

Comments of the
International Chamber of Commerce (ICC)
and the
Business and Industry Advisory Committee to the OECD (BIAC)
to the
Antitrust Modernization Commission's
Request For Public Comment
“International”
February 15, 2006

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Comments of Michael Blechman¹
on International Comity Considerations
on Behalf of the International Chamber of Commerce (ICC)
and the Business and Industry Advisory Committee to the OECD (BIAC)

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INTRODUCTION

The International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) are pleased to respond to the request of the Antitrust Modernization Commission (AMC) for comments on international comity considerations. Headquartered in Paris, the ICC is the leading international business organization and is comprised of members from more than 130 countries. Affiliated with the ICC and also headquartered in Paris, BIAC is the OECD-recognized link between OECD and the business community.

The topic of comity is an important one for businesses that conduct operations on an international scale, and has been discussed in multiple policy statements issued by the ICC and BIAC.² As the AMC recognized in its request for comments, more than 100 jurisdictions around the globe have adopted competition or antitrust laws. While the proliferation of national competition regimes has created opportunities both for cooperation among sister agencies and for the convergence of policies and procedures, it also has created the potential for a variety of adverse consequences, including increased transaction costs and heightened uncertainty for businesses, and instances of friction and conflict across jurisdictional boundaries. Both positive

¹ Michael Blechman presents these comments on behalf of the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC). Mr. Blechman serves as the Vice Chair of the ICC Commission on Competition and the Chair of the Competition Committee of the U.S. Council for International Business (USCIB). The presenter gratefully acknowledges the input of Ferdinand Hermanns, Chair, ICC Commission on Competition; James F. Rill, Chair, BIAC Competition Committee and Vice Chair, USCIB Competition Committee; Calvin S. Goldman, Vice Chair, BIAC Competition Committee; Rufus Ogilvie Smals, Vice Chair, BIAC Competition Committee; Christine C. Wilson, member, BIAC Competition Committee and member, USCIB Competition Committee; Crystal Witterick, member, ICC Commission on Competition; and Jennifer Patterson, member, USCIB Competition Committee. The presenter also acknowledges with appreciation the invaluable drafting and research assistance of Courtney Barg, Associate, O'Melveny & Myers, and Jane Antonio, Research Analyst, Howrey LLP.

² See, e.g., ICC & BIAC, *ICC/BIAC Comments on report of the US International Competition Policy Advisory Committee (ICPAC)* (June 5, 2000), available at <http://www.iccwbo.org> (follow "Policy statements" hyperlink; then follow "5 June 2000" hyperlink); ICC, *ICC Comments on EU-US Positive Comity Agreement* (Mar. 12, 1997), available at <http://www.iccwbo.org/id370/index.html>; and ICC, *International Cooperation between Antitrust Authorities* (Mar. 28, 1996), available at <http://www.iccwbo.org/id363/index.html>.

and adverse consequences are manifested across a spectrum of substantive antitrust areas, including multi-jurisdictional mergers, vertical agreements, monopolization or dominance, and hard-core cartels.

Greater reliance on comity mechanisms holds the potential to reduce the adverse consequences flowing from the proliferation of competition regimes while concomitantly enhancing the quality of antitrust enforcement and the interaction of sister agencies. While initial steps have been taken to strengthen reliance on comity principles and mechanisms, further work remains. As detailed in these comments, the ICC and BIAC urge the AMC to consider recommendations for enhancing international antitrust comity mechanisms.

BACKGROUND

The adoption and application of myriad competition standards and procedures by multiple jurisdictions holds the potential to create a variety of negative effects, not only for businesses but for governments and consumers as well. These negative effects have been acknowledged widely, and include (1) heightened uncertainty and increased transaction costs for businesses; (2) economic inefficiency, with consequent adverse effects on trade and investment (and, ultimately, on consumers); (3) a chilling effect on private sector cooperation with authorities; (4) incentives for forum-shopping; (5) conflicts and interference with other jurisdictions' competition regimes; (6) impediments to effective enforcement actions against conduct or transactions affecting multiple jurisdictions; (7) misallocation of the finite resources of competition authorities; and (8) increased political tension and reduced incentives for competition authorities to cooperate with their counterparts in other jurisdictions.

This potential for adverse consequences is exacerbated by the fact that markets – particularly those involving intellectual property – increasingly are global. Thus, even when an investigation or enforcement action is undertaken by only one jurisdiction, that jurisdiction's actions may generate effects around the world when undertaken within the context of a global market. When multiple jurisdictions become involved, the potential for adverse consequences increases concomitantly.

For more than a century, public international law has acknowledged comity – the general principle that a country should take other countries' important interests into account while conducting its law enforcement activities in return for their doing the same — as a means for addressing friction among countries arising from enforcement of their respective laws. It is important to note that the exercise of comity is not the abdication of jurisdiction; rather, it is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries.

In the antitrust arena, two types of comity are employed: traditional comity and positive comity. Traditional comity involves a country's consideration of how it may prevent its laws and law enforcement actions from harming another country's important interests.³ The

³ OECD, COMMITTEE ON COMPETITION LAW AND POLICY, CLP REPORT ON POSITIVE COMITY, FINAL REPORT ¶ 18 (1999) (referring to traditional comity as “negative comity”).

Competition Law and Policy Committee of the OECD⁴ in 1995 recommended that, in seeking to implement traditional comity, a country should (1) notify other countries when its enforcement proceedings may have an effect on their important interests, and (2) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.⁵ At its core, the concept of traditional comity involves a country's conducting its proceedings and applying its laws with a view toward avoiding harm to other countries.

Positive comity, in contrast, involves a request by one country that another country undertake enforcement activities in order to remedy allegedly anticompetitive conduct that is substantially and adversely affecting the interests of the referring country.⁶ With respect to positive comity, the Competition Law and Policy Committee of the OECD in 1995 recommended that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis in considering its legitimate interests.⁷ Thus, positive comity places responsibility for the primary investigation and possible remedy in the hands of the jurisdiction most closely associated with the alleged anticompetitive conduct. By avoiding extraterritorial action that may unduly impinge upon another country's interests, and instead deferring to that jurisdiction's enforcement of its own competition regime, the exercise of positive comity may be viewed as a very important extension of traditional comity.

Antitrust enforcement authorities representing many different jurisdictions have acknowledged the important and beneficial role that comity considerations can play in the international competition arena. After highlighting the difficulties engendered by the proliferation of competition regimes, for example, then-Commissioner Karel Van Miert of the European Commission stated that these difficulties could be overcome by taking into consideration the concerns of all relevant jurisdictions and, to the extent possible, devising compatible and coherent remedies throughout the relevant market.⁸ In 2005, Commissioner Sheridan Scott of Canada's Competition Bureau underscored this view, stating that Canada "should act with moderation and constraint when proposed enforcement action conflicts with another state's action, when there is a significantly greater nexus with that jurisdiction and our concerns will be dealt with."⁹ Commissioner Scott cited three recent cases in which commitments made by parties to a foreign enforcement agency addressed Canadian competition

⁴ The OECD Competition Law and Policy Committee has since shortened its name to the OECD Competition Committee.

⁵ OECD, REVISED RECOMMENDATION OF THE COUNCIL CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE, FINAL REPORT ¶¶ I.A.1 and I.B.4.b (1995).

⁶ OECD, *supra* note 3.

⁷ See OECD, *supra* note 5, at ¶¶ I.B.5.b-c.

⁸ Commissioner Karel Van Miert, *International Cooperation in the Field of Competition: A View from the EC*, Remarks Before Fordham Corporate Law Institute 24th Annual Conference 2 (Oct. 16, 1997), available at http://europa.eu.int/comm/competition/speeches/text/sp1997_073_en.html.

⁹ Commissioner Sheridan Scott, *C is for Competition: How We Get Things Done in a Globalized Business World*, Remarks Before the Insight Conference 6 (June 17, 2005).

concerns.¹⁰ And in 2004, then-Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice (DOJ) R. Hewitt Pate stated:

Comity – a certain degree of trust in each other’s systems – is a realistic goal . . . and one that will become even more important as antitrust enforcement regimes spread around our shrinking world. . . . The alternative – an international system of seriatim review of controversial matters by different authorities that enables opponents of a transaction to skip across the globe until they get an answer that they like – is unacceptable. . . . A global antitrust system in which each agency simply lines up to take its whack at the piñata is not a model that is going to serve us, or the market, very well.¹¹

APPLICATION OF COMITY MECHANISMS IN PRACTICE

The 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (1991 U.S./EC Agreement) states that its purpose is “to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.”¹² This Agreement incorporates both traditional and positive comity provisions, and merits a detailed description, both because many subsequently negotiated bilateral agreements have relied upon this Agreement as a model, and because it is widely credited with the significant levels of cooperation and convergence that have occurred between the U.S. antitrust authorities and the European Commission (EC) since its enactment.

Article VI of the 1991 U.S./EC Agreement embodies the principle of traditional comity and states that each jurisdiction “will seek, at all stages in its enforcement activities, to take into account the important interests” of the other jurisdiction. Listed within Article VI are six factors to be considered in the event that competing interests arise:

- the relative significance to the anticompetitive activities involved of conduct within the enforcing Party’s territory as compared to conduct within the other Party’s territory;
- the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party’s territory;

¹⁰ The three cases Commissioner Scott cites are General Electric’s acquisition of Instrumentarium Corporation, Sanofi-Syhelabo’s acquisition of Aventis and the Competition Bureau’s consideration of allegations of abuse of dominance on the part of Microsoft.

¹¹ R. Hewitt Pate, *Current Issues in International Antitrust Enforcement*, Remarks Before the Fordham Corporate Law Institute 31st Annual Conference on International Antitrust Law and Policy 10-11 (Oct. 7, 2004), *available at* <http://www.usdoj.gov/atr/public/speeches/206479.pdf>.

¹² 1991 U.S./EC Agreement, Art. I.1, *available at* <http://europa.eu.int/comm/competition/international/95145b.html>.

- the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;
- the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and
- the extent to which enforcement activities of the other Party with respect to the same persons may be affected.¹³

Mechanisms for consultation between the U.S. and the EC are described in Article VII of the Agreement. Consultations are to be conducted in keeping with the tenet of cooperation and "with a view to reaching mutually satisfactory conclusions."¹⁴

Positive comity provisions are contained in Article V of the 1991 U.S./EC Agreement. These provisions are founded upon the recognition that anticompetitive activities that occur within the territory of one Party to the Agreement (and that violate the antitrust laws of that Party) may adversely affect the interests of the other Party to the Agreement. Based on this recognition, Article V permits a Party whose interests are being adversely affected to request the Party in whose territory the challenged conduct is occurring to initiate appropriate enforcement activities. In 1998, the U.S. and the EC entered into an agreement to enhance the positive comity provisions contained in their original agreement.¹⁵ The supplemental agreement reaffirmed the Parties' commitment to pursue cooperative efforts through the use of positive comity, and clarified the procedures for formal referrals of cases under the terms of the Agreement.¹⁶

The traditional comity provisions in the 1991 U.S./EC Agreement (and, to a lesser extent, the positive comity provisions contained in that Agreement) have since been incorporated into numerous bilateral accords. These agreements, together with the work undertaken by international organizations such as the OECD and the ICN, have facilitated substantial strides in cooperation among enforcement authorities, particularly in the U.S./EC relationship. Antitrust enforcement authorities now routinely notify each other of investigations, share information during investigative phases, and either confer regarding or jointly negotiate remedies. One recent example of U.S./EC enforcement cooperation can be seen in the review of Procter & Gamble's acquisition of The Gillette Company by the EC and the Federal Trade Commission (FTC). Representatives at each agency contacted each other shortly after the deal was

¹³ *Id.*, Art. VI.3.

¹⁴ *Id.*, Art. VII.1.

¹⁵ 1998 U.S./EC Agreement, Art. IV.

¹⁶ INT'L COMPETITION POLICY ADVISORY COMM. TO THE ATTORNEY GEN. AND ASSISTANT ATTORNEY GEN. FOR ANTITRUST, FINAL REPORT 229-231 (2000).

announced. Both agencies applied similar standards to the transaction, shared information with each other, and reached similar conclusions.¹⁷

The work undertaken by international organizations such as the OECD and the ICN has also facilitated convergence. The OECD has initiated studies and drafted reports on facilitating convergence among enforcement agencies. For example, the OECD issued a recommendation covering cooperation on anticompetitive practices among its thirty member countries in 1995.¹⁸ More recently, in 1999, the OECD Competition Committee released a report on positive comity. While the report does not suggest procedures for making or considering positive comity requests, it provides suggestions to member countries for drafting procedures or guidelines to incorporate positive comity provisions into cooperation agreements.¹⁹

Earlier this year, the BIAC Competition Committee formally requested that the OECD Competition Committee, or its Working Party No. 3, undertake a review of possible initiatives to clarify and strengthen the comity recommendations contained in the OECD's 1995 Recommendation.²⁰ The review would include a renewed examination of the ways and means to apply comity principles to ameliorate the degree of difference, through moderation and restraint, in implementing enforcement actions that affect another state's important interests. BIAC believes that there is a substantial likelihood of meaningful progress through the OECD as evidenced by the work already completed in the merger area. In 2001, ICC and BIAC presented to the OECD Competition Committee its *Recommended Framework for Best Practices in International Merger Control Procedures*.²¹ This document evolved to form the basis of the ICN's *Recommended Practices for Merger Notification Procedures*²² and the OECD's *Recommendation of the Council on Merger Review*.²³

Despite significant progress, recent antitrust investigations conducted in multiple jurisdictions have had divergent outcomes, and emphasize that coordination among enforcement agencies could benefit from greater reliance on traditional comity mechanisms. For example, while the United States consulted with both the EC and the Korean Fair Trade Commission (KFTC) in their investigations of Microsoft's business practices, the enforcement agencies ultimately imposed divergent remedies on Microsoft.²⁴ In a DOJ press release, Deputy Assistant

¹⁷ William Blumenthal, General Counsel, Fed. Trade Comm'n, *Cross Atlantic Perspectives of Enforcement*, Remarks before the ABA Section of International Law 2005 Fall Meeting Program 2 (Oct. 27, 2005).

¹⁸ See OECD, *supra* note 5.

¹⁹ See OECD, *supra* note 3.

²⁰ Letter from James F. Rill, Chair, BIAC Competition Committee, to Frederic Jenny, Chair, OECD Competition Committee (Jan. 6, 2006) (on file with author).

²¹ BIAC, *Recommended Framework for Best Practices in International Merger Control Procedures* (2001), available at <http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf>.

²² ICN, *Recommended Practices for Merger Notification Procedures* (2005), available at <http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf>.

²³ OECD, RECOMMENDATION OF THE COUNCIL ON MERGER REVIEW (2005), available at [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c\(2005\)34](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c(2005)34).

²⁴ The United States' final judgment against Microsoft prohibits the company from preventing computer manufacturers and end users from choosing alternatives to Windows Media Player and Windows Messenger. In

Attorney General J. Bruce McDonald asserted that the KFTC and EC remedies were in direct conflict with the United States' belief that "remedies that strip out functionality can ultimately harm innovation and the consumers that benefit from it."²⁵ Without taking any position on that case or the conflict, the ICC and BIAC submit that conflicting remedies of this type, which arguably impose inefficiencies on business and potentially inhibit innovation, can be avoided through greater reliance on comity mechanisms.

Similarly, progress remains to be made with respect to positive comity. Despite the inclusion of a positive comity mechanism in the 1991 U.S./EC Agreement more than a decade ago, and the strengthening of that provision in 1998, positive comity has been employed only infrequently and with limited success. For example, the DOJ formally referred to the EC an investigation into anticompetitive conduct in the computer reservation system (CRS) industry. The Sabre Group, a CRS based in the United States, filed several complaints with the DOJ regarding the practices of its competitor Amadeus, a European CRS owned by several European airlines. The DOJ concluded that the EC had an advantage in pursuing the investigation and possibly implementing a remedy because the conduct primarily occurred in Europe and primarily affected European consumers. The referral to the EC – the first formal positive comity referral under the 1991 U.S./EC Agreement – represented an important step in the cooperation between the two enforcement agencies. We are not aware of other formal positive comity referrals, although similar (or perhaps more satisfactory) results have been accomplished through subsequent reliance on informal referral mechanisms.

As the number of jurisdictions with antitrust or competition laws has increased, reliance on comity principles has become more important not just within the agency arena, but within the judicial arena, as well. Recently, for example, in *Ahlstrom Osakeyhtiö v. Commission*, OJ 1988 C281-16, the European Court of Justice refused to impose comity limitations on conduct that had a direct effect within the European Community. And in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-166 (2004), the U.S. Supreme Court expanded the traditional comity notion of "prescriptive comity" – the principle that laws should not be interpreted so as to infringe on the legal interests of other countries – into a major canon of statutory construction.

AMC SHOULD CONSIDER WAYS TO ENHANCE COMITY MECHANISMS

The ICC and BIAC believe that the AMC should consider a variety of measures to promote greater application of comity principles and mechanisms in the international competition arena. For example:

- Steps should be taken to develop internationally recognized standards for determining when deference should be given to the substantive law, investigations, enforcement

contrast, the KFTC imposed a remedy ordering Microsoft to sell in Korea a version of its Windows operating system without Windows Media Player and Windows Messenger. The EC imposed a similar remedy requiring Microsoft to unbundle Windows Media Player from its Windows operating system in Europe. See Press Release, Department of Justice, *Statement of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision in its Microsoft Case* (Dec. 7, 2005), available at http://www.usdoj.gov/atr/public/press_releases/2005/213562.htm.

²⁵ See U.S. DOJ Press Release, *supra* note 22.

actions, and/or remedies of another country. These standards then could be implemented through bilateral or multilateral agreements, and incorporated in domestic statutes, decisional law, and enforcement policy, as well as in fashioning remedies.

- The development of these standards could build on the analysis already embodied in existing antitrust agreements (such as the 1991 and 1998 U.S./EC Agreements), statutes (such as the FTAIA), and case law. Factors to consider might include:
 - where the conduct at issue primarily occurred, where its anticompetitive effects primarily occurred, and where possible remedies would be implemented;
 - the degree of conflict between the extraterritorial application of a country's laws and the laws, economic policies, and/or enforcement activities of the country in which the conduct primarily occurred or in which its anticompetitive impact primarily resulted;
 - presumptive deference when the transaction or conduct at issue has no direct, substantial and reasonably foreseeable impact in a particular country; and
 - conditioning deferral on the receipt of confirmation during the investigation that there is no direct, substantial, or reasonably foreseeable impact in the deferring jurisdiction.
- The U.S. and foreign enforcement agencies should be encouraged to participate as *amici curiae* in cases involving comity issues, both here and abroad (to the extent permissible under local law), just as the U.S. and other foreign governments did in *Empagran*.²⁶
- Consideration should be given to why positive comity mechanisms, such as those contained in the 1991 and 1998 U.S./EC Agreements, have been employed so infrequently. Efforts should be made to develop ways to facilitate more frequent and successful use of positive comity mechanisms.
- Experience with the application of comity in non-antitrust regulatory and transnational settings (*e.g.*, banking, taxation, and securities regulation) may provide guidance on the successful application of comity in the antitrust arena.
- The U.S. should encourage the OECD, the International Competition Network (ICN), and other appropriate international organizations to focus on mechanisms for enhanced comity in developing guiding principles and best-practice guidelines for antitrust enforcement agencies. This process should include roundtables, peer reviews and other mechanisms. The U.S. also should encourage the OECD to

²⁶ Those governments include the U.S., Germany, Belgium, the United Kingdom, the Netherlands, Japan, and Canada. The USCIB also submitted an *amicus* brief.

continue its efforts in its internal function and to promote comity principles in its outreach function, the Global Forum on Competition, which consists of the thirty OECD member countries plus twenty-one non-member countries. The goal of the Global Forum on Competition is to increase interaction among competition authorities and to promote cooperation and convergence among enforcement agencies.

- The OECD, the ICN, and other appropriate organizations should also continue to undertake projects designed to facilitate convergence. Although complete substantive convergence among jurisdictions is highly unlikely, the goals of minimizing disparities wherever feasible and introducing transparency otherwise should continue to be pursued. To this end, the AMC should encourage the U.S. to participate in the efforts of international organizations to facilitate convergence, and to continue international technical assistance efforts to promote sound antitrust enforcement in other jurisdictions, particularly those with newly developed competition regimes, thereby enabling application of enhanced comity on a broader scale in the future.
- Given the similarities of their competition regimes and their history of largely successful cooperation, the U.S./EC and U.S./Canada relationships appear to be useful laboratories for implementing and testing strengthened comity provisions.