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Cite items in this volume to "10 Sedona Conf. J. ____ (2009)."

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GLOBAL ENFORCEMENT OF ANTICOMPETITIVE CONDUCT

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Globalization of commerce has increased the economic interdependence of countries around the world.¹ The increasing integration of markets has brought with it an increase in the number and frequency of anticompetitive business practices, affecting economies worldwide. Recent statistical analysis found that the 283 international cartels discovered between 1990 and 2005 adversely affected more than one quarter of the world's business. In 2005 alone, sales affected by cartels were about \$2.1 trillion in real U.S. dollars.² Of the 283 discovered cartels, 16% were active only in North America, 47% were active only in Europe (compared to 16% in North America and 12% in other continents), and the remaining 25% operated globally.³

The increasingly globalized nature of anticompetitive practices has been accompanied by an increase in competition laws enacted by countries around the world.⁴ For example, Australia, Japan, Israel and Ireland have all worked to enhance their competition laws since 1990.⁵ In addition, several Latin American countries enacted or revised competition laws in the last twenty years, including Panama, Nicaragua, Venezuela, Chile and Argentina.⁶ China first introduced a comprehensive competition law in 2007,⁷ and its anti-monopoly law only became effective on August 1, 2008.⁸ In most cases, these new competition acts are patterned on those in the United States and Western Europe, and focus on the market and effects of the enacting country.⁹

One effect of the number of competition laws enacted worldwide is increased divergence in their application and enforcement. This leads to inconsistent detection and regulation of anticompetitive practices, which, in turn, allows such conduct to remain profitable. Because the enforcement of country-specific competition laws is necessarily limited in a globalized economy, only the cross-border cooperation of both criminal and private enforcement can effectively deter

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1 Alvin K. Kleverick & Alan O. Sykes, *United States Courts and the Optimal Deterrence of International Cartels: A Welfare Perspective on Empagran*, 3 J. COMPETITION L. & ECON. 309, 310 (2007).

2 *Id.*

3 John M. Connor & C. Gustav Helmes, *Statistics on Modern Private International Cartels 1990-2005*, (The American Antitrust Institute, AAI Working Paper No. #07-01, Jan. 2007) at Summary [hereinafter Connor Working Paper].

4 Countries with emerging market economies realize the benefits that competition laws can provide for the development process. Similarly, countries whose economies are in transition see competition policy as a vehicle for ensuring the operation of efficient markets and as a remedy for entrenched dominant position positions in specific industries. See John O. Haley, *Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes*, 1 WASH. U. GLOBAL STUD. L. REV. 1, 2 (2002).

5 Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions*, at the The Twentieth Annual National Institute on White Collar Crime (March 2, 2006), available at <http://www.usdoj.gov/atrp/public/speeches/214861.htm>.

6 Ana Maria Alvarez & Pierre Horne, *Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance*, 83 CHI.-KENT L. REV. 91, 98 (2008).

7 Richard Schwindt & Devin McDaniels, *Competition Policy, Capacity Building, and Selective Adaptation: Lessons from Japan's Experience*, 7 WASH U. GLOBAL STUD. L. REV. 35, 36 (2008). See Chinese Anti-monopoly law, available at http://www.lawinfochina.com/law/display.asp?db=1&cid=6351&keyword=anti_monopoly.

8 Stephen Harris, Jr. & Rodney Ganske, *The Monopolization and IP Abuse Provisions of China's Anti-Monopoly Law: Concerns and a Proposal*, 75 ANTITRUST L.J. 213 (2008).

9 As William Kovacic has noted, "A half-century ago, only one country, the United States, had antitrust statutes and active enforcement. Today over ninety jurisdictions have competition laws." William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309 (April 2-5, 2003).

anticompetitive conduct and compensate victims. While there have been significant strides in cooperation among government enforcement agencies, global mechanisms for private, civil enforcement must also keep pace to ensure that these goals are met.

I. THE PROBLEM OF SELECTIVE ENFORCEMENT

Inconsistent application of existing laws – and, indeed, the absence of competition legislation in many areas – has led to the problem of uneven regulation and enforcement of competition laws. This “selective enforcement” allows cartels, monopolists and other antitrust offenders to continue to be profitable operating on a global basis, despite facing stringent enforcement in certain jurisdictions. As Professor Eleanor Fox has described the problem:

In view of the fact that markets are global and law is national (or regional) only, there are obstacles to achieving consumers’ interest, efficiency, and innovation – all of which surpass borders. We are relegated to working out problems horizontally, nation to nation, or not working them out and letting the chips fall where they may. Often conflicts are observed, but only from a nation-centered perspective. Officials of one nation will notice an inconsistency within their own system, usually belatedly, often at the remedy stage, and these officials assume that if certain “thorns in the side” are removed (such as foreign injunctions against U.S. firms’ mergers, or mandatory injunctions compelling duties by a U.S. firm), the problem will be cured. This is an illusion. The particular compromises achieved are likely to be suboptimal, to reflect nationalism often masquerading in the name of competitiveness, and to feed the growing consolidation of industry.¹⁰

Deterring anticompetitive conduct thus requires a global cross-jurisdictional approach. It is now widely recognized that anticompetitive conduct can have a negative effect on a wide range of countries or regions, even if the conduct is targeted to only one, or a handful, of countries.¹¹ While this recognition has inspired efforts to converge competition rules toward international norms,¹² such uniformity for competition rules is still lacking.

Selective enforcement exists because the competition regimes of different countries or regions have different goals, informed by distinct societal and economic norms that impact policy considerations and, thus, levels of enforcement. Because different competition regimes have different goals, and each focuses on its own territory, it is not surprising that the intensity and scope of enforcement is widely divergent.

Exacerbating this problem are concerns about how one country’s competition policy can affect other countries, *i.e.*, “negative comity.”¹³ For example, under the Supreme Court’s comity analysis in *Empagran*, even where nations agree about primary conduct, such as price fixing, damages may be limited with respect to foreign nationals because United States trading partners may object to robust remedies allowed under U.S. law.¹⁴ This, in turn, encourages countries to refuse to hold U.S. entities liable in exchange for the U.S. not holding their companies liable for open market infringements. This negative comity then lessens the likelihood of effectively redressing or stopping international cartel activity.

¹⁰ Eleanor M. Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 *TUL. L. REV.* 571, 576-77 (Dec. 2005).

¹¹ According to Kovicic, “[t]he global expansion of competition law influences cross-border commerce. National or regional antitrust systems often endorse the comparatively broad view of extraterritoriality pioneered by the United States and the European Union (EU). This ensures that individual transactions or practices involving major suppliers of goods and services will be subject to scrutiny under the competition laws of more than one jurisdiction, and often many.” Kovicic, *supra* note 9.

¹² See *Id.*; *Foreign Law Year in Review: 2001*, 36 *INT’L LAW.* 879, 883 (2002).

¹³ See Fox, *supra* note 10, at 578.

¹⁴ See *Id.*

A. Global Price Fixing Cartels

1. Selective Enforcement Allows Cartels to Remain Profitable

One consequence of an increasingly interdependent marketplace is the rise of the international cartel,¹⁵ a problem made worse by the selective enforcement of cartel practices. While cartels are universally condemned,¹⁶ with enforcement in the European Union and other areas becoming increasingly more active,¹⁷ selective and inconsistent enforcement continues to make them profitable for the participants. For example, one need look no farther than the United States' antitrust enforcement scheme – one of the world's most comprehensive, featuring civil and criminal enforcement by federal, state, and private parties – to see the limitations national borders impose on international cartel enforcement. While the United States has enjoyed numerous recent successes against foreign and international cartels, enforcement by U.S. consumers alone, for the damage international cartels cause to them, may not sufficiently deter the cartels. If a cartel is made to pay damages solely for the harm it causes to a geographically limited group of consumers, it may still make enough wrongful profit worldwide to make violating competition laws economically attractive.¹⁸ As Circuit Judge Higginbotham noted, “Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.” *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 435 (5th Cir. 2001) (Higginbotham, J., dissenting). Competition law enforcement must also become truly global to remove the overall profit from international cartels, and thus deter their formation. *See, e.g., Amicus Br. of Joseph E. Stiglitz and Peter R. Orszag, F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, No. 03-724 (S. Ct. of the United States), at 3-5 (“If that aggregate expected punishment is smaller than the sum of the profits garnered in each nation, deterrence of the global cartel is inadequate and consumers everywhere will be harmed.”).

National borders not only cause problems in the legal enforcement of cartels, but also create advantages that allow them to operate more effectively. Borders can prevent detection of a cartel by masking its geographical reach, thereby hindering discovery of illicit payments and international agreements on market allocations.¹⁹ In other words, globalization has allowed companies to operate and maneuver freely within the economy, but features inherent to national barriers also help provide protections for cartelists who operate internationally.

Despite the increased attention cartels have received from the international community, inconsistent under-enforcement on a worldwide basis makes the operation of a cartel worth the risk to the cartelist.²⁰ Current measures are not by themselves an adequate deterrence for cartelists, nor provide adequate compensation for consumers worldwide, and it is not surprising that recidivism “bedevils the international cartel scene.”²¹

15 International-cartel discovery rates have been increasing since 1990, from four to six per year in the early 1990s to about 35 per year in 2003-2005. Connor Working Paper, *supra* note 3.

16 As the United States Supreme Court put it in *Verizon Commc'ns v. Trinko, LLP*, cartels are “the supreme evil of antitrust.” 540 U.S. 398 (2004).

17 “The current message to large organisations emanating from both the EU and the UK Office of Fair Trading (OFT) about involvement in cartel activity is ‘clean up your act or face both financial and criminal consequences.’” *Cracking Down on Cartels*, STRATEGIC RISK, Dec. 2007, available at <http://www.strategicrisk.co.uk/story.asp?storycode=368294>, (last visited July 28, 2008).

18 For example, in the case of the worldwide vitamins cartel, though defendants have paid criminal fines of approximately \$2.2 billion in the United States and overseas, and have settled civil lawsuits with domestic plaintiffs in the amount of approximately \$2.4 billion, those sanctions pale when compared to the profits of approximately \$18 billion, adjusted for inflation, which defendants reaped during the 1990s. *See Amicus Br. of Economics Prof. B. Douglas Bernheim, et al.*, at 9-11, *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724). Thus, despite criminal and civil prosecutions more aggressive than those levied against any other cartel, defendants will still walk away with an estimated \$9 to \$13 billion in global profits by virtue of their cartel activity, more than double the fines and damages they have paid to date in all proceedings. *See Amicus Br. of Prof. Bush, et al.*, *F. Hoffman-La Roche, Ltd.* 542 U.S. 155 at 4. As Professor Bush, *et al.*, noted, “These sanctions are much less than the amount needed to discourage future cartel formation.” *Id.*

19 Jonathan T. Schmidt, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 200 (2006) (internal citations omitted).

20 *See generally*, Connor Working Paper, *supra* note 3.

21 *Id.* For example, of the 11 companies with the worst record for repeat cartel offenses, each has been caught in at least 10 different cartels. As the authors note, however, “These 11 companies are simply the proverbial ‘tip of the iceberg,’ because we have found 174 documented instances of cartel recidivism; of these 86 companies recorded three or more cartel violations.” *Id.*

2. Selective Enforcement Harms Regional And Global Economies

The lack of sufficient enforcement has grave consequences for the economic region the cartel affects, whether the cartel acts globally, regionally or locally. This is so because cartel activity necessary leads to a loss of competition, inefficient market outcomes,²² and therefore, an inefficient allocation of resources. Because national and regional economies are often intimately intertwined, a cartel in one country or region will in turn spread and affect other countries or regions.²³

The European Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules ("White Paper") finds, for example, that when looking at *domestic EU cartels*, the annual cost to consumers and other victims of hardcore cartels equals approximately €25 billion to €69 billion annually. Expressed as a proportion of the EU's gross domestic product, the negative welfare impact of all these hardcore cartels is estimated as ranging from 0.23% to 0.62% of EU's GDP in 2007 (and this only includes harm by cartels, not monopolies, etc.). Put even simpler, the potential benefits of enhanced private enforcement can be illustrated like this: if more effective competition mechanisms were to lead to a reduction of hardcore cartels by, for example, 5%, the negative consumer welfare impact would be reduced by €1.23 to €3.45 billion.²⁴

When looking at *global cartels*, the annual costs to EU consumers and other victims of hardcore cartels equals approximately €13 billion to €37 billion annually. This estimate comprises harm from consumers and other victims paying a high overcharge, and also economic benefits foregone by consumers, etc. who do not purchase due to the inflated price.²⁵

B. Abuse of Dominant Position

1. Reasons for Divergent Enforcement

Policy and enforcement issues are more complicated in cases involving an abuse of a dominant position than in cartel cases. In cases involving abuse of dominant position, the same behavior is often evaluated under different standards in different countries.²⁶ In fact, the difficulty that results from divergent standards of what constitutes improper unilateral conduct has been called the "the single most problematic [transnational antitrust issue] that exists . . ."²⁷ This problem arises primarily from the different policy, economic and legal considerations that shape competition enforcement across jurisdictions.

2. Policy Considerations

Underlying policy considerations often obscure enforcement because abuse of dominant position cases can involve other legal rights. Intellectual property rights – such as patents and copyright – effectively sanction a legal monopoly or claimant position, even if such a grant is only

22 "[T]here is near-universal agreement amongst economists that naked cartels result in inefficient outcomes." Richard Schwindt & Devin McDaniels, *Competition Policy, Capacity Building, and Selective Adaptation: Lessons from Japan's Experience*, 7 WASH U. GLOBAL STUD. L. REV. 35, 40 (2008).

23 See e.g., Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L. J. 801 (2004).

24 *Commission Staff Working Document accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules*, Brussels, at 14-15, SEC (2008) 406 (Apr. 2, 2008) [hereinafter White Paper].

25 Several modern cartels provide similar examples. For example, in the electronics industry, several defendants have been investigated by authorities in both the U.S. and EU for their participation in multiple cartels affecting millions, if not billions, of dollars in sales across multiple continents. Manufacturers of DRAM, a variety of random access memory component that stores digital information and provides high-speed storage and retrieval of data used in personal computers, printers, digital cameras, wireless telephones, and other electronic devices, have been the subject of price-fixing investigations by both the United States Department of Justice ("DOJ") and the European Commission ("EC"). Several companies have already pled guilty in the United States and have paid hundreds of millions of dollars in fines.

Many of the same defendants were involved in a cartel in the SRAM market as well, which had an enormous impact on the European market. During the conspiracy period from 1999 through 2005, total European sales of SRAM are estimated to be €3.93 billion. SRAM Market Study Q4, 2004 (2005 sales are projected numbers). This represents approximately 20% of worldwide SRAM sales during this period. The impact of the conspiracy on SRAM prices was particularly dramatic in 2000, when average selling prices increased over 37% from \$3.93 per unit in 1999, to \$5.31 per unit in 2000. While prices later dropped in 2002, the SRAM manufacturers' cartel continued to maintain prices above what they otherwise would have been.

The cartel in the polymethyl-methacrylate ("PMMA") market had a similarly massive impact. The number of EU purchasers of the PMMA affected by defendants' conspiracy is likely in the thousands. The EC, in its investigation, found that the PMMA cartel covered the whole of the European Economic Area ("EEA"), and that the 2000 EEA market value for the PMMA products involved was €665 million.

26 See Kovicic, *supra* note 9.

27 Diane P. Wood, *The U.S. Antitrust Laws in a Global Context*, 2004 COLUM. BUS. L. REV. 265, 272 (2004).

temporary. It can be a difficult policy determination to reconcile competitor enforcement with these IP protections. Similarly, the extent to which product bundling can be either a means to compete, or a means to suppress competition, has no simple answer. Different countries make different determinations when balancing such considerations against competition enforcement.

a. Economic Considerations and Legal Standards

National courts, regulators and legislatures take into account different economic considerations when determining what constitutes an abuse of dominant position. Each country or region that adopts a prohibition on abuse of dominant power adapts its interpretation of the law to its specific circumstances. For example, one of the stated goals of the new Chinese anti-monopoly law is to promote “the healthy development of the socialist market economy,”²⁸ which is not necessarily a goal adopted by many other competition regimes.

Different approaches to monopolization are not limited to those between transition economies, such as China, and more mature economies. Interpretative differences between ‘monopolization’ in the U.S. and ‘abuse of dominance’ in the EU, for instance, are now the areas of greatest difference between competition policies of the United States and Europe.²⁹ While both section 2 of the Sherman Act (the anti-monopolization statute in the United States) and Article 82 of the Treaty Establishing the European Community (the European statute prohibiting abuse of dominant market power) were “informed by a mixed set of socio-political-economic goals,”³⁰ those goals are actually quite different. Section 2 in the United States was created to combat the aggregation of power that undermines the ability of small market players to operate fairly within the market.³¹ Article 82 in the European Union, on the other hand, was adopted to help regulate dominant firms in an effort to protect powerless market actors such as buyers, suppliers, competitors, and consumers as part of the quest to achieve an integrated common market in Europe.³²

The differences in goals and standards between countries results in the uneven enforcement of unilateral anticompetitive conduct.³³ This different view of what constitutes abuse of dominant power, or monopolization, means that many companies – including IBM, Coca Cola, Microsoft, Intel and Apple – have come under scrutiny in one jurisdiction for conduct that is not investigated or regulated in other jurisdictions. For example, the European Union began an enforcement action against Intel for conduct that the United States initially refused to investigate.³⁴ Inconsistent application of the competition laws on a global scale can create unpredictable effects for the businesses involved, consumers, and overall legal enforcement.

2. Without Effective Enforcement, Abuse Of Dominance Harms Markets And Consumers

The difficulty countries have in determining what constitutes abuse of dominant position does not render its effect on markets any less pernicious.³⁵ With one entity abusing its dominant power in any given market, the economic efficiency of that market is greatly reduced. Horizontal competitors are restricted in their ability to enter the market, which interferes with their ability to

28 Anti-monopoly Law of the People's Republic of China, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=85714.

29 Reza Dibadi, *Article 82 Gestalt, Myths, Questions*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 615, 617 (May 2007) (quoting William J. Kolasky, *What Is Competition? A Comparison of the U.S. and European Perspectives*, 49 ANTITRUST BULL. 29, 40 (2004)).

30 Eleanor M. Fox, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide*, 2006 UTAH. L. REV. 725 (2006).

31 John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction*, 125 U. PA. L. REV. 1182, 1186-87 (1977); John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 290-300 (1988).

32 See Fox, *supra* note 30.

33 No less an authority than Herbert Hovenkamp has discussed the difficulties of defining what constitutes improper unilateral conduct. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 151 (2005) (“The very ubiquity and diversity of unilateral conduct render classification of offenses extremely difficult.”).

34 Only after a change in leadership at the FTC did it begin to investigate Intel, in June 2008. See Joel Hruska, *Intel Antitrust Woes Spread as FTC Launches Investigation*, ARS TECHNICA, June 6, 2008, available at <http://arstechnica.com/news/ars/post/20080606-intel-antitrust-woes-spread-as-ftc-launches-investigation.html>; Jeremy Reimer, *EU Slaps Intel with Formal Antitrust Charges*, ARS TECHNICA, July 26, 2007, available at <http://arstechnica.com/news/ars/post/20070726-eu-slaps-intel-with-formal-antitrust-charges.html>.

35 Remedies can only be effective if approached with a global view. “For every antitrust violation we need a remedy. Remedies are typically not satisfactory, leading to the angst of ‘Pyrrhic victories.’ Globalization is aggravating the problem.” Fox, *supra* note 10, at 572.

effectively compete within that market. With competition foreclosed in the market, consumers – much like consumers of a price-fixed product– pay higher prices than they otherwise would, and suffer from a reduction in quality as the incentive to innovate from the entity abusing its dominant market power is diminished.

With the continued globalization of economies over the last several decades, however, the effect caused by an entity abusing its dominant power will not be relegated merely to the area in which the abuser operates. Instead, the foreclosed market may initiate chain reactions that infect the market or closely similar markets in other countries or regions. When an entity abuses its dominant market power in one country or region, it may diminish consumer welfare in others.

II. GLOBAL PUBLIC REMEDIES FOR ANTICOMPETITIVE BEHAVIOR AS A SOLUTION TO SELECTIVE ENFORCEMENT

Resolution of the problem of selective enforcement must match the scope of enforcement to the scope of the violation. This increased public enforcement³⁶, and the corollary cross-border cooperation necessary to make the enforcement effective, must occur both in the criminal and civil arenas. Increased cooperation among enforcement agencies and an improved mechanism to resolve global private litigations are therefore necessary.

A. Cross-Border Cooperation in Public Investigations

Progress has already been achieved in the criminal enforcement of cartel behavior. In a recent and ongoing investigation into a bid-rigging cartel in the marine hose industry, for instance, governments from countries on three continents coordinated their regulatory enforcement activities to ensure that a global cartel was met with a unified, harmonized global criminal response.

In May 2007, eight executives from the United Kingdom, France, Italy and Japan were arrested in the United States and charged for their role in a conspiracy to rig bids and fix prices for marine hose.³⁷ The arrests in the United States were coordinated with raids in Europe and Japan. Assistant Attorney General Thomas O. Barnett emphasized the importance of cross-jurisdictional cooperation, stating that the arrests in combination with raids in the United States and abroad “demonstrate [the] ability to work effectively with foreign competition authorities to shut down international cartels.”³⁸

Nor did the cross-jurisdictional cooperation end with the raids. Immediately after pleading guilty in the United States to participating in the marine hose cartel, three executives were arrested in the United Kingdom for the same activity.³⁹ On June 11, 2008, the Southwick Crown Court in the United Kingdom handed down larger sentences for the three men than those to which they each had agreed under their American plea agreements.⁴⁰ As a result of cooperation between the United States and the United Kingdom, the defendants’ prison terms in the United States, the longest ever given to foreign nationals charged with antitrust offenses, were suspended in consideration for the time to be spent in prison in the United Kingdom – three years for two of the defendants and two and a half

36 There is no question, for example, that the European Commission is dedicated to the public enforcement of competition laws. Examples of industries that have most recently faced significant fines by the European Commission are those manufacturing elevators and switch gears. In the market for the installation and maintenance of lifts and escalators in Germany, Belgium, Luxembourg and the Netherlands, EU regulators imposed record fines totaling over €992 million on five manufacturers for their cartel participation. The largest fine of €479 million was imposed on ThyssenKrupp because the company was determined to be a price-fixing recidivist. In addition, Otis was fined €225, Schindler €144 million, Kone €142 million, and Mitsubishi’s Durch subsidiary €1.8 million. See Press Release, Schindler, European Commission Drops Accusations of Pan-European Collusion (Feb. 21, 2007), http://www.schindler.com/group_news?news=88264. In the switch gears industry, Siemens was recently fined a total of €418 million, including €396 million in its Power Transmission and Distribution (PTD) division and €22 million against Siemens Austria. See *Siemens to Take EU Fine to European Court of Justice*, EU BUSINESS, Jan. 24, 2007, http://www.eubusiness.com/news_live/1169643624.79/.

37 Press Release, United States Department of Justice, Eight Executives Arrested on Charges of Conspiring to Rig Bids, Fix Prices and Allocate Markets for Sale of Marine Hose (May 2, 2007). Marine hose is a flexible rubber hose used to transport oil between tankers and storage facilities and buoys.

38 *Id.*

39 *U.S. Jail Time Suspended for British Cartel Members*, COMPETITION LAW 360 (June 27, 2008).

40 Hearing before His Honour Judge Geoffrey Rivlin QC, *Regina v. Whittle*, (June 11, 2008).

years for the third. Although the prison sentences in the United States were suspended, the three men still faced substantial fines ranging from \$75,000 to \$100,000 in the United States.⁴¹

Investigations such as the one into the marine hose cartel are not the only means through which governments have been working together to deter anticompetitive conduct. The United States also has entered agreements with several countries, including Japan, Brazil, Australia and the United Kingdom, to foster cooperation between governments for the investigation and prosecution of cartel activity.⁴² Through these agreements, and participation in inter-governmental groups such as the International Competition Network⁴³ and the ICN Workshop on Cartel Enforcement,⁴⁴ governments from around the globe have shown a keen interest in using coordinated criminal enforcement to stop cartels.

While cooperation in the criminal enforcement of anticompetitive conduct is helpful in deterring such conduct, cross border criminal enforcement has at least two flaws that inherently limit its effectiveness. First, government agencies, by their nature, are limited by political and practical considerations in terms of what cases they can and will pursue. Any enforcement agency has only a certain amount of resources at its disposal, which means that choices are made in terms of what conduct is or is not pursued. The problems with this type of selective enforcement can be magnified if a government has irrational, political or other incentives to discriminatorily protect one industry or company. The second major limitation of criminal enforcement is that the victims of the illicit conduct go uncompensated for the losses that result from the conduct. Civil enforcement, when used in conjunction with criminal enforcement efforts, is a necessary component of a complete structure of anti-cartel enforcement.

B. Expanding Private Enforcement of Anticompetitive Practices

Unlike criminal enforcement, private damage actions for cartel infringements have the advantage of being market-based rather than regulatory. They are directly related and proportionally correlated to the harm inflicted on the cartel's victims. Experience in the United States has shown how potent a weapon civil enforcement can be. There, the use of private damages actions accounts for approximately 90% of the means of ensuring compliance with the antitrust rules.⁴⁵ The current state of the law, in which there is no global mechanism to collectively address the victims harmed by anticompetitive conduct and limited extra-territorial jurisdiction for civil cases, is beginning to show signs of change, with select jurisdictions recognizing the value of collective redress.

1. First Steps in the European Union

On December 20, 2005, the European Commission published a Green Paper that addressed how to facilitate actions for damages caused by violations of the EC Treaty competition rules on restrictive business practices and abuse of dominant market positions (Articles 81 and 82 EC Treaty respectively). The Green Paper was part of an effort to learn from U.S. private damages actions and adapt similar, though not identical, approaches to the European setting.⁴⁶ As the European Commission noted:

Enhanced private enforcement will maximize the amount of enforcement as a means of enforcement additional to public enforcement. Increased levels of enforcement of the law will increase the incentives of companies to comply with

⁴¹ *U.S. Jail Time*, *supra* note 40.

⁴² Harvey I. Safenstein, *The Practical Aspects of Corporate Antitrust Compliance Programs*, 1426 PLI/CORP. 691, 859 (June 2004).

⁴³ See Hammond, *supra* note 5.

⁴⁴ R. Hewitt Pate, of the United States Department of Justice, said at the 2004 ICN Cartel Workshop, "I can think of no better or more valuable substantive contribution to cartel enforcement than supporting this workshop." See, e.g., R. Hewitt Pate, *International Anti-Cartel Enforcement*, ICN Cartels Workshop (Nov. 21, 2004).

⁴⁵ W. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?* (2003) 26(3) *WORLD COMPETITION* at 473.

⁴⁶ See, e.g., Commission of the European Communities, *Green Paper: Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf; Commission Staff Working Paper, *Annex to the Green Paper*, SEC (2005) 1732 (Dec. 19, 2005), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/sp_en.pdf.

the law, thus helping to ensure that markets remain open and competitive [F]acilitating private enforcement will add more frequently than before to the fines imposed by public competition authorities the possibility for the victim of the anti-competitive behaviour to recover his losses. Both damages awards and the imposition of fines contribute [to] the maintenance of effective competition and deter anticompetitive behaviour.⁴⁷

This initiative was driven by the recognition that, to date, there have been very few damages claims brought before courts of the Member States for breaches of the competition rules. For example, a study conducted on behalf of the European Commission found that private enforcement of European competition law through damages actions is relatively meager, and characterized the area as one of “total underdevelopment” and “astonishing diversity”⁴⁸. As England’s Office of Fair Trading recently reported:

It is notable that, so far, consumers appear to have obtained virtually no redress in private competition law actions. It is unclear how extensively businesses have obtained redress to date, given that few successful cases have been reported and that the details of any private settlements that have been reached are confidential.⁴⁹

Two and a half years later, on April 3, 2008, the Commission published the White Paper, discussed earlier, as a follow-up to the Green Paper, containing more detailed suggestions for new models to achieve compensation for consumers and businesses who are the victims of breaches of EC competition law. The White Paper includes suggestions for making damages claims by victims more viable and efficient, while ensuring respect for European legal systems and traditions. The model outlined by the Commission is based on compensation through single damages for the harm suffered.

The Commission’s move toward easing the way for civil litigations based on violations of competition law is based on the recognition that businesses and consumers harmed by anticompetitive activity are entitled to be compensated for their actual losses.⁵⁰ A more developed civil litigation mechanism will enhance the overall level of respect for the EC competition rules by discouraging companies from engaging in anticompetitive activity, which in turn will lead to the development of more fair and efficient markets and economies. Allowing for civil litigation also has the benefit of bringing the benefits of Community law closer to citizens.⁵¹

The Commission’s proposals effectively acknowledge that private enforcement of competition law, which compensates victims, discourages anticompetitive conduct and benefits the European Community at large, is underdeveloped at present in the European Union.⁵² The extent to which this situation is transformed by the Commission’s proposals remains to be seen. Even so, the Commission’s papers represent only the first steps needed to develop a comprehensive means of achieving legal redress for victims of anticompetitive behavior on a regional basis in Europe. Because of the fluidity of the current landscape, broader transnational solutions may be achieved through informal private settlement processes.

47 *Annex to the Green Paper*, *supra* note 47, at 6-7.

48 *See Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, Ashurst (Aug. 31, 2004), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/economic_clean_en.pdf; *see also* Neelie Kroes, Member of European Commission in charge of Competition Policy, Opening Speech at European Parliament Workshop on Damages Actions for Breach of the EC Antitrust Rules: The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce Their Rights (June 6, 2006), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/speech_06062006.pdf

49 Office of Fair Trading, *Private Actions in Competition Law: Effective Redress for Consumers and Business* at 8 (April 2007), http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft/916.pdf.

50 In its 2001 judgment, in *Courage v Crehan* (case C-453/99), the Court of Justice explicitly recognized a right to damages for breaches of EC competition law. The Court stated that:

the full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. *Id.*

51 *Competition: Commission launches consultations on facilitating damages claims for breaches of EU competition law*, IP/05/1634 (Dec. 20, 2005).

52 *See* Ashurst, *supra* note 49.

2. Private Actors are Seeking Solutions with Defendants

Recent experience in the United Kingdom reflects a greater opportunity for private settlement of competition law claims. Despite the relative lack of stand-alone or follow-on private actions for damages in the UK courts arising from breaches of competition law,⁵³ a number of private settlements of competition disputes have been concluded between 2000 and 2005.⁵⁴ These settlements primarily involved abuse of dominance cases, and almost half of the settlements consisted of a payment in lieu of damages or some form of agreement as to future conduct.

Cartel cases, however, have not seen quite the same success in terms of private settlement. From 2000 to 2005, approximately 50 infringement decisions were issued by the Commission and United Kingdom's Office of Fair Trading involving cartellists. There were nevertheless relatively few private cartel settlements, indicating that literally thousands of potential victims (including large, sophisticated companies) of the many cartels that have been uncovered have not yet taken action to recover their losses arising from the disclosed cartels. No formal, effective mechanism exists to ensure global peace for defendants while simultaneously providing collective redress. Victims of the illicit activity are left uncompensated, even though in many of these situations in which there is or has been a government investigation, there is little question as to the defendant's liability. Given the lack of a formal private mechanism for global settlement, private claimants have been forced to implement creative settlement structuring in an attempt to achieve global remedies.

From the perspective of the cartelist or the abuser of dominant power, however, a principal obstacle to reaching settlement with the victims of anticompetitive behavior is the difficulty illicit actors have in achieving global peace. Defendants have expressed a willingness to enter into private settlements, but only if they receive private peace for the entirety of the market impacted by the anticompetitive behavior. In other words, a private or alternative dispute resolution mechanism for achieving global settlements that provides finality and closure must be available to infringers. Without such a mechanism, settlement agreements that attempt to approximate a global resolution are the best agreements available to both claimant and defendant.

One recent groundbreaking case demonstrates how settlements affecting European businesses and consumers can be structured. In early 2008, a £73.5 million settlement was reached on behalf of UK air passengers in the price-fixing class action lawsuit brought against British Airways and Virgin Atlantic in the United States.⁵⁵ Under the terms of the settlement, passengers who purchased tickets from either airline for specified long-haul flights between August 11, 2004 and March 23, 2006 will be able to claim a partial refund. Passengers who purchased tickets from the airlines in the United Kingdom are entitled to a refund of 33.3% of the fuel surcharge they paid on each flight segment purchased. Passengers who purchased tickets in the United States will receive their partial refund (also 33.3% of the fuel surcharge paid on each flight segment) in dollars rather than pounds out of a separate \$59 million United States settlement fund. This unprecedented settlement represents the first instance in which multijurisdictional claims have been resolved simultaneously, providing equal compensation to both United States and United Kingdom classes of purchasers.

3. A Formal Mechanism is Still Needed for Civil Redress

The current approach that necessitates such creative settlement structures, however is not sufficient to guarantee a true global settlement. Rather, it represents the beginning of a more comprehensive compensation procedure. A formal mechanism to resolve global disputes is still needed, and any such mechanism should be collective in nature. Only a collective mechanism can provide adequate compensation for all victims and avoid the chilling effect that results from forcing

53 There have only been 15 final judgments in competition damages cases in the last 40 years in the UK, with only one 'fully' successful claim in any of the cases.

54 Rodger, *Private Enforcement of Competition Law, The Hidden Story* [2008] ECLR.

55 Danny Fortson, *UK businesses braced for class action suits after BA and Virgin pay out \$200m*, THE INDEPENDENT, Feb. 16, 2008, available at <http://www.independent.co.uk/news/business/news/uk-businesses-braced-for-class-action-suits-after-ba-and-virgin-pay-out-200m-783077.html>.

claimants to sue individually. Individual consumers alone have almost no chance of being able to bring cases against corporate players engaged in anticompetitive behavior. Potential plaintiffs, who often decide against litigation because the costs of bringing an antitrust claim greatly outweigh their damages, may be inclined to join a collective action because they can profit from the economies of scale. There is then a strong case for shifting the balance of litigation risk in favor of the “little” man and small business. Furthermore, because the decision to bring a suit to enforce private rights against illicit actors is market driven, rather than policy driven, a formal mechanism for collective redress avoids the flaws and deficiencies present with selective enforcement.

Any formal mechanism for collective redress will only work if there is some level of universal jurisdiction that allows for cases to be coordinated among civil litigants in different countries. One possibility would be to have a procedure similar to the Multidistrict Litigation Panel in the United States, through which related actions filed in different countries could be coordinated into one action.

In implementing this mechanism, it must be clear as a matter of policy that the dominance of the supply relationship cannot itself deter the enforcement of private rights. The biggest pragmatic obstacle to private enforcement is not procedural, it is the fear that pursuing their rights will interfere with a purchaser-claimants relationship with its supplier. Until this threat of supply retaliation is removed from the market, private enforcement will be inadvertently restrained, if not in whole, than at least in significant part.

In order to act as an effective means of collective relief, any formal mechanism also must address: (1) the need for an opt-out system, or its functional equivalent; (2) reducing the putative effect of so-called “loser pays” rules that are prominent in the European Union; (3) issues related to indirect purchaser compensation; and (4) the need for truly global settlements.

a. The Opt-out System

The U.S. currently employs an opt-out model for class actions, where one party litigates on behalf of a class of all similarly situated victims, with the exception of those who choose to exclude themselves. While the opt-out system may be unique to the United States, and potentially objectionable to many other jurisdictions, some procedure must be created that replicates its functionality. As an alternative to the opt-out system, the European Commission has suggested through the White Paper, for example, that there either be (1) representative actions; or (2) opt-in actions.

With respect to representative actions, the EC recommends that they be brought by qualified entities such as consumer associations, state bodies or trade associations, on behalf of identified or, in restricted cases, unidentified victims. Though this is a step in the right direction, it is imperative that such options ensure that these entities that will represent consumers not be defined too narrowly. If they are, the types of actions will be severely restricted. In order for any system with a representative action model to be truly representative, certain criteria are necessary to ensure that all parties are protected. First, representative entities should be independent from conflicts of interest from whom the entity seeks to represent and from those whom it may wish to engage to run the collective action on its behalf. Second, the entity should be able to show that they are able to pursue the litigation effectively (though not so tightly as to restrict consumer groups from sub-contracting litigation efforts to reputable lawyers). And third, entities should be able to show that they are reputable.⁵⁶

Similarly, an opt-in system will only be effective if those EU Member States that implement such systems publicize potential litigation to claimants. All bars to publication need to be lifted so as to allow claimants to know about, and choose to opt-in to an action. Moreover, the formalities for

⁵⁶ This would be consistent with the current UK's system for representative actions. John Pheasant and Anna Bicarregui, Hogan & Hartson, LLP, *Striking the right balance: towards a “competition culture” not a “litigation culture”?* Comment on the European Commission's White Paper on damages actions for breach of EC antitrust rules, at 8.

opting in must be minimal. There should not be extensive claim forms or payment of fees when opting in to an action. Without these provisions, opt-in actions will be unsuccessful – potential plaintiffs will have no notice of the action, and even if they do, they will be discouraged to join due to the administrative and financial burdens of opting in.

b. “Loser Pays” Rules

In contrast to the United States, many countries operate under loser pay cost structures that require losing litigants to pay for the legal costs of the winning party. This threat of having to pay substantial costs stifles claimants from bringing meritorious cases because the potential cost outweighs any potential gain a claimant may receive from a litigation. Any universal mechanism for collective redress must develop means of addressing this threat.

Some countries with loser pays rules have begun to realize the negative effect they have on private actions. The European Commission, for example, has recently encouraged national courts to exercise their discretion in assessing costs flexibly in order to protect claimants. This is not enough, however. Competition regimes should take additional steps to emphasize that individual consumers who are represented by an approved representative body should be protected for adverse costs completely (regardless of the outcome of the litigation).

c. Indirect Purchasers and the Passing-On Defense

Different countries hold different views on the viability of indirect purchaser claims against anticompetitive actors. Much discussion in the White Paper revolves around resolving how to allow both the direct and indirect buyers from a cartel to claim redress where the overcharge the cartel has caused has been extracted from a whole group of purchasers. The primary issue is how to address the passing-on of anticompetitive overcharges from direct purchasers to indirect purchasers. The White Paper, after weighing several options, suggests defendants should be entitled to rely on the passing-on defense against a claim for compensation of the overcharge, brought by a claimant who is not a final consumer.⁵⁷ It also suggests that an indirect purchaser should be able to rely on the rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level.⁵⁸ In the United States, on the other hand, indirect purchasers can only recover for antitrust damages in select states, meaning that certain purchasers in the United States have no standing to sue for claims that are nearly identical to those for which their indirect counterparts would have standing.

d. Mechanisms for Global Settlements

With recent government activity, and increased inter-governmental cooperation to enforce competition laws, more private settlements related to anticompetitive behavior are needed. Such cases need not be based on illicit activity that occurs mostly in the United States. Claimants now are using new tools to seek redress from the cartel for their global anticompetitive activity. It is easy to imagine a worldwide cartel, for example, that engaged in anticompetitive activity with respect to a product sold throughout the world. (Such a cartel, may or may not, affect commerce in the United States.) Using a combination of private agreement between private litigants, implemented through the use of an independent evaluation, and the laws of the United States, the European Union and several Member States of the European Union, one settlement can be used to attempt to resolve a cartel's global liability. The current state of laws outside of the United States in general, and the use of an opt-in rather than an opt-out system in particular, does not guarantee global resolution, but it can eliminate most of a cartel's practical exposure and provide sufficient comfort to the cartel that it has been provided with a mechanism that effects collective redress.

For example, the parties can reach an agreement on general terms for an overall settlement prior to formally initiating litigation proceedings. The cartel can agree to pay, for instance, a set

⁵⁷ White Paper, *supra* note 24, at 65.

⁵⁸ White Paper, *supra* note 24, at 67.

percentage of its worldwide sales to its customers for the product affected by the anticompetitive conduct (an “overcharge percentage”), and agree to cooperate with claimants as they pursue non-settling cartelists. In exchange, the settling cartelist can receive a near-worldwide release from any potential liability (and concomitant damages) stemming from its anticompetitive activity. Notably, this can be achieved through a private contract that does not require court approval, although approval may be sought in certain cases. In order to achieve such a settlement’s desired goal of reimbursing all potential claimants for the harm suffered as a result of the conspiracy, the settlement may require multiple mechanisms for multiple jurisdictions.⁵⁹ One such mechanism can carve viable United States claims out of the worldwide settlement, which would allow such claims to move forward under the class action opt-out system in the United States.⁶⁰ (And just as with the air passenger case described above, claimants in different jurisdictions can receive refund payments in different monetary denominations.)

Other mechanisms can then be used to secure the release of and payment for claims not involving the United States through the use of a “claims made” system. For instance, the settling cartelist would deposit (or, in certain situations, guarantee) the settlement amount, excluding the amount related to claims that can be made in the United States (if any), in an account that will be made available to potential claimants until all applicable statutes of limitations have expired. Those victims who directly or indirectly purchased the product(s) affected by the anticompetitive behavior from the settling cartelist can then recoup a portion of the payments made for the product(s) (*i.e.*, the estimated overcharge) from the account. Such worldwide claims would require an extensive private or public notice program to inform potential claimants of their opportunities with settling cartelist. In order to allocate refunds to claimants, particularly in situations that are more complicated than the per-ticket purchased refund in the air passenger case, an expert can be appointed to effect proper allocation.⁶¹

As part of the settlement, the settling cartelist could also provide consideration other than reimbursement payments, such as an agreement to cooperate in the investigation of its co-cartelists and an agreement to participate in “funding.” By funding, the settling cartelist could agree to pay for the costs associated with losses in any litigation subsequently initiated outside the United States by settling claimants against the settling cartelist’s co-conspirators. Funding is necessary to avoid the risks associated with the “loser pays” rules in the United Kingdom and elsewhere. A financial arrangement can normally be established between the settling cartelist and a third party funder that allows the settling cartelist to offset some or all of the costs of funding. Moreover, cartelists who settle early can demand that their later-settling co-conspirators cover any funding costs for which the early settler (or settlers) was responsible and take over any future funding obligations. Thus, the funding requirement creates an incentive toward early settlement. Other incentives for settling early can include the application of a lower overcharge percentage compared with those who settle later, which would translate into a settlement discount and reduced interest payments for the early settler.

The air passenger settlement described above and the hypothetical description of a structure that allows for near-global settlement represent the beginning of what is possible, and necessary, to better redress anticompetitive activity around the globe. A universal settlement structure that allows for consistent civil enforcement of competition rules and a practical alternative to multiple universal jurisdiction highest certainty and formality with the least cost but virtually assured unacceptable option.

59 For instance, in the Netherlands, a mechanism exists for court approval of privately agreed settlements under the Dutch Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*). Under this mechanism, on April 11, 2007, Royal Dutch Shell plc announced that it had reached a settlement with a class of claimants in connection with the adjustments of its proven oil and gas reserves in 2004. Shell agreed to make a maximum payment of \$ 352.6 million, plus administrative costs, to the members of the class without admitting any wrongdoing.

60 The air passenger case demonstrates that United States claims do not have to be carved out. There, the court in the United States exercised jurisdiction over the foreign claims, but applied European Union law to the European claims. If the cartel is structured differently, however, it may be easier to treat the claims that are viable in the United States as completely separate from all other global claims. That allows for use of the class action mechanism already available in the United States without violating comity concerns.

61 Such a position is a normal feature of settlements in many areas of the economy in the United Kingdom. See generally JOHN KENDALL, *DISPUTE RESOLUTION: EXPERT DETERMINATION* (3rd Ed. 2001).

4. Access to Evidence Between Jurisdictions

Recent developments in both the United States and the European Union related to the ability of a party litigating in one country to get relevant discovery from a party in a different country demonstrate precisely how cross-jurisdictional cooperation can be both effective and efficient. The issue of “access to evidence” raises the question of how to strike a balance between (1) what are perceived as “excesses of the US system”, which supposedly lead to a party settling a case because of the expansive discovery requirements, and (2) the current rules in many countries, including several Member States of the European Union, where claimants do not bring actions because all the documentation and evidence is in the hands of the defendants.

In the United States, the Supreme Court has potentially expanded litigants’ ability to perform cross-jurisdictional discovery. See *Intel v. AMD*, 542 U.S. 241 (2004). *Intel* reaffirms that 28 U.S.C. Section 1782 allows for discovery of domestic entities by parties to foreign proceedings. In addition, the *Intel* decision opens the door for discovery of United States entities to be made at a very preliminary stage of litigation – potentially even before a foreign proceeding is actually filed.⁶² This enhances the ability of a litigant pursuing anticompetitive behavior on a global scale to conduct discovery of domestic parties where the lawsuit is intended to be, but has not yet been, filed in a foreign court.⁶³

Based on this Supreme Court decision, the Union Federal des Consommateurs – Que Choisir (the “QC”) recently sought cross-jurisdictional discovery in a motion filed with the *Intel* court earlier this year. The QC is a French organization that defends the rights of consumers in litigation against corporations, and pushes for public policies reinforcing the rights of consumers. The QC’s motion – currently *sub judice* – seeks permission to take discovery that will help it pursue cases against Intel in London, England and Lisbon, Portugal, which the QC intends to bring subsequent to an expected ruling adverse to Intel from the European Commission.⁶⁴ If granted, the QC motion will demonstrate that courts can, at the very least, coordinate their discovery efforts when a company’s anticompetitive conduct affects several countries.

Meanwhile, the EC, in an attempt to overcome the “information asymmetry” problem while “avoid[ing] the negative effects of overly broad and burdensome disclosure obligations”, suggests in the White Paper that across the EU, “a minimum level of disclosure *inter partes* for EC antitrust damages cases should be ensured.”⁶⁵ The White Paper states that national courts should have the power to order parties to disclose specific categories of relevant evidence, thus forming a judge-controlled disclosure of relevant evidence.

These recent developments in both the United States and the European Union only the beginning of what is needed for global civil enforcement. Cross-jurisdictional discovery is necessary to assist a case that may be progressing at different speeds in different countries, particularly where the activity at issue crosses borders.⁶⁶ Such cooperation should be used and expanded, but it is not a substitute for a true universal mechanism to achieve collective redress for victims of anticompetitive conduct.

62 In its broadest holding, the Court found that Section 1782 “does not limit the provision of judicial assistance to ‘pending’ adjudicative proceedings.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004). The Court instead held that a dispositive ruling by a tribunal – the European Commission in *Intel* – need only be “within reasonable contemplation.” *Id.* at 259.

63 According to the Supreme Court, Section 1782 does not contain a “foreign-discoverability” requirement that would necessitate a threshold showing by the party seeking discovery that the discovery sought must be discoverable in the foreign proceeding. Based on the language of Section 1782, “confirmed by its context,” the Court concluded that “the statute authorizes, but does not require, a federal district court to provide assistance to a complainant in a European Commission proceeding that leads to a dispositive ruling, *i.e.*, a final administrative action both responsive to the complaint and reviewable in court.” *Id.* at 255. Although the Court carved out privileged material from the statute’s aegis, it found nothing in either the text or the legislative history of Section 1782 that could be read to limit “a district court’s production-order authority to material that could be discovered in the foreign jurisdiction if the material were located there.” *Id.* at 260.

64 *Advanced Micro Devices, Inc. v. Intel, Corp.*, Civ Act. No. 05441-JJF, Reply Brief of Union Federal des Consommateurs – Que Choisir in Support of Its Motion to Intervene, 1-2 (July 16, 2008). The QC brought its brief seeking discovery under, *inter alia*, Section 1782.

65 White Paper, *supra* note 24, at 5.

66 *Ford v. F. Hoffman-LaRoche, Ltd.*, Sup. Ct. Justice File No. 771/99 (Ontario, Canada), Justice Cumming’s Reasons for Decision ¶ 45-49 at 13 (Jan. 26, 2001).

III. CONCLUSION

In an ever-changing world, principles of justice cannot change with borders. To provide justice, however, there must be meaningful access to achieve it. Justice must not only be equal for all, it must be equally available to all.

Modern globalized life, while increasing the integration of markets, has also brought with it an increase in the number and frequency of anticompetitive practices, affecting economies worldwide. Though some competition regimes have tradition of strict enforcement of competition laws, independent national enforcement of competition laws cannot alone deter global anticompetitive conduct. Without effective international cooperation and a global mechanism for private enforcement, anticompetitive behavior will not be deterred, and the grave effects on economies and citizens around the world will continue. So long as international selective enforcement of competition laws remains a problem, cartelists and monopolists will continue to distort entire markets, injuring *all* market players: large and small, companies and citizens.