THE ENDURING VITALITY OF COMITY IN A GLOBALIZED WORLD

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INTRODUCTION

Consideration of comity in antitrust cases is more important than ever. The global proliferation of competition law enforcement agencies has produced profound effects. Most are highly beneficial for consumers at a local level, but these many agencies create significant difficulties because they apply different legal standards, procedures, and approaches to identifying and redressing perceived antitrust violations. One inescapable consequence is a much greater risk of conflict.

This conflict can take various forms. In the extreme case, it can mean that different jurisdictions impose conflicting remedies for the same conduct irrespective of the effect in another jurisdiction, making it impossible for a party to comply with both remedies. As an example, one jurisdiction might require the complete divestiture of intellectual property in order to gain merger clearance, while another jurisdiction might require the party to license that same intellectual property. But there are more subtle tensions, equally problematic, that can result in the regulation of a party's conduct by one or more agencies that affect market conduct far beyond the enforcing agency's own borders. These risks are particularly high when an agency applies the "effects" doctrine, which often results in remedies that necessarily have an effect beyond that jurisdiction's own borders.

Agencies seeking to enforce their antitrust laws should recognize these risks and guard against interfering with the legitimate interests of other governments regulating conduct within their own borders and determining how their own domestic markets should function. This Article examines some of the sources of tension in the competition ecosystem and the means the agencies now use to address those conflicts. The Article identifies a gap that still exists between the need for and mechanisms of coordination and proposes an

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expanded use of traditional comity to ensure that international competition law enforcement produces benefits for consumers while minimizing unnecessary and inappropriate interference with the legitimate interests of foreign jurisdictions.[1]

I. DIFFERENCES IN SUBSTANTIVE ANTITRUST STANDARDS

A key source of tension in international competition law enforcement emanates from a difference in the substantive standards applied by different jurisdictions. Some of these tensions are fundamental and stem from the very different political situations within which competition laws have emerged. One need look no further than the two leading global enforcement authorities, the United States and the European Commission ("E.C."), to see this difference.

During the 1880's in the U.S., numerous "trusts," which controlled nearly all the firms in a particular industry were emerging in many sectors, including railroads and oil. In response, advocates of antitrust laws argued that, to be successful, the American economy required free competition and the opportunity for individuals to build their own businesses. As Senator John Sherman stated:

> If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[2]

In 1890, the U.S. Congress enacted the Sherman Act, which prohibits concerted activities in restraint of trade.[3] The Act was designed principally to break up the railroad and the oil trusts, which had concentrated huge amounts of wealth in the hands of few, at the expense of consumers and the competitiveness of the American economy. The efforts of the U.S. Department of Justice to pursue and eliminate these trusts were affirmed by the Supreme Court in 1904[4] and reaffirmed in 1911.[5]

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1 This is in contrast to those who argue that comity has served its purpose and should be discarded. *See, e.g.*, Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 565 (2000) (arguing that comity played a historically "important role" but has "ceased to matter" in the face of the globalization of antitrust enforcement).

2 21 CONG. REC. 2,457 (1890).

3 *See* Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (2016)) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

4 *See* N. Sec. Co. v. United States, 193 U.S. 197 (1904).

5 *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

In contrast, post-World War II Europe faced a massive need to rebuild the commercial economy and politically unify the continent following the war. In designing post-war European institutions, leaders sought "to expand and integrate markets and sustain development, [and] concluded that competition policy would be a necessary element of the new structure, principally to curb abuses of national monopolies."[6] The 1952 Treaty of Paris that established the European Coal and Steel Community contained provisions regarding cartels, concentrations (mergers), and a firm's abuse of its dominant position.[7] These provisions were principally aimed at preventing Germany from re-establishing its pre-war dominance in coal and steel production.[8] However, these competition provisions "were not actually applied very much."[9] In 1957, the Treaty of Rome established the European Economic Community (now the European Union).[10] The Treaty laid the foundation of Europe's common market, including the EU's competition law, with the goal of "ensuring that competition . . . [is] not distorted in the Common Market."[11]

With different origins and objectives underlying the two jurisdictions' competition laws, it is not surprising that the scope of enforcement and the standards applied are quite different in some areas. While there are large areas of agreement, for example with respect to enforcement against cartels, there are also areas of divergence. One obvious example is the evaluation of a dominant or monopolistic position.[12] Although the terms "monopolist" and "dominant undertaking" are both intended to identify firms that are able to exert market power over customers, unconstrained by competitors, the United States and the E.C. have different views on when that power is presumed to exist. Under the decisional law of the United States, with its history of a diversity of competitors and ease of entry in most sectors, a firm is conclusively presumed not to be a monopolist if it has a market share of less than

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6 OECD, COMPETITION LAW AND POLICY IN THE EUROPEAN UNION 9 (2005), www.oecd.org/eu/35908641.pdf.

7 *See* Treaty Instituting the European Coal and Steel Community arts. 65-66, Apr. 18, 1951, 261 U.N.T.S. 140.

8 *See* Eline Poelmans, *Changes in the Structure of Coal and Steel Industries Under the ECSC (1952-1967): Was West Germany Kept "Small"?*, 30 ESSAYS IN ECON. & BUS. HIST. 5, 7 (2012).

9 COMPETITION LAW AND POLICY IN THE EUROPEAN UNION, *supra* note 6, at 10.

10 *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

11 *Id.* at 16.

12 A general definition of dominance is the following: "A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers, and ultimately, the final consumer. A dominant firm holding such market power would have the ability to set prices above the competitive level[,] to sell products of an inferior quality or to reduce [i]ts rate of innovation below the level that would exist in a competitive market." Eur. Comm'n Directorate-Gen. for Competition & OECD, *Glossary of Competition Terms: Dominant Position*, CONCURRENCES, www.concurrences.com/en/droit-de-la-concurrence/glossary-of-competition-terms/Dominant-position?lang=en (last visited Jan. 27, 2018).

50%. Further, courts are unlikely to view as a monopolist a firm with a market share below 70%.[13] Under guidance issued by the European Commission, however—with an eye on Europe's history of state-sponsored monopolies and higher regulatory barriers for entrants—there is a presumption of dominance for firms with market shares greater than 40%.[14] This stark difference creates the potential for the E.C. to enforce and impose remedies against companies, as dominant firms, that the United States has concluded should be completely unconstrained as competitors.

To the extent the E.C.'s regulation of a company affects its global operations, the E.C.'s remedies could bar a company from engaging in a range of conduct that the U.S. competition laws view as harmless or even pro-competitive. A good example is the use of exclusive purchasing contracts. In the United States, the enforcement agencies recognize exclusive purchasing by a company, even one that is a large player but not a monopolist, as having potentially pro-competitive efficiencies.[15] These potential efficiencies come from the buyer being able to gain certainty of supply and the seller's ability to more efficiently plan production and potentially increase output.[16] But the same large player, defined by the E.C. as dominant and therefore as an "unavoidable trading partner," could be found to have imposed a "restriction by object," which is per se unlawful by the E.C.[17] A remedy imposed by the E.C. to void such a contract in Europe may well make it infeasible for exclusive purchasing to continue in the United States. For example, if there is a single manufacturing site supplying the product globally, there could be a scenario in which the E.C.'s remedy governs commercial conduct in the U.S. This

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13 *See* Exxon Corp. v. Berwick Bay Real Estates Partners, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam) ("[M]onopolization is rarely found when the defendant's share of the relevant market is below 70%."); *see also* United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187-88 (3d Cir. 2005) ("[A] share significantly larger than 55% has been required to establish prima facie market power" and a market share between seventy-five percent and eighty percent of sales is "more than adequate to establish a prima facie case of power."); Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989) (to establish "monopoly power, lower courts generally require a minimum market share of between 70% and 80%.").

14 *See* Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the E.C. Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7, 9 [hereinafter *E.C. Abuse Guidance*].

15 *See Exclusive Dealing or Requirements Contracts*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or (last visited Jan. 27, 2018).

16 *See* Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949) (describing the possible benefits of requirements contracts as assuring for the buyer "supply, afford[ing] protection against rises in price, enabl[ing] long-term planning on the basis of known costs, and obviat[ing] the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand"); *see also* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012) (recognizing that "[e]xclusive dealing agreements are often entered for entirely procompetitive reasons, and generally pose little threat to competition").

17 E.C. Abuse Guidance, *supra* note 14, at 13; Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), 2012 O.J. (C 326) 47, 88 [hereinafter TFEU].

could occur even though the U.S. has a much different view of the substantive antitrust standard and an equally significant and legitimate interest in the efficiencies that it sees arising from a less-regulated market.

Another important substantive difference relates to the prohibition of "excessive pricing."[18] U.S. competition laws, as well as the laws of several other well developed competition law jurisdictions, such as Canada and Australia, do not prohibit excessive pricing in the absence of exclusionary behavior.[19] The United States has taken the view that allowing a monopolist that has succeeded on the merits to charge high prices is justified by the incentive this policy creates for ventures to invest and innovate.[20]

The European Commission takes a much different approach, which reflects a different economic assessment. It views the regulation of purely exploitative conduct as fundamental to its mission:

> . . . Article 102(a) states that an abuse may consist in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." This example of an abuse is generally understood to cover conduct such as charging excessive prices. In the early days of European competition policy, some commentators were even of the opinion that Article 102 from a legal perspective was exclusively concerned with exploitative abuses.[21]

As recently as April 2015, the Commission sent a Statement of Objections to Gazprom challenging, among other things, its "territorial restrictions [that] allowed Gazprom to carve up the market, as a result of which it may have been able to pursue an excessive pricing policy in five Member

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18 E.C. Abuse Guidance, *supra* note 14, at 8.

19 *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.") (emphasis in original); United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."); OECD, EXCESSIVE PRICES 197 (2011), www.oecd.org/competition/abuse/49604207.pdf ("Generally speaking, Australia does not regulate prices and has no legal concept of 'excessive prices' as a breach of competition law. Instead, Australia relies on promoting competition and efficiency in markets in Australia to keep prices at reasonable levels. Where markets are not likely to become competitive, for example due to natural monopoly characteristics or insurmountable barriers to entry, Australia relies upon a range of ex-ante regulatory interventions to address market power problems, including access and price regulation.").

20 *See Verizon*, 540 U.S. at 407.

21 EXCESSIVE PRICES, *supra* note 19, at 309-10.

States."[22] In response to these charges, Gazprom recently offered to eliminate the alleged excessive pricing.[23]

These are not the only examples of important substantive differences between the United States and the European Commission. Others include the existence of a "portfolio effects" doctrine in E.C. merger cases,[24] the Commission's use of a per se rather than a rule of reason standard for minimum resale price maintenance,[25] and the E.C.'s application of a "margin squeeze" doctrine.[26] In each case, these major substantive divergences create the potential for enforcement in one jurisdiction to undermine important policy decisions consciously made in the other.

Two other important points bear mentioning. First, these significant substantive differences remain despite an enormous effort by the two jurisdictions, both bilaterally and in multilateral fora, to foster cooperation, avoid

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22 European Commission Press Release IP/17/555, Antitrust: Commission Invites Comments on Gazprom Commitments Concerning Central and Eastern European Gas Markets (Mar. 13, 2017), http://europa.eu/rapid/press-release_IP-17-555_en.htm.

23 *See id*.

24 OECD, PORTFOLIO EFFECTS IN CONGLOMERATE MERGERS 7 (2002), http://www.oecd.org/competition/mergers/1818237.pdf ("Portfolio effects in conglomerate mergers include potential pro- and anti-competitive effects that might arise due to a merger uniting complementary products in which one or more parties enjoy significant market power."). *Compare* Press Release, U.S. Dep't of Justice, Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition (July 3, 2001), www.justice.gov/archive/atr/public/press_releases/2001/8510.htm (concluding that the GE/Honeywell merger would be procompetitive), *and* Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), www.justice.gov/archive/atr/public/press_releases/2001/8140.htm (requiring certain divestitures before the U.S. approved the merger), *with* European Commission Press Release IP/01/939, The Commission Prohibits GE's Acquisition of Honeywell (July 3, 2001), http://europa.eu/rapid/press-release_IP-01-939_en.htm (concluding the GE/Honeywell merger would have created impermissible dominant market positions post-merger). *See* William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, 10 GEO. MASON L. REV. 533, 541 (2002) (suggesting that the GE/Honeywell merger could be considered a portfolio effects case).

25 *Compare* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007) (establishing framework of analysis that considers market power and market structure to assess the actual effects of minimum resale price maintenance (RPM) under a rule of reason, and abandoning the per se standard of analysis that had applied to minimum RPM since Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)), *with* Commission Regulation 330/2010 of April 20, 2010, On the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1, 4. *See Guidelines on Vertical Restraints*, 2010 O.J. (C 130) 1, 7.

26 *Compare* Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438, 449, 453, 457 (2009) (when an integrated firm can legally refuse to deal in the upstream product, a margin squeeze complaint may not be brought under Section 2 of the Sherman Act), *with* Case C-280/08P, Deutsche Telekom AG v. Eur. Comm'n, 2010 E.C.R. I-9555 (margin squeeze treated as a stand-alone abuse of dominant position without the need to establish a duty to deal with a rival).

conflicts, and increase convergence in their substantive law.[27] For example, the United States and the European Commission entered into an extensive cooperation agreement in 1991 that includes: case notification requirements, information exchange rules, cooperation and coordination requirements for the respective enforcement agencies, and both negative and positive comity procedures.[28] In practice, enforcement agencies in both jurisdictions coordinate extensively, indeed almost daily, on antitrust enforcement.[29]

Second, to appreciate fully the risks of international conflict, one must consider the substantive differences between jurisdictions and multiply them by the more than 130 competition law enforcement agencies that are currently active.[30] In an ever-globalizing economy in which most businesses have some transactions or operations that cross borders, enforcement actions that have purely territorial effects may become the exception rather than the rule.

Competition authorities certainly are not blind to this potential for conflict and chaos. Indeed, they have undertaken important and meaningful efforts to think through these issues and, in some cases, have come up with suggested practices to improve coordination and cooperation. Below, this Article examines some of these efforts and the benefits they offer. But, as it also discusses, there are gaps in these initiatives that will be very difficult to fill without increased reliance upon traditional principles of comity.

II. EFFORTS TO AVOID CONFLICTS DESPITE THE DIFFERENCES

Several multilateral and bilateral initiatives are aimed at avoiding conflict among governments and competition authorities. The Organisation for Economic Cooperation and Development ("OECD") Competition Committee and the International Competition Network ("ICN") are perhaps the two

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27 *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sep. 13, 1991, 30 I.L.M. 1491, 1995 O.J. (L 95) 47.

28 *See id.* art. iv; *Bilateral relations > United States of America*, EUR. COMM'N, http://ec.europa.eu/competition/international/bilateral/usa.html (last visited Jan. 27, 2018); Charlotte Leskinen, *The EU/US Cooperation in the Field of Antitrust Law Enforcement—Some Challenges to Future Cooperation* 5-6 (IE Law School, Working Paper No. WPLS10-06, 2010), https://cee.ie.edu/sites/default/files/wp%204%20Charlotte.pdf.

29 *See, e.g.*, Alexandar Schaub, Dir.-Gen. for Competition, European Comm'n, Address Before the Mentor Group: Competition in the Information Society, (Dec. 6, 1996), http://ec.europa.eu/competition/speeches/text/sp1996_064_en.html (describing high-profile dawn raids where the E.C. advised the United States as to whether there were antitrust implications for the United States uncovered in the raid).

30 *See The Enforcers*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (last visited Jan. 27, 2018).

most important bilateral organizations that work to promote cooperation and convergence among agencies.[31]

The OECD has recognized that: "Competition authorities' actions are increasingly more focused on cases with an international dimension, and in this context effective and efficient international co-operation becomes not only desirable, but necessary for the successful enforcement of competition laws at [the] national level."[32] To that end, the OECD Competition Committee brings together the lead enforcement officials from the thirty-five OECD members, as well as a host of international competition experts, for regular sessions to discuss substantive and procedural competition issues. It also convenes sessions with nearly 100 non-member competition enforcement agencies in its annual "Global Forum on Competition."[33]

The ICN has even broader membership, with over 130 agencies participating.[34] The ICN is a virtual network of competition agencies formed in 2001 to promote cooperation and information sharing among agencies in the use of investigative tools, the organization of agency resources, and recognition of common analytical principles.[35] The ICN has been described as being bound together "by a community of interests rather than by treaty."[36] The ICN does not have any rulemaking authority, and its members decide whether and how to implement its recommendations.[37] Still, the ICN's views have received considerable support and acceptance from governments, as well as from the private sector, and many agencies strive to conform to the ICN's internationally-approved benchmarks.[38] For example, it has published a number of "Recommended Practices" and similar documents designed to identify fundamental principles that should be observed by all competition

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31 *See* OECD, INTERNATIONAL ENFORCEMENT CO-OPERATION: SECRETARIAT REPORT ON THE OECD/ICN SURVEY ON INTERNATIONAL ENFORCEMENT CO-OPERATION 3 (2013), http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf.

32 OECD, EXECUTIVE SUMMARY OF THE HEARING ON ENHANCED ENFORCEMENT CO-OPERATION 2 (2014), www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M(2014)2/ANN3/FINAL&doclanguage=en.

33 *See Global Forum on Competition*, OECD, https://www.oecd.org/competition/globalforum/ (last visited Jan. 27, 2018).

34 *See Member Directory*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/members/member-directory.aspx (use alphabetical index to see list of member agencies) (last visited Jan. 27, 2018).

35 *See History*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/about/history.aspx (last visited Jan. 27, 2018).

36 ELIZABETH F. KRAUS & MARIA B. COPPOLA, THE INTERNATIONAL COMPETITION NETWORK: A VIRTUAL REALITY 2 (2004), www.ftc.gov/system/files/attachments/key-speeches-presentations/kraus coppolaicn04.pdf.

37 *See* INT'L COMPETITION NETWORK, ICN FACT SHEET AND KEY MESSAGES 2 (2009), http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

38 *See id.*

agencies.[39] Numerous jurisdictions have implemented these practices.[40] But neither the OECD nor the ICN is able to facilitate case-specific cooperation or to address conflicts or tensions that may arise in specific enforcement situations.

Thus far, agencies have focused mainly on bilateral cooperation as a means of avoiding outright conflicts.[41] The principal means of dealing with case-specific tensions has been through bilateral communication that is either ad hoc or structured through a bilateral cooperation agreement.[42] Agencies are often constrained from engaging in direct ad hoc discussions with foreign governmental bodies or must do so only through "official channels," which implies the involvement of officials who may not be experts in competition law. More useful are bilateral cooperation agreements, which permit agency-to-agency communication and cooperation. These are typically designed to facilitate coordination where both agencies are actively engaged in a common enforcement initiative, such as the review of a merger notified in both jurisdictions or the coordinated investigation of an international cartel.[43]

Merger enforcement is probably the best example of the use of bilateral cooperation agreements to align outcomes and avoid conflict.[44] As former Assistant Attorney General William Baer noted:

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39 *ICN Guidance*, INT'L COMPETITION NETWORK, www.internationalcompetitionnetwork.org/about/icnguidance.aspx (last visited Jan. 27, 2018).

40 *See, e.g.*, INT'L COMPETITION NETWORK, MERGER WORKING GROUP, ICN RECOMMENDED PRACTICES SELF-ASSESSMENT (2016), http://www.internationalcompetitionnetwork.org/uploads/library/doc1091.pdf.

41 The U.S-E.C. bilateral cooperation agreement has improved communication on mergers, as recognized by the agencies, in a number of specific cases, including, e.g., the mergers between Nestle and Ralston Purina and between Bayer and Aventis Crop Science. *See* European Commission Press Release IP/01/1136, Commission Gives Conditional Clearance to the Acquisition of the Petfood Company Ralston Purina by Nestlé, at 2 (Jul. 27, 2001), http://europa.eu/rapid/press-release_IP-01-1136_en.htm (recognizing that the Nestle and Ralston Purina "case was also examined by the US Federal Trade Commission"); European Commission Press Release IP/02/570, Commission Clears Bayer's Acquisition of Aventis Crop Science, Subject to Substantial Divestitures, at 3 (Apr. 17, 2002) (recognizing that based on the "bilateral agreement on antitrust co-operation between the European Commission and the United States of America, the Commission and the Federal Trade Commission have co-operated closely in their analysis of the acquisition of ACS by Bayer").

42 *See* OECD, LIST OF FIFTEEN CO-OPERATION AGREEMENTS (2015), https://www.oecd.org/daf/competition/competition-inventory-list-of-cooperation-agreements.pdf (listing fifteen bilateral agreements regarding conflicts among different competition laws).

43 *See* Seventh United Nations Conference to Review the UN Set on Competition Policy, ROUNDTABLE ON INTERNATIONAL COOPERATION ON MERGER CASES AS A TOOL FOR EFFECTIVE ENFORCEMENT OF COMPETITION: SUBMISSION BY THE UNITED STATES OF AMERICA 2 (July 6-10, 2015), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/ccpb_7rc2015_rtintcoop_usa_en.pdf; OECD, CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 15 (2014), https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

44 *See, e.g.*, European Commission Press Release IP/00/668, Commission Prohibits Merger Between MCI WorldCom and Sprint (Jun. 28, 2000), http://europa.eu/rapid/press-release_IP-00-668_en

> We . . . need to recognize, commend, and encourage the bilateral cooperation that occurs on merger reviews. Antitrust Division attorneys and economists regularly consult with foreign colleagues on issues of process, timing, and substance affecting merger investigations. Our FTC colleagues do the same. In the last five years we have worked with other enforcers in 40% of our merger challenges; last year alone, we cooperated with 16 different foreign enforcers—sometimes more than one at a time—in 14 different investigations. Coordination gets enforcers to the right results more quickly and avoids inconsistent outcomes, benefitting both consumers and the merging parties.[45]

While there are significant efforts aimed at convergence, there are relatively few checks and balances on the extraterritorial effect of enforcement. To date, the United States has entered into bilateral cooperation agreements with eleven jurisdictions, motivated by the mutual desire of the parties to cooperate and coordinate more closely on antitrust enforcement and to avoid conflicts.[46] These agreements generally provide for (1) notification of the other government regarding an investigation that may affect its interests; (2) sharing of information to the extent permitted by domestic law; (3) coordination of parallel proceedings; (4) application of comity principles; and (5) consultation to resolve any conflicts arising from enforcement activities or other matters under the agreement.[47]

Under U.S. law, these bilateral cooperation agreements are formal and binding upon the U.S. government.[48] They do not, however, have the same

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.htm (describing the coordination leading to the E.C.'s decision to block the MCI WorldCom and Sprint merger as one where "[t]he two authorities have . . . enjoyed a good working relationship" and promising that "[t]his co-operation will continue in future cases, especially if and when the two authorities identify common competition concerns that might require a jointly pursued remedial action."); European Commission Press Release IP/00/424, Commission Clears Merger Between Alcoa and Reynolds Metals, Under Conditions (May 3, 2000), http://europa.eu/rapid/press-release_IP-00-424_en.htm (describing the E.C.'s approval of a merger between Alcoa and Reynolds as one where "the Commission cooperated closely with the Antitrust Division of the U.S. Department of Justice in the review of the Alcoa/Reynolds deal thanks to the bilateral antitrust agreement of 1991 between the two competition authorities").

45 Bill Baer, Ass't. Atty. Gen., Dep't of Justice, Antitrust Div., "Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement," Address Before the Georgetown Law 9th Annual Global Antitrust Enforcement Symposium, at 3 (Sept. 29, 2015), www.justice.gov/opa/file/782361/download.

46 *See Antitrust Cooperation Agreements*, DEP'T OF JUSTICE, www.justice.gov/atr/antitrust-cooperation-agreements (last updated Aug. 17, 2016) (listing agreements with Germany (1976), Australia (1982 and 1999), the European Union (1991 and 1998), Canada (1995 and 2004), Israel (1999), Japan (1999), Brazil (1999), Mexico (2000), Chile (2011), Colombia (2014), and Peru (2016)).

47 *See, e.g.*, Commission Decision 97/816, 1997 OJ (L 336) 16, 17 (EC), http://ec.europa.eu/competition/mergers/cases/decisions/m877_19970730_600_en.pdf (indicating that pursuant to Article VI of the competition agreement between the E.C. and U.S., the E.C. notified U.S. authorities of its conclusions and concerns with the merger between Boeing and McDonnell Douglas and "sought an appropriate way to take account of important national interests of the United States, particularly those stemming from the consolidation of the US defense industry.").

48 *See* INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, U.S. DEP'T OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, annex 1-C, at v (2000).

legal status as a treaty, which means the agreements do not supersede domestic laws.[49] Even so, as noted by a number of U.S. antitrust agency heads over the years, bilateral cooperation agreements have provided a stimulus for broader and deeper cooperation with foreign antitrust agencies.[50] Neither multilateral nor bilateral agreements, however, are well-suited to address situations in which one agency is undertaking an enforcement action that would conflict directly with the interests of a foreign sovereign. This conflict could arise either from a conflicting action taken by the foreign state,[51] or from the foreign state's decision that the same facts do not make out a violation of that state's substantive standard.[52] Multilateral efforts fail in this regard because the guidance is usually general in nature and these organizations do not seek to address case-specific issues.[53] Bilateral initiatives may offer more promise but often fail because they are limited in scope and number. For example, the United States is a party to only eleven bilateral agreements and many countries have not entered into any bilateral agreement.[54] In theory, to be effective,

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49 *See id.*

50 *See* Deborah Platt Majoras, Chairman, FTC, "Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy," Address Before the Annual Conference on International Antitrust Law & Policy, at 4 (Sept. 27, 2007), www.ftc.gov/sites/default/files/documents/public_statements/convergence-conflict-and-comity-search-coherence-international-competition-policy/070927fordham_0.pdf (stating that the US-EC cooperation agreement resulted in close, regular, and routine contacts between the agencies in the investigation and resolution of competition matters, and spawned similar agreements with other jurisdictions); *see also* R. Hewitt Pate, Ass't Att'y Gen., Dep't of Justice, Antitrust Div., "Securing the Benefits of Global Competition," Address Before the Tokyo American Center, at 4 (Sept. 10, 2004), www.justice.gov/atr/file/517946/download (stating that antitrust cooperation agreements have increased dialogue and cooperation with foreign competition agencies); Scott D. Hammond, Dep. Ass't Att'y Gen., Dep't of Justice, Antitrust Div., "Charting New Waters in International Cartel Prosecutions," Address Before the National Institute on White Collar Crime, at 6 (Mar. 2, 2006), www.justice.gov/atr/file/518446/download (stating that bilateral antitrust cooperation agreements have aided the Department of Justice in prosecuting foreign firms and individuals).

51 *See, e.g.*, Commission Decision 2004/134, 2004 OJ (L 48) 1, 84 (EC), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004D0134&from=EN (prohibiting merger between two U.S. companies—General Electric and Honeywell—even as the United States and 11 other jurisdictions authorized the merger); European Commission Press Release IP/01/939, The Commission Prohibits GE's Acquisition of Honeywell (Jul. 3, 2001), http://europa.eu/rapid/press-release_IP-01-939_en.htm (describing the differing outcomes as "unfortunate" and concluding that "each authority has to perform its own assessment and the risk of dissenting views, although regrettable, can never be totally excluded").

52 *See, e.g.*, Hartford Fire Insurance Co. v. California, 509 U.S. 764, 798-99 (1993) (discussing the role of comity in a case where the alleged conduct potentially violated U.S. antitrust law but was "'lawful in the state in which it took place'" and "the foreign state [had] a strong policy to permit or encourage such conduct" (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §415 cmt. j. (1986))).

53 *See* Philip Lowe, Director-General for Competition, European Comm'n, "International Cooperation Between Competition Agencies: Achievements and Challenges," Speech at the 4th Seoul International Competition Forum, at 3-5 (Sep. 5, 2006), http://ec.europa.eu/competition/speeches/text/sp2005_021_en.pdf.

54 *See* CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT, *supra* note 43, at 2-4 (listing 11 bilateral agreements to which the United States is a party).

every jurisdiction would need to engage with every other in order to achieve the general objective of considering and respecting the interests of foreign sovereigns in making enforcement decisions. Because this is a practical impossibility, a principle of general applicability—comity—needs to remain omnipresent.

Without comity as an effective tool to avoid tensions, divergent remedies by different competition agencies are likely to lead to poor enforcement outcomes. Not only will they give rise to increased costs and inefficiencies for agencies and businesses, they ultimately will impede business certainty, and result in diminished investments and reduced innovation. This means everyone loses—businesses, antitrust enforcement agencies, and consumers.

III. IMPORTANCE OF COMITY IN AVOIDING CONFLICT

The presence of more than 130 antitrust regimes around the world, the increasing globalization of business, and the absence of an overriding antitrust regime to adjudicate conflicts between sovereign nations drive any discussion of comity in antitrust. The legal doctrine of comity offers a framework to resolve these competing interests. Traditional (or negative) comity requires courts and enforcers to consider the foreign interests at play in a given antitrust case and possibly forgo enforcement out of regard for those interests.[55]

The potential for competing interests arises from the application of the effects doctrine, which necessarily entails a competition agency looking at conduct beyond its own borders.[56] Originally, courts viewed the U.S. antitrust laws as territorial, not international. In *American Banana v. United Fruit Co.*,[57] the Supreme Court limited application of the Sherman Act to exclude the overseas acts of a U.S. corporation on the ground that it was acting with the sanction of a foreign government and within the territorial sovereignty of that government.[58] But in 1945, in *United States v. Aluminum Co. of America (Alcoa)*,[59] the Second Circuit moved away from a strict territorial approach

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55 *See* Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 44 BERKELEY J. INT'L L. 157, 161 (2016) ("At its simplest, international comity is the concept of judicial respect for the sovereignty of foreign nations.").

56 Despite the European Court of Justice not having formally recognized the effects doctrine, the E.C. regularly applies the doctrine. *See generally* Damien Geradin, Marc Reysen & David Henry, *Extra-territoriality, Comity and Cooperation in EC Competition Law* (2008), https://ssrn.com/abstract=1175003 (providing an overview of the effects doctrine under both EU and U.S. antitrust law, including references to case law and bilateral agreements that aim to reinforce the application of comity).

57 213 U.S. 347 (1909).

58 *See id*. at 357 ("The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.").

59 148 F.2d 416 (2d Cir. 1945).

by finding that a foreign corporation that placed a quota on ingot aluminum shares imported into the United States violated antitrust laws based upon the effects of this conduct on the U.S. market.[60] *Alcoa* held that the Sherman Act reached agreements entered into and consummated outside the United States by foreign companies "if they were intended to affect [U.S.] imports and did affect them."[61] Judge Hand wrote, "[I]t is settled law—as [the defendant] itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[62] But even in that moment, the court underscored the continued vitality of comity-like considerations. The court recognized that any overseas supply limitation could "have repercussions in the United States" and concluded the Congress "certainly did not intend for the [Sherman] Act to cover them" in light of the "international complications likely to arise."[63] Although this assertion was controversial among foreign governments at the time, most U.S. courts that considered the matter adopted it; the U.S. Supreme Court then validated the idea in *Hartford Fire Insurance Co. v. California*,[64] and later many other nations adopted it.[65]

Lower courts struggled with the application of the effects doctrine. In *Timberlane Lumber Co. v. Bank of Am.*,[66] the Ninth Circuit articulated a jurisdictional rule of reasonableness that weighed domestic versus foreign interests when deciding whether a court should exercise jurisdiction.[67] The court's understanding of comity in *Timberlane* largely followed the Second

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60 *See id*. at 444 (stating that the actions were "unlawful, though made abroad, if they were intended to affect imports and did affect them.").

61 *Id.*

62 *Id.* at 443.

63 *Id.*

64 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

65 In 2015, the OECD prepared a comprehensive inventory of fifteen government-to-government cooperation agreements where at least one of the signatories was an OECD country. *See* OECD, INVENTORY OF CO-OPERATION AGREEMENTS—NOTE BY THE SECRETARIAT 3 (Nov. 20, 2015), www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2015)12/rev1&docLanguage=En. Fourteen of the fifteen agreements contain provisions for traditional, or negative, comity. *See* OECD, PROVISIONS ON NEGATIVE COMITY 2-12 (2015), www.oecd.org/daf/competition/competition-inventory-provisions-negative-comity.pdf. The agreements included EU-Switzerland, EU-Korea, Canada-Japan, EU-Japan, Canada-Mexico, Mexico-U.S., Japan-U.S., Brazil-U.S., Canada-EU, Israel-U.S., Canada-U.S., EU-U.S., Australia-U.S., and Germany-U.S. *See id.*

66 549 F.2d 597 (9th Cir. 1976).

67 *See id.* at 613-14.

Restatement of Foreign Relations, which was extended in the Third Restatement.[68] Relying upon considerations of comity, the court held that a conspiracy in the production of Honduran lumber could not be redressed in a U.S. court despite having clear effects in the United States. The court reasoned that the effects test articulated in *Alcoa* was necessary but not sufficient to exercise jurisdiction in light of "international comity and fairness."[69]

In 1982, the Congress passed the Foreign Trade Antitrust Improvements Act[70] (FTAIA) in an effort to clarify when U.S. antitrust law applies to international conduct.[71] The FTAIA established a two-part test for applying U.S. antitrust law extraterritorially.[72] First, a court must consider whether the conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce—domestic or foreign.[73] Second, the court must determine whether the conduct gives rise to a claim under the Sherman Act.[74] Ironically, the FTAIA has been widely criticized for injecting uncertainty and confusion into the

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68 *See id*. at 614-15 ("The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. . . . Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction." (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965))); Susan E. Burnett, *U.S. Judicial Imperialism Post* Empagran v. F. Hoffman-Laroche*? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT'L L. REV. 555, 572-73 n.73 (2004) (describing the Third Restatement as a two-step analysis where the court first asks "whether there is a jurisdictional basis, such as territory or effect within the territory, for regulatory jurisdiction" and second "whether it would be 'reasonable' for the court to exercise this jurisdiction.").

69 *Timberlane*, 549 F.2d at 613; *see also Am. Banana*, 213 U.S. at 357 ("The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.").

70 *See* Foreign Trade Antitrust Improvements Act, Pub. L. No. 97–290, tit. IV, 96 Stat. 1246 (1982) (codified as amended at 15 U.S.C. § 6a (2016)).

71 The House Report stated that the FTAIA was intended to create an objective standard for determining the existence of "intended effects" under *Alcoa*. *See* H.R. REP. NO. 97-686, at 2-3 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2487-88 ("[C]ourts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists. [The FTAIA] addresses these problems of perception and definition by clarifying the Sherman Act and the antitrust proscriptions of the Federal Trade Commission Act to make explicit their application only to conduct having a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce or domestic exports."). A second impetus for the FTAIA was a desire to ensure that U.S. antitrust laws did not act as a "barrier to joint export activities that promote efficiencies in the export of American goods and services." *Id*. at 2.

72 *See* Burnett, *supra* note 68, at 575-76 (citing H.R. REP. NO. 97-686, *supra* note 71, at 5).

73 *See id.* at 576.

74 *See id.*

application of U.S. antitrust law abroad.[75] In fact, the intent behind the FTAIA was to limit, not to expand extraterritorial application of the Sherman Act.[76] Furthermore, the legislative history of the Act expressly suggested the FTAIA should be interpreted as leaving courts free to apply principles of international comity to cases even after they have been held reachable under the FTAIA threshold test.[77]

After passage of the FTAIA, the role of the *Timberlane* balancing test was unclear.[78] *Hartford Fire* appeared to resolve the matter by narrowing the application of international comity considerations and broadening application of the substantial effects test.[79] The Court held comity considerations do not bar Sherman Act claims against foreign defendants when, as here, the foreign conduct produces a substantial effect in the United States.[80] Defendants argued that, because the United Kingdom had "established a comprehensive regulatory regime over the London reinsurance market" and their conduct was permissible under that regime, the case against them should be dismissed on comity grounds.[81] The Court disagreed, finding the defendants' argument did not "state a conflict" and thus concluded that there was "no conflict with British law."[82] This view, derived from the Restatement (Third)

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75 *See id*. (describing the FTAIA as failing "to clarify extraterritorial effect" and making the issue "even more confusing and complex"); Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. REV. 2151, 2157 (2003) (describing the FTAIA as a "drafting disaster, the worst nightmare of every legislation professor. Its obtuse language has provided a field day for critics.").

76 *See* Burnett, *supra* note 68, at 586.

77 *Id*. at 590 (". . . Congress explicitly stated that issues of international comity are unaffected by the FTAIA and should continue to play a role in whether a court should hear a case once jurisdiction is determined under the FTAIA." (citing 128 CONG. REC. H18,953 (daily ed. Aug. 3, 1982) (statement of Rep. McClory))).

78 In *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), the court overrode comity considerations by exercising jurisdiction in the face of a British injunction against parties seeking adjudication in the United States. The court recognized comity as a necessary doctrine but also found it necessary to limit its use in order to avoid "destroying the autonomy of the courts" and ensuring the judicial functions were not "usurped." *Id.* at 938-39.

79 Nineteen states and several private plaintiffs alleged that a number of re-insurance companies in the United Kingdom sought to pressure insurers in the United States into restricting "the terms of coverage of commercial general liability insurance available in the United States." *Hartford Fire Co.*, 509 U.S. at 770. The district court, applying the *Timberlane* framework, dismissed claims naming only certain London-based defendants on comity grounds and was subsequently overruled by the Court of Appeals, which also applied *Timberlane* but concluded that it did not bar exercising Sherman Act jurisdiction. *See id.* at 778.

80 *See id*. at 796 (finding that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

81 *Id*. at 798-99.

82 *Id*. at 799. *But see* Edward T. Swaine, *Cooperation, Comity, and Competition Policy: United States*, *in* COOPERATION, COMITY, AND COMPETITION POLICY 13 (Andrew T. Guzman ed., 2011) (calling the decision "unsound in light of its stated premises" and arguing that the Court misapplied the Third Restatement in this case); *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting).

of Foreign Relations Law § 403, requires a literal contradiction between U.S. law and foreign law for a court to refuse jurisdiction on comity grounds.[83]

It is important to note that the Court in *Hartford Fire* did not completely foreclose application of comity principles in antitrust. The Court did not explicitly overrule *Timberlane* or dispute that the FTAIA did not limit a court's discretion to apply comity considerations to an international transaction.[84] Rather, it said it "need not decide that question here . . . for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct . . . , international comity would not counsel against exercising jurisdiction in the circumstances alleged here."[85]

Following *Hartford Fire*, a circuit split emerged between the Fifth and Second Circuits about whether the FTAIA required a nexus between the injury—that is, the anticompetitive effect—and the United States.[86] The Court considered this question in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[87] That case represented a shift back toward international comity principles and has been described as both a course-change from *Hartford Fire*'s limited application of comity and a "strong endorsement of the principle of comity."[88] The case involved an alleged price-fixing conspiracy among foreign and domestic vitamin manufacturers and distributors to raise prices in the United States and foreign countries.[89] The petitioners moved to dismiss the suit "as to the *foreign* purchasers"[90] and the Court assumed for its analysis that all of the relevant transactions occurred outside of United States commerce.[91] The Court relied, *inter alia*, upon principles of comity to interpret the FTAIA as

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83 *See, e.g.*, Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 569 (2000) ("The majority only accepted as a true conflict those rare situations where the foreign government actually required what United States law forbade.").

84 *See Hartford Fire*, 509 U.S. at 798.

85 *Id.*

86 *Compare* Den Norske Stats Oljeselskap As v. Heeremac VOF., 241 F.3d 420, 427-28 (5th Cir. 2001) (finding no jurisdiction existed because the injury did not "'give[] rise' to [plaintiff's] antitrust claim"), *with* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 399-400 (2d Cir. 2002) (concluding that a domestic injury is not required in order to meet the "'give[] rise'" requirement). *See also* Burnett, *supra* note 68, at 596-601 (discussing the circuit split which ultimately led to *Empagran*).

87 542 U.S. 155, 159 (2004).

88 A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 327 (2008). *See also Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1273 (2011) ("The holding marked a shift in the Court's conception of comity from the pre-*Empagran* bright-line concept to balancing foreign and domestic interests, and in light of compelling foreign interests this new conception of comity pushed courts away from exercising jurisdiction.").

89 *See Empagran*, 542 U.S. at 159.

90 *Id*. The parties were "five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins from petitioners for delivery outside the United States." *Id*. at 159-60.

91 *Id*. at 160.

excluding from "the Sherman Act's reach" an "independently caused foreign injury."[92]

Although more robust forms of comity considerations have been slow to gain purchase, approaches that avoid direct conflict, such as recognition of the foreign sovereign compulsion defense, are still applied rigorously by U.S. courts.[93] Recently, the Second Circuit dismissed a case against Chinese manufacturers alleged to have fixed prices of vitamin C.[94] The Court of Appeals reviewed the district court's judgment, following a jury trial and verdict for the plaintiffs, that Chinese pharmaceutical firms had violated U.S. antitrust law by participating in a conspiracy to fix the price and limit the supply of vitamin C. The Second Circuit vacated the $147 million judgment against the Chinese companies, holding that exercising jurisdiction over the defendants was improper—even though the price-fixing harmed American importers and consumers—because, according to a letter from the Chinese government that the lower court had not fully credited, the Chinese government compelled the defendants' actions.[95]

IV. COMITY IN ACTION

Strong comity principles localize the enforcement of competition laws. They allow nations to regulate their economies as they see fit and in accordance with local culture and custom. When applied, comity reduces the likelihood that one country would enforce its laws in a manner that greatly disrupted (whether intentionally or not) another country's economy.[96]

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92 *Id*. at 173 ("[T]hese two sets of considerations, the one derived from *comity* and the other reflecting history, convince us that the Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.") (emphasis added); *see also id*. at 174 ("The considerations previously mentioned—those of *comity* and history—make clear that the respondents' reading is not consistent with the FTAIA's basic intent.") (emphasis added); *id*. at 175 ("That reading furthers the statute's basic purposes, it properly reflects considerations of *comity*, and it is consistent with Sherman Act history.") (emphasis added).

93 Under the foreign sovereign compulsion defense, a defendant may escape liability under United States law if it shows that its actions, although in violation of United States law, complied with the directives of a foreign government. *See* Interamerican Refining Corp. v. Texas Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970); *see also* Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prod. Holdings (N. Am.) Inc., 954 F. Supp. 733, 736 (S.D.N.Y. 1997) ("That conflict is sufficient to entitle defendants to invoke the doctrines of act of state, foreign sovereign compulsion, and international comity."). The state compulsion doctrine is intertwined with notions of "comity and fairness." Marek Martyniszyn, *A Comparative Look on Foreign State Compulsion as a Defence in Antitrust Litigation*, 8 COMPETITION L. R. 143, 144 (2012), http://pure.qub.ac.uk/portal/files/13701497/SSRN_id1986032.pdf.

94 *See In re* Vitamin C Antitrust Litig., 837 F.3d 175, 194-95 (2d Cir. 2016).

95 *See id*. at 194-95.

96 *See, e.g.*, Commission Decision 2001/718, 2001 OJ (L 268) 28, 46 (EC), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001D0718&from=EN. (approving the merger between AOL and Time Warner with conditions); European Commission Press Release IP/00/1145, Commission

Where there is a direct conflict of laws, the cases make clear that comity has an important role to play in respecting the policy decisions reflected in the laws, actions, and pronouncements of other jurisdictions.[97] In these cases, U.S. courts have taken action to retract the reach of the U.S. antitrust laws in order to ensure that foreign governments' interests are respected.[98] But there is an equally important application of comity that requires antitrust enforcement authorities to apply comity out of respect for the interests of foreign governments. That application lies in declining to enforce competition laws, and avoiding the application of remedies beyond the borders of an agency's own jurisdiction, when a foreign jurisdiction affirmatively has chosen a less restrictive application of its competition laws. In these cases, where "Jurisdiction A" has affirmatively decided and declared that it will *not* enforce its competition laws against certain commercial activity, "Jurisdiction B" should not only respect that approach, but take pains to ensure that its application of its competition laws does not overtake the non-enforcement decision of Jurisdiction A.

For this and other reasons, U.S. enforcement agencies have explicitly included comity considerations in their guidance concerning prosecutorial discretion: "The U.S. enforcement agencies recognize that concepts of international comity must play a role in antitrust enforcement. Accordingly, even when jurisdiction exists, the Department of Justice will consider 'whether significant interests of any foreign sovereign would be affected.'"[99] It is not clear, however, that foreign competition authorities have comparable positions.

Without this recognition of comity by competition authorities, the international competition community faces the potential for a "most restrictive means" approach to competition law enforcement, with those jurisdictions having the lowest tolerance dictating the outcome for other jurisdictions globally. This type of approach would allow a single jurisdiction to act as the 'global competition police' according to whatever competition standard it enforces. This creates the potential, and indeed the incentive, for jurisdictions

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Gives Conditional Approval to AOL/Time Warner Merger (Oct. 11, 2000), http://europa.eu/rapid/press-release_IP-00-1145_en.htm (describing the E.C. approval of the AOL and Time Warner merger after AOL agreed to "sever all structural links with German media group Bertelsmann AG" in order to protect "online delivery of music over the internet and software-based music players" in Europe).

97 *See In re Vitamin C Antitrust Litig.*, 837 F.3d at 194; *Trugman-Nash, Inc.*, 954 F. Supp. at 736; *Interamerican Refining Corp.*, 307 F. Supp. at 1296.

98 *See In re Vitamin C Antitrust Litig.*, 837 F.3d at 194; *Trugman-Nash, Inc.*, 954 F. Supp. at 736; *Interamerican Refining Corp.*, 307 F. Supp. at 1296.

99 TERRENCE F. MACLAREN, 1 ECKSTROM'S LICENSING: JOINT VENTURES § 4:8 (2017) (quoting U.S. DEP'T OF JUSTICE & U.S. FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2, at 12 (1995)) (emphasis omitted).

to use competition law enforcement as an aggressive tool of industrial policy.[100]

A good example of the application of a domestic antitrust law that is in conflict with foreign antitrust laws, with arguable industrial policy objectives, is the recent decision of the Korea Fair Trade Commission ("KFTC") against Qualcomm, which seeks to impose a global remedy based upon Korean antitrust standards that are not applicable elsewhere.[101] In that case, the KFTC concluded that Qualcomm's licensing practices violated Korean competition law because the company refused to license its standard essential patents, and "coerced" licensees to pay "unilaterally determined royalty rates," in circumvention of its FRAND commitments.[102] Both the "refusal to license" theory and the "coercion" theory, which is a thinly veiled excessive pricing claim, would not be recognized theories of antitrust harm in the United States.

Nonetheless, the KFTC imposed a "global remedy" that would force Qualcomm to change its licensing practices worldwide. It reasoned that:

> [T]he illegal conduct of [Qualcomm has] been carried out not only against the Korean enterprises and the Korea-registered patents in the territory of Korea, but also in the remaining parts of the world, in the same way and at the same time. The effects of the illegal conduct influence overseas markets as well as the domestic market. . . . [I]t is reasonable not to limit the [remedial measures] and the scope of application only to the territory of Korea and the Korea-registered patents, in order to effectively remove the anti-competitive effects influencing the Korean market.[103]

But the KFTC wrongly assesses the need for the application of comity. It considers comity only in the case of affirmative conflict stemming from an application of another country's laws:

> The issue of international comity related to a law enforcement of other countries is to be considered in cases *where there is any conflict between the [remedial orders] issued by KFTC and any law enforcement of another country*, etc. The issue of international comity does not arise

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100 *See generally* OECD, COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS 12-13 (2009), www.oecd.org/daf/competition/44548025.pdf (describing several perspectives on the possible conflict between industrial policy and competition law).

101 *See* Korea Fair Trade Commission [KFTC], Case No. 2015SiGam2118, at 139, Jan. 20, 2017.

102 Koren W. Wong-Ervin, Douglas H. Ginsburg, Anne Layne-Farrar, Scott Robins & Ariel Slonim, *A Comparative and Economic Analysis of the U.S. FTC's Complaint and the Korea FTC's Decision Against Qualcomm*, COMPETITION POL'Y INT'L, April 2017, at 23, 32, www.competitionpolicyinternational.com/wp-content/uploads/2017/04/CPI-Wong-Ginsburg-Layne-Robins-Slonim.pdf.

103 KFTC, Case No. 2015SiGam2118 at 139.

> simply because a conduct carried out of the country is included in the matters subject to a [remedial order].[104]

Thus, the KFTC ignores completely situations in which the antitrust laws of other countries would permit, or even endorse, the actions it is prohibiting Qualcomm from taking in those countries.[105] For example, the KFTC condemns as per se unlawful Qualcomm's use of so-called portfolio licensing,[106] but the policies of many other jurisdictions not to preclude portfolio licensing suggests it can be viewed as harmless or efficiency enhancing. The KFTC's order nonetheless would seek to preclude portfolio licensing globally, ignoring the approach of other jurisdictions as to what constitutes permissible conduct.

In short, the KFTC would respect comity only if, as is the case in most instances of cooperation, the foreign jurisdiction has a parallel enforcement proceeding on the same substantive basis. In all other circumstances, other countries are forced to abide by the KFTC's rules on how the commercial market should function. This is evident from the KFTC's determination of when comity might require different action: "[Qualcomm] may request the Korea Fair Trade Commission to re-review this [remedial order] if the final and binding judgment, measure or order of a foreign court or competition authorit[y] . . . conflicts with this [remedial order], making it impossible to comply with both of them at the same time."[107]

This would result in Korea exercising direct control over the licensing of U.S. and other jurisdictions' patents, despite the fact that those other jurisdictions clearly have a greater interest in the protection of the intellectual property rights they have granted than does Korea. By contrast, the U.S. generally does not use compulsory licensing as a remedy in non-merger cases.[108]

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104 *Id.*

105 The KFTC's decision also raises serious questions about whether the KFTC or the Korean courts have jurisdiction to determine the rights of patent rights granted by foreign jurisdictions. *Cf.* Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368 (Fed. Cir. 1994) (court lacks original jurisdiction over disputes involving foreign patents); Voda v. Cordis Corp., 476 F.3d 887 (Fed. Cir. 2007) (supplemental jurisdiction over foreign patents disfavored due, *inter alia*, to comity considerations).

106 KFTC, Case No. 2015SiGam2118 at 129-30.

107 *Id.* at 139.

108 *See* R. Hewitt Pate, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., "Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust," Speech at the 2005 EU Competition Workshop, at 4-5 (Jun. 3, 2005), https://www.justice.gov/atr/speech/competition-and-intellectual-property-us-licensing-freedom-and-limits-antitrust (explaining that "[t]here are practical reasons to tread carefully when considering compulsory licensing: designing and enforcing such licenses is complex and can be an invitation to endless ancillary compliance litigation. As explained in the *Trinko* case, an enforcement agency should not impose a duty to deal that it cannot reasonably supervise . . . ."); Makan Delrahim, Dep. Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., "Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust," Presented at the British Institute of Int'l and Comparative L., at 1-2 (2004), https://www.justice.gov/atr/file/518076/download (stating

Comity directly addresses this condition, requiring a jurisdiction to balance its own enforcement priorities against the interests of the foreign jurisdiction(s) in which the enforcement action would have effects.

The KFTC decision can be contrasted with the decision of China's National Development and Reform Commission ("NDRC") in an investigation of the same conduct. In February 2015, the NDRC found Qualcomm guilty of abuse of market dominance and engaging in monopolistic activities that eliminated and restricted competition, namely: "(1) charging unfairly excessive patent royalties; (2) tying patents that are not standard-essential patents in the telecom industry without a legitimate reason; and (3) imposing unreasonable conditions in the sale of baseband chips."[109] Qualcomm was ordered to cease its infringing activities and was fined $975 million, which represented about eight percent of its 2013 revenue in China.[110] The NDRC expressly kept its decision and remedy, however, territorial in nature. The NDRC focused on: (1) licensing of Chinese standard essential patents (2) to Chinese manufacturers (3) for use in China.[111]

The NDRC decision applies comity far more conscientiously than does the KFTC decision. Even though the substantive competition laws of China differ significantly from the laws of the United States and many other jurisdictions, China's remedial measures are appropriately limited to ensure that the commercial result is not forced upon other jurisdictions that might have a significant, indeed greater, interest in regulating the use and licensing of intellectual property.

Intellectual property, along with other technology products and services, may be among the interests particularly subject to adverse effects from the lack of comity. These and other products and services commonly transited across borders, such as energy, commercial banking, natural resources, and electronics, differ from traditional products and services that are typically local or regional in scope. Therefore, jurisdictions should be particularly vigilant in these sectors to respect the legitimate interests of other sovereigns with different competition laws.

CONCLUSION

Traditional comity requires more than avoidance of conflicting outcomes and remedies; it also requires respect for differences in the scope and

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that "[n]on-merger compulsory licensing imposed by an agency or the courts, though, should be a rare beast.").

109 Peter Corne & Blake Yang, *China's Qualcomm Decision Sends Mixed Messages*, LAW360 (Mar. 17, 2015, 3:14 PM), www.law360.com/articles/632623.

110 *See id.*

111 Press Release, Qualcomm Inc., Qualcomm and China's National Development and Reform Commission Reach Resolution (Feb. 9, 2015), http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf.

commercial effect of the laws of foreign sovereigns. If competition agencies do not apply comity in the application of their laws and in limiting the extra-territorial scope of their remedies, then international competition enforcement will quickly devolve into a "race to the bottom," in which the country with the most restrictive competition laws will regulate commercial conduct for the entire world. The effects doctrine is a legitimate basis upon which to apply competition laws and impose remedies but, just as an agency considers how foreign conduct affects its domestic consumers, it likewise should ensure that its remedy does not unnecessarily affect foreign governments, agencies, business interests, or consumers. Comity should be invoked to prevent the effects doctrine from becoming a way for one jurisdiction to impose its domestic commercial policy on the conduct of businesses outside its borders. Otherwise competition enforcement turns from a policy to protect consumers into a slightly disguised way of implementing industrial policy.