-jurisdictional review may be able to help themselves. As discussed previously, in merger contexts, waivers are relatively routine; in the area of single-firm conduct, they are not. As one panelist observed, progress in cooperation in specific cases and investigations "can be expanded and assisted by cooperation from parties through waivers of confidentiality and similar undertakings."[73] This may be an important way in which firms concerned about the costs of multiple investigations and the prospect of inconsistent remedies could assist the Department in making the process more efficient and effective.

Increased Focus on Comity. A number of panelists also recommended that principles of comity play a greater role in preventing potential conflicts among jurisdictions and creating a more predictable environment. As one commentator defines it,

> Comity is a concept of reciprocal deference [that] holds that one nation should defer to the law and rules (or dispute disposition) of

[68] ANTITRUST MODERNIZATION COMM'N, *supra* note 58, at 219.

[69] Feb. 13 Hr'g Tr., *supra* note 2, at 140–41 (Heather) (recommending that the technical-assistance review be approached "holistically and in cooperation with other developed countries to ensure that available resources are allocated efficiently and effectively and to ensure that other important initiatives such as the protection of intellectual property are pursued").

[70] *See* 15 U.S.C. §§ 6201–12 (2000).

[71] ANTITRUST MODERNIZATION COMM'N, *supra* note 58, at 218.

[72] *See* Vautier, *supra* note 38, at 202 ("[C]harges in the 1994 Microsoft investigation . . . were noteworthy in that they were initiated through close coordination between two enforcement bodies who also joined to settle the case in negotiation with Microsoft. An important feature of this case was that Microsoft consented to both the U.S. and EU authorities exchanging confidential information.").

[73] Rill, *supra* note 7, at 14.

> another because, and where, the other has a greater interest; a greater claim of right. It is a concept founded on process, not outcome. It is irrelevant that the outcome may not be the preferred one of the deferring country. Indeed, that is the point.[74]

One panelist observed, "I think we need to restore a greater role for the notion of international comity, the idea that one jurisdiction will defer to another jurisdiction which has more substantial and significant contacts with the conduct at issue."[75] Similarly, the panelist from the U.S. Chamber of Commerce testified, "The Chamber believes that the U.S. should explore the concept of enhanced comity, including such elements as an agreement amongst jurisdictions to defer to one another in relation to remedies."[76] Another panelist echoed these views, stating that "[g]iven globalization, I think it is increasingly important to find some way to allocate responsibility among multiple agencies" and further suggesting that "a kind of common sense approach would . . . [give] a greater deference to the rules of the defendant's home country."[77] Others have made similar recommendations.[78]

On the other hand, one panelist took issue with the proposal that jurisdictions defer to the defendant's home country:

> [F]or AMD and Intel . . . our revenues are probably seventy-five percent coming from outside the U.S. . . . We have productive capacity all over the world. . . . The innovation process is one that is built on human resources located around the world, in no particular jurisdiction. And the marketplaces are global.
>
> So, to look at where a company is chartered or where the CEO sits is not a relevant variable to determine competition policy.[79]

Indeed, he questioned the basic concept of deference:

> [B]e careful when you talk about who ought to take the lead. I don't think it's ever going to, in the practical world, occur, because in a globalized world, what a dominant company does in any particular jurisdiction affects all other jurisdictions . . . .
>
> To think that any jurisdiction is going to advocate or forebear the protection of its own consumers in favor of another jurisdiction, that would be a remarkable thing. And I just don't think it's healthy.[80]

The Department is continuing to explore whether more can be done to employ comity principles in the area of single-firm conduct. Comity is a doctrine that has long been recognized and applied by the courts[81] and the antitrust enforcement agencies,[82] but with difficulty in some cases. It is incorporated in all

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[74] Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation, N.Y. Univ. Sch. of Law, Testimony Before the Antitrust Modernization Commission Hearing on International Issues 6 (Feb. 15, 2006), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/statement_Fox_final.pdf.

[75] May 1 Hr'g Tr., *supra* note 15, at 18 (Kolasky).

[76] Feb. 13 Hr'g Tr., *supra* note 2, at 139 (Heather); *see also* May 8 Hr'g Tr., *supra* note 10, at 145 (Pitofsky) (advocating a program of enhanced comity and noting that "Canada does it on a regular basis").

[77] Jan. 30 Hr'g Tr., *supra* note 2, at 38 (Heiner).

[78] *See, e.g.*, ANTITRUST MODERNIZATION COMM'N, *supra* note 58, at 221 (recommending that "the United States . . . pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements").

[79] Jan. 30 Hr'g Tr., *supra* note 2, at 193–94 (McCoy); *see also* Phred Dvorak, *Why Multiple Headquarters Multiply*, WALL ST. J., Nov. 19, 2007, at B1 (suggesting that the concept of "home country" may be outdated for multinational firms).

[80] Jan. 30 Hr'g Tr., *supra* note 2, at 194–95 (McCoy); *accord id.* at 195 (Haglund).

[81] *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 163–64 (1895); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937–38 (D.C. Cir. 1984); *see also* F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 164–68 (2004) (using principles of prescriptive comity in construing the Foreign Trade Antitrust Improvements Act). *See generally* SECTION OF ANTITRUST LAW, *supra* note 40, at 1179–85.

[82] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2 (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm.

the formal cooperation agreements to which the United States is a party.

Although some have urged greater focus on comity to address concerns such as forum shopping and multiple-agency reviews, others are more skeptical. For example, one commentator has noted, "Comity is an ambiguous concept. Invoking the word does not reveal its practical meaning. Whether one nation has a greater claim of right than another is usually not obvious in cases in which duties of deference are likely to be asserted."[83]

Some of the difficulties are operational. Some enhanced comity proposals are predicated largely on encouraging competition agencies to defer to the enforcement decisions of the jurisdiction with the greatest interest in the matter. But how is that to be determined? Should it depend on "the defendant's home country," as one panelist proposed?[84] Should it, instead, depend on the size or significance of sales, or capital investments, or the number of customers in the particular jurisdiction? How is greatest interest in the matter determined in cases involving intellectual property? And what about the severity of anticompetitive effects and the size of the jurisdiction—should smaller jurisdictions always defer to larger ones?

Even more fundamentally, it is questionable how realistic it is to expect one competition agency to defer to another when, as sometimes happens, conduct has substantial effects in multiple jurisdictions. Such deference may require restraining basic impulses of national sovereignty: "Virtually every jurisdiction insists upon recognition of its sovereignty. While comity principles may lead a jurisdiction to refrain from asserting powers in a particular case, those principles are clearly viewed as subordinate."[85]

No competition agency should launch an investigation when conduct clearly lacks significant effects within that agency's jurisdiction. However, when such effects are present in multiple jurisdictions, it may be unrealistic to expect deference from a jurisdiction where important consumer interests are at stake. One jurisdiction—Canada—has indicated that it will abstain from bringing its own case when it has concluded that its interests are protected by another jurisdiction's actions,[86] and other jurisdictions may do the same in specific cases. These jurisdictions, however, explicitly reserve the right to act themselves if they believe that their consumers have not been protected adequately.

It is also important to guard against comity being used to promote national champions. As has been observed, "Comity is a horizontal, nation-to-nation concept, seeking—by reciprocal deference—to maximize the joint interests of the affected nations or to split their differences through repeated interactions. It may play into the hand of nationalism and the nurturing of national champions."[87]

The Department will continue to explore how to strengthen cooperative bilateral relationships in the area of single-firm conduct. In appropriate cases, the Department may invoke comity principles in attempting to persuade an agency abroad to defer to the United States, and likewise will consider such principles in deciding whether it should defer consistent with its responsibility to protect U.S. consumers. However, at this point, the Department does not underestimate the challenges of doing so and is focusing its international convergence efforts on increased dialogue and cooperation.

Greater Cooperation and Coordination on Remedies. As discussed above, one of the basic

[83] Fox, *supra* note 74, at 6.

[84] Jan. 30 Hr'g Tr., *supra* note 2, at 38 (Heiner).

[85] William Blumenthal, *The Challenge of Sovereignty and the Mechanisms of Convergence*, 72 ANTITRUST L. J. 267, 272 (2004); *see also* Antitrust Modernization Commission: Public Hearing Hr'g Tr. 15, Feb. 15, 2006, *available at* govinfo.library.unt.edu/amc/commission_hearings/pdf/060215_International_Transcript_reform.pdf [hereinafter AMC Hr'g Tr.] (Tritell) ("How should jurisdictions, including the United States, reconcile enhanced comity principles with domestic statutory obligations to protect their consumers?").

[86] *See* AMC Hr'g Tr., *supra* note 85, at 14.

[87] Fox, *supra* note 74, at 6.

concerns raised by the current environment of overlapping enforcement is that one jurisdiction's remedy may have serious spillover effects on consumers in other jurisdictions. The severity of this concern depends on the nature of the remedy. For example, remedies requiring the sharing of intellectual property with competitors may well have major spillover effects in other parts of the world. Similarly, remedies addressing product design may have substantial spillover effects as firms, responding to the requirements of one regime, may be forced to design sub-optimal products from the perspective of consumers in other jurisdictions. On the other hand, some remedies, such as those involving distribution or marketing practices, may involve conduct that can be more easily tailored to particular jurisdictions and thus are less likely to have significant spillover effects. In short, a remedy imposed by one jurisdiction may have effects elsewhere, but the extent of any effect will vary depending on the remedy at issue. The Department believes that more should be done to address spillover concerns through regularized and early consultations among involved agencies and parties, and, in suitable cases where confidentiality obligations and simultaneous timing permit, the joint fashioning of appropriate remedies.

The Department believes that more should be done to address the spillover effects that remedies imposed by one jurisdiction may have on consumers in other jurisdictions.

V. Conclusion

There is considerable diversity among jurisdictions in the laws governing single-firm conduct, the types of regimes for enforcing those laws, and the remedies that are imposed for violations. That is understandable. Different countries have different economic histories, legal systems, and policy objectives, and are at different stages of development.

While this divergence has raised legitimate concerns, it is important not to overstate the issue. Not all single-firm conduct cases have cross-border ramifications and not all such cases have divergent results. The problem, however, is that even a small number of high–profile cross–border cases with divergent results are likely substantially to impact (and potentially inefficiently chill) how global companies conduct their business, and even how they design the products they bring to market.

There has been increasing convergence around some basic principles: that the primary purpose of laws governing single-firm conduct is to serve consumers and competition in general rather than to protect individual competitors; that economics should play a key role in the analysis; and that competitive effects, rather than formalistic line-drawing, should be the focus of liability. Yet there remain important differences in certain areas between the enforcement policies of even mature antitrust jurisdictions such as the United States and the EU. And the emergence of competition regimes in major trading partners such as Brazil, China, and India adds to the sense of urgency that antitrust agencies need to improve the way they work together in this area.

There are no quick fixes to the concerns identified in the hearings, and impediments to full convergence are likely to remain for some time. What each jurisdiction can do is strive to make its own enforcement policy and laws on single-firm conduct as clear and transparent as possible, so that businesses can determine what the law is and how they can best comply with their obligations. Additionally, the Department will continue to seek opportunities to improve cooperation and coordination with other competition regimes in individual cases, and will actively support multilateral organizations such as the ICN and the OECD in their efforts to foster convergence in the area of single-firm conduct based on sound economic principles.

As one authority has observed, "Convergence is an organic process that grows out of learning from each other's experience, allowing all of us to retain the best elements. In a globalising world

it is important to take an open-minded approach and constantly consider whether one's own rules and practices can be improved."[88] The Department agrees and will continue to strive to do so at home and abroad.

[88] Alexander Schaub, Dir. Gen., DG Competition, European Comm'n, Continued Focus on Reform: Recent Developments in EC Competition Policy (Oct. 25, 2001), *available at* http://ec.europa.eu/comm/competition/speeches/text/sp2001_031_en.pdf (quoted in Thomas O. Barnett, *Section 2 Remedies: A Necessary Challenge*, *in* 2007 ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE 549, 549 (Barry E. Hawk ed., 2008)).